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.

Memo of Law on 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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MEMO OF LAW ON MOTION TO DISMISS AMENDED COMPLAINT UNDER CPLR § 3211 FOR LACK OF PERSONAL JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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) Atnonin 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 (hereinafter, individually "Defendant" or, collectively, the "Defendants"), bring this Motion by and through their counsel, Eric Turkewitz (also acting *pro se*) and Marc J. Randazza (*pro hac vice*), to dismiss all pending claims against them. Plaintiffs Joseph Rakofsky and Rakofsky Law Firm P.C. ("RLF") (hereinafter, collectively, "Rakofsky," or the "Plaintiff,"

as RLF ostensibly is Rakofsky's alter-ego) have failed to properly state a claim for defamation, intentional infliction of emotional distress, intentional interference with business relationships, or violations of New York Civil Rights Law §§ 50 and 51.

I. Introduction

This case has been dubbed "*Rakofsky v. The Internet*" by the media and has grabbed headlines nationwide, launching a flood of Internet memes. The absurdity of this case is the stuff of permanent legend, and it is certain to take its place in history as the butt of lawyer jokes and tales mocking the American legal system. Most similar to *Pearson v. Chung* (Judge Roy L. Pearson sues dry cleaners, seeking $67 million for losing his pants) in its unusual facts and the negative associations it indiscriminately brings upon members of the bar, any injury Rakofsky has suffered was self-inflicted, and either caused or exacerbated by filing this suit.

Rakofsky set the wheels of his own reputation's demise in motion by exercising poor judgment. The wheels gained momentum due to Rakofsky's unwillingness to take responsibility for his actions. Rakofsky now lashes out at others for his errors and omissions, and as unfortunate as it is that this suit has been filed at all, it will be a constitutional travesty if this case survived a Motion to Dismiss.

Rakofsky's first publicly reported error was his mishandling of a first-degree murder case to the point of mistrial. Of course, even the best lawyers might find themselves in that kind of predicament. Rakofsky's bungle was, however, all but a foregone conclusion. It was not just his first murder trial; it was his first trial ever. Taking such a case as one's first trial was a judgment error that cannot be overstated. Courtroom witnesses, including a reporter for The Washington Post and the judge himself, uniformly stated that Rakofsky's performance in that trial was inadequate. Rakofsky could have taken his lumps, learned from his errors, and moved on with

his career. Instead, Rakofsky sought to silence reporting on how he handled that case and to send a message to any journalist who might report on this matter of public concern. That message is: "Write about me and I will sue you."

To silence his critics and to try to chill new ones from coming forward, Rakofsky filed this lawsuit. (Exhs. A, B; Aff. of J. Malcolm DeVoy ¶¶ 6-7) When criticism of *this* action swelled on the Internet, Rakofsky amended his Complaint to punish those unsupportive voices as well. (Exhs. C, D; DeVoy Aff. ¶¶ 8-9) This suit falls within the category of strategic litigation against public participation – a "SLAPP" lawsuit – and lacks even the slightest merit.[1]

This lawsuit serves no legitimate purpose but to shake down the Defendants for exercising their First Amendment right to report and comment on public events. It would be one thing if Rakofsky filed this lawsuit in haste and blind passion, but this species of frivolous, abusive litigation against numerous defendants is his *modus operandi*. *See, e.g., Lesne v. 15 Park Row Apartment Building et al*, Index No. 112150/10 (N.Y. Sup. Ct. N.Y. County 2010) (suing 26 defendants – with Rakofsky admitted *pro hac vice* as plaintiff's counsel – for damages stemming from a leaking roof). The Plaintiff's claims are so ill-conceived that there could be no legitimate explanation for bringing this suit.

Despite having some time to cool off and reconsider, Rakofsky doubled-down and filed the Amended Complaint. (Exh. C; DeVoy Aff. ¶ 8) Even after amendment, the Complaint remains poorly conceived. In fact, it contains much, if not all, of the material necessary to establish the Defendants' fatal defenses. The Defendants now move to dismiss the lawsuit against them due to Rakofsky's failure to state any claim upon which relief can be granted, and this Court's lack of personal jurisdiction over them.

[1] The Defendants place the Court and the Plaintiff on notice that they intend to seek sanctions against the Plaintiff under 22 NYCRR 130-1.1 and CPLR § 8303-a.

II. Statement of Facts

Despite graduating from law school in 2009, Rakofsky has had a high-profile legal career during his limited time in practice. In March of 2011, Rakofsky began trial – his first ever – on a first-degree murder case before the District of Columbia Superior Court.[2] Rakofsky's performance was "readily apparent" as being "not up to par under any reasonable standard of competence under the Sixth Amendment," and "below what any reasonable person could expect in a murder trial." (These characterizations were used by Hon. William H. Jackson, presiding judge for the trial of *D.C. v. Deaner*, in which Rakofsky was defense counsel. A true and correct copy of the trial transcript from April 1, 2011 is attached as Exhibit E, with these quotes found at 4:24-5:1, 5:17-19; *see* DeVoy Aff. ¶ 10) This caused Judge Jackson to declare a mistrial and appoint the defendant new counsel for the defendant, Dontrell Deaner. (Exh. E at 5-6) Rakofsky attempts to impugn Judge Jackson's ethics and impartiality in his Amended Complaint, alleging some kind of conspiracy against him. No other observers of the trial shared Rakofsky's opinion, evinced from the reporting done by any of the 81 defendants in this action. (*See generally* Exh C)

Rakofsky's interpretation of events, as seen in the Amended Complaint, reveals a wildly different interpretation of what happened in the *Deaner* case. Instead of accepting that his actions were the basis for Judge Jackson's pointed comments (*see* Exh. E), Rakofsky describes a conspiracy between Judge Jackson and the Assistant United States Attorney assigned with prosecuting Deaner, Vinet S. Bryant ("Bryant") (Exh. C ¶ 94), to undermine Rakofsky's case and humiliate him for no apparent reason. (*Id*. ¶¶ 100-118) Rakofsky claims that Bryant and Judge Jackson colluded to undermine his case, with Judge Jackson granting Bryant's motion to exclude evidence on the eve of trial, Judge Jackson interrupting Rakofsky during his opening statement

[2] *D.C. v. Deaner*, Case No. 2008-CF1-030325 (D.C. Superior Ct. 2008).

without any objection lodged by Bryant, and Judge Jackson's admission of evidence unfavorable to Rakofsky's client. (*Id*. ¶¶ 100-110) According to Rakofsky, this plot reached its crescendo when Judge Jackson, previously trying to treat Rakofsky gently, did an about-face and removed Rakofsky from the case, citing grave concerns regarding Rakofsky's performance and competence. (*Id*. ¶¶ 103, 110-118; Exh. E)

Given that the *Deaner* trial was a matter of public concern, being covered by The Washington Post, a public post-mortem of Rakofsky's performance in the case was inevitable. It is entirely possible that Rakofsky fancied himself a natural in the courtroom, hoping that the outcome of the *Deaner* trial would be a defense victory, winning the adulation of many as he scooped up heaps of praise. The headlines would read "HIS FIRST TRIAL – A RESOUNDING WIN!" In fact, who *wouldn't* want to report on an attorney with a brand new law license winning a defense verdict in a murder case in his first trial ever? Unfortunately for Rakofsky, he did not consider that neither fate nor public opinion have any concern for his plans.

He further failed to consider that the actual practice of law is not as it appears in the movies. Prevailing at trial takes experience and hard work. Rakofsky took shortcuts, both preparation-wise and in matters of ethics. He predictably failed. Adding to his misfortune (but fortunately for the public), The Washington Post was there. Rakofsky's dreams of grandeur imploded. Their collapse stripped away his carefully cultivated online persona, and revealed someone who has behaved about as poorly and ignobly with his law degree as anyone could.

Much was written about Rakofsky's failings in press outlets both large and small. The Washington Post, a defendant in this action, had one of the first reports of the case's dismissal. A host of other sources, from news outlets to opinion-based blogs commented on the case as the story spread through both the traditional and electronic media. The nationally famous criminal

defense attorney Norm Pattis wrote of the *Deaner* case, "*I've read hundreds of trial transcripts in my time. This might be a collector's item. I simply do not recall a case in which a mistrial was granted and such hostile words were uttered from the bench*"[3]

Rakofsky was not without comment, either: At about the same time that Judge Jackson dressed down Rakofsky's performance as "not up to par under any reasonable standard of competence" (Exh. E at 5:18-19), Rakofsky triumphantly updated the status of his Facebook profile with "1st-Degree Murder… MISTRIAL!" A true and correct copy of this update as it appeared on March 31, 2011, is attached as Exhibit F. (DeVoy Aff. ¶ 11) At least seven of Rakofsky's friends "liked" the update, while others congratulated him on what was presented as a resounding victory. (Exh. F) Plaintiff thanked his well-wishers for their support – propping up the notion that what happened in the *Deaner* case was a personal victory, rather than a professional embarrassment. (*Id*.) Mr. Deaner, who would now spend months extra in pretrial detention due to Rakofsky's incompetence, did not update his Facebook status.

The media did its job – shining sunlight on Rakofsky's misdeeds. Rakofsky's experience was held up as a cautionary tale of what lawyers should not do. A lawyer should not accept representation of a client in a matter for which he is completely unqualified, as doing so is a violation of the professional responsibility codes of New Jersey (Rule 1.1), Washington, D.C. (Rule 1.1) and New York (Rule 1.1(a) and (b)). Legal commentators were agog in the wake of a lawyer possessing a scant week of experience accepting a First-Degree Murder case as his first-

[3] Norm Pattis, *Mr. Rakofsky's Professional Suicide And Time I'll Never Get Back,* Norm Pattis Blog, June 5, 2011, http://www.pattisblog.com/index.php?article=Mr_Rakofsky_s_Professional_Suicide_And_Time_I_ll_Never_Get_Back_3255 (*last accessed* Nov. 16, 2011) (emphasis added).

ever case.[4] That this was Rakofsky's first trial is not in dispute, and Plaintiff acknowledges this in his Amended Complaint. (Exh. C ¶ 89) Rakofsky took the case without even being admitted in the District of Columbia, instead associating with local counsel only after being retained. (*Id*. ¶ 93) However, Rakofsky's failures at trial were not just rookie mistakes, as Judge Jackson advised him to seek ethics counsel for some of his actions – including an attempt to get a witness to misrepresent her recollection of the facts (Exh. E at 5:4-10, 7:1-3 ("There's an e-mail from you to the investigator that you may want to look at, Mr. Rakofsky. It raises ethical issues."))

Having voluntarily taken the public stage, and tripping and falling under the lights, Rakofsky learned that the media is not kind to charlatans. Scrutiny of his behavior revealed failings that go far beyond his acceptance of the *Deaner* case. Of particular interest to the Defendants was Rakofsky's web presence, comprised of websites located at colorfully descriptive domain names including, but not limited to, <FinancialCrimeLaw.com>, <TrialSyndicate.com>, <WhiteCollarFirmCT.com> and <WhiteCollarLawDC.com>, as well as his attorney profile on the LawyerSearch service. (Exhs. G-K; DeVoy Aff. ¶¶ 12-17) In particular, these sites boasted of Plaintiff's offices in New Jersey, New York and Connecticut, despite the fact that neither Rakofsky nor his firm had the right to practice law outside of New Jersey.[5] (*See* Exhs. G-J) At one point, these websites even contained video of Rakofsky describing his practice and personal ethos. (Exh. K; DeVoy Aff ¶ 17)

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[4] Rakofsky was admitted to practice in New Jersey on April 29, 2010 (Exh. L, DeVoy Aff. ¶ 18), and allegedly was approached by Deaner's family about representing him in the first-degree murder case just four days later, on May 3, 2010. (Exh. C ¶ 88)

[5] At the time of this Motion, it appears that Rakofsky is not admitted to practice law in any state. On September 26, the New Jersey Supreme Court published its attorney ineligibility list for 2011, *available at* http://www.judiciary.state.nj.us/notices/2011/n110927e.pdf (*last accessed* Nov. 15, 2011). On page 8 of 212, Joseph Rakofsky - the only "Rakofsky" in the document - is identified as ineligible to practice law. On September 28, 2011, the New Jersey Lawyers' Fund for Client Protection issued a list of attorneys to be deleted from the Supreme Court's September

Shortly thereafter, the discussion of Rakofsky's performance in the *Deaner* case quieted to silence as the press and the blogosphere turned their attention elsewhere. Yet, on May 13, 2011, Rakofsky filed suit against 74 defendants for defamation and violations of New York Civil Rights Law §§ 50 and 51 due to their reporting and opining on this matter of public concern. (Exh. A) Instead of silencing the Defendants, the suit made the story even bigger news and prompted other media sources – now Defendants as well – to comment on the lawsuit's frivolity and self-defeating nature. One legal commentator wrote, "Only a fool would chose to litigate claims of defamation in the face of the these comments. There is simply no gloss that can cover the damning observations of the trial judge: Rakofsky was worse than inexperienced, he was, in the judge's words, so poorly prepared that he failed to provide effective assistance of counsel."[6]

In response to this new wave of criticism, Plaintiff added 7 of these new defendants to his Amended Complaint, bringing the total of those sued to 81. (Exh. C) Mr. Rakofsky not only refuses to take responsibility for what he has done to Mr. Deaner, while attempting to muzzle anyone who wrote about his misdeeds with respect to that trial, but he also wishes to silence anyone who thinks ill of the instant case as well.

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26 ineligibility list, *available at* http://www.judiciary.state.nj.us/notices/2011/n110929e.pdf (*last accessed* Nov. 15, 2011) Joseph Rakofsky's name was not found on this list of deletions.

Since then, the New Jersey Lawyers' Fund for Client Protection has issued three notices reinstating attorneys from the Supreme Court's ineligibility list. These notices were issued on October 31, *available* at http://www.judiciary.state.nj.us/notices/2011/n111031c.pdf (*last accessed* Nov. 15, 2011), November 1, *available at* http://www.judiciary.state.nj.us/notices/2011/n111101b.pdf (*last accessed* Nov. 15, 2011), and November 11, *available at* http://www.judiciary.state.nj.us/notices/2011/n111110d.pdf (*last accessed* Nov. 15, 2011). Despite diligent efforts to find any evidence to the contrary, the undersigned believe, based on the documentation available from the Supreme Court of New Jersey, that Rakofsky is ineligible to practice law in that state, and has been since September 26, 2011.

[6] *See* Pattis, *supra* at n. 3.

Since filing the Amended Complaint, Rakofsky has engaged in conduct that has wasted the Defendants' and this Court's time and resources. Plaintiff has turned formalities, such as harmonizing a date on which Defendants would file this responsive pleading, and the *pro hac vice* admission of their counsel,[7] into a mud wrestling match that delayed Defendants from addressing the merits of Rakofsky's case. In fact, on June 13, 2011, Plaintiff's counsel, Richard Borzouye, sought leave from this Court to withdraw from his representation, risking further delay of this litigation – a request that this Court granted while adjourning the case until September 15, 2011 and beyond.

This delay was put in place because Rakofsky represented at the *pro hac vice* hearing that the departure of Attorney Borzouye was a surprise to him. However, this tale is almost certainly belied by Rakofsky himself, who – though anonymously – posted an advertisement on Craigslist seeking new counsel for a case that could only conceivably be this one on June 30, 2011. A true and correct copy of this Craigslist advertisement, posted on June 30, 2011, is attached hereto as Exhibit M (DeVoy Aff. ¶ 19). Fortunately, this lawyer would *not* have to worry about writing anything – as the ad's phantom poster "will be responsible for most of the drafting" of the briefing in this case, pending within a jurisdiction where Rakofsky is not licensed. (*Id*.)

Now, finally, with a harmonized response date set and the issue of *pro hac vice* representation resolved, Defendants file their omnibus Motion to Dismiss in this Action.

[7] Rakofsky's contest of Mr. Randazza's *pro hac vice* application displays not only obstinance, but hypocrisy as well; Rakfosky liberally makes use of *pro hac vice* admissions to practice in numerous jurisdictions where he is not licensed – in fact, the *Deaner* case underlying this litigation was one of several cases where Rakofsky appeared *pro hac vice*. *See, e.g., Coppage v. U-Haul Int'l, Inc., et al*, Index No. 402765/10 (N.Y. Sup. Ct. N.Y. County 2010); *OneWest Bank FSB v. Kahn et al*, Index No. 20488/10 (N.Y. Sup. Ct. Kings County 2010); *Lesne v. 15 Park Row Apartment Building et al*, Index No. 112150/10 (N.Y. Sup. Ct. N.Y. County 2010); *D.C. v. Deaner*, Case No. 2008-CF1-030325 (D.C. Superior Ct. 2008).

III. New York's Controlling Legal Standards Compel Dismissal of Rakofsky's Claims.

CPLR §§ 3211(a)(3), (7), (8) and (9) permit the Defendants to move to dismiss on the following grounds: 1) Plaintiff Rakofsky Law Firm, P.C., lacks capacity to bring this lawsuit under New York Business and Corporation Law § 1312; 2) The Court lacks personal jurisdiction over the Defendants under CPLR § 302 and Rakofsky's failure to serve many more, and; 3) Rakofsky has failed to state a claim for which relief can be granted.

Under CPLR § 3211(a)(3), a plaintiff must have the legal capacity to bring his or her suit before New York's courts. A plaintiff's failure to meet this burden compels dismissal of his or her lawsuit. "[I]f plaintiff has no right to seek enforcement of the statute, his claims under it must be dismissed outright under 3211(a)(3)." *Hammer v. Am. Kennel Club*, 304 A.D.2d 74, 77 (N.Y. Sup. Ct. App. Div. 1st Dept. 2003). A plaintiff's legal capacity to sue is distinct from the concept of standing, and in the case of corporations, capacity to sue is provided by enabling statutes. *Cmty. Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 155 (N.Y. 1994); *I & T Petroleum Inc. v. Lascalia*, Index No. 10337/07, 2009 NY Slip Op 50173U (N.Y. Sup. Ct. Nassau County Jan. 26, 2009). Absent such capacity, the plaintiff's action is dismissed. *Hammer*, 304 A.D.2d at 77.

Similarly, under CPLR § 3211(a)(7), courts look beyond the pleadings and consider evidence relevant to whether the claim may proceed. Courts analyze the facts set forth in a plaintiff's pleadings when confronted with a Motion to Dismiss under CPLR § 3211(a)(7), as the court's sole criterion is whether the plaintiff actually *has* a cause of action, not whether one is merely stated. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (N.Y. 1994); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (N.Y. 1977); *Rovello v. Orofino*, 40 N.Y.2d 633, 634 (N.Y. 1976).

This is not the only standard relevant to determining the Court's jurisdiction over the Defendants in this case. Where the foreign Defendants did not conduct sufficient purposeful

activities in New York, which bore a substantial relationship to the subject matter of this action, so as to avail themselves of the benefits and protections of New York's laws, New York's courts lack jurisdiction over them. CPLR § 3211(a)(8); *Standard Wine & Liquor Co. v. Bombay Spirits Co.*, 20 N.Y.2d 13, 17 (N.Y. 1967); *CK's Supermarket Ltd. v. Peak Entertainment Holdings, Inc.*, 37 A.D. 3d 348 (N.Y. Sup. Ct. App. Div. 1st Dept. 2007); *see also Andrews v. Modell*, Slip Op. No. 2009-06977, 2011 N.Y. App. Div. LEXIS 3910 at *2-4 (N.Y. Sup. Ct. App. Div. 2d Dept. May 10, 2011). The party asserting jurisdiction has the burden of proving its existence. *Sanchez v. Major*, 289 A.D.2d 320 (N.Y. Sup. Ct. App. Div. 2d Dept. 2001) (holding that the plaintiff bears the burden of proving jurisdiction over the defendants where plaintiff alleged New York's jurisdiction was proper).

Additionally, obtaining personal jurisdiction over the foreign Defendants is only effective when "made pursuant to the appropriate method authorized by the CPLR." *Markoff v. S. Nassau Community Hospital*, 61 N.Y.2d 283, 288 (N.Y. 1984); *Kostelanetz & Fink, L.L.P. v. Hui Qun Zhao*, 180 Misc. 2d 847 (Civ. Ct. City of N.Y. 1999); *Miron Lumber Co. v. Phylco Realty Dev. Co.*, 151 Misc. 2d 139, 142 (Civ. Ct. City of N.Y. 1991). Service of process that does not strictly comply with authorized statutory methods is invalid – even if a defendant receives actual notice of the pending action independently of the defectively served notice. *Markoff*, 61 N.Y.2d at 288 (N.Y. 1984); *Miron Lumber Co.*, 151 Misc. 2d at 142 (Civ. Ct. City of N.Y., 1991).

IV. Argument

Rakofsky's case against the Defendants fails on every single basis necessary for it to proceed. First, RLF is not authorized to do business in New York State and therefore is precluded from bringing this suit. Moreover, this Court lacks personal jurisdiction over the foreign Defendants. Rakofsky has not even identified two of the defendants – John Doe #1, the

author of Crime & Federalism, and another defendant known only as "tarrant84" – for him to determine the propriety of personal jurisdiction.[8] Even if Rakofsky had identified these defendants, precedent demonstrates that their identities should be kept confidential.[9] Two Defendants are immune from liability under federal law (47 U.S.C. § 230), and virtually all of them have yet to be properly served – despite numerous defective attempts – with some waiting to be served at all.

Substantively, Rakofsky has failed to state a cause of action upon which relief can be granted. The necessary elements to sustain his claims for defamation, intentional infliction of emotional distress ("IIED"), tortious interference with business relationships, and violations of New York Civil Rights Law §§ 50 and 51 are missing from Rakofsky's Amended Complaint and, moreover, would be legally unsupportable even if they were properly pled. As such, all of these claims must be dismissed against the Defendants.

A. Rakofsky Law Firm P.C. Cannot Participate in this Action under New York Business and Corporation Law § 1312; Its Claims Must be Dismissed.

Plaintiff RLF has no right to bring this suit. Under New York Business and Corporation Law § 1312(A):

> A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such

[8] At the hearing of September 15, 2011, Rakofsky represented to the Court that all defendants had been served. The undersigned questioned him, in the presence of the Court, asking him if he was certain. Rakofsky maintained this fact to the Court. However, the fact that Rakofsky has not so much as identified two defendants belies his claim. *See* Aff. of Eric Turkewtiz ¶¶ 8-15, *See* Exhibit T (containing affidavits of service for served defendants) (DeVoy Aff. ¶¶ 26-27).

[9] In *Varrenti v. Gannett Company, Incorporated*, the New York Supreme Court for Monroe County held that defendant Gannett could not reveal the true identities of pseudonymous defendants, known only by the names under which they posted comments online, "because opinions cannot form the basis of a defamation claim." Index No. 3613/11 *2011 NY Slip Op 21296* at *12-13 (N.Y. Sup. Ct. Monroe County, Aug. 3, 2011). Accordingly, as the statements of the Doe defendants in this case also constitute opinions, the Court must similarly protect the true identities of John Doe # 1 and tarrant84.

> corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation.

A search of the New York Secretary of State's database reveals nothing with the term "Rakofsky." (Exh N; see DeVoy Aff. ¶ 20) Rakofsky's websites, however, show that RLF maintains a New York presence and does business within the state, evinced by the advertisement of RLF's New York office. (Exhs. H, N; DeVoy Aff. ¶¶ 13-14, 20) Beyond mere targeted communications and advertisements within New York, RLF demonstrably does business within the state, as Rakofsky has been counsel in numerous New York actions. *See Coppage*, Index No. 402765/10; *OneWest Bank FSB*, Index No. 20488/10; *Lesne*, Index No. 112150/10.

Defendants are not aware of, nor could they find, evidence of RLF's authorization to do business in New York State. (Exh N; DeVoy Aff. ¶ 20) For all of the Plaintiff's representations about the reach of his law firm, across the entire East Coast and spanning numerous domain names, it does not appear to be registered to do business anywhere but New Jersey. (*See* Exh. H, N, Q; DeVoy Aff. ¶¶ 12-15, 20, 23) Before addressing the legal ramifications for this failure, it is appropriate to take the opportunity to reflect on what this deficiency – just one of many – reveals about the supposed competence of Joseph Rakofsky, which he has placed directly at issue in this case. Rakofsky's chief complaint is that the Defendants have opined that he is incompetent. Meanwhile, he has failed to so much as register his law practice within New York so that it may bring suit there. (*See* Exhs. H and N). RLF seems to be involved in a significant amount of litigation in New York state through *pro hac vice* admissions in conjunction with his former counsel in this case, Richard Borzouye. *See Coppage*, Index No. 402765/10; *OneWest Bank FSB*, Index No. 20488/10; *Lesne*, Index No. 112150/10. Rakofsky himself, despite being

counsel of record in litigation within this state, *pro hac vice*, is not even qualified to practice law in his one state of admission.[10]

Therefore, while these failures speak to the issue of Rakofsky's competence, they also have a direct bearing on RLF's ability to maintain this lawsuit. New York's precedent on this issue is clear, unambiguous, and disallows RLF from being a plaintiff. *See Marion Labs., Inc. v. Wolins Pharmacal Corp.*, 271 N.E.2d 554 (N.Y. 1971) (affirming dismissal of suit brought by company doing business in New York without authorization); *see also Cmty. Bd. 7 v. Schaffer*, 639 N.E.2d 1, 2 (N.Y. 1994) (denying corporation the right to sue when it did business with New York State without authorization). As RLF was not registered to do business within New York, it lacks capacity to bring suit under New York's Business and Corporation Law, and thus, its claims must all be dismissed from this action under CPLR § 3211(a)(3).

B. This Court Lacks Personal Jurisdiction Over Defendants 7-32 in this Case.

In a case that Rakofsky brought to punish others for calling him incompetent, he has ironically failed to obtain jurisdiction over Defendants 7-32 (collectively, the "Foreign Defendants"), identified *supra*, through any proper means. (DeVoy Aff. ¶ 5) First, New York's

[10] As explained in detail in footnote 5, Rakofsky currently is ineligible to practice law in New Jersey (see http://www.judiciary.state.nj.us/notices/2011/n110927e.pdf), with no notice available that he has been removed from the state's ineligibility list. As set forth in footnote 7, Rakofsky has appeared *pro hac vice* in several New York cases based on his New Jersey admission – and may still be active in those matters – despite being, by all appearances, ineligible to practice law at this time. *See, e.g., Coppage v. U-Haul Int'l, Inc., et al*, Index No. 402765/10 (N.Y. Sup. Ct. N.Y. County 2010); *OneWest Bank FSB v. Kahn et al*, Index No. 20488/10 (N.Y. Sup. Ct. Kings County 2010); *Lesne v. 15 Park Row Apartment Building et al*, Index No. 112150/10 (N.Y. Sup. Ct. N.Y. County 2010).

This is particularly relevant in light of Rakofsky's numerous representations to this Court that he was an attorney licensed to practice in New Jersey. (Turkewitz Aff. ¶¶ 13-16) In a sworn affidavit dated October 13, 2011, and a motion submitted to the Court on October 24, 2011, Rakofsky represented that he was engaged in the practice of law, and a member of the Bar of New Jersey in good standing. (*Id*. ¶¶ 15-16) These statements are belied by reality, as Rakofsky had been ineligible to practice law in New Jersey for almost one month at the time they were submitted to the Court.

long-arm statute, CPLR § 302(a)(2), specifically precludes defamation claims from being a basis for personal jurisdiction over foreign defendants. Moreover, this statute precludes Rakofsky from exercising personal jurisdiction over any of the Defendants.

There are other jurisdictional problems undermining Rakofsky's case. One defendant in particular, Banned Ventures LLC, is sued merely for the comment of one of its anonymous users, "tarrant84." Title 47 of the U.S. Code, Section 230, specifically exempts Banned Ventures and Banni for liability for statements made by "tarrant84." *Shiamili v. Real Estate Group of N.Y., Inc.*, 952 N.E.2d 1011 (N.Y. June 14, 2011); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 699-700 (S.D.N.Y. 2009). Finally, and belying Rakofsky's insistence of his competence, Rakofsky has failed to properly serve many of the Foreign Defendants, despite numerous attempts to do so, and not served the anonymous Defendants included in this motion.

1. New York's Long-Arm Statute Does Not Confer the Court with Personal Jurisdiction over the Foreign Defendants.

New York's long-arm statute, CPLR § 302, determines Rakofsky's ability – or inability, in this case – to exercise personal jurisdiction over the Defendants. In fact, CPLR § 302(a)(2) specifically prohibits actions "sounding in defamation" from being the basis of personal jurisdiction in New York. Here, Rakofsky's first and headline cause of action against the Defendants is for defamation, and at a minimum this claim must be dismissed under CPLR § 302(a)(2).[11]

[11] The rationale for the exclusion of defamation actions from the New York Long-Arm statute, CPLR 302 (subd. [a], pars. 2 and 3) is that the Advisory Committee recognized the fact that the mere assertion of jurisdiction over out of state publishers would create a chilling effect on freedom of speech and freedom of the press. *Legros v. Irving*, 38 A.D.2d 53, 55 (N.Y. Sup. Ct. App. Div. 1st Dep't 1971) (quoting 1 Weinstein, Korn & Miller N.Y. CIVIL PRACTICE ¶ 302.11) "These important civil liberties are entitled to special protections lest procedural burdens shackle them." *Id*. at 55. New York recognized the procedural burden that the plaintiffs capitalized upon in *New York Times v. Alabama*, and civilized New York's long arm statute

As a matter of course, Courts dismiss defamation claims that are used as a flimsy hook to pull foreign defendants into New York. *See Messenger v. Gruner + Jahr Printing and Publ'g*, 727 N.E. 2d 549 (2000) (dismissing defamation claim against foreign defendant); *Arrington v. N.Y. Times Co.*, 434 N.E. 2d 1319 (1982); *Cohen v. Herbal Concepts*, 100 A.D. 2d 175 (N.Y. App. Div. 1 1984); *Costanza*, 181 Misc. 2d at 562; *De Gregorio v. CBS, Inc.*, 123 Misc. 2d 491 (1984); *Smigo v NYP Holdings*, Inc., Index No. 108756/08, *2010 NY Slip Op 30556U* at *1 (N.Y. Sup. Ct. Mar. 17, 2010); *Talley v Moss*, Index No. 45272/09, *2009 NY Slip Op 32546U* at *1 (N.Y. Sup. Ct. Oct. 22, 2009).

In this case, Rakofsky's entire Complaint "sounds in defamation," and permitting the case to continue against any of the foreign defendants would be counter to the legislative intent of removing a jurisdictional chill from expressive activity out of state. In addition to the defamation cause of action, his claims for intentional infliction of emotional distress and intentional interference are predicated on the same statements Rakofsky claims to be defamatory – essentially multiplying his defamation claim into multiple causes of action. Identical analysis applies to Rakofsky's claims under Civil Rights Law §§ 50 and 51, where he claims the unauthorized use of his name in a news story is a violation of his civil rights, while maintaining that the Defendants' use of his name is defamatory as well. To that end, each and every claim asserted by Rakofsky is a mutation of his defamation claim, and they should all be dismissed against the Defendants.

The Defendants' actions do not satisfy the remaining conditions for personal jurisdiction under CPLR § 302. All of the Defendants' actions complained of by Rakofsky occurred through

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accordingly. *See also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 245 (2d Cir. 2007) (discussing the rationale for New York's exclusion of defamation actions and the *Legros* analysis).

blog posts, published on the Internet. The statements were written by people outside New York. They were written about a case that took place in Washington, D.C. They were written about a New Jersey attorney, whom nobody could have known was a New York resident. New York's courts have held, repeatedly, that such Internet communications are not a proper basis for personal jurisdiction. *Best Van Lines. Inc. v. Walker*, 490 F.3d 239, 250 (2d Cir. 2007) (citing *Realuyo v. Villa Abrille*, *2003 U.S. Dist. LEXIS 11529* (S.D.N.Y. 2003), *aff'd* 93 Fed. Appx. 297 (2d Cir. 2004)); *Starmedia Network, Inc. v. Star Media, Inc.*, *2001 U.S. Dist. LEXIS 4870* at *1 (S.D.N.Y. 2001); *Competitive Technologies, Inc. v. Pross*, 836 N.Y.S.2d 492, (N.Y. Sup. Ct., Suffolk County 2007).

Every instance of the Defendants' speech and communication detailed in Rakofsky's Complaint occurred on the Internet, with the statements originating outside of New York state, about matters taking place in Washington, D.C., involving a New Jersey attorney, and were statements made for news, commentary and opinion purposes by the Defendants. The clear language of New York's long-arm statute shows that this type of speech is categorically outside the reach of CPLR § 302(a). Rakofsky must bring his claims against the Foreign Defendants elsewhere, if they are fit to be brought at all.

2. Rakofsky Failed – Repeatedly – to Properly Serve the Defendants.

There is no question that Rakofsky has chosen the wrong court in which to bring this action, as it cannot exercise personal jurisdiction over the Foreign Defendants. Even if Rakofsky's misguided belief about this forum's propriety were correct, it would still be improper for this Court to exercise jurisdiction over the Defendants at this juncture. Rakofsky has been unable to properly serve process on many of them. (*See* Exh. T; DeVoy Aff. ¶¶ 26-27)

The CPLR is specific about the manner in which service is to be made on defendants, and particularly foreign defendants. Failure to comply with the terms of the CPLR renders service invalid, and negates the jurisdiction the plaintiff may have been able to obtain over them. *Flick v. Stewart-Warner Corp*., 555 N.E.2d 907, 910-11 (N.Y. 1990) (holding that strict statutory compliance with the CPLR is needed to effect service); *Nimkoff Rosenfeld & Schechter v. O'Flaherty*, 71 A.D.3d 533 (N.Y. Sup. Ct. App. Div. 1st Dept. 2010); *Flannery v. GMC*, 214 A.D.2d 497, 504-05 (N.Y. Sup. Ct. App. Div. 1st Dept. 1995); *Franz v. Bd. of Educ.*, 112 A.D. 2d 934-35 (N.Y. Sup. Ct. App. Div. 2d Dept. 1985); *Air Conditioning Training Corp. v. Pirrote*, 270 A.D. 391, 393 (N.Y. Sup. Ct. App. Div. 1st Dept. 1946) ("it is well settled that a statute permitting service of process other than by personal service must be strictly complied with in order to confer jurisdiction upon the court"); *see also Markoff v. S. Nassau Community Hosp*., 61 NY2d 283, 288 (1984) (holding that service must be completed in strict compliance with the CPLR). CPLR §§ 307, 308, 310, 311 and 313 require personal service to be made to the individual sued or, in the event of a partnership or corporation, an authorized representative – even when made to out-of-state defendants. Similarly, CPLR § 312-a requires service by mail to 1) be made by First Class U.S. Mail, and 2) to contain two copies of a service-by-mail form along with the Complaint.

While some of the Defendants have been properly served, Rakofsky's use of many differing methods to attempt service – almost all of them being wrong – is remarkable:

- Defendant Bennett first received service by certified mail – not First Class mail as required by CPLR §§ 308 and 312-a - and then was subject to an attempt at personal service on his firm's receptionist, who is not authorized to accept service of process. Thus, Bennett has not properly been served. (Exh. T at 89-90)

- Rakofsky first sent Defendant Mayer the Complaint – with no summons – via certified mail, followed by an Amended Complaint sent via certified mail, again without an amended summons. Finally, Rakofsky made personal service on an unknown individual who forwarded the Amended Summons and Amended Complaint onto Mayer, but almost certainly without possessing authority to accept service on Mayer's behalf, and only after two prior defective attempts. (Exh. T at 36)
- Defendant Gamso had a yet a different experience. On May 18, Gamso received only the file-stamped Amended Complaint by certified mail; on May 20, Gamso received the file-stamped Amended Complaint and Summons, but an unstamped Amended Summons, and no service-by-mail form.
- Defendant Pribetic was sent solely the Amended Complaint by certified mail to his address in Ontario, Canada.
- For another example, Defendant Wells, misidentified in the Amended Complaint as "David C. Wells P.C." – the firm's full legal name is "Law Office of David C. Wells P.C." – and as a Florida professional corporation when the firm is organized in Texas, was initially served via certified mail; Rakofsky subsequently served Wells with the Amended Summons and Amended Complaint through personal service. (*See generally* Aff. of David Wells)
- In New York State, and even within Manhattan where Rakofsky lives, he could do no better; Rakofsky delivered the original Complaint and Summons to Defendants Turkewitz and Turkewitz Law Firm by serving a receptionist, but did not do the easy follow-up mailing by first class mail that is strictly required by CPLR § 308. (Turkewitz Aff. ¶¶ 3-14) Rakofsky then sent a copy of his Amended Complaint to Turkewitz via

certified mail (but not the Amended Summons), yet another method of service not authorized by the CPLR (and therefore also ineffective). (*Id*. ¶¶ 4-6) These repeated failures to complete the most basic and ministerial steps of commencing a lawsuit – on a lawyer with a published address in Manhattan and receptionist who could take service -- illustrates Rakofsky's incompetence and substantiates Judge Jackson's comments about Rakofsky's "astonishing" performance in the *Deaner* trial. (*Id*. ¶¶ 8-12; Exh E).

Thus, in addition to the inherent procedural defects in Rakofsky's case, he must contend with defective service of process. This same issue arises again and again across many of the Defendants, both in New York and nationwide. Rather than suffer more of Rakofsky's antics, though, they have elected to waive these defects so the Court may reach a decision on the Amended Complaint's merits. Damning not only to Rakofsky's attempt to subject the Defendants to the personal jurisdiction of New York's courts, Rakofsky's consistent butchery of something as basic as service of process – rendering him unable to even get out of the gate to pursue litigation – validates Judge Jackson's view that Rakofsky's abilities were far below what any reasonable person would expect from an attorney. (*See* Exh. E)

B. Despite Pleading Four Causes of Action Against the Defendants, Rakofsky Has Failed to State Any Claim Upon Which Relief Can be Granted.

Rakofsky's Amended Complaint attempts to allege that each of the Defendants committed defamation, intentional infliction of emotional distress, intentional interference with business relationships and violations of New York Civil Rights Law §§ 50 and 51 against Rakofsky. As a matter of law, Rakofsky has not alleged a single cause of action against any Defendant for which this Court can grant relief.

1. Defendants Banned Ventures LLC and BanniNation are Immunized From All Liability Under 47 U.S.C. § 230, and thus Cannot be Sued Under Any of the Causes of Action Asserted by Rakofsky.

In addition to the exemption from personal jurisdiction discussed above, Defendant Banned Ventures LLC is immune from the claims against it. Under 47 U.S.C. § 230, Banned Ventures LLC and Banni are immune from liability for the statements made by tarrant84, a user of Banned Ventures LLC's online services – found on the Banni website – who is also joined as a Defendant in this action. *See* 47 U.S.C. § 230; *Shiamili*, 952 N.E.2d at 1011 (holding that user-generated content published on Internet service provider weblog, similar to those sued in this case, was not liable for defamation); *Atl. Recording Corp.*, 603 F. Supp. 2d at 699-700 (holding that the protections of 47 U.S.C. § 230 should be construed liberally, where applicable); *see also Universal Comm. Sys. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (supporting a broad construction of § 230 protections); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331-32 (4th Cir. 1997) (finding publishers and distributors of content produced by others to be immunized from liability for defamation under § 230).

Congress enacted 47 U.S.C. § 230 to immunize online service providers such as Banned Ventures LLC and BanniNation in cases precisely like this one. In operating and displaying a message board, Banned Ventures LLC and Banni are "online service providers" within the scope of 47 U.S.C. § 230, and thus immune from liability arising from the actions of its users. *Shiamili*, 952 N.E.2d at 1011. Rakofsky's claims against the LLC and website, based on statements made by other service users, are necessarily barred as a matter of law by operation of 47 U.S.C. § 230.

The existence and operation of § 230 is no mystery, as it was enacted in 1996 as part of the Communications Decency Act. In fact, this statute is one of the driving protective forces that have allowed the Internet, particularly the burgeoning social media sector, to flourish. Whether Rakofsky was ignorant of this statute or consciously disregarded it is unknown. What is certain,

however, is that Banned Ventures LLC and Banni are improperly joined as Defendants to this action and entitled to dismissal of all claims against it by virtue of § 230 alone.

2. Rakofsky Failed to State a Claim for Defamation Against Any and All Defendants.

New York law sets forth four elements in a defamation cause of action: (1) a false statement of fact; (2) published to a third party without privilege or authorization; (3) with fault amounting to at least negligence, and; (4) that caused special harm or defamation per se. *Dillon v. City of N.Y.*, 261 A.D.2d 34, 38 (N.Y. Sup. Ct. App. Div. 1st Dept. 1999); *see also Epifani v. Johnson*, 65 A.D.3d 224, 233 (N.Y. Sup. Ct. App. Div. 2d Dept. 2009). "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory." *Brian v Richardson*, 660 N.E.2d 1126 (1995).

Rakofsky's defamation claim fails on numerous grounds. First, the Defendants' statements constitute opinions, rather than facts. To the extent there is factual content within the Defendants' statements, it is verifiably true by the *Deaner* trial court's record. Although Rakofsky claims that Judge Jackson declared a mistrial due "solely" to his disagreements with Deaner, the transcript from April 1, 2011 clearly states that "**I would have granted a motion for a new trial under 23.110**"[12] (Exh. E at 4:15-17) (emphasis added). Jackson also said, **"[a]lternatively, I would find that [Deaner's requests for new counsel] 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*"** (*Id*. at 4:22-5:1) (emphasis added).

[12] § 23.110 is the D.C. Criminal Law statute that allows for a new trial to be granted due to incompetence of defendant's counsel.

Second, the Defendants' statements are privileged as constitutionally protected commentary on a significant news event. Dovetailing on this point, Rakofsky is a public figure – certainly at least a limited-purpose public figure within the legal community – and therefore must prove actual malice or reckless disregard for the truth in the Defendants' statements, which he can never do.

a. Defendants' Statements are Matters of Opinion, Protected by the First Amendment, and Therefore Not Defamatory.

Statements of opinion, however offensive, are unequivocally not defamatory. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"). "Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380 (N.Y. 1977). Rakofsky bears the burden, as Plaintiff, of proving that Defendants' statements, viewed in the context in which they appeared, were factual in nature rather than their opinions. In New York, it is for the Court to determine whether a statement is one of fact or opinion. *Brian v. Richardson*, 660 N.E.2d 1126, 1129 (N.Y. 1995); *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1167 (N.Y. 1993); *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270,1272 (N.Y. 1991).

When making the determination of whether a statement is one of fact or opinion, courts examine three factors: (1) whether the specific language in issue has a precise meaning that is readily understood; (2) whether the statements are capable of being proven true or false, and; (3) whether the full context in which the speech appears and the broader social context and surrounding circumstances signal readers that what is being read is opinion, rather than fact. *Id*.

Characterizations of one's professional abilities as "unprofessional," "negligent" and other disparaging terms – including those with a legal significance, such as "incompetent" – is not defamatory in New York. In *Amodei v. New York State Chiropractic Association*, the New York Supreme Court Appellate Division found that a speaker's claim that a chiropractor was "unprofessional" constituted an opinion, rather than a statement of fact. 160 A.D.2d 279, 280 (N.Y. Sup. Ct. App. Div. 2d Dept. 1990), *aff'd* 571 N.E.2d 79 (N.Y. 1991); *See also Halegoua v. Doyle*, 171 Misc. 2d 986, 991 (N.Y. Sup. Ct. 1997) (finding that a letter in which the author recounted his personal experience with a doctor, containing a statement that doctor was "negligent and unprofessional," was an opinion insufficient to support a defamation claim).

New York's Federal Courts have ratified the state's view of this issue. The Southern District of New York has found that statements describing a plaintiff as "untrustworthy, unethical and unprofessional," and "incompetent" to be non-actionable opinion. *Tasso v. Platinum Guild Int'l*, No. 94 Civ. 8288, *1998 U.S. Dist. LEXIS 18908* at *5-6 (S.D.N.Y. Dec. 3, 1998). In *Wait v. Beck's North America, Inc.*, the Northern District of New York similarly held that "Statements that someone has acted unprofessionally or unethically generally are constitutionally protected statements of opinion." 241 F. Supp. 2d 172, 183 (N.D.N.Y. 2003).

Defendants' complained-of statements are expressions of opinion based on the truth, reflected in the trial transcripts found in Exhibit E. The context of the Defendants' statements makes them very obviously statements of opinion by their authors. A blog usually is considered to be personal and subjective, even when providing commentary on news and current events.

Thus, while reporting factual issues such as Rakofksy's mistrial in *Deaner*, the Defendants are not purely factual reporters of hard news, a nuance that a reasonably prudent person would perceive, and accordingly adjust his or her perceptions. Some Defendants make

this obvious. AboveTheLaw.com, owned by Breaking Media LLC, and for which defendant Elie Mystal is an editor/contributor, states in its About page that it brokers in legal "news *and gossip*" (emphasis added). (Exh. O; DeVoy Aff. ¶ 21) Defendant Crime & Federalism, authored by John Doe # 1, is more cynical, with the blog's byline stating, "[b]ecause everything I was ever told was a lie." (Exh. P; DeVoy Aff. ¶ 22)

This is not to say that the Defendants' blogs and statements are fictional or even unserious. However, they are very clearly not courts, bar associations, or other entities whose proclamations of "incompetence" could be perceived as an indisputable fact. With this lawsuit, Rakofsky ignores such journalistic license to which all speakers are entitled. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 893 U.S. 6, 14 (1970); *Gross*, 623 N.E.2d at 1163, 1167 and 1169 (holding that rhetorical hyperbole is not actionable as defamation, as taken in context the statements convey other than an objective fact is being asserted).

i. The Deaner Mistrial

Rakofsky claims that Defendants are wrong in stating that Judge Jackson ordered a mistrial due to his incompetence, and that the *sole* reason for mistrial was Rakofsky's disagreements with his client, Dontrell Deaner. Based on Deaner's repeated requests for new counsel and Judge Jackson's comments on Rakofsky's performance in the case (Exh. E at 2-4), it is apparent that Rakofsky's disagreement with Deaner arose from Rakofsky's inability to effectively argue Deaner's case. For Rakofsky to argue that a mistrial was ordered "solely" due to a disagreement with his client without identifying the cause of that disagreement – Rakofsky's incompetence – is disingenuous.

Even more disingenuous is Rakofsky's resistance of the word "alternatively." Judge Jackson held that even if he did not order a mistrial due to Rakofsky's disagreement with his

client, Jackson would have made the same order due to Rakfosky's incompetence. (Exh. E at 4-5) Rakfosky acts as if this statement does not exist, despite being present in court when it was made. (*See* Exh. E at 2) There is no meaningful difference between Rakofsky's mistrial being entered as a result of a disagreement with his client, by all indications premised on his incompetence, or the alternate basis of his performance below the standard of competence required by the Sixth Amendment. In either event, there was a mistrial because of Rakofsky's incompetence. (*See generally* Exh. E)

Judge Jackson's comments, repeated by the Defendants, are non-falsifiable statements of opinion. While Rakofksy's lack of "competence" had dire consequences in the *Deaner* case, it is a word whose meaning is determined by subjective experience, such as "short" or "tall," and, as such, means what the declarant believes it does. Based on the facts available, Defendants commented on Rakofksy's poor performance in the *Deaner* trial as it described by Judge Jackson himself. (*See generally* Exh. E)

Judge Jackon's public statements informed the Defendants' opinions that Rakofsky was incompetent. The second-hand nature of such reports, filtered through the perspective of bloggers and commentators and presented in that media, reinforce that these statements were simply opinions. Therefore, the Defendants' alleged defamatory statements are opinions, not factual in nature, and cannot be defamatory. However, to the extent that there is a need to determine whether the statement "Joseph Rakofsky is incompetent as an attorney" is true or not, the record in both *Deaner* and this case resolves any such question in the Defendants' favor.

ii. The Nature of Rakofsky Law Firm, Rakofsky's Qualifications and Rakofsky's Unethical Business Generation.

Despite being licensed in New Jersey at one time, Rakofsky and his firm, Rakofsky Law Firm, purported to have offices in Connecticut, New York City, New Jersey, and the District of

Columbia. (*See* Exh. H) And, though organized as a Professional Corporation in New Jersey (Exh. Q; DeVoy Aff ¶ 23), the Rakofsky Law Firm's websites indicated that the firm had multiple offices outside of New Jersey, as well as lawyers with some unspecified affiliation with the Firm – though they were not identified as partners, associates or of counsel. (*See* Exh. H)

Rakofsky's websites also contained strong statements about his prior experience. Offering services in fields as diverse as bankruptcy, corporate litigation, criminal law, "financial crimes," "sex crimes," violent crimes and "white collar crimes" (Exhs. G-I), Rakofsky's multiple websites resided at suggestive domain names such as <FinancialCrimeLaw.com>, <TrialSyndicate.com>, <WhiteCollarFirmCT.com> and <WhiteCollarLawDC.com>. These sites bragged of Rakofsky's experience in cases involving "Murder, Embezzlement, Tax Evasion, Civil RICO, Securities Fraud, Bank Fraud, Insurance Fraud, Wire Fraud, Conspiracy, Money Laundering, Drug Trafficking, Grand Larceny, Identity Theft, Counterfeit Credit Card Enterprise and Aggravated Harassment." (Exh. H) In a statement to the Washington City Paper published on April 4, 2011, though, Rakfosky admitted that "[w]hen I say I've worked on those cases, that doesn't mean I've worked on those cases on my own," and instead was "working with other lawyers, interning and stuff."[13] Even the *Deaner* court noted, with surprise and revolt, that the trial was Rakofsky's first. (Exh. E at 3:24-4:7) Judge Jackson even told Rakofsky that his conduct in connection with the *Deaner* trial – specifically, his e-mail to the investigator seeking to "trick" a witness (Exh. R; DeVoy Aff. ¶ 24) – raised "ethical issues." (Exh. E at 7:1-3)

Rakofsky's claims of legal prowess, when contrasted against his actual admitted experience, can be more than reasonably construed as lies and misrepresentations. To the extent

[13] Rend Smith, *N.J. Laywer Doesn't Care What D.C. Thinks of Him*, Washington City Paper (Apr. 4, 2011), *available at* http://www.washingtoncitypaper.com/blogs/citydesk/2011/04/04/n-j-lawyer-doesnt-care-what-d-c-thinks-of-him/ (*last accessed* Aug. 10, 2011).

Rakofsky enhanced his online presence and improved his stature in search results provided by internet search services such as Google or Bing – a practice known as Search Engine Optimization ("SEO") – Defendant Tannebaum, an expert in legal ethics, believed this conduct to be equivalent to solicitation. (Exh. C ¶ 179)

Tannebaum's opinion is also informed by the April 9, 2011 Washington Post article where it is revealed that Rakofsky repeatedly called Deaner's grandparents, representing that he had worked in criminal cases before, and offering his services at an unusually low fee of $10,000.[14] Provided as blog commentary, these statements are opinions, rather than statements of fact. Tannebaum does not contend that Rakofsky actually solicited his clients, but uses the word to express his opinion concerning the manner in which Rakofsky contacted, and was retained by, Deaner's family.

Additionally, the facts the Defendants' statements are based upon – the very words of Judge Jackson in the *Deaner* case (*see* Exh. E) – provide an irreproachable basis for the Defendants' expressed opinions. Judge Jackson's statements were made during trial. A trial is an official government proceeding. As such, the Defendants' statements are fair comment and fall within the scope of New York Civil Rights Law § 74. They cannot be the basis for a defamation action so long as the Defendants' reporting of Judge Jackson's commentary was fair and accurate. *See 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). These statements by the Defendants constitute constitutionally protected "fair comment[s]." *See Id*. Imposing liability upon the Defendants for making such statements would violate state law, and even if state law were not an

[14] Kenneth Alexander, *Woman Pays $7,700 to Grandson's Attorney Who Was Later Removed for Inexperience*, The Washington Post (Apr. 9, 2011), *available at* http://www.washingtonpost.com/local/woman-pays-7700-to-grandsons-attorney-who-was-later-removed-for-inexperience/2011/04/08/AF15DY9C_story.html (*last accessed* Aug. 10, 2011).

obstacle to liability, the First Amendment would not permit liability to attach.

iii. The Defendants' Accusations of Ethical Violations Are Matters of Opinion, Not Fact, But are True Anyway.

It is certain that Rakofsky violated numerous ethical rules during the *Deaner* case. Rakofsky's conduct in the *Deaner* case (as well as his advertisements) led commentators, including some of the Defendants, to form the opinion that his conduct was unethical and to share that opinion with their readers. In addition to the inadequate representation discussed above (*see* Exh. E at 2-5), Rakofsky was confronted in court with a letter he wrote to an investigator, instructing the investigator to "trick" a witness into misstating the facts of her observations. (*Id*. at 7:1-3; Exh. R)

Both New Jersey and the District of Columbia – where Rakofsky was admitted *pro hac vice* for the *Deaner* trial – have rules of professional conduct that were implicated by Rakofsky's behavior. Rule of Professional Conduct 1.1 in both jurisdictions require that counsel be competent in representation of a client. The transcript of April 1, 2011 in *D.C. v. Deaner* leaves no doubt that Rakofsky was not competent in handling the litigation. (*See generally* Exh. E)

Moreover, both New Jersey and the District of Columbia possess rules of professional conduct prohibiting misrepresentations to both the tribunal and third persons. Yet, in trying to have an investigator "trick" (Exh. R) a witness into misstating her observations and in using his many websites to create the appearance of deep experience and even "specializ[ation]" in complex criminal matters (Exhs. H, J), despite the impossibility of acquiring such experience while having his law license a scant year,[15] Rakofsky sought to create – and perhaps did create –

[15] This is to say nothing of Rakofsky's probable unlicensed practice of law in New York, where he resides and, on the dating website <JDate.com> where he goes by the moniker "WallStreetLawyr." On that site, Rakofsky represents that he "currently work[s] at a law firm on Wall Street," and claims to "live on Wall Street, only a few buildings away from my office,"

false representations of fact, both in the *Deaner* case and with respect to his legal experience.

To the extent the Defendants questioned the ethics of Rakofsky's conduct, their statements were solely matters of opinion. None of the defendants are the disciplinary authorities for New Jersey or the District of Columbia, and no visitor to their websites would mistake them as such. While it is very likely that Rakofsky's conduct was in fact unethical, the Defendants' statements are merely their opinions of his conduct based on the facts provided by actual trial proceedings and based upon Rakofsky's own words. The basis for those initial news reports and the Defendants' comments – substantiated by the transcript attached hereto as Exhibit A – were official proceedings within the ambit of New York Civil Rights Law § 74. Thus, fair and accurate commentary of what transpired at those proceedings, including the Defendants' statements, are immunized from being a source of liability for defamation under the statute. *See 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).

Summarizing Rakofsky's conduct as "unethical," particularly in light of the *Deaner* court's revelation about Rakofsky's instruction for the investigator to "trick" a potential witness (Exhs. E, R), is a fair summary of his inability to execute the trial effectively, as well as his attempts to mislead the Court. The Defendants had every right to express their opinion of Rakofsky as "unethical," and his actions in this case have not alleviated the Defendants of that opinion.

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despite only previously being licensed to practice law in New Jersey. A true and correct copy of Rakofsky's profile is attached hereto as Exhibit S. (DeVoy Aff. ¶ 25) While Rakofsky passed the July 2010 New York bar exam, according to the New York State Board of Law Examiners website, he has not been admitted, with his application apparently pending with the Committee on Character and Fitness.

b. Rakofsky is a Public Figure Who Fails to Establish the Defendants Acted with Actual Malice or Reckless Disregard for the Truth.

Public figures – those who are newsworthy or notable for reasons relevant to the public or a subset thereof – are held to a higher standard for proving defamation. When a plaintiff alleging defamation is a public figure, the plaintiff must show that the allegedly false statements were made with actual malice – knowing falsity, or a reckless disregard for the truth. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 779 N.E.2d 167, 171 (N.Y. 2002). Such public figures can include limited-purpose public figures who "have thrust themselves into the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Huggins*, 726 N.E.2d at 460.

It is not necessary for Rakofsky to be a household name like John Wayne or Barack Obama to be a public figure, either – he may be a limited-purpose public figure within a certain community, such as the legal community or legal blogosphere – for the same public figure standards to apply. *Huggins v. Moore*, 726 N.E.2d 456, 460 (N.Y. 1999). Rakofsky's own pervasive notoriety and newsworthiness within the legal community may even make him an involuntary public figure. *Wehringer v. Newman*, 60 A.D.2d 385, 389 n.4 (N.Y Sup. Ct. 1st Dept. 1978); *see Gertz*, 418 U.S. at 345 ("it may be possible for someone to become a public figure through no purposeful action of his own"). New York law expressly recognizes the legal status of involuntary, limited purpose public figures, which would aptly describe Rakofsky in this case. *Daniel Goldreyer Ltd. v. Dow Jones & Co.*, 259 A.D.2d 353 (N.Y. Sup. Ct. App. Div. 1st Dept. 1999); *Silverman v. Newsday Inc*., Index No. 9540/08 *2010 N.Y. Slip. Op. 30959U* at *7 (N.Y. Sup. Ct. Nassau County Apr. 14, 2010) (finding an involuntary limited purpose public figure exists when "(1) there is a public controversy; (2) plaintiff played a sufficiently central

role in that controversy; and (3) the alleged defamation was germane to the plaintiff's involvement in the controversy," further determining that a school district official became an involuntary limited purpose public figure because of her alleged misuse of public funds). The U.S. Supreme Court has clearly established that the Court must make the determination as to whether the Plaintiff can cross the "constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice'" *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 511 (1984).

From the first report of Rakofsky's mistrial, he has been a public figure, and sought to make himself one by engaging the media on numerous occasions. *Park v. Capital Cities Comms., Inc.*, 181 A.D.2d 192, 197 (N.Y. Sup. Ct. App. Div. 4th Dept. 1992) (finding that a physician, normally a private person, became a public figure by seeking media attention). "The essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention." *James v. Gannet Co.*, 353 N.E.2d 834, 840 (N.Y. 1976). As indicated in Exhibit C at ¶ 118, Rakofsky even anticipated that The Washington Post, and other Defendants in this action would report on Jackson's mistrial order.[16] The Washington Post, a Defendant in this action, first reported on Rakofsky's scolding from Judge Jackson on April 1, publishing an almost word-for-word account of Jackson's commentary found in the transcript (Exh. E). Not only was the disposition of the trial so rare as to warrant public attention, the trial was not some small matter, but rather a first-degree murder trial where the defendant, who was a rising sports star, faced a serious prison sentence for allegedly taking another's life. (*See Id*.)

[16] Rakofsky characterizes Judge Jackson's comments as "slanderous and defamatory" (Exh. C ¶ 118) but has not joined Jackson as a defendant in this action, while naming virtually every entity that repeated Jackson's statements, which were made in a public forum and preserved on the public record.

In and of itself, the *Deaner* trial was newsworthy. Simply being involved in such a case can make an attorney a limited purpose public figure. *Goldreyer*, 259 A.D.2d at 353; *see Dameron v. Washington Mag., Inc.*, 779 F.2d 736, 743-42 (D.C. Cir. 1985) (holding that the plaintiff, an air traffic controller, was a limited purpose public figure in connection with an aviation accident, despite not engaging the media, because his participation was central to the resulting public event). Rakofsky's mishandling of the *Deaner* case made it even more of a matter of public concern; a lawyer's bungling of a murder trial is a matter of heightened public interest, and for legal commentators there is not just a right, but a *responsibility*, to write about such matters so that others may learn from them.

Even if those circumstances were insufficient to make Rakofsky a public figure, he certainly transformed himself into one in the ensuing months. In an April 4, 2011 Washington City Paper article titled "*N.J. Lawyer Doesn't Care What D.C. Thinks of Him*," Rakofsky willingly engaged in an interview in which he told the reporter that "People put lies on the record and people are reading about these lies," with respect to the *Deaner* mistrial.[17] The instant lawsuit was the subject of an article published by The Atlantic, titled "Meet the Lawyer Who Sued the Internet."[18] Not only a party to the instant litigation, but the one who initiated it, Rakofsky criticized The Atlantic nonetheless for characterizing his conduct as "incompetence."[19]

It is likely that the Defendants would have published their opinions about the case even without a mainstream publication such as The Washington Post taking the lead. In fact, it was because of the newsworthiness and of Rakofsky's actions that so many people reported on them

[17] *See* Smith, *supra* n. 13.
[18] Adam Martin, *Meet the Lawyer Who Sued the Internet*, The Atlantic Wire (June 14, 2011), *available at* http://www.theatlanticwire.com/national/2011/06/meet-lawyer-who-sued-internet/38782/ (*last accessed* June 14, 2011).
[19] *Id*.

in the first place, and were joined in his unwieldy action against 81 defendants. The sheer number of defendants sued by Rakofsky for commenting on the *Deaner* case – and the prominence of some Defendants, including The Washington Post, the American Bar Association Journal, Above The Law, and Avvo, to name a few – demonstrates the newsworthiness of his folly. This was not some coordinated attack on Rakofsky, but the news cycle's natural response to his repeated and significant unforced errors.

As a public figure, Rakofsky is held to a higher standard in pursuing defamation claims. A public figure must show that the allegedly defamatory article was false, and that the falsity was published with actual malice – knowledge that the statement was false – or a reckless disregard for the truth. *Sullivan,* 376 U.S. at 254 (1964); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (To show "reckless disregard," a plaintiff must provide evidence that the defendant "in fact entertained serious doubts as to the truth of his publication…there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of probable falsity"). A "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Id*; *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (holding that an actual malice-bound plaintiff must show "evidence of deliberate falsification or reckless publication despite the publisher's awareness of probable falsity").

As such, whether Rakofsky is a general public figure or a public figure only with respect to the *Deaner* case and the above-captioned litigation, Rakofsky must show that the Defendants made untrue statements with actual malice. Judge Jackson stated that one of two alternate bases for ordering mistrial in the *Deaner* case was Rakofsky's "poor grasp" of criminal procedure, and that his performance that was "not up to par under any reasonable standard of competence under

the Sixth Amendment." (Exh. E at 4-6) Thus, Rakofsky's defamation claim against these Defendants for their statements about him could not even overcome a simple negligence standard, which is applied for private figure plaintiffs in defamation cases. It is a legal certainty that these facts could never surpass the more rigorous actual malice threshold.

In light of the transcript's contents (*see Id*.), the Defendants' statements do not bear a reckless disregard for the truth, nor a knowing misrepresentation of it. It is not a leap of logic at all to translate Judge Jackson's comments into a characterization of "incompetence," because that is what he said. Beyond being a statement of opinion, such a characterization would primarily be truthful in this instance. *Amodei,* 160 A.D.2d 279, 280 (N.Y. Sup. Ct. App. Div. 2d Dept. 1990), *aff'd* 571 N.E.2d 79 (N.Y. 1991); *Wait*, 241 F. Supp. 2d at 183 ("Statements that someone has acted unprofessionally or unethically generally are constitutionally protected statements of opinion"); *Tasso*, *1998 U.S. Dist. LEXIS 18908* at *5-6 (finding statements describing a plaintiff as "untrustworthy, unethical and unprofessional," and "incompetent" to be non-actionable opinions). As such, Rakofsky, a public figure, is incapable of ever crossing the threshold of actual malice required to sustain a defamation claim against the Defendants.

c. Defendants' Statements are all Substantially True, if not Entirely True, and Therefore Are Not Defamatory as a Matter of Law.

Substantial truth is all that is required to constitute "truth" as an absolute defense to claims of defamation. *Smith v. United Church Ministry*, 212 A.D.2d 1038, 1039 (N.Y. Sup. Ct. App. Div. 4th Dept. 1995); *Schwartzberg v. Mongiardo*, 113 A.D.2d 172, 174 (N.Y. Sup. Ct. App. Div. 3d Dept. 1985). Substantial truth exists "[w]hen the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done." *Fleckenstein v Friedman*, 193 N.E. 537, 538 (N.Y. 1934); *Kondratick v. Orthodox Church in Am*., 2010 NY

Slip Op. 31034U, *2010 N.Y. Misc. LEXIS 1945* at *5 (N.Y. Sup. Ct., Nassau County, Apr. 19, 2010).

In this case, Defendants' commentary is not even inaccurate, let alone untrue. Defendants all reported that the *Deaner* case had concluded in an order of mistrial, and that Judge Jackson criticized Rakofsky for his lack of ability as an attorney. While Rakofsky contends that the mistrial was ordered "solely" because Deaner sought to replace Rakofsky as his attorney, the parade of horribles set forth by Judge Jackson in the April 1, 2011 transcript strongly supports the inference that Deaner's dispute with Rakofsky stemmed from Rakofsky's incompetence, rendering him unable of appropriately representing Deaner. (*See* Exh. E at 2-3) Judge Jackson even said that, in the alternative, he would have declared a mistrial due to Rakofsky's poor performance. (*Id*. at 4-5)

The minutiae and nuance of these details may have been lost in translation as bloggers quickly analyzed the *Deaner* case's implications for the criminal justice system. The transcript of the proceedings, and even Rakofsky's own statements on his Facebook page, support all of the Defendants' statements as being true: The *Deaner* court ordered a mistrial, one ground of which was Rakofsky's incompetence – a condition that underlied Deaner's desire to replace Rakofsky as his attorney – which was addressed by Judge Jackson. In short, there is nothing that Rakofsky alleges the Defendants said (*see generally* Exh. C) that is untrue, or even inconsistent, with the *Deaner* trial's April 1, 2011 official transcripts (Exh. E at 2-6) and even Rakofsky's own account of events (Exh. F). The Defendants' statements are, at a minimum, substantially true, and are certainly closer to the entire truth than anything Rakofsky has represented about the *Deaner* case or this instant matter.

d. Defendants' Statements Are a Fair and True Report of Judicial Proceedings and are Thus Qualified Under NYCRL § 74.

As the Defendants' statements about Rakofsky arose from his participation in the *Deaner* case, the Defendants' complained-of statements are subject to additional defenses against Rakofsky's defamation claim. New York Civil Rights Law ("NYCRL") § 74 specifically precludes a cause of action for libel from being maintained against any "person, firm or corporation" for the publication of a "fair and true" report of "any judicial proceeding […] or other official proceeding." This statute has been applied in cases like this, where the plaintiffs, aggrieved by reality, attempt to punish media outlets for reporting true-but-unflattering facts of public record. *Freihofer*, 480 N.E.2d at 353-54; *Shiles*, 261 N.E.2d at 252-53; *Saleh v. N.Y. Post*, 78 A.D.3d 1151 (N.Y. Sup. Ct. App. Div. 2d Dept. 2010); *Sokol v. Leader*, 74 A.D.3d 1180, 1181 (N.Y. Sup. Ct. App. Div. 2d Dept. 2010).

The conditions that statements must meet to be protected by NYCRL § 74 are specific, but satisfied in this case. A statutorily protected "fair report" cannot make it impossible, in context, for the reader to determine that the statements were made during a judicial or other official proceeding. *Saleh*, 78 A.D.3d at 1151; *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114-15 (N.Y. Sup. Ct. App. Div. 2d Dept. 2009). To qualify for this statutory protection, the report must also be substantially accurate, but liberality is allowed for summaries of proceedings and the use of language other than the proceeding's exact words so long as the substance of proceedings is "substantially stated." *Holy Spirit Assn. for Unification of World Christianity v. N.Y. Times Co.*, 399 N.E. 2d 1185, 1187 (N.Y. 1979); *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc.*, 183 N.E. 193, 197-98 (N.Y. 1932); *Lacher v. Engel*, 33 A.D.3d 10, 17 (N.Y. Sup. Ct. App. Div. 1st Dept. 2006); *Saleh*, 78 A.D.3d at 1152.

The protections found in NYCRL § 74 apply with equal force to the Defendants in this case. In every scenario, it was obvious that the comments about Rakofsky's competence and honesty arose from a judicial proceeding (*see* Exhs. E and F), normally on blogs written by lawyers that primarily, if not exclusively, addressed legal issues. The Defendants' commentary was obviously in connection with the *Deaner* trial, specifically the mistrial entered by the court on April 1, 2011, in language that would shame any other practicing attorney. The April 1, 2011 transcript verifies truth and accuracy of the Defendants' reports. (*See generally* Exh. E)

The Defendants' description of the proceedings is at least substantially accurate, and just barely short of a word-for-word description of the hearing. Judge Jackson described Rakofsky's performance as "not up to par under any reasonable standard of competence under the Sixth Amendment." (*Id*. at 5:18-19) Judge Jackson further stated that, in the alternative, he would have granted a mistrial as a matter of "manifest necessity," as Rakofsky's performance was "below what any reasonable person could expect in a murder trial." (*Id*. at 4:23-5:1) Judge Jackson also said it was "evident" that Rakofsky had never tried a case before, that he was "astonished" by Rakofsky's actions, and that Rakofsky had an "inability" to raise defense theories, coupled with "not a good grasp of legal principles and legal procedure." (*Id*. at 4:2, 4:4, 4:10, 4:11-12)

In light of such commentary, the Defendants did not have much need for the literary license afforded by NYCRL § 74, as Judge Jackson's commentary was as harsh as anything the Defendants wrote. To the extent the Defendants summarized Judge Jackson's finding of Rakofsky's performance as "below any reasonable standard of competence under the Sixth Amendment" (*id*. at 5:18-19) with terms such as "incompetence," such statements are permissible, substantially true and accurate characterizations of judicial proceedings allowed by

NYCRL § 74. *Holy Spirit Assn. for Unification of World Christianity*, 399 N.E. 2d at 1187; *Briarcliff Lodge Hotel, Inc.*, 183 N.E. at 197-98. Even if including subjective commentary – inherent in the blogosphere – the Defendants' statements accurately reported the events of the April 1, 2011 hearing in *D.C. v. Deaner*, and in fact often described the events in *softer* language than that used by the Judge. To the extent the Defendants opined on Rakofsky's performance, their subjective statements do not negate the accuracy of their reports on the *Deaner* court's actions, nor confuse the reader into believing the statements related to anything other than the April 1 hearing. Consequently, as fair reports on a public proceeding, Defendants' statements cannot be the basis for a claim of defamation.

3. Rakofsky Failed to State a Claim for Intentional Infliction of Emotional Distress Against The Defendants.

The Defendants' speech is entitled to special protection under the First Amendment, as it was about a matter of public concern and made in a public forum, and it cannot be restricted simply because it has upset the Plaintiff. *Tex. v. Johnson*, 491 U.S. 397, 414 (1989). Rakofsky is not entitled to preferential treatment simply because his feelings were hurt in a newsworthy story. We all "must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988). The Defendants' statements are central to public debate about newsworthy items, even if the people at the center of those stories are, upon reflection, distressed about what made them so notable. The pits in these individuals' respective stomachs, though – especially when self-inflicted, like Rakofsky's – are not valid reasons to suppress the speech of others. As the Defendants' speech is at the core of what the First Amendment protects, Rakofsky's IIED claim must fail. *Snyder v. Phelps*, __ U.S. __, 131 S. Ct. 1207, 1219 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988).

In New York, a plaintiff must satisfy four conditions to allege a successful claim for IIED. These elements are: 1) extreme and outrageous conduct; 2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; 3) a causal connection between the conduct and injury; and 4) severe emotional distress. *Howell v New York Post Co*., 612 N.E.2d 699, 702 (N.Y. 1993); *Zane v. Corbett*, 82 A.D.3d 1603, 1607 (N.Y. Sup. Ct. App. Div. 4th Dept. 2011). Rakofsky has not properly pled any of these elements, and he could not prove them as a matter of law them even if he had sufficiently stated them. The news reporting and commentary provided by Defendants is not extreme or outrageous conduct by any measure, it was not done with intent to cause – or disregard of probably causing – severe emotional distress, and Rakofsky did not endure severe emotional distress. IIED specifically requires physical harm, and feeling sad about facing public scrutiny for one's newsworthy shortcomings does not qualify. This lack of physical harm precludes any causal relationship between Rakofsky's claim and the Defendants' actions.

First, and most simply, Rakofsky cannot show that Defendants' actions were outrageous or extreme conduct under New York law. Courts have characterized this requirement as "rigorous and difficult to satisfy." *Stern v. Burkle*, 36 Media L. Rptr. 2205 (N.Y. Sup. Ct., N.Y. County 2008) (citing *Howell*, 612 N.E.2d at 705). Conduct more shocking than that alleged by the Plaintiff has been found *not* to constitute outrageous conduct in New York, such as a supervisor displaying an employee's nude photographs to his co-workers, *Anderson v. Abodeen,* 29 A.D.3d 431 (N.Y. Sup. Ct. App. Div. 1st Dept. 2006), a defendant allegedly impersonating a plaintiff to send out an unflattering e-mail and encourage readers to vomit on the plaintiff, *Rall v. Hellman,* 284 A.D.2d 113 (N.Y. Sup. Ct. App. Div. 1st Dept. 2001), and even prompting a police investigation by misreading a plaintiff's x-rays, believing items in plaintiff's abdomen to be

narcotics packages. *Berrios v. Our Lady of Mercy Medical Center,* 20 A.D.3d 361 (N.Y. Sup. Ct. App. Div. 1st Dept 1995).

In light of this demanding standard, New York's courts have repeatedly refused to categorize news reporting as "extreme or outrageous" conduct. In *Stern*, a case much like this one, the plaintiff alleged that the defendants engaged in a conspiracy to ruin his reputation through the media, after newspapers reported on the plaintiff's alleged blackmail of defendant for $220,000 in return for a year of favorable news coverage, including the oft-inflammatory New York Daily News. 36 Media L. Rptr. at 2205 (citing *Howell*, 612 N.E.2d at 705). The court found that this reporting of this news did not rise to the level of conduct needed to predicate a claim for IIED. *Id*. Thus, the rote republication of public events, such as the Defendants' in this case, is not extreme or outrageous conduct. Under the facts as alleged, there is no possible way for a court or jury to find that the Defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," qualifying as extreme or outrageous behavior. *Collins v. Willcox Inc.*, 158 Misc. 2d 54, 56-57 (N.Y. Sup. Ct., N.Y. County, 1992).

Defendants' reporting on a case of professional import not only falls short of being outrageous conduct, but it is immunized against liability by the First Amendment. Public speech on matters of public concern, defined as "any matter of political, social or other concern to the community," *Connick v. Myers*, 461 U.S. 138, 145-46 (1983), or "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004), receives the First Amendment's highest protections. As discussed above, Rakofsky's mistrial was an issue of public concern, as it regarded the administration of justice and courts, and was addressed in the public through the blogosphere.

New York's courts concur with the lofty ideals of the United States Supreme Court. Because of the newsworthiness of Rakofsky's actions, and his status as a public figure, mere publication of his actions could not lead to liability for IIED. *Howell*, 612 N.E.2d at 704; *see also Hustler*, 485 U.S. 46, 56 (1988) (holding that public figures cannot recover for IIED without showing false statements made with "actual malice," thus barring the claim from being levied against factually accurate reporting). Mere comment on, or reporting of, news events – as Defendants have done in this case – does not give Rakofsky license to sue them for IIED simply because he dislikes it when truthful, accurate reporting portrays him badly. New York's precedent recognizes that public individuals may be embarrassed by their actions, and has de-clawed them of their ability to punish the media for documenting their foibles. *Howell*, 612 N.E.2d at 704; *see also Bridgers v Wagner***,** 80 A.D.3d 528 (N.Y. Sup. Ct. App. Div. 1st Dept. 2011). Rakofsky, falling into this category, therefore cannot sue the defendants for IIED.

Assuming the Defendants' actions were extreme and outrageous – which they surely are not – Rakofsky would have to show that they were made with the *intent* to cause his emotional distress. *Howell*, 612 N.E.2d at 702; *Zane*, 82 A.D.3d at 1607. Even if Rakofsky has suffered emotional distress, "intent is not established merely because an individual has suffered severe emotional distress as the proximate result of another's actions." *Richard L. v. Armon*, 114 A.D.2d 1, 5 (N.Y. Sup. Ct. App. Div. 2d Dept. 1989). Rakofsky's allegation falls flat in this regard; each of the Defendants' respective purposes in commenting and reporting on the lawsuit was to provide that commentary for other readers, as members of the press, and as legal commentators seeking to provide information to the public about matters of public concern.

A review of the Defendants' complained-of statements and the contexts in which they appear tell a compelling story of serving the public good. None of the entity websites sprang

into existence solely to harass Rakofsky, nor did any of the Defendants begin writing and commenting for the lone purpose of hounding him for his ethical and practical shortcomings. To the contrary, many Defendants have been writing legal blogs for years, informing the public, and increasing the level of knowledge of the judicial system. The reality is that Rakofsky's hurt feelings are incidental to the bloggers' interests and ambitions, which are far greater than Rakofsky himself. The public has a right to know what happens in its courtrooms, and (for its own protection) further has a right to know when lawyers act irresponsibly. The Defendants discharged their duties as members of the Fourth Estate. Harming Rakofsky's pride was an unavoidable consequence of the Defendants' privileged, socially valuable free speech.

Rakofsky's claim also fails for neglecting to specify what emotional distress and anguish he suffered. Rakofsky attempts to skate around this requirement by claiming to have endured "severe and debilitating emotional injury and anguish," (Exh. C ¶ 197) but never specifies the form in which he experienced this supposedly crippling damage. This is insufficient; Rakofsky must establish that severe emotional distress was suffered, which must be supported by **medical** evidence, rather than recitation of speculative claims. *Walentas v. Johnes*, 257 A.D.2d 352, 353 (N.Y. Sup. Ct. App. Div. 1st Dept. 1999); *Leone v. Leewood Serv. Station*, 212 A.D.2d 669, 672 (N.Y. Sup. Ct. App. Div. 2d Dept. 1995); *Richard L.*, 114 A.D. at 4. In addition to not supplying medical records, Rakofsky has failed to allege what his emotional injuries are, despite claiming to have suffered "severe and debilitating emotional injury and anguish." (Exh. C ¶¶ 196-97, 206-07) Rakofsky has failed to so much as allege any specific injuries, instead relying simply upon a vague notion of "emotional injury and anguish." This pleading failure undermines his IIED claim, and thus it should be dismissed.

The third element of IIED, requiring a causal connection between the Defendants' conduct and intent with the Plaintiff's severe emotional distress, is absent in this case. As demonstrated, Defendants' conduct was neither extreme nor outrageous as a matter of law, and the Defendants lacked the requisite intent to cause emotional harm to Rakofsky. Simultaneously, Rakofsky has failed to claim he endured the severe emotional harm requisite to sustain his claim under New York law. With no other element of IIED present, the tort's third requirement - a causal connection between a defendant's actions and a plaintiff's harm – cannot exist as a matter of law. *Howell*, 612 N.E.2d at 702; *Zane*, 82 A.D.3d at 1607.

The simple fact is, Rakofsky is upset that his incompetence and lack of ethics, originally identified by Judge Jackson (Exh. E), have been publicly exposed. IIED is not a catch-all tort to be wielded by someone who might be mad at someone else. The claim requires the plaintiff to meet high standards, and Rakofsky will never be able to meet those standards. Therefore, this claim must be dismissed against all Defendants.

4. Rakofsky Failed to State a Claim for Intentional Interference with Contract Against Any and All Defendants.

Similar to Rakofsky's defamation cause of action, Rakofsky claims that the Defendants' allegedly defamatory statements constituted intentional interference with his existing contractual relationships, mostly with existing clients. (Exh. C ¶¶ 208-213) To successfully bring this claim, Rakofsky must show: 1) the existence of a contract between the plaintiff and a third party; 2) defendants' knowledge of the contract; 3) the defendants' intentional inducement of the third party to breach or otherwise render performance of the contract impossible; and 4) and injury to the plaintiff. *Lama Holding Co. v Smith Barney, Inc*., 668 N.E.2d 1370, (N.Y. 1996); *Vigoda v. D.C.A. Productions Plus Inc*., 293 A.D.2d 265 (N.Y. Sup. Ct. App. Div. 1st Dept. 2002); *Avant Graphics v. United Reprographics*, 252 A.D.2d 462 (N.Y. Sup. Ct. App. Div. 1st Dept 1998);

Global Reinsurance Corporation-U.S. Branch v. Equitas Ltd., 20 Misc. 3d 1115A (N.Y. Sup. Ct., N.Y. County 2008) (citing *Hoag v. Chancellor, Inc*., 246 A.D.2d 224, 228 (N.Y. Sup. Ct. App. Div. 1st Dept. 1998)). As with his other claims, Rakofsky has failed to put forth a viable cause of action for intentional interference with contractual relationships, as several essential elements are missing from the Amended Complaint and this case. Moreover, Rakofsky alleges that Defendants' actions interfered with his "establishment of contractual relations" with other clients. (Exh. C ¶ 209, 212-23) This allegation is irrelevant and fundamentally outside the limited scope of this tort.

Even confining this Motion's analysis to Plaintiff's presently existing contracts, Rakofsky's intentional interference with contract cause of action is beset with problems. The first problem concerns the contracts allegedly at issue. While Rakofsky alleges the existence of contracts, he does not even generally identify these contracts' counterparties – even in cases where his representations are matters of public record – and offers no indicia of these contracts' actual existence.

In addition, Rakofsky's allegations fail to establish whether the contracts at issue can even be covered by a claim for intentional interference: Service contracts without a specified duration are presumed to be terminable at will, a proposition that aligns closely with the professional imperative for clients to have their choice of legal counsel. *Glenmark Pharm., S.A. v. Nycomed U.S., Inc.*, Index No. 603615/09, *2010 N.Y. Slip Op. 31131U* at *18 (N.Y. Sup. Ct., N.Y. County Apr. 29, 2010); *B. Lewis Productions, Inc. v Maya Angelou, Hallmark Cards, Inc*., Case No. 01-cv-0530, *2005 U.S. Dist. LEXIS 9032* at *1 (S.D.N.Y. 2005) (noting that a duration clause is not necessary in a contract for services, but if a service contract makes no provision for duration, the contract is presumed to be terminable at will). Agreements that are terminable at

will can be "classified only as prospective contractual relationships, and thus cannot support a claim for tortious interference with *existing* contracts." *Glenmark Pharm*, *2010 N.Y. Slip Op. 31131U* at *16 (emphasis added) (citing *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)).

Rakofsky fails to allege the Defendants' knowledge of these specific contracts' existence, an essential element of this claim. *See Lama Holding Co*, 668 N.E.2d at 1370; *Vigoda*, 293 A.D.2d at 265. The only business relationship ostensibly governed by a contract that was commented upon by the Defendants is Rakofsky's representation of Dontrell Deaner, which ended before the Defendants remarked on it. Rakofsky cannot show that the Defendants' intentional actions induced third parties to breach their contracts, if any, with Rakofsky.

Using statements from Defendant Greenfield to embody this cause of action in his Amended Complaint, Rakofksy quotes Greenfield as writing, "[i]f all works as it should, no client will ever hire Rakofsky again. Good for clients." (Exh. C ¶ 212) This statement clearly is not directed to anyone with whom Rakofsky has a contractual relationship with, nor identifies them in any way – if such individuals exist. The statement further indicates that nobody should *form* a contractual relationship with Rakofsky – i.e., that he should never be hired in the future – and is not an encouragement to breach any *existing* contracts.

For Rakofsky to construe this statement, and its republication, as intentional interference with contract is to not only ignore the law, but the naked language of the statement itself. This is not a call to breach or render a contract's performance impossible, but commentary on the advisability of hiring Rakofsky for future work – analogous to a review of a restaurant or other service provider. Surely, AT&T would not sue everyone who commented on <www.who-

sucks.com> that AT&T's phone service "sucks," and nobody should ever use them as a phone carrier, for intentional interference with contract. Substantively, Greenfield's statements and other Defendants' republications of them are no different, and similarly should not carry any legal consequence.

It is no coincidence, then, that Rakofsky does not allege – and would be unable to show – that any third parties breached or otherwise ended their existing contracts with Rakofsky as a causal result of Defendants' statements. To that end, Rakofsky has failed to allege the fourth element of this tort: That the Defendants' actions caused him harm. Rakofsky did not allege that the Defendants' actions led to third parties breaching their contracts with him. (*See* Exh. C ¶¶ 211-213) This is either because such breaches did not occur, or Rakofsky had no contracts to breach in the first place.

Finally, the only "contracts" that Rakofsky might have would be engagement agreements with clients. However, Rakofsky is not admitted to practice in New York, and his New Jersey license was suspended in September 2011 (*see* n. 5, *supra*). Accordingly, what lawful contract could he have, which could have been affected by the Defendants' statements? If Rakofsky has any current clients, it is the Bar – and not the Defendants – that stands in the way of the execution of those contracts. This cause of action is improperly asserted and unsupported by the facts of this case. It must be dismissed.

5. Rakofsky Failed to Allege Violations of New York Civil Rights Law §§ 50 and 51 Against Any and All Defendants.

Rakofsky's invocation of New York Civil Rights Law ("NYCRL") §§ 50 and 51 seeks to punish conduct falling squarely within the newsworthiness exception to liability under those statutes. Under New York law, NYCRL §§ 50 and 51 are to be narrowly construed, and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living

person. *Messenger v. Gruner + Jahr Printing & Pub*., 727 N.E.2d 549, 551-52 (N.Y. 2000), *cert denied* 531 U.S. 818; *Walter v. NBC Tel. Network, Inc.*, 27 A.D.3d 1069, 1070 (N.Y. Sup. Ct. App. Div. 4th Dept. 2006).

Where there is a non-commercial aspect to a defendant's use of the plaintiff's name, portrait or picture, these statutes do not apply. *Messenger*, 727 N.E.2d at 551-52; *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 586 (N.Y. 1984) (holding that it is the content of the article, rather than the newspaper's desire to increase circulation, that determines whether an article using someone's image and likeness is newsworthy and excepted from NYCRL §§ 50 and 51); *Walter*, 27 A.D.3d at 1070. The most important non-commercial aspect of an unauthorized use of a plaintiff's name, portrait and picture is for news purposes, known as the newsworthiness exception. *Messenger*, 727 N.E.2d at 551-52; *Stephano*, 474 N.E.2d at 586; *Walter*, 27 A.D.3d at 1070. Newsworthiness is liberally construed and broadly applied; its applicability is a legal question that hinges on a court's determination. *Messenger*, 727 N.E.2d at 551-52; *Stephano*, 474 N.E.2d at 586; *Walter*, 27 A.D.3d at 1070.

Even if the Defendants' statements about Rakofsky are not strict news reporting, as they incorporate humor, satire, and other expressive elements, their statements fall within the newsworthiness exception to liability. *Walter*, 27 A.D.3d at 1070; *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 448 (N.Y. Sup. Ct., N.Y. County 1968). Indeed, the newsworthiness exception is "by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement." *Paulsen*, 59 Misc. 2d at 448. Even if Rakofsky shunned publicity – something he clearly did not do, evinced by his past statements to

Washington City Paper[20] and The Atlantic[21] – the Defendants' use of his name and image would be protected as newsworthy due to the public's interest in his activities and the Defendants' actions in reporting on the *Deaner* trial. *Costlow v. Cusimano*, 34 A.D.2d 196, 198-99 (N.Y. Sup. Ct. App. Div. 4th Dept. 1970) (holding that the manner in which an article develops its topic is not relevant to whether the article is protected by constitutional guarantees of free speech); *DeGregorio v. CBS, Inc.*, 123 Misc. 2d 491, 493 (N.Y. Sup. Ct., N.Y. County 1984).

The shocking uniqueness of Rakofsky's performance in the *Deaner* trial has already been established; as trials are public events, it is little surprise that traditional and digital media paid attention to the case, especially in light of Rakofsky's noteworthy performance. (*See generally* Exh E) Similarly, the capture and republication of Rakofsky's then-publicly available profile on the Facebook.com service, which bore statements relating to the *Deaner* trial, was also related to newsworthy reporting on the trial and almost inseparable from Judge Jackson's order of mistrial. (*Id*.; Exh. F)

Rakofsky celebrated the case's mistrial on his Facebook profile's "wall," an area where Rakofsky and others could exchange information and written messages. (Exh. F) Rakofsky's friends and former classmates – none the wiser to the real reason why the *Deaner* case would resolve in a mistrial – congratulated Rakofsky. He thanked them, never once mentioning that the mistrial arose due to his own inadequate representation, furthering his misrepresentation as the Court's mistrial order as a victory – initiated by his triumphant "1st-Degree Murder… MISTRIAL!" status update. (*Id*.) Such celebration was beyond premature: In entering a mistrial, Judge Jackson repeatedly castigated Rakofsky for his incompetence and subpar performance

[20] *See* Smith, *supra* n. 13.
[21] *See* Martin, *supra* n. 18.

during the trial, and indicated that Deaner's removal of Rakofsky as counsel very likely arose from Rakofsky's inability to competently defend him. (Exh. E at 2:17-5:22)

As matters of public interest, identifying Rakofsky as affected counsel in the *Deaner* court's mistrial order and castigation of him, as well as his misleading celebration of it, is not punishable under NYCRL §§ 50 and 51. The Defendants, commentators and writers all (even if earning revenue as an incident of their reporting), used Rakofsky's name and image to identify him and add context to Judge Jackson's devastating comments. Defendants' use of Rakofsky's Facebook profile and contents therein – essential to establish his identity – was necessary to show how Rakofsky distorted the outcome of his case, even after being accused of dishonesty by the court. (*Compare* Exhs. E 5:4-10 and 7:1-3; F; R (depicting the e-mail in question, where Rakofsky asks the investigator to "trick" a witness))

The Defendants' use of this then-publicly available information incorporated essential elements of Rakofsky's detachment from reality into the Defendants' individual narratives and collective zeitgeist. Rather than engaging in self-reflection after a performance that would dishearten seasoned litigators (*see generally* Exh. E), Rakofsky threw a social party on Facebook, celebrating an outcome arising from incompetence and inability. This news could not be reported without using Rakofsky's name. If Rakofsky's use of NYCRL §§ 50 and 51 as a sword against the Defendants in this case is permissible, then the media might as well never again identify the subjects of its unflattering news stories, however important they are.

Some of the Defendants satirized Rakofsky and made quips at his expense. Because these comments relate to the reporting of newsworthy events, though, they are covered by the newsworthiness exception to NYCRL §§ 50 and 51. *Walter*, 27 A.D.3d at 1070; *Paulsen*, 59 Misc. 2d at 448. In sum, there is no theory of liability under NYCRL §§ 50 and 51 under which

any of the Defendants could be liable for reporting on Rakofsky's own newsworthy conduct, compounded and expanded upon by Rakofsky's own conduct. As such, this claim must fail against all Defendants.

6. Rakofsky's Case is Doomed to Fail, and the Court Should Deny any Further Attempts to Continue this Litigation

While amending a Complaint to cure errors or defects in the original (or in this case, errors within the First Amended Complaint), it presumes some type of merit to the underlying action. The First Department is clear that while it is "well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay, [this Court] has consistently held that in order to conserve judicial resources, an examination of the proposed causes of action is warranted and leave to amend will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law." CPLR § 3025; *Davis & Davis, P.C. v. Morson*, 286 A.D.2d 584 (N.Y. Sup. Ct. App. Div. 1st Dept. 2001). Amendment is particularly inappropriate in this case, as Rakofsky's entire case, however phrased, "fails to state a cause of action or is palpably insufficient as a matter of law." *Davis & Davis*, 286 A.D.2d at 585 (citing *Bencivenga & Co., CPAs, P. C. v. Phyfe*, 210 A.D.2d 22 (N.Y. Sup. Ct. App. Div. 1st Dept. 1994); *Bankers Trust Co. v. Cusumano*, 177 A.D.2d 450 (N.Y. Sup. Ct. App. Div. 1st Dept. 1994); *Stroock & Stroock & Lavan v. Beltramini*, 157 A.D.2d 590 (N.Y. Sup. Ct. App. Div. 1st Dept. 1990)).

For all of the reasons stated in this Motion, Rakofsky cannot show that the many Defendants defamed him, tortuously interfered with his contractual relationships, intentionally inflicted emotional distress upon him, violated his civil rights, or committed even a single one of the plethora of wrongs he alleged – or may subsequently allege – against the Defendants. Any

additional amendments to this Amended Complaint, or attempts to do the same, serve no purpose other than burning additional party and judicial resources. Therefore, any motion or cross-motion by Rakofsky to further amend his Complaint should be denied.

Conclusion

In open court, Rakofsky stated his opinion that the Defendants are responsible for prolonging this case because they "refuse to settle." Of course they refuse to settle - this case is an abuse of the legal system. If Rakofsky's case is not dismissed, it poses a grave danger to freedom of the press, and the defendants represented by the undersigned will not shirk their responsibility to stand up for The First Amendment. Nevertheless, this Court must dismiss this action, and do so now. If it is permitted to linger for one extra day, it will force these members of the press to endure lengthy litigation to simply vindicate a right that the press has had since before anyone involved in this case had a law license – the right (and the responsibility) to comment on matters of public concern. Given how this litigation has been prosecuted so far, it is unlikely for Rakofsky to conduct his case expeditiously or economically.

Lawyers, especially criminal defense lawyers, are bestowed great trust and responsibility by society. Rakofsky had the trust of the Deaner family, and had a responsibility to render effective assistance of counsel. He failed to do so and, fortunately, Judge Jackson saw this and declared a mistrial. Rakofsky deserved criticism for his actions, and the press had every right to deliver that criticism. In fact, the press had a responsibility to inform the public of the events in the public's courtroom. The press further had a responsibility to educate the public about the Sixth Amendment, and Rakofsky's horrendous failure to live up to it as a criminal defense

attorney. It is not every day that a judge issues such a stern rebuke to a lawyer.[22] That, in itself, elevated the newsworthiness of the story.

When the press reports on a matter of public concern, often there is an antagonist in the story who wishes that the whole affair would just go away. Since the invention of the news camera, criminals have covered their faces on the way into the courtroom in the hope that it will partially shield them from public scorn. The Fourth Estate does its job when it informs the public of misdeeds, such as those committed by Rakofsky. If this case is allowed to move forward, it will chill the press in its function of reporting on the conduct of wrongdoers – especially when they are members of the Bar.

The Defendants have done the legal profession a service by shining the sun's cleansing light upon Rakofsky and his actions. Their stewardship to the Bar, their chosen vocation, and the public, compelled them to speak frankly about what Rakofsky did to Dontrell Deaner. The Defendants were compelled to speak honestly about Rakofsky's questionable marketing and business practices, and the potential further damage he may do to clients and the justice system. Instead of being cowed into muteness to protect one of their own – a "code of silence" common among police officers[23] and, to some extent, doctors[24] – the Defendants spoke, and they were heard about matters of vital public importance.

In this case, nothing less than freedom of the press and the right and responsibility to shine a light on public dangers hangs in the balance. All of this because we have what one

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[22] *See* Pattis, *supra* at n. 3.
[23] Selwyn Raab, *The Dark Blue Code of Silence*, New York Times (May 2, 1993), *available at* http://www.nytimes.com/books/98/02/08/home/15700.html (*last accessed* Nov. 16, 2011).
[24] Eric Turkewitz, *Doctors Refusing to Treat Lawyers (Is The White Coat of Silence Intensifying?)*, New York Personal Injury Law Blog (Sept. 8, 2008), http://www.newyorkpersonalinjuryattorneyblog.com/2008/09/doctors-refusing-to-treat-lawyers-is-the-white-coat-of-silence-intensifying-updated.html (*last accessed* Nov. 16, 2011)

commentator charitably referred to as "a young lawyer without the sense to know when he ought simply to admit he erred."[25] Less charitably, the Defendants can describe Rakofsky as motivated by greed, coupled with a desire to censor the press so that his own shortcomings may hide in the shadows, however badly he has harmed others because of them, ready to claim more victims in the future.

For the foregoing reasons, this Court is not merely justified in dismissing all of Rakofsky's claims against the Defendants – it must do so. Rakofsky has failed to establish personal jurisdiction over the Foreign Defendants, and cannot exercise jurisdiction over them due not only to CPLR § 302, but his inability to properly serve, or even identify, many of them. Substantively, Rakofsky has failed to articulate even one cause of action in his Complaint for which the Court can accord him relief. Consequently, this Complaint must be dismissed against all Defendants, and any motions to amend his Amended Complaint should be denied.

The very temperature of The First Amendment hangs in the balance of this case. Any pain or damage that Rakofsky has suffered is either imaginary, not properly the subject of a valid claim, or self-inflicted. Yet, even that outcome does not go far enough. It is most appropriate for the Court to dismiss Rakofsky's claim with prejudice, to be tax Rakofsky with fees and costs, and for Rakofsky to be barred from causing further harm to hapless clients or to the public's perception of the legal system – among other penalties. This Court must remove the chill hanging over public discourse by terminating these proceedings with prejudice, in favor of the Defendants, reserving jurisdiction for the sole purpose of hearing a motion for sanctions under under 22 NYCRR 130-1.1 and CPLR § 8303-a.

[25] *See* Pattis, *supra* at n. 3.

Respectfully submitted this 14th day of December 2011

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