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.

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Memo of Law in Opposition to Plaintiffs' Cross-Motion to Amend the Amended Complaint

Index # 105573/11

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION TO AMEND THE AMENDED COMPLAINT

Introduction

Joseph Rakofsky brought more than 80 defendants into this litigation, but clearly does not want to finish it. Rather than face the negative merits of this ill-conceived lawsuit, he seeks to interminably put off the end of the proceedings by proposing a staggering 269-page, 1223-paragraph, second amended complaint, seeking more than $200 million in damages. For more than a year, the defendants filing this opposition have awaited their day in court and a chance to dismiss this suit. The defendants incurred the expense of filing this substantial motion, and would face extreme prejudice if forced to prepare yet another motion to dismiss an even more bizarre second amended complaint. Of course, such a filing would no doubt be met with more of Rakofsky's trademark frivolity and time-wasting that drives up the costs of litigation with more futile motion practice (Turkewitz Aff. ¶¶ 8-14). At every turn, Rakofsky has turned this litigation into a money pit for the defendants, a waste of judicial economy, and it has served to chill free speech in the legal blogosphere and elsewhere (*id*. ¶¶ 8-15). It is time for this to stop.

With all that has happened in this litigation, it is easy to forget that it is still in the pleading stages. More than a year ago, Rakofsky initiated this action by filing a Complaint. He then filed an Amended Complaint, consuming his one ability to amend as of right. CPLR § 3025(a). When Rakofsky realized what he had done – and that bloggers, the traditional media, and defenders of the First Amendment would not roll over and pay $5,000 in protection money (see Doudna Mot. to Dismiss) – he immediately requested a stay. Despite demanding this stay, Rakofsky later moved this Court (Rak. Aff. Oct. 24, 2011), and then the Appellate Division, for emergency relief modifying the stay so that he could file a second amended complaint. Both Courts rejected these requests. *See Rakofsky v. Wash. Post Co,. et al.*, Case No. M-162 2012 NY Slip Op 64858(U) (1st Dept. Feb. 21, 2012) (denying plaintiffs' motion for emergency relief).

Rakofsky has no right to file and serve a second amended complaint, and there is no reason for the Court to let him do so. For the same reasons the court should dismiss the first amended complaint with prejudice, the second amended complaint is doomed from the start – rendering any amendment an exercise in futility. Rakofsky's restated causes of action fail for the same reasons as those in the first amended complaint. His new causes of action – including a previously rejected, bizarre, and paranoid theory of "internet mobbing" – are similarly not recognized at law. Even if leave to amend were granted, Rakofsky's abuse of joinder in combining dozens of very different defendants, each with unique factual and jurisdictional defenses, compels the severance of all but the lead defendant.

It is long past time for this litigation and Rakofsky's abuse of the judicial process to end. As seen in the proposed second amended complaint, Rakofsky sees every action that does not terminate this litigation as an invitation to exponentially increase its absurdity and frivolity. The first step in ending Rakofsky's wasteful campaign is denying this cross-motion. Then, the Court

may adjudicate the more than one dozen pending motions to dismiss the amended complaint and rightly terminate this case with prejudice.

Argument

Rakofsky's cross-motion for leave to amend must be denied. After more than a year of litigation, the defendants await adjudication of their motion to dismiss, which was served on December 15, 2011. The defendants will face substantial prejudice if this Court grants Rakofsky leave to amend. However, there is no reason for the Court to grant Rakofsky leave, as the proposed second amended complaint still fails to set forth a single cause of action for which relief can be granted. (Despite this infirmity, the consumption of defendants' resources required to oppose Rakofsky's cross-motion to amend ensures that the proposed amendments have served the plaintiffs' purpose.) Finally, if for some reason Rakofsky obtains leave to file a second amended complaint, the defendants should be severed from this action, and the plaintiffs required to buy separate index numbers for each defendant, as the proposed second amended complaint lays bare the misjoinder of these defendants.

I. The Amendment, Filed More than One Year after the Original and Amended Complaints, is Untimely and Would Cause Undue Prejudice to the Defendants Because of the Delay.

An amended complaint will only be approved if it merely "expands upon and relates back to" the claims made in the original complaint, and if the causes of action were pleaded with sufficient specificity. *Pickholz v. First Boston, Inc.*, 202 AD2d 277, 277 (1st Dept. 1994). If the original pleading does not give notice of "the transactions, occurrences, or series of transactions or occurrences," the claim cannot be made in an amended pleading. CPLR § 203(f).

Rakofsky filed the original Complaint on May 11, 2011, and then filed an amended complaint just days later. He tried twice before to do a second amended complaint and twice was denied, once before Justice Goodman and once before the First Department. (Turkewitz Aff. **¶¶ 6-7)** Now, more than one year afterward, Rakofsky seeks leave again to file a second amended complaint for no other purpose than to drive up the costs of litigation – since a review of the original complaint, amended complaint and now proposed second complaint reveals that none of them remotely approach a resolution of the fatal flaw that this case suffers at its core: It is patently frivolous. The complaints themselves, rather than improving with each incarnation, seem to descend deeper and deeper into ludicrous rants.[1] Even this time, with the assistance of outside counsel, the proposed second amended complaint is truly the least supportable of the Rakofsky Collection.

In his clear attempt to simply increase the costs of litigation, Rakofsky delayed his latest opus until after all of the appearing defendants filed their motions to dismiss – including the defendants filing this opposition, who filed a detailed motion to dismiss in excess of 50 pages with the court in March of this year, and served it in December 2011 (Defs.' Mot. to Dismiss).

Where this lateness is coupled with prejudice to the opposing party, leave to amend should be denied. *Clark v. MGM Textiles Indus*., 18 A.D.3d 1006 (3d Dept. 2005); *Moon v. Clear Channel Communs., Inc.*, 307 A.D.2d 628, 629 (3d Dept. 2003); *Farrell v. K.J.D.E. Corp.*, 244 A.D.2d 905 (4th Dept. 1997). Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case." *Loomis v Civetta Corinno Const. Co*., 54 N.Y.2d 18,

[1] A key issue in this case is the general statement that a federal judge called Rakofsky "incompetent" and that he questioned Rakofsky's ethics. With each document Rakofsky files in this case, those accusations are brought into sharper and sharper focus as the indisputable truth. It is the defendants' position that no competent or ethical attorney could affix his name to anything that has yet been filed by Mr. Rakofsky in this case.

23 (N.Y. 1981). This standard is well met in this case, where Defendants experience prejudice every day this litigation is not dismissed, with costs and fees that must be taxed to Rakofsky. Rakofsky increases the defendants' costs with every action he takes, simultaneously increasing their burden and pushing the date when they will finally be heard – and have this case dismissed – far into the horizon. If the Court grants Rakofsky leave to file yet another frivolous and unsupportable complaint, it (and the parties) will be treated to more bizarre and wasteful antics (*see id*.). It is time for this Court, with ample justification, to tell Rakofsky "enough."

II. The Proposed Second Amended Complaint Fails to state Any Causes of Action Against the Defendants; As an Amendment Would be Futile, Leave to Amend Must be Denied.

Notwithstanding the prejudice that amendment would cause the defendants at this point, Rakofsky's proposed amendment would not fix a single issue confronting the Amended Complaint – while frivolously adding other unsupportable causes of action – and serve only to further waste party and judicial resources. Upon a motion to amend, the Court reviews the proposed causes of action to determine whether leave to amend is warranted. *Non-Linear Trading Co. v. Braddis Assocs.,* 243 A.D.2d 107, 116 (1st Dept. 1998); *East Asiatic Co. v. Corash,* 34 A.D.2d 432 (1st Dept. 1970). This allows the Court to deny leave if the proposed amended complaint fails to state a cause of action, or if the proposed complaint is palpably insufficient. *Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc.*, *LLC*, 82 A.D.3d 1035, 1037 (2d Dept. 2011); *Scofield v. DeGroodt*, 54 A.D.3d 1017 (2d Dept. 2008); *Tishman Constr. Corp. v. City of N.Y.,* 280 A.D.2d 374 (1st Dept. 2001); *Bankers Trust Co. v. Cusumano,* 177 A.D.2d 450 (1st Dept. 1991).

Rakofsky's proposed second amended complaint is palpably insufficient as a matter of law. None of the causes of action alleged therein are sustainable. The proposed amendments do nothing to fix its fundamental legal flaws.

A. Rakofsky's Proposed Second Amended Complaint Fails to State a Claim for Defamation Against any of the Defendants.

The main focus of Rakofsky's proposed second amended complaint is its 32 individual causes of action for defamation. (Proposed 2d Am. Compl. ¶¶ 77-512) 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 (1st Dept. 1999); *see also Epifani v. Johnson*, 65 A.D.3d 224, 233 (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 (N.Y. 1995).

The fact that it took Rakofsky 435 paragraphs to allege 32 claims for defamation should inform the Court of the mental gymnastics necessary for him to allege why obvious expressions of opinion – and repetition of official proceedings – magically become defamatory statements of fact (*id.*). Despite the lengths Rakofsky took to itemize his defamation claims against individual defendants – each ranging from $1,000,000 to $10,000,000 in alleged damages – their re-allegation cannot overcome the immutable fact that Rakofsky has brought suit over non-actionable statements.

a. The Defendants' Statements are Matters of Opinion and Not Defamatory.

Statements of opinion are 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 must show that the defendants' statements, viewed in the context where they appeared, stated facts rather than their opinions. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). Courts determine whether a statement is one of fact or opinion as a matter of law. *Brian*, 660 N.E.2d at 1129; *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" – are not defamatory in New York. In *Amodei v. New York State Chiropractic Association*, the Second Department 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 (2d Dept. 1990), *aff'd* 571 N.E.2d 79 (N.Y. 1991); *Halegoua v. Doyle*, 171 Misc. 2d 986, 991 (N.Y. Sup. Ct. 1997) (finding that a statement that doctor was "negligent and unprofessional," was an opinion insufficient to support a defamation claim). The Southern District of New York has found that describing a plaintiff as "untrustworthy, unethical and unprofessional," and "incompetent" is not defamatory as a matter

of law, as these are statements of 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 held: "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).

After a year of litigation Rakofsky finally concedes this point on page 47 of his Opposition Memo of Law to the motion to dismiss, where he states:

> "Whether Mr. Rakofsky was, in fact, incompetent is not itself an issue as to which Plaintiff alleges he was defamed by Defendants. This would be a matter of opinion that would be neither provably true nor provably untrue." (Emphasis in original)

And yet, despite conceding that charges of incompetence are clear opinion, he persists on moving to amend the amended complaint with exactly those arguments.

Rakofsky's proposed amended complaint sets forth that the defendants' blogs are sources of news, commentary, and information (Proposed 2d Am. Compl. ¶¶ 77-512). Rakofsky's proposed submission also, however, makes it clear that the defendants are not courts, bar associations, or other entities whose proclamations of "incompetence" could be perceived as proclamations of objective fact (*id*.). Rakofsky's proposed amended complaint ignores the journalistic license to which all speakers are entitled, and seeks to ensnare the defendants' in an increasingly broad and more illogical net of defamation claims. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 893 U.S. 6, 14 (1970); *Gross*, 623 N.E.2d at 1163, 1167 and 1169 (finding rhetorical hyperbole is not defamation, as the statements, in context, do not convey an objective fact). As the defendants' statements alleged to be defamatory in the proposed second amended complaint are opinions, Rakofsky has failed to allege effective claims for defamation.

b. Rakofsky, a Public Figure, Fails to Allege that the Defendants Acted with Actual Malice or Reckless Disregard for the Truth.

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 that "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. While Rakofsky alleges that the defendants made their statements with "malice and hate" – apparently misunderstanding the actual malice doctrine – he does allege that the defendants' statements were made with "reckless disregard for the truth." However, this allegation can be refuted with admissible public records under CPLR 4540 (Mot. to Dismiss Ex. E) and disproven as a matter of law. *People v. Sykes*, 167 Misc. 2d 588, 590 (N.Y. Sup. Ct. Monroe County 1995).

It is not necessary for Rakofsky to be a household name to be a public figure: He may be a limited-purpose public figure within a certain community, such as the legal community or the legal blogosphere, for the same public figure standards to apply. *Huggins v. Moore*, 726 N.E.2d 456, 460 (N.Y. 1999). Rakofsky's pervasive notoriety and newsworthiness within the legal community makes him an involuntary or "nexus" public figure (provided the court does not see Rakofsky's acts before that making him a *voluntary* public figure). *Wehringer v. Newman*, 60 A.D.2d 385, 389 n.4 (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"); *Dameron v. Washington Mag., Inc.*, 779 F.2d 736, 743-42 (D.C. Cir. 1985) (holding that the plaintiff, an air

traffic controller who avoided the media, was a limited purpose public figure in connection with an aviation accident because his participation was central to the resulting public event).

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 (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 requires courts to 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 U.S., Inc.*, 466 U.S. 485, 511 (1984).

From the first report of Rakofsky's mistrial, he has been a public figure, and he sought to make himself one by engaging the media on numerous occasions. *Park v. Capital Cities Comms., Inc.*, 181 A.D.2d 192, 197 (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 his proposed second amended complaint at ¶¶ 145-46, Rakofsky anticipated that The Washington Post and other defendants in this action would report on Jackson's mistrial order. And, as seen in the proposed second amended complaint, a raft of coverage began on April 1, with a range of

large media companies including The Washington Post, Washington City Paper, Reuters, Above The Law, Avvo, Reuters and the ABA Journal publishing almost word-for-word accounts of Judge Jackson's commentary from the April 1 proceeding (*id*. ¶¶ 77-512; Mot. Ex. E).

As a public figure, even a nexus one, Rakofsky is held to a higher standard in pursuing defamation claims. *Harte-Hanks Comms., 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*. Rakofsky, however, has steeped his defamation claims upon this insufficient theory (Proposed 2d Am. Compl. ¶¶ 77-512), further rendering them insufficient as a matter of law.

In light of the transcript's contents (*see* Mot. to Dismiss Ex. E), the Defendants' statements do not bear any resemblance to a reckless disregard for the truth, nor a knowing misrepresentation of it. Rakofsky's allegations to the contrary are unavailing. It requires no leap of logic to translate Judge Jackson's comments into a characterization of "**incompetence**." Beyond being a statement of opinion, such a characterization would be eminently truthful in this instance. *Amodei,* 160 A.D.2d at 280; *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. In light of the transcript's contents, Rakofsky, a public figure, is incapable of alleging as a matter of law that the defendants acted with reckless disregard for the truth. Cursory review of the April 1, 2011 proceeding's transcript reveals that Rakofsky's claims to the contrary fall flat on their face, and are sanctionable on their

own. If any doubt existed prior to the suit being filed, a review of Rakofsky's actions in this particular case confirm the negative assessments of his competence.

c. The Defendants' Statements Were Substantially True, and thus Non-Defamatory.

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 (4th Dept. 1995); *Schwartzberg v. Mongiardo*, 113 A.D.2d 172, 174 (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).

The underlying issue is whether the defendants called Rakofsky "incompetent." In this case, defendants' commentary is neither inaccurate nor 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 point that Deaner's dispute with Rakofsky stemmed from Rakofsky's incompetence, rendering him unable of appropriately representing Deaner. (*See* Mot. to Dismiss Ex. E at 2-3) Judge Jackson even said that, in the alternative, he would have declared a mistrial anyway due to Rakofsky's poor performance. (*Id*. at 4-5)[2]

[2] "I would have granted a motion for a new trial under 23.110" (Mot. to Dismiss Ex. E at 4:15-

That parade of horribles and its implications for the criminal justice system were quickly analyzed. The transcript of the proceedings, support all of the Defendants' statements as being at least substantially if not wholly true: The *Deaner* court ordered a mistrial, one ground of which was Rakofsky's incompetence – a condition underlying 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* Proposed 2d Am. Compl.) that is untrue, or even inconsistent, with the *Deaner* trial's April 1, 2011 official transcripts (Mot. to Dismiss Ex. E at 2-6). This includes Rakofsky's e-mail to his investigator in which he unethically asked the investigator to "trick" a witness – and now blames the defendants for relying on the plain meaning of the word "trick." (Proposed 2d Am. Compl. ¶¶ 133-144). The defendants' statements are at least substantially true, and not a basis for a defamation claim.

d. The Defendants' Statements are Privileged by State and Federal Statutes.

The defendants are not limited to common law defenses against Rakofsky's claims of defamation, but are protected by statutes enacted by both Congress and the New York legislature. As the defendants' statements reiterate Judge Jackson's comments during the *Deaner* trial, their statements are protected by New York Civil Rights law § 74. Additionally, defendants Banned Ventures LLC and Bannination are immunized from liability for the comments of "tarrant84" and others by virtue of 47 U.S.C. § 230.

i. The Defendants' Statements are Fair and True Reports of Official Proceedings Under New York Civil Rights Law § 74.

As the defendants' statements about Rakofsky arose from his participation in the *Deaner* case, their complained-of statements are subject to additional defenses against Rakofsky's

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17). Section 23.110 is the D.C. Criminal Law statute that allows for a new trial to be granted due to defendant's counsel's incompetence. This statute is judicially noticeable under CPLR R4511.

defamation claim. New York Civil Rights Law ("NYCRL") § 74 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 applies in cases like this, where plaintiffs attempt to punish defendants for reporting true facts of public record. *Freihofer v Hearst Corp.*, 65 N.Y.2d 135, 140-142 (N.Y. 1985); *Shiles*, 261 N.E.2d at 252-53; *Saleh v. N.Y. Post*, 78 A.D.3d 1151 (2d Dept. 2010); *Sokol v. Leader*, 74 A.D.3d 1180, 1181 (2d Dept. 2010).

NYCRL § 74 applies in this case. A statutorily protected "fair report," in context, leads 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 (2d Dept. 2009). The defendants' reports must also be substantially accurate to qualify for this privilege, but summaries of proceedings and the use of language other than the proceeding's exact words is allowed so long as the proceedings' substance 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 (1st Dept. 2006); *Saleh*, 78 A.D.3d at 1152.

It is obvious on the face of the proposed complaint that the defendants' statements arose from a judicial proceeding (Proposed 2d Am. Compl. ¶¶ 77-534). They were restated on legal blogs. The defendants' commentary was in connection with the *Deaner* trial, specifically the mistrial the court entered on April 1, 2011, in which the court used language that would shame any other attorney.[3] The April 1, 2011 transcript verifies the truth and accuracy of the defendants' reports. (*See generally* Mot. to Dismiss Ex. E) The defendants' comments on the

[3] Instead of being ashamed, Rakofsky triumphantly declared "MISTRIAL!," leading his friends to believe he had reached a professional triumph. (See Defendants' Mot. to Dismiss Ex. F.)

"trick" e-mail are similarly protected by § 74, as that e-mail was filed with the court (*id*. at 7:1-3).

The defendants' description of the proceedings is not only substantially accurate, but just barely short of a word-for-word description of the hearing transcript. 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).[4]

In light of such scathing judicial commentary, the defendants did not have much need for the literary license afforded by NYCRL § 74. 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 highly accurate characterizations of judicial proceedings that are allowed by NYCRL § 74. *Holy Spirit Assn.*, 399 N.E. 2d at 1187; *Briarcliff Lodge Hotel, Inc.*, 183 N.E. at 197-98. The defendants accurately reported the events of the April 1, 2011 hearing in *Deaner*, and mostly described the events in *kinder* language than that used by the judge. As fair reports on a public proceeding, defendants' statements cannot be the basis for a

[4] In light of Rakofsky's behavior before this Court to date, Judge Jackson's statements can hardly be criticized or deemed unreliable.

claim of defamation.

ii. Defendants Bannination and Banned Ventures LLC are Immunized from Liability for Third Parties' Actions Under 47 U.S.C. § 230.

Under 47 U.S.C. § 230, Banned Ventures LLC and Bannination are immune from liability for the statements made by "tarrant84," a user of Banned Ventures LLC's online services – found on the Bannination website – who is also joined as a defendant in this action. *See* 47 U.S.C. § 230; *Shiamili v. Real Estate Group of N.Y., Inc.*, 952 N.E.2d 1011 (N.Y. 2011) (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. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 699-700 (S.D.N.Y. 2009) (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).

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 Bannination 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 "tarrant84" and other service users, are necessarily barred as a matter of law by operation of 47 U.S.C. § 230. The facts Rakofsky alleges in the proposed second amended complaint – that Banned Ventures LLC and Bannination are liable for content posted to its service by user "tarrant84" – is exactly the scenario § 230 was enacted to protect against. *Shiamili*, 952 N.E.2d at 1011; *see also Black v. Google, Inc.*, 39 Media L. Rep. 2513 (9th Cir. 2011) (affirming Google's § 230 immunity for negative, allegedly defamatory reviews);

Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) ("so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process").

Section 230's existence and operation is no mystery, as it was enacted in 1996. Rakofsky has chosen to ignore it and its well-worn precedent nationally and within New York. As a matter of law, all claims against Banned Ventures LLC and Bannination arising from third parties' postings are barred by virtue of § 230. *Shiamili*, 952 N.E.2d at 1011.

B. Rakofsky's Proposed Second Amended Complaint Fails to State a Cause of Action for Intentional Infliction of Emotional Distress ("IIED").

Making a mountain out of a molehill, Rakofsky seeks to punish all of the defendants for their benign statements of opinion by averring that they caused him severe emotional distress. The elements for a claim for intentional affliction of emotional distress 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 the injury; 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 (4th Dept. 2011). Rakofsky has failed to plead any of the elements for IIED in his proposed second amended complaint.

Within this cause of action, Rakofsky accuses the defendants of making statements and, even more strangely, *linking* to posts where other defendants made posts that Rakofsky found objectionable. (As discussed *infra*, a mere hyperlink does not give rise to liability.) Mere insults – even offensive ones such as racial and ethnic slurs – do not constitute "extreme and outrageous" conduct. *Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169, 182 (2d Dept. 1989). Instead, the alleged conduct "must consist of more than mere insults, indignities, and

annoyances." *Id*.; *Nestlerode v. Federal Ins. Co.*, 66 A.D.2d 504, 507 (4th Dept. 1979) ("There is no occasion for law to intervene in every case where some one's feelings are hurt"); *Belanoff v Grayson*, 98 A.D.2d 353, 357 (1st Dept. 1984) ("The law does not provide a remedy against all activity which an individual may find annoying"); *Lincoln First Bank v Barstro & Assocs. Constr*., 49 A.D.2d 1025-26 (4th Dept. 1975) ("The law does not fasten liability on mere threats, annoyances or petty oppressions or other trivial incidents which must necessarily be expected and are incidental to modern life no matter how upsetting").

Conduct far more shocking than that alleged by the plaintiffs 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 (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 (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 (1st Dept 1995). These acts were deemed to be beneath the appropriate level to sustain an IIED claim. Meanwhile, Rakofsky floods this court with crocodile tears at having a spotlight shined on his incompetence and lack of ethics. These tears should be dried with Rakofsky's own repentance for what he has done, rather than the defendants' money.

Because of the newsworthiness of Rakofsky's actions, as demonstrated throughout his proposed second amended complaint's allegations of publication by numerous sources large and small, mere comment on Rakofsky could not give rise to IIED. *Howell*, 612 N.E.2d at 704; *see also Hustler v. Falwell*, 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 law recognizes that public individuals may be embarrassed by their actions, and has preemptively deprived them of the ability to punish the media for reporting their failures. *Howell*, 612 N.E.2d at 704; *see also Bridgers v Wagner***,** 80 A.D.3d 528 (1st Dept. 2011). Rakofsky, falls into this category, and cannot legally claim to suffer emotional distress in connection with his own notable, contemptible and newsworthy conduct.

Rakofsky's proposed IIED claim also fails for neglecting to specify what emotional distress and anguish he suffered. Nowhere in the proposed cause of action is the form in which he experienced this supposedly crippling damage identified with required specificity. Rakofsky must allege that severe emotional distress was observably suffered based on **medical** evidence, rather than recitation of speculative claims. *Walentas v. Jones*, 257 A.D.2d 352, 353 (1st Dept. 1999); *Richard L. v. Armon*, 144 A.D.2d 1, 4 (2d Dept. 1989) ("one of the elements of the tort of intentional infliction of emotional distress is that the victim *be shown* to have suffered *severe* psychological damage") (emphasis added). Rakofsky has failed to allege what medical or emotional injuries he suffered, instead formulaically claiming to have encountered "pain, suffering, embarrassment, humiliation, anxiety, trauma and inconvenience." (Proposed 2d Am. Compl. ¶¶ 526-34) This failure to allege any specific injuries or demonstrable instances of distress as required by *Richard L* undermines Rakofsky's proposed IIED claim, and leave to amend should not be granted.

C. Rakofsky Fails to Allege a Cause of Action for Intentional Interference with Contract Against the Defendants.

Rakofsky includes all of the defendants in his claim for intentional interference with contract, yet fails to state a viable cause of action under this theory. In order to bring a claim of intentional interference with existing contractual relationships, the plaintiff must show 1) the existence of a contract; 2) the defendants' knowledge of that contract; 3) the defendants' intentional inducement of a third party to breach or otherwise render performance of the contract impossible; and 4) 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 (1st Dept. 2002); *Avant Graphics v. United Reprographics*, 252 A.D.2d 462 (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 (1st Dept. 1998). Rakofsky has failed to allege this claim's elements, rendering amendment of the Complaint futile.

Rakofsky's allegations of intentional interference with contractual relations as stated in his Second Amended Complaint fail to show any elements needed to satisfy the claim. First, although Rakofsky states that the Defendants have interfered with existing relationships, he fails to allege any party or parties who have breached their contracts, or state any specific contracts that the defendants have caused to be breached. To the contrary, Rakofsky devotes much of this cause of action to accusing the defendants of preventing him from obtaining future contracts – something plainly outside the scope of this tort (Proposed 2d Am. Compl. ¶¶ 537-539). *See Vigoda*, 293 A.D.2d at 265; *Avant*, 252 A.D.2d at 462.

Rakofsky's proposed amended complaint also has not alleged the existence of contracts that, if interfered with, would be covered by this cause of action. Contracts without a specified duration, such as those usually entered into between attorneys and their clients, are presumed to be terminable at will. *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). Terminable-at-will agreements, such as those inherent to the attorney-client relationship, are "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)).

The defendants' specific knowledge of an existing contract is an essential element to this claim. *See Lama Holding Co*, 668 N.E.2d at 1370; *Vigoda*, 293 A.D.2d at 265. Rakofsky does not allege that the defendants had any knowledge of his *specific* contracts with other parties, though. The closest Rakofsky comes to satisfying this requirement – which still fails – is quoting defendants Kravet & Vogel and Simple Justice, as writing: "The Internet will not be kind to Rakofsky, nor should it. If all works as it should, no client will ever hire Rakofsky ever again. Good for clients. Not so much for Rakofsky." (*Id*. ¶ 539) Ironically, Rakofsky's choice of this statement is self-defeating: Even if terminable-at-will attorney-client agreements were covered by the tort of intentional interference with contract, the defendants' comment specifically relates to the formation of *future* contracts – not those presently existing. Furthermore, the defendants' statements hope that uninformed members of the public are not duped into doing future business with Rakofsky; absent from these statements are any plea or inducement for third parties to breach their existing contracts with him.

Because Rakofsky does not allege the first three elements of this tort, he also fails to show how the defendants damaged any existing contracts. Without alleging the existence of a contract, Rakofsky cannot successfully claim that they have been breached as a result of the defendants' actions. As a matter of law, Rakofsky has failed to allege the elements of intentional interference with contract in the proposed second amended complaint, rendering any amendment granted by this court futile.

D. Rakofsky's Proposed Second Amended Complaint Fails to State a Claim for Violation of New York Civil Rights Law §§ 50 and 51.

Civil Rights Law §§ 50 and 51 prohibit the use of a person's name, portrait, picture or voice for advertising or trade purposes without that person's written consent. While courts generally have construed the term "purposes of trade" to mean "making profit," these statutes do not apply when reporting on matters of public interest – such as Rakofsky's handling of the *Deaner* case. *Messenger v. Gruner + Jahr Printing & Pub*., 727 N.E.2d 549, 551-52 (N.Y. 2000), *cert denied* 531 U.S. 818; *Delan by Delan v. CBS, Inc.*, 91 A.D. 2d 255, 259 (2d Dept. 1983). Matters that enjoy constitutional protection include current news items, but also those items that are "informative and entertaining." *Id.*

Where there is a non-commercial aspect to the defendants' use of the plaintiff's name, portrait or picture, §§ 50 and 51 do not apply. *Messenger*, 727 N.E.2d at 551-52; *Stephano v. News Group Pubs., 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 §§ 50 and 51); *Walter v. NBC Tel. Network, Inc.*, 27 A.D.3d 1069, 1070 (4th Dept. 2006). 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 question of law, not fact. *Messenger*, 727 N.E.2d at 551-52; *Stephano*, 474 N.E.2d at 586; *Walter*, 27 A.D.3d at 1070. From the sheer number and magnitude of defendants joined in this action – including the Washington Post, Reuters, the ABA Journal, Above The Law and the Washington City Paper – Rakofsky's proposed second amended complaint demonstrates that his conduct was newsworthy and fits within this exception. (Proposed 2d Am. Compl. ¶¶ 3-15, 57-58,76)

Even if the defendants' statements about Rakofsky are not strict news reporting, as they incorporate satire and other expressive elements, their statements fall within the newsworthiness exception to liability. *Walter*, 27 A.D.3d at 1070; *Paulsen*, 59 Misc. 2d at 448. Indeed, the newsworthiness exception to §§ 50 and 51 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. Defendants' use of Rakofsky's name and image is 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 (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).

From the facts alleged in the proposed second amended complaint, the defendants' alleged use of Rakofsky's name and likeness is covered by the newsworthiness exception to NYCRL §§ 50 and 51 – even if their use of his name and image is not strictly for traditional news reporting. *Walter*, 27 A.D.3d at 1070; *Paulsen*, 59 Misc. 2d at 448. 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, and amendment of this claim would be futile.

E. Rakofsky's Proposed Second Amended Complaint Does Not State a Claim for Intentional Interference with Prospective Economic Advantage.

To sustain a cause of action for intentional interference with prospective economic advantage (IIPEA), Rakofsky's proposed second amended complaint must set forth four elements:

> (1) the existence of a profitable business relationship;
> (2) the defendant's interference with that relationship;
> (3) the defendant's use of dishonest, unfair or improper means; and
> (4) damage to the plaintiff's business relationships.

Fonar Corp. v. Magnetic Resonance Plus, Inc., 957 F. Supp. 477, 482 (S.D.N.Y. 1997); *Bertuglia v. City of N.Y.*, Case No. 1:11-cv-2141 *2012 U.S. Dist. LEXIS 36927* at *53-56 (S.D.N.Y. Mar. 19, 2012). The conduct alleged in an IIPEA claim must be criminal, independently tortious, or taken for no purpose but to inflict intentional harm on the plaintiffs. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (N.Y. 2004); *Bertuglia*, *2012 U.S. Dist. LEXIS 36927* at *54. Furthermore, the plaintiff must allege that the plaintiff would have entered into a business relationship *"but for*" the defendants' interference. *School of Visual Arts v. Kuprewicz,* 3 Misc. 3d 278, 288 (N.Y. Sup. Ct. N.Y. County 2003).

Rakofsky's allegation of this claim first fumbles by stating that he has a "valid economic relationship with other parties," but not a "profitable business relationship" as required under New York law (Proposed 2d Am. Compl. ¶ 563). *Fonar*, 957 F. Supp. at 482; *Bertuglia*, *2012 U.S. Dist. LEXIS 36927* at *53-56. Rakofsky also alleges that the defendants took "intentional acts," but fails to allege whether they were tortious, criminal or made solely for the purpose of harming him (*Id*. ¶ 565). *Carvel*, 3 N.Y.3d at 190.

But even if Rakofsky properly alleged the elements of this claim, they are defeated by the proposed second amended complaint's other allegations. Rakofsky does not allege that the defendants engaged in any criminal conduct. The allegations that Rakofsky does make against the defendants do not constitute defamation or any other tort for the reasons discussed both *supra* and *infra*. Thus, the defendants' actions are not improper under that theory of liability.

Finally, the proposed second amended complaint alleges that the defendants acted for purposes other than solely harming Rakofsky. Defendants Above The Law, Breaking Media LLC and Elie Mystal clearly made their statements as part of their normal business in writing about legal news (Proposed 2d Am. Compl. ¶ 168). Defendants Elefant and MyShingle.com similarly reported on the case as part of their normal business of providing information to attorneys managing their own practices (*Id*. ¶ 191). Though these are just a few examples, the defendants' statements – even those Rakofsky included in his complaint – reveal their true purpose in making statements about the plaintiffs: to disseminate news and opinion, rather than to mount a singularly purposed attack on the plaintiffs.

As such, the four corners of the proposed second amended complaint reveal the insufficiency of Rakofsky's proposed IIPEA claim. Not only has Rakofsky not alleged an adequate underlying economic relationship and sufficiently harmful conduct from the defendants to sustain this claim, but the defendants' alleged conduct would not satisfy this tort's elements as a matter of law. *Carvel*, 3 N.Y.3d at 190. The proposed second amended complaint's IIPEA claim is insufficient as a matter of law, and thus the Court should deny leave to amend.

F. Rakofsky fails to allege a cause of action for injurious falsehood against the Defendants.

In light of the 13 motions to dismiss already filed in this litigation, Rakofsky is aware of the strong First Amendment shield thwarting his ignoble campaign. Thus, in his proposed second amended complaint, he attempts to plead his defamation causes of action against the defendants in the alternative as "injurious falsehood."

This claim fails. Rakofsky misapprehends both its elements and application. "The action for injurious falsehood lies when one publishes false and disparaging statements about another's *property* under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom." *Cunningham v. Hagedorn*, 72 A.D.2d 702, 704 (1st Dept. 1979) (emphasis added); *Lampert v. Edelman*, 24 A.D.2d 562 (1st Dept. 1965). In the numerous instances of this claim Rakofsky asserts against the defendants, Rakofsky asserts that the statements "were and are harmful to the interests of Rakofsky." If there were any doubt as to what this claim concerned, Joseph Rakofsky removes any doubt in the first paragraph of the proposed second amended complaint, defining "Rakofsky" as himself. As Rakofsky's proposed claims allege harm to a person, rather than property, they "may not be the subject of an action for injurious falsehood." *Cunningham*, 72 A.D.2d at 704.

Even if the Court were to take an unprecedentedly broad view of injurious falsehood, the defendants' arguments concerning "falsity" with respect to defamation would apply to this claim as well. First Amendment protections for false statements "apply to all claims whose gravamen is the alleged injurious falsehood of a statement." *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1042 (Cal. 1986). Defamation defenses apply equally to injurious falsehood claims, as "although such limitations happen to have arisen in defamation actions, they […] broadly protect free-

expression and free-press values." *Blatty*, 42 Cal. at 1043.

As Rakofsky's injurious falsehood and defamation claims are both steeped in matters of expression, the defenses available for defamation apply equally to injurious falsehood. *N.Y. Times Co.* v. *Sullivan,* 376 U.S. 254, 269 (1964); *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs.*, 175 F.3d 848, 852-84 and 860 (10th Cir. 1999); *SCO Group, Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1293 (D. Utah 2010) ("the Court finds that [injurious falsehood] claims are subject to the First Amendment"); *Massachusetts Sch. of Law v. Am. Bar Assn.*, 952 F. Supp. 884, 889 (D. Mass. 1997); *Dulgarian v. Stone*, 2 Mass. L. Rep. 25 (Mass. Superior Ct. 1994). The defendants incorporate by reference the preceding discussion of Rakofsky's unsupportable defamation claims, further demonstrating the futility of Rakofsky's proposed injurious falsehood claim.

G. Rakofsky's Proposed Negligence Claim is Duplicative of his Defamation Claims and Barred as a Matter of Law.

As a sixty-ninth cause of action, Rakofsky seeks to hold the defendants liable for negligence. The substance of this cause of action, however, is merely a restyled defamation claim. Rakofsky is not the first person to attempt to disguise a defamation claim as an action for negligence, nor is he the first to fail:

> As to plaintiff's cause of action for negligence, which is based upon the corporate defendants' alleged failure to prevent and/or their participation in [employee's] purported dissemination of defamatory materials, we are of the view that plaintiff cannot recover under the traditional principles of negligence.

Butler v. Delaware Otsego Corp., 203 A.D.2d 783, 785 (3d Dept. 1994). New York courts have made clear that "a defamation cause of action is not transformed into one for negligence merely by casting it as such." *Colon v. City of Rochester*, 307 A.D.2d 742 (4th Dept. 2003); *see Virelli v. Goodson-Todman Enters., Ltd.*, 142 A.D.2d 479, 485 (3d Dept. 1989). Where the entire injury

alleged by a plaintiff "flows from the effect on his reputation," New York law treats the claim – under whatever name it is alleged – as one for defamation. *Jain v. Sec. Indus. & Fin. Makts. Ass'n*, Case No. 08 Civ. 6463 *2009 U.S. Dist. LEXIS 91206* at *23-24 (S.D.N.Y. Sept. 28, 2009), quoting *Lines v. Cablevision Systems Corp.*, Case No. 04-cv-2517 *2005 U.S. Dist. LEXIS 42540* at *14 (E.D.N.Y. Sept. 21, 2005).

To allege negligence, Rakofsky must claim that the defendants owed a duty of reasonable care to him, which the defendants breached. *O'Brien v. Alexander*, 898 F.Supp. 162, 173 (S.D.N.Y. 1995). When the alleged duty and breach simply claim defamation as it does here, though, that claim should be dismissed. *Id.* A plaintiff like Rakofsky, who alleges injury to his reputation as a result of a defendant's statements, has only defamation remedies available. *Colon*, 307 N.Y.S.2d at 752. Defamation is "defined in terms of injury to reputation and not in terms of the manner in which it was accomplished," and therefore cannot be presented as a negligence claim. *Ramsay v. Mary Imogene Bassette Hosp*., 113 A.D.2d 149, 152 (3d Dept. 1985).

Rakofsky's claim references a "duty to make a reasonable inquiry before presuming to report on the client's trial," and leaves the defendants to prove a negative: That this duty does not, in fact, exist. Fortunately, New York has proclaimed that the entire tort of negligence is inapplicable when used to allege a defamation claim. *Colon*, 307 A.D.2d at 742; *Butler*, 203 A.D.2d at 785; *Virelli*, 142 A.D.2d at 485. Identical to *Jain* and *Lines*, Rakofsky's negligence claim alleges that the defendants' conduct has resulted in damages to his reputation, including his present and future relationships with clients and his ability to engage in "professional activities, personal tasks and recreational acts." (Proposed 2d Am. Compl. ¶ 1196) To the extent that this claim is recognized at all, it should be as one for defamation, which is legally insufficient for the reasons set forth *supra*. This negligence claim is nonexistent as a matter of

law, and was included in the proposed second amended complaint solely to vex the defendants and waste party resources.

H. Rakofsky's Proposed *Prima Facie* Tort Claim Also Fails as a Matter of Law on Numerous Levels.

In order to state a claim for a *prima facie* tort, a complaint must show four elements: 1) an intentional affliction of harm; 2) that causes damages; 3) without justification or excuse; 4) through an act or acts that would otherwise be lawful. *Curiano v. Suozzi*, 63 N.Y.2d 113, 117, (N.Y. 1984). Rakofsky must allege that the defendants acted solely out of disinterested malevolence and for no other purpose. *O'Brien*, 898 F. Supp. at 174; *Curiano*, 63 N.Y.2d at 117.

Rakofsky cannot baldly allege that the defendants had no motive but to harm him. When it is clear from the face of the complaint that the defendants had other motivations for acting, even despite the plaintiff's claims to the contrary, there is no claim for prima facie tort. *Cohen's West 14th St. Corp. v. Parker 14th Associates*, 125 A.D.2d 249 (1st Dept. 1986) ("Here it is apparent from the face of the complaint that Owners had an economic interest and was not, therefore, motivated solely by malevolence"); *Benton v. Kennedy-Van Saun Mfg. & Eng. Corp.*, 2 A.D.2d 27, 28-29 (1st Dept. 1956) (holding defendants' actions had motives other than harming plaintiff, and thus "did not constitute the malicious and unjustifiable attempt to injure plaintiff that is an essential ingredient in an action for 'prima facie' tort"). In fact, Rakofsky's own pleading defeats the allegation of this claim. Rakofsky theorizes that the entire exercise of these parties writing about the *Deaner* trial was to somehow make money off of Rakofsky's fame. (Opp. at 42-44 ("But there is more to why [the defendants] decided, on one Spring day in April 2011, to defame and injure Joseph Rakofsky, a young lawyer none of them knew, for what they thought, reading the Washington Post, he had done in a case in that city of no possible

interest to them. They had a business interest in doing something in unison on the Internet, and they may have viewed Joseph Rakofsky as manna dropping down on then [sic] from heaven for the very reason that he presented a handy and safe target [to make the defendants look better].”))

The allegation of a specific tort claim and a *prima facie* tort cause of action has been described as “utterly irreconcilable,” as the actions underlying the specific tort make clear that there is no separate, otherwise lawful action that must be subject to the catch-all of *prima facie* tort. *Id.* at 28. When “relief may be afforded under traditional tort concepts, *prima facie* tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort” *Freihofer*, 65 N.Y.2d at 143; *see Butler*, 203 A.D.2d at 784-85**;** *Bassim v Hassett*, 184 A.D.2d 908, 910 (3d Dept. 1992). As Rakofsky alleges numerous other torts in his pursuit of recovery for his perceived harms, New York law precludes him from claiming a *prima facie* tort to seek a double recovery.

Based on the Complaint’s 1200 preceding paragraphs and 69 other causes of action, this is an obvious attempt to make sure the defendants are saddled with this frivolous litigation indefinitely if the plaintiff’s cross-motion to amend is granted. As evinced by the other causes of action, the defendants had other motivations for their actions, ranging from expressing their opinions to warning others of Rakofsky’s behavior. *Id*. Even accepting *arguendo* the remainder of Rakofsky’s proposed second amended complaint as true, the defendants then acted with the intent to interfere with his contracts, or defame him, or to violate his civil rights – rather than with the generalized, disinterested malevolence required to show a *prima facie* tort. *Id*.

While Rakofsky alleges specific instances of conduct in his proposed *prima facie* tort claim, exactly *what* theory unites them and creates liability is unintelligible (Proposed 2d Am. Compl. ¶¶ 1201-18). When New York’s courts have faced theories similar to Rakofsky’s *prima*

facie tort claim, they have dismissed them as failing to state a cognizable cause of action. In *Kaisman v. Hernandez*, this Court rejected a virtually identical *prima facie* tort theory based on numerous defendants causing the plaintiff's name to appear in search engines, allegedly harming his professional reputation. *2008 N.Y. Slip. Op. 30723U* at *4-6 (N.Y. Sup. Ct. N.Y. County Mar. 12, 2008). The *Kaisman* court noted that the *prima face* tort claim in that case, like Rakofsky's in this one, was defined by its "speculative" and abusive demand for unprovable damages: $50,000,000 in *Kaisman*, and $25,000,000 in this case (*id*. ¶ 1218).

At the heart of Rakofsky's *prima facie* tort claim is the theory that the defendants' linking their websites and specific statements of opinion to one another was somehow improper. The proposition that the mere act of hyperlinking from one website to another – the very essence of the world wide web -- is somehow tortious under any theory of the law has been universally rejected. *Firth v. State*, 98 N.Y.2d 365 (N.Y. 2002); *Haefner v N.Y. Media, LLC*, 82 A.D.3d 481, 482 (1st Dept. 2011) (linking to allegedly defamatory materials not tortious); *Martin v. Daily News, L.P.*, 35 Misc. 3d 1212A (N.Y. Sup. Ct., N.Y. County 2012) (holding that links enabling the sharing of an already available, allegedly defamatory article through social media outlets was not tortious); *See Salyer v. Southern Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912, 918 (W.D. Ky. 2009) (finding that the use of "hyperlinks, while adding a new method of access" was not tortious); *Sundance Image Tech., Inc. v. Cone Editions Press Ltd.*, 35 Media L. Rep. 2451 (S.D. Cal. 2007) (refusing argument that "links to statements already published on the Web" were tortious). The Court must once again refuse his previously rejected prong of Rakofsky's *prima facie* tort theory.

Finally, there is the patent absurdity of the "internet mobbing" theory. Rakofsky made a public spectacle of himself through his hubris and lack of legal acumen. Rakofsky elected to

take the *Deaner* case to its ignominious end, and he alone chose to make a spectacle of himself with this litigation. It should come as no surprise that a great many people exercised their First Amendment rights by criticizing these very public actions. If criticism by numerous people, however, now gives rise to a new cause of action against all of them, then it is time for the New York Times to sell its printing press, the Huffington Post to destroy its servers, and tens – even hundreds – of thousands of bloggers to retreat into silence, as the First Amendment has lost its meaning. The entire purpose of reporting and media will be held hostage by the hurt feelings and oppressive tort claims of individuals whose lack of judgment is so monumental that the public would be disserved by not documenting it.

For the many reasons enumerated above, Rakofsky's theory of *prima facie* tort must fail. Granting leave to amend the complaint to include this claim would be futile. If Rakofsky is allowed to bring this claim in a second amended complaint, it will result only in a successful motion to dismiss for failing to state a claim, as nowhere, anywhere, has this theory of liability previously been recognized.

III. Even if Amendment Were to be Granted, Joinder is Improper and all but the First Defendant Must be Severed from the Action.

Inherent in Rakofsky's sprawling proposed complaint is a multitude of facts to be proven, a wide array of substantive and jurisdictional defenses available to the defendants, and the sheer burden of administering one case with vexatious plaintiffs and many dozens of defendants. The legislature recognized this potential for abuse and enacted CPLR §§ 603 and 1003, which allows for severance of misjoined claims and parties, respectively. *Hickson v. Mt. Sinai Med. Ctr.*, 87 A.D.2d 527 (1st Dept. 1982) (holding that severance should have been granted where "[t]he completely differing factual allegations and defenses interposed could only confuse the issues

and delay trial and disposition of plaintiffs' causes of action"). CPLR § 1003 grants the Court wide discretion over the management of sprawling litigation with many parties, such as this case:

> Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately.[5]

Affirming these principles, the Southern District of New York recently issued a definitive order on the joinder of more than 240 defendants from unique jurisdictions, each with distinct defenses and facts pertaining to their alleged wrongdoing. See *Digital Sins, Inc. v. John Does 1-245*, Case No. 11 Civ. 8170 (CM), *2012 WL 1744838* at *1 (S.D.N.Y. May 15, 2012). In Digital Sins, the Southern District analyzed Federal Rules of Civil Procedure 20 and 21 – analogues to the CPLR's provisions on party and claim joinder – to sever all but one John Doe defendant. *Id*.

The same facts compelling severance in the Digital Sins case will require severance in the event Rakofsky's cross-motion to amend is granted. All that is alleged in the proposed amended complaint is that dozens of defendants committed similar torts in similar ways. This "does not satisfy the test for permissive joinder in a single lawsuit." *Id*. The fact that a large number of people allegedly engaged in similar acts does not authorize a vexatious plaintiff to join them as defendants in a single lawsuit. *Id*., citing *Nassau County Assn. of Ins. Agents, Inc. v. Aetna Life Casualty*, 497 F.2d 1151, 1154 (2d Cir. 1974). While the proposed complaint sets forth allegations of similar wrongs, they are independent acts taken by unconnected parties at different times, making joinder improper. See *Digital Sins*, *2012 WL 1744838* at *1.

Moreover, the *Digital Sins* court found that there would be no judicial economy in "trying what are in essence 245 different cases together." *Id*. "Each defendant's situation, which

[5] See also CPLR § 1002(c), which provides that "the court may make such orders as will prevent a party from being embarrassed, *delayed, or put to expense by the inclusion of a party against whom he asserts no claim and, who asserts no claim against him, and may order separate trials or make other orders to prevent prejudice*" (emphasis added).

is unique to him or her, will have to be proved separately and independently." *Id*. In this case, where the defendants all made different and unique statements that were published and distributed on different websites, with different degrees of investigation, and different motivations, Rakofsky's claims against them – assuming any of them were properly alleged – would turn into several dozen individual mini-trials.

The only economy gained in keeping this litigation contained to one case if the cross-motion for leave to amend is granted is economy for the plaintiff. *Id*. By keeping dozens of defendants in this one action, Rakofsky is free from having to litigate in the defendants' proper home jurisdictions, paying the appropriate filing fees in those courts, and finding counsel to bring such ill-conceived litigation. If this Court grants Rakofsky leave to amend, this Court – and all of the parties – will be required to participate in all of the mini-trials arising from this action and the party-by-party adjudication of both jurisdiction and merits.

While the defendants have not raised this issue before, hoping to resolve this litigation conclusively with their pending motion to dismiss, the proposed amended complaint would only further complicate the litigation. As demonstrated supra, leave to amend should be denied due to the futility of the claims therein. However, if the Court does grant leave, the obvious misjoinder of such widely disparate parties would require severance of the defendants under CPLR §§ 1002(c) and 1003. *Hickson*, 87 A.D.2d at 527; c.f. *Digital Sins*, *2012 WL 1744838* at *1.

Conclusion

Rakofsky's cross-motion for leave to file a second amended complaint should be denied. Rakofsky filed one ill-considered complaint. He then doubled down and filed a more outrageous amended complaint. He then waited for the defendants to draft and file their numerous motions to dismiss, and now seeks to file what must be one of the most outrageous and unsupportable

complaints ever brought before this Court. The defendants will face further prejudice if required to file yet another motion to dismiss – and endure whatever wasteful motion practice that Rakofsky, true to form, has planned in the interim.

Like the pending amended complaint, the proposed second amended complaint fails to allege a single viable cause of action. Even the allegations that Rakofsky properly states are immediately disprovable as a matter of law. Allowing Rakofsky leave to amend would be futile – but at this point, the proposed second amended complaint has already served its purpose, requiring extensive and costly analysis in the form of this opposition.

In the event this Court grants Rakofsky leave to amend, the defendants should be immediately severed from this action. Consistent with the notions of due process and fair play, Rakofsky will be free to pursue them in separate actions, paying the appropriate filing fees, and in the defendants' proper jurisdictions. It is the defendants' preference, however, that leave to amend be denied and their motion to dismiss be heard on the pending amended complaint, so that they may have the action dismissed forthwith, and with finality.

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

Marc J. Randazza, Esq., *pro hac vice*
(Lic. MA, AZ, CA, FL, NV)
Randazza Legal Group
6525 W. Warm Springs Road, Suite 100
Las Vegas, NV 89118
(888) 667-1113

Eric Turkewitz
The Turkewitz Law Firm
Pro se and as counsel to the
Defendants listed above
228 East 45th Street – 17th Floor
New York, NY 10017 (212) 983-5900