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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Memorandum of Law In Support of Defendants' Motion for Sanctions Under 22 NYCRR 130-1.1 and CPLR § 8303-a

Index # 105573/11

The defendants identified within this motion, represented by Randazza Legal Group and the Turkewitz Law Firm, hereby move for sanctions against Plaintiffs Joseph Rakofsky, Rakofsky Law Firm (collectively the "plaintiffs," or "Rakofsky") and Matthew H. Goldsmith, Plaintiff's counsel, under CPLR § 8303-a and 22 NYCRR § 130-1.1.

I. Introduction

Rakofsky's vexatious conduct has caused this case to consume more than one year to even reach a hearing on the defendants' dispositive motions. At the hearing, the Court mercifully advised Rakofsky to abandon his course (Exh A at 91:14-20). Defiant, Rakofsky refused to do so – but not without personally advising the Court why it was wrong, and he was right (Exh B). This wasteful conduct has gone too far, and must be sanctioned lest it continue, and other parties, similarly desiring to abuse the legal system, observe this case and determine that virtually no misconduct will result in sanctions.

II. Statement of Facts

In May 2011, Rakofsky filed a lengthy defamation complaint against more than 70 defendants. Days later, Rakofsky filed his first amended complaint, increasing the number of claims, and bringing the tally of defendants to 81. Rakofsky opposed the defendants' perfunctory motion for their attorney's *pro hac vice* admission, turning a routine motion into a lengthy endeavor. Rakofsky's antics responding to that motion delayed the case for months.

After the Court admitted Mr. Randazza *pro hac vice*, Rakofsky immediately sought to stay the proceedings. While the original stay was only to last until December 2011, it ultimately lasted through March of 2012. Despite requesting the stay, Rakofsky then repeatedly tried to file motions in violation of it: First in November 2011 – which Rakofsky ultimately withdrew – and then again in December 2011, which the Court denied as "incomprehensible" (Exh C). In response, Rakofsky applied for emergency relief to the Appellate Division for the First Department. The Appellate Division also summarily denied Rakofsky's request for emergency relief. *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 attempted those filings despite the fact that his lawyer had quit almost immediately after suit was started, and the corporate plaintiff therefore had no attorney. A corporation cannot proceed *pro se*. CPLR 321(a).

Finally, back at the trial court, Rakofsky obtained new counsel and was ready to proceed with the litigation. With every filing, though, Rakofsky made it very clear that it was he, and not his new counsel, who was steering the litigation. Every submission Rakofsky made to the Court was signed "written by Joseph Rakofsky," so as to ensure he would take credit – or responsibility – for it. Nevertheless, his counsel continued to maintain responsibility for the case. Among

these submissions, Rakofsky opposed the defendants' motion to dismiss by misrepresenting the state of the law to this Court, and moved to file a second amended complaint full of previously rejected theories of liability including negligence, injurious falsehood, and a made-up tort of "internet mobbing."

As the Court indicated at the June 28 hearing, these theories have no merit (Exh A at 86:13-18, 86:25-87:7). The Court specifically advised Rakofsky to withdraw his claims – lest the Court have to rule on them and his competence (*id*. at 91:14-20, 92:4-26). For defendants, though, responding to each and every absurd contention Rakofsky made over the course of this litigation has represented a real financial cost in the thousands of dollars.

Long before this Court offered Rakofsky a face-saving exit (*id*. at 91:14-20), the defendants did the same. At the outset of this case, the defendants offered to provide Rakofsky with mentorship and a chance to redeem his tarnished public image (Exh D ¶¶ 4-6) in return for abandoning this ill-conceived litigation and acknowledging his errors. Just as Rakofsky rebuffed this Court, he also rejected the defendants' offer. Rakofsky's goal has been clear: this is a SLAPP[1] suit, and will be pursued as one until the Court drives a stake through its heart and ends it once and for all.

Rakofsky rejected all opportunities to escape from this reckless course of action unscathed. As this is a case about core First Amendment values, the defendants are compelled to seek sanctions. If there were ever any argument that this litigation was proper, the Court extinguished it on June 28, 2012, when it all but told Rakofsky to discontinue the action.

[1] SLAPP is a common acronym for "strategic litigation against public participation." SLAPP suits are retaliatory lawsuits brought to harass, intimidate, and burden defendants engaged in First Amendment-protected expression that the plaintiff dislikes.

Defendants have shown restraint – waiting nearly six months for Rakofsky to come to his senses. He has not. Sanctions are appropriate.

III. Argument

Rakofsky's conduct has been vexatious, frivolous, and improper at every step. To the extent Rakofsky's defamation claims rest upon his lack of competence, he has time and time again raised serious questions about his basic legal skills, and validated defendants' published criticisms of him.

While the Court has not yet ruled on the defendants' motion to dismiss, indicating instead that it would provide Rakofsky an opportunity to discontinue his claims, it appears very likely that the defendants will prevail.[2] Rakofsky disregarded the Court's merciful warning and the increasingly evident faults in this case; sanctions are therefore appropriate.

A. Rakofsky's Conduct Has Been Improper and Characterized By Failure.

Since this litigation began, Rakofsky has foundered on many fronts. Whenever Rakofsky attempted to serve the defendants with any paper, ranging from his complaint to his opposition to the defendants' motion to dismiss, chaos has ensued.[3] These defects would be dispositive, had the defendants not waived them, knowing that a procedural victory would not hinder Rakofsky's bizarre quest. (Defts. Mot. to Dismiss at 20)

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[2] "[I]f you want me to render a decision, I'll do so, but it doesn't look like it's going to be in your favor." "[A]t the end of the day, I'm going to make a decision. I don't think it's going to be . . . in your favor." "I don't think you're going to like my decision and I don't think that it's going to bode well for your client." (Exh A at 91:4-6, 91:16-20; 92:22-24)

[3] When serving his numerous oppositions to the defendants' motions to dismiss, Rakofsky failed for several days to serve copies of the papers on all counsel – despite the fact that many of his opposition briefs referred to other opposition briefs which he did not supply to all counsel. (Turkewitz Aff. ¶¶ 15-22)

Substantively, Rakofsky's claims in the first amended complaint were baseless. Rather than conclude the litigation, Rakofsky doubled down and moved to file a second amended complaint, with claims even more wild and baseless than the original complaint or the first amended one. A great number of Rakofsky's representations to the Court are premised on radical distortions of fact and law.

1. Rakofsky's Amended Complaint is Frivolous, Cannot Succeed for Procedural and Substantive Reasons, and Is Sanctionable on Its Own.

From this case's inception, Rakofsky has engaged in conduct that vexatiously complicated the proceedings.

Under the primary theory of Rakofsky's case, defamation, he could not, as a matter of law, have jurisdiction over the majority of defendants bringing this motion since they are out-of-state. CPLR § 302(a)(2); *Messenger v. Gruner + Jahr Printing and Publ'g*, 727 N.E. 2d 549 (2000) (dismissing defamation claim against foreign defendant). Even the allegedly tortious activity at bar – communications posted on blogs – had previously been rejected by New York's courts as a basis for personal jurisdiction. *Best Van Lines. Inc. v. Walker*, 490 F.3d 239, 250 (2d Cir. 2007); *Competitive Technologies, Inc. v. Pross*, 836 N.Y.S.2d 492 (N.Y. Sup. Ct., Suffolk County 2007).

Two defendants that are joined in this motion, Banned Ventures LLC and "Bannination," are immunized against liability for their users' tortious actions by federal law. 47 U.S.C. § 230; *Shiamili v. Real Estate Group of N.Y., Inc.*, 952 N.E.2d 1011 (N.Y. 2011). Rakofsky knew this, or should have been able to determine this with any degree of ordinary diligence. Regardless, he insisted upon filing a baseless suit, and then insisted upon maintaining it afterwards in the face of the inescapable legal conclusion that it was filed without any basis in fact or law.

On the merits, Rakofsky's claims were doomed to fail. New York law requires a defamation plaintiff to allege and prove (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, to establish defamation. *Dillon v. City of N.Y.*, 261 A.D.2d 34, 38 (1st Dept. 1999). Rakofsky's conduct in the *Deaner* case made him a public figure, requiring him to show that defendants' allegedly defamatory statements were made with "actual malice" – reckless disregard for their truth, or knowledge of their falsity. *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). Even as a limited-purpose public figure, *Huggins v. Moore*, 726 N.E.2d 456, 460 (N.Y. 1999), or an involuntary one, *Daniel Goldreyer Ltd. v. Dow Jones & Co.*, 259 A.D.2d 353 (1st Dept. 1999), Rakofsky would be held to this standard, and could not show defamation.

Rakofsky's defamation claims fail because <u>everything Rakofsky complains of is provably true</u>.[4] During the *Deaner* trial, Judge Jackson told Rakofsky that a new trial for his client was manifestly necessary to protect his client's rights, and that Rakofsky's performance was "below what any reasonable person could expect in a murder trial." (Exh E at 4:22-5:1) Rakofsky pinned his action on the defendants' statements that subjectively embarrassed him, but were matters of great public import and, more importantly, <u>entirely true</u>. *Hirschfeld v. Daily News L.P.*, 271 A.D.2d 386 (1st Dept. 2000) (awarding attorneys' fees and costs where defamation action over true statements was "a waste of the Court's and opposing counsel's time"). Such conduct not only thwarts Rakofsky's claim, but also begs for sanctions.

[4] While truth is an absolute defense to defamation, substantial truth – faithfully conveying the gist or sting of an event – is all that is required to establish the truth of an allegedly defamatory statement and defeat a plaintiff's claim. *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).

Rakofsky's continued complaint that others defamed him because the mistrial was "solely" due his request to be relieved as counsel is demonstrably false. It is extraordinary that, in the face of Judge Jackson's words explicitly to the contrary, Rakofsky continues to promote this falsehood and use it as the basis for continuing this lawsuit.

The defendants' reporting of the *Deaner* trial's proceedings were nearly verbatim reports of the case's transcripts (Exhs. E and F), and thus protected as a "fair comment" on official proceedings under New York Civil Rights Law § 74. *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 353-54 (N.Y. 1985). Still other defenses preclude Rakofsky from prevailing on his defamation claims. The non-factual statements by the defendants were opinions, and incapable of forming the basis of defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

Rakofsky's other claims in the first amended complaint suffer from similar fatal flaws. Rakofsky's intentional infliction of emotional distress ("IIED") claims failed to allege conduct sufficient to, as a matter of law, satisfy the tort's elements. *See Anderson v. Abodeen,* 29 A.D.3d 431 (1st Dept. 2006) (supervisor displaying nude photographs of subordinate employee's wife to employee's colleagues not IIED); *Rall v. Hellman,* 284 A.D.2d 113 (1st Dept. 2001) (impersonating plaintiff to send out e-mail requesting others to vomit on the plaintiff not IIED); *Berrios v. Our Lady of Mercy Medical Center,* 20 A.D.3d 361 (1st Dept 1995) (subjecting plaintiff to police investigation not IIED); *Stern v. Burkle*, 36 Media L. Rptr. 2205 (N.Y. Sup. Ct., N.Y. County 2008). 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).[5] Rakofsky, believing his subjective embarrassment for his own

[5] Additionally, as a public figure, Rakofsky cannot recover for IIED without showing the defendants acted with actual malice. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)

actions constitutes others' outrageous conduct, stepped far beyond the boundaries of the law by attempting to punish the defendants' exercise of their rights under the First Amendment.

Rakofsky's claim for tortious interference with contract failed on numerous levels. First, Rakofsky failed to allege the existence of even a single contract that could be breached based on the defendants' alleged interference, rather than a terminable-at-will service contract – such as one for legal services – that could end at any time. *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 service contract with no provision for duration is presumed to be terminable at will). Rakofsky also failed to allege that defendants had knowledge of these contracts, to the extent any protectable contracts existed, as required by law. *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).

Similarly, Rakofsky's claims that the defendants violated New York Civil Rights Law §§ 50 and 51 applies only to commercial uses of a plaintiff's name and likeness. *Messenger v. Gruner + Jahr Printing & Pub*., 727 N.E.2d 549, 551-52 (N.Y. 2000). But defendants only used Rakofsky's name in reporting on Rakofsky's newsworthy bungling of the *Deaner* case – a "fair use" of someone's name, image, and likeness that falls well beyond the reach of §§ 50 and 51. *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 586 (N.Y. 1984) (holding that it is the content of the article that determines whether an article using someone's image and likeness is newsworthy and excepted from NYCRL §§ 50 and 51).

(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).

In a complaint spanning hundreds of paragraphs, Rakofsky failed to properly allege a single cause of action that could succeed as a matter of law. After filing his amended complaint, Rakofsky delayed defendants' motions to dismiss for nearly one year. As the second anniversary of *Rakofsky v. The Internet* approaches, defendants still await the dismissal of Rakofsky's unsupportable litigation.

2. Rakofsky's Substantive Arguments Beyond the Complaint and Amended Complaint Have Also Been Uniformly Incorrect as a Matter of Law.

When defendants filed their motion to dismiss in March 2012, Rakofsky knew his case was doomed. In an effort to keep defendants embroiled in litigation, plaintiffs moved for leave to file a second amended complaint containing still more unsupportable claims. The proposed second amended complaint sprawled its way across 300 pages and 1200 paragraphs.

Rather than learn from the many errors defendants attacked in their initial motion to dismiss, Rakofsky only expanded upon his deficient causes of action by including baseless claims of injurious falsehood, negligence, intentional interference with prospective economic advantage, and prima facie tort for an unsupportable theory "internet mobbing." *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). Rakofsky's theory of injurious falsehood as a proxy for defamation cannot withstand a motion to dismiss. *Cunningham v. Hagedorn*, 72 A.D.2d 702, 704 (1st Dept. 1979) (holding that injurious falsehood claims apply only to property, rather than personal interests).

Nor would Rakofsky's theory of "negligence" survive. *Colon v. City of Rochester*, 307 A.D.2d 742 (4th Dept. 2003) ("a defamation cause of action is not transformed into one for negligence merely by casting it as such"). Rakofsky's claim for intentional interference with

prospective economic advantage would also fail as a matter of law, as he would be unable to show the defendants' conduct was criminal, tortious, or taken for no purpose other than to harm him. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (N.Y. 2004). Defendants' opposition to Rakofsky's pending cross-motion for leave to amend addresses each claim's flaws in great detail, but as seen here, Rakofsky's proposed amendments and reasons also should be seen for the bad faith that they exhibit.

Remarkably, Rakofsky – a lawyer himself – was represented by counsel throughout the litigation's important portions, including the filing of the complaint and first amended complaint, moving for leave to file a second amended complaint, and opposing our motion to dismiss. If Rakofsky's conduct could be explained by mere ignorance, it would have improved at some point. But such a clear pattern of disregarding the law, while compounding the litigation at the defendants' expense, demonstrates contempt for settled law, other parties, and this Court, and cries out for sanctions.

3. Rakofsky Made Material Misrepresentations of Fact and Law to the Court.

Throughout this litigation, Rakofsky maintained that *U.S. v. Deaner* did not end in a mistrial. This is belied by Rakofsky's own Facebook status update from March 31, 2011, (Exh G), and by the *Deaner* case's transcripts (Exhs. F at 7:10-15; 10:25-11:22; E at 4:18-5:2)

Rakofsky maintains that the March 31 transcripts from the *Deaner* case make it clear that he moved to withdraw as counsel, rather than the court declaring a mistrial. The transcripts themselves, however, read otherwise. The *Deaner* court stated that the defendant was "requesting a mistrial." (Exh F at 12:3) In fact, the March 31, 2011 transcript from the *Deaner* trial refutes Rakofsky's entire narrative, and clarifies that Dontrell Deaner sought a mistrial to free himself from Rakofsky's representation:

> THE COURT: You understand that because you are asking for that to happen, that is to say **you are asking for a mistrial**, you're waiving you right to double jeopardy; that is to say, you are waiving your right because – to double jeopardy because the government will be able to prosecute you again. You understand?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: You also understand that if we do that, **if I do grant a mistrial and the government elects to prosecute you for this again**, it will probably result in your continued detention until the case is resolved; do you understand?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Knowing that, **do you still wish to – for this Court to declare a mistrial** and to grant you another lawyer?
>
> THE DEFENDANT: Yes.

(Exh F at 11:6-22) (emphasis added). While Rakofsky insists that the *Deaner* trial ended because the court granted his motion to withdrawal, the conclusion of Dontrell Deaner's case was unambiguously a mistrial. Rakofsky's theory is contradicted by the *Deaner* trial's record. It is clear that Rakofsky moved to withdraw from the case because of Dontrell Deaner's anger over Rakofsky's demonstrated incompetence:

> Just, after [Rakofsky] did the cross-examination I learned, man, he, like, every question I asked him to write down – I write down for him to ask, **he just won't ask, you know what I'm saying**? And I try to tell Mr. Grigsby, like he's just ignoring me.
>
> See, when I ask him, before I asked him I refer to **Mr. Sherlock, and he be like yeah, that's a good question because we have evidence to back it up. And [Rakofsky] just won't ask him. He just won't ask**.
>
> […] **I was trying to tell [Rakofsky] like basically stick to the point**, the questions that he was asking when he was asking stuff that really – like you could see in my notes that I was writing on there, telling him **the questions really that he ask really don't matter, for real, you know what I'm saying**?

(Exhibit F at 5:6-6:17) (emphasis added). Based on Dontrell Deaner's representations about Rakofsky's incompetence at trial, the court granted Rakofsky's motion to withdraw and

scheduled the case for a new trial (Exhibit E). The *Deaner* court made it clear, though, that Rakofsky's incompetence would have resulted in a mistrial anyway, as his performance – which was "below what any reasonable person could expect in a murder trial" – "alternatively" would have resulted in mistrial as a matter of "manifest necessity" (Exhibit E at 3:12-5:10).

Rakofsky similarly insists that the defendants misunderstood what he meant by instructing the investigator to "trick" a witness in the proceeding. Yet, that is exactly the word Rakofsky used in his e-mail (Exh H). By all appearances, Rakofsky intended to "trick" the witness – but, *post hoc*, he claims that he <u>really</u> meant the word "trick" to mean something entirely proper and ethical (Pls.' Mem. in Opp. to Defts. Mot. to Dismiss at 49). This Court saw the implausibility of Rakofsky's argument. (Exh A at 64:21-65:7) This is only one example of Rakofsky's flexible interpretation of the truth in this case.

Finally, in his July 1, 2012 letter to the Court, Rakofsky triples down in the face of this Court's warning to withdraw the baseless claims. Rakofsky claims to have found three cases supporting his argument for using a negligence claim to redress defamatory statements. (Exh B) Rakofsky attempted to mislead the Court as to those cases' holdings.

In Rakofsky's letter to this Court (Exh B), he first cites *Dornhecker v. Ameritech Corp*., 99 F. Supp. 2d 918, 930 (N.D. Ill. 2000), wherein "Ameritech [allegedly] acted negligently by breaching its duty to use reasonable care in determining the true identity of individuals requesting phone service," rather than the plaintiff re-casting a claim for defamation as one for negligence. In another case Rakofsky cited in this letter (*id*.), *Cincinnati Ins. Co. v. Pro Enters., Inc.*, negligence was alleged as a cause of action based on the company's failure "to adequately review and monitor the work quality of the trade contractors, coordinate the schedule and budget, and supervise the hotel project," rather than as an alternative to defamation. 394 F. Supp. 2d

1127, 1129 (D.S.D. 2005). Finally, in *Hazelwood v. Harrah's*, 109 Nev. 1005 1012-13 (Nev. 1993), the court denied a motion to dismiss negligence and negligent misrepresentation claims based on a Harrah's employee making an inaccurate statement about company policy that plaintiff relied upon – claims having nothing to do with defamation. None of these cases use negligence as an alternative claim for defamation, and for a simple reason: Doing so is improper.

Rakofsky has intentionally engaged in a pattern of misrepresenting facts and law to the Court throughout this litigation. Any time he gets caught doing so, he increases the stakes and digs his hole deeper, hoping that this Court will follow him down into his bizarre world where "trick" does not mean "trick," where "mistrial" does not mean "mistrial," and where defendants owe him $142,000,000 in damages for the "harm" they have done to his reputation. Having had no reputation in law previously, of course, it would be impossible to destroy. More importantly, however, Rakofsky personally destroyed any reputation he ever could have had within this profession through his incompetence and ethical failings in both the *Deaner* trial and this case.

B. The Court Must Sanction Plaintiffs, Plaintiffs' Counsel, or Both Under CPLR § 8303-a.

Under CPLR § 8303-a, sanctions for frivolous litigation are mandatory, and require the court to award a prevailing party its costs and reasonable attorneys' fees up to $10,000. CPLR § 8303-a(a). A finding of frivolousness is proper when the plaintiffs' claims were commenced or continued in bad faith i) solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or ii) without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law. CPLR § 8303-a(c). The Court may order a portion of these fees to be payable by plaintiffs'

counsel. CPLR § 8303-a(b); *Bostich v. U.S. Trust Corp.*, 233 A.D.2d 193 (1st Dept. 1996) (imposing sanctions equally against plaintiffs and plaintiffs' counsel). Though the two plaintiffs likely considered themselves quite clever by naming more than eighty defendants in this action, it means that the 35 parties bringing this motion represent $700,000 of potential liability for them and their counsel under the statute.[6]

While Rakofsky complained about the choice of defendants' counsel and tried to prevent it (Turkewitz Aff. ¶¶ 5-6), he should consider himself fortunate that this group of defendants banded together in order to share legal costs. Otherwise, the aggregate legal fees the defendants rightfully seek to recover from him would be far higher.

1. Rakofsky Acted Solely to Prolong the Litigation, Harass the Defendants, and Maliciously Injure the Defendants Through Their Expenditure of Attorneys' Fees.

"[F]rivolous and baseless actions will not be tolerated and will result in a strict application of the provisions of CPLR § 8303-a." *Rittenhouse v. St. Regis Hotel Joint Venture*, 180 A.D.2d 523, 525 (1st Dept. 1992). Rakofsky's conduct, and the manner in which he delayed the litigation to rack up defense costs, falls within this category. While the baselessness of

[6] Randazza Legal Group has collectively billed the 35 defendants bringing this motion $89,947.35 to date in this case and its related parallel proceedings (e.g., Rakofsky's petition to the Appellate Division), for a total of $2,569.92 per defendant. The defendants have collectively incurred attorneys' fees and costs of more than $94,000, a portion of which was incurred in December 2012 and has not yet been billed to them. Eric Turkewitz has further incurred 140 hours of time representing defendants in this group, as of oral argument on the motion to dismiss in June 2012 (Turkewitz Aff. ¶ 28). These sums, and their continued growth, are directly attributable to Rakofsky's past and ongoing conduct. Additionally, these amounts are far less than the full market value of Randazza Legal Group's services, as the firm has significantly discounted its hourly rates for the defendants in this case, and routinely offered discounts to the defendants in light of the case's uncontrolled growth at Rakofsky's insistence. Rakofsky, not defendants, should bear the financial burden of his unsupportable litigation.

Rakofsky's case is independently sanctionable, the manner in which his behavior has caused the defendants to incur excessive litigation costs is particularly egregious.

Rakofsky's delay, multiplication, and protraction of these proceedings (which rest upon completely unsupportable legal theories) is apparent from the docket. Rakofsky vigorously protested defendants' choice of counsel, and required Mr. Randazza to travel from Las Vegas to New York for a very brief hearing on his motion to appear *pro hac vice*. (Turkewitz Aff. ¶ 6) Rakofsky then obtained a stay that lasted for six months, but he twice attempted to file documents in violation of it, seeking to obtain extraordinary relief while defendants were unable to participate in the litigation.[7] (*Id*. ¶¶ 7-10)

Rakofsky unsuccessfully moved the First Department for emergency relief that would allow him to file documents in violation of the stay he requested. *Rakofsky, 2012 NY Slip Op 64858(U)*. When litigation recommenced, Rakofsky immediately sought to <u>further</u> extend it by moving to file a second amended complaint that spanned hundreds of pages, yet cured none of the deficiencies identified in the numerous motions to dismiss that had been filed against him. (*Id*. ¶¶ 11-13) Rakofsky has unreasonably, maliciously, and obsessively multiplied these proceedings for more than a year. (*Id*. ¶¶ 5-21, 24-27) He should pay the price for his conduct.

Others have preceded Rakofsky in this conduct and incurred sanctions under CPLR § 8303-a. In a case similar to the one at bar, an attorney much like Rakofsky brought an unsupportable defamation action, and his claims were disposed of before trial. *Zysk v. Kaufman, Borgeest & Ryan, LLP*, 53 A.D.3d 482 (2d Dept. 2008). The attorney plaintiff, however, moved to re-argue his dismissed defamation claims despite their frivolity. *Id*. The court sanctioned the plaintiff for both bringing unsupportable claims and forcing defendants to oppose his baseless

[7] While Rakofsky withdrew his first such motion, this Court denied his second as "incomprehensible." (Turkewitz Aff ¶¶ 8-9; Exh C)

request for re-argument. *Id*. The *Zysk* court's decision incorporated the plaintiff's status as an attorney into its decision to impose sanctions on him under CPLR § 8303-a, as he should have known better than to assert, maintain, and attempt to resuscitate claims with no basis in law or fact. *See Id*. Just as the plaintiff in *Zysk* sought to re-argue his unsupportable defamation claims, so too has Rakofsky sought multiple, unsuccessful bites at the apple trying to create a non-frivolous theory of his case, all while subjecting defendants to mounting legal fees.

Rakofsky passed the New York bar in July 2010 (though for reasons he never discussed he has failed to be admitted to practice here over the last two years).[8] Having passed the bar exam, he should know better than to engage in his present conduct. In fact, Rakofsky *is* admitted in New Jersey. Since the basis of First Amendment law is federal, Rakofsky should not be treated as a layman uneducated in the law. He knew better.

2. Rakofsky's Claims Were Brought Without Any Reasonable Basis in Law or Fact, And Had No Good Faith Justification.

As demonstrated above and in the defendants' motion to dismiss and opposition to Rakofsky's motion for leave to amend, Rakofsky's claims are hopelessly flawed. Worse, they are nothing less than a frontal attack on defendants' First Amendment rights. Rakofsky's attempt to re-cast his defamation claims as a half-dozen other torts is not only a needless attempt to increase defendants' defense costs, but it is baseless – and sanctionable.

In a case of abusive litigation similar to this one, the First Department affirmed sanctions on a plaintiff for re-casting simple defamation claims as causes of action for prima facie tort,

[8] New York State Board of Law Examiners http://www.nybarexam.org/Results710/OR710.html (last accessed Dec. 26, 2012).

injurious falsehood, and intentional interference with prospective economic advantage.[9] *Entertainment Partners Group, Inc. v. Davis*, 198 A.D.2d 63, 64 (1st Dept. 1993). The First Department pointedly identified the Davis case as strategic litigation against public participation, "designed to chill the exercise of a citizen's right[s]," which is disfavored under New York law. 198 A.D.2d at 64. Rakofsky sued more than 80 defendants who exercised their rights to free speech in reporting on matters of public concern. He pursued them under identically improper claims for the same acts of alleged defamation, and now must face sanctions for doing so.

Similarly, the Fourth Department imposed sanctions upon a plaintiff and plaintiff's counsel for pursuing a defamation claim based on a newspaper's reporting on the contents of numerous police reports detailing the plaintiff's hostile conduct. *Mitchell v. Herald Co*., 137 A.D. 213, 218-19 (4th Dept. 1988). Because the newspaper's statements about plaintiff were true based on relevant police reports, and plaintiff (and plaintiff's counsel) knew the reported facts to be true, the *Mitchell* court found their conduct to be undertaken in bad faith. *Id*. at 219. *See also Zysk*, 53 A.D.3d at 482 (awarding sanctions against plaintiff, an attorney, for pursuing unsupportable defamation claim).

In this case, it is clear from the *Deaner* trial transcripts and Rakofsky's own Facebook celebrations that the *Deaner* case ended in mistrial. (Exhs E, F, and G) This outcome was based on the necessity of Rakofsky's withdrawal from the case because of his incompetent handling of it (Exh F at 5-6 and 11-12). Rakofsky's blunders were so obvious that Judge Jackson would have "alternatively" declared a mistrial because of the poor quality of Rakofsky's representation. (Exh E at 3-5) Despite these clear and uncontrovertable facts, Rakofsky pursued unsupportable

[9] A plaintiff may not denominate an action for defamation "as one for intentional interference with economic relations, prima facie tort, or injurious falsehood if, in fact, the claim seeks redress for injury to reputation." *Id.* at 64.

claims in an egregious waste of time and resources. *Hirschfeld v. Daily News LP*, 271 A.D.2d 386 (imposing sanctions in defamation case based on truthful statements; plaintiff's claims were "a waste of the Court's and opposing counsel's time"). Rakofsky and Rakofsky's counsel knew the statements they claimed to be defamatory were absolutely true, but pursued them anyway. This conduct epitomizes pursuing claims unsupported by fact or law, and must be sanctioned.

C. The Court Should Sanction Plaintiffs and Plaintiffs' Counsel Under 22 NYCRR 130-1.1.

This Court may also award defendants their expenses incurred in this litigation and reasonably incurred attorneys' fees arising from Rakofsky's frivolous litigation under 22 NYCRR § 130-1.1(a). To the extent plaintiffs' counsel is liable for this frivolous conduct, the Court is also empowered to award defendants their costs and attorneys' fees against plaintiffs' attorney of record as well. 22 NYCRR § 130-1.1(b); *Congregation Yetev Lev D'Satmar, Inc. v. Nachman Brach, Inc*., 20 Misc. 3d 1142(A) (N.Y. Sup. Ct. Kings County 2008) (imposing sanctions on counsel for "frivolous conduct" that is "completely without merit in law"). The definition of "frivolous" conduct under NYCRR §130-1.1 is the same as CPLR § 8303-a. *Martian Ent., LLC v. Harris*, 12 Misc. 3d 1190(A) (N.Y. Sup. Ct. N.Y County 2006).

The impropriety of Rakofsky's conduct is evaluated in context, based on Rakofsky's ability to investigate the legal and factual bases for his claims and the duration of Rakofsky's frivolous conduct upon knowing that his claims lacked a legal or factual basis. *Levy v. Carol Management Corp.*, 260 A.D.2d 27, 34 (1st Dept. 1999); *Park Health Ctr. v. Country Wide Ins. Co.*, 2 Misc. 3d 737, 740 (N.Y. City Civ. Ct. 2003). It is proper for a court to impose sanctions under 22 NYCRR § 130-1.1 where a plaintiff's claims are wholly without merit. *D.W. v. R.W.*,

34 Misc. 3d 1222(A) (N.Y. Sup. Ct. Westchester County 2012) (imposing sanctions against plaintiff under 22 NYCRR § 130-1.1 for filing complaint with frivolous causes of action). Rakofsky's claims are clearly frivolous; In spite of his legal training, Rakofsky pushed forward with his baseless claims, and continues to do so despite the Court's strong advice to withdraw this case. (Exh A at 91:15-20) Even if Rakofsky happened to be blind to the law and the facts – which he clearly isn't because he passed both the New York and New Jersey bars – the lawyers who participated in this farce on his behalf could not be similarly impaired. They should be held jointly and severally liable for any sanctions imposed by this Court.

Even if, for the sake of argument, Rakofsky's claims had some theoretical merit, they are sanctionable when "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure" the defendants. 22 NYCRR § 130-1.1(c)(2); *Levy*, 260 A.D.2d at 33 ("We look at the broad pattern of the [plaintiff's] conduct in this regard and not just the question whether a strand of merit, illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation" (internal citations omitted)). Rakofsky's management of the litigation satisfies this standard, as it demonstrates a disregard for judicial and party resources. All Rakofsky's motion practice and tenuous theories of the defendants' liability has achieved is the burden (or goal, in Rakofsky's view) of increasing the burden of defendants' legal fees.

Moreover, 22 NYCRR § 130-1.1's purpose is to conserve judicial resources and deter vexatious litigation and dilatory or malicious litigation tactics, in addition to remedying past transgressions. *Kernisan v. Taylor*, 171 A.D.2d 869, 870 (2d Dept. 1991); *see Levy*, 260 A.D.2d at 34. Despite this Court handing a last clear chance to discontinue the action without further damage (Exh A at 91:15-20), Rakofsky and his counsel refuse to do so, and continue instead to waste party and judicial resources. Disregarding the Court has been the basis for sanctions in the

past, and should cause the Court to sanction Rakofsky in this case. *Levy*, 260 A.D.2d at 34; *Klin Const. Group, Inc. v. Blue Diamond Group Corp*., 25 Misc. 3d 1230(A) (N.Y. Sup. Ct. Kings County 2009). Plaintiffs' and their counsel's conduct in this case has been sufficiently dilatory to eclipse any sliver of merit his claims may have theoretically had, making sanctions appropriate. *Hirschfeld v. Friedman*, 307 A.D. 856, 859 (1st Dept. 2003); *Levy*, 260 A.D.2d at 34; *Park Health Ctr*., 2 Misc. 3d at 740.

The Court is also entitled to sanction Rakofsky under 22 NYCRR § 130-1.1(c)(3) for making "material factual statements that are false." *Mascia v. Maresco*, 39 A.D.3d 504, 505-06 (2d Dept. 2007); *Klin Const. Group*, 25 Misc. 3d at 1230(A). As set forth in Section A 3 of this motion, Rakofsky's entire case is premised on his misrepresentations that the *Deaner* case did not end in a mistrial due to his incompetence, and that his performance in that case was not, as Judge Jackson described it, below the standards of the Sixth Amendment (Exh E at 5:16-19). Beginning with these foundational misrepresentations, Rakofsky has made others to the Court, including in his July 1 letter. As Rakofsky is an attorney, this untruthfulness is particularly egregious. Without delving into every misrepresentation found in Rakofsky's many papers filed with this Court, mere paragraphs of the *Deaner* transcript reveal that Rakofsky's action is based on a fabrication (Exhs F at 10:25-11:22; E at 4:18-5:2) and calls for the Court's harshest sanctions.

IV. Conclusion

Both Rakofsky and plaintiffs' counsel have so badly abused the judicial system in this action that anything less than an imposition of harsh sanctions will embolden them to continue and repeat their conduct. Rakofsky, having passed the bars of two states and been admitted in one, commenced this action in order to extract nuisance settlements from dozens of defendants (Exh I). Their only wrong was exercising their core First Amendment rights. When defendants chose to defend the First Amendment rather than pay Rakofsky's *danegeld*,[10] they were subjected to costly and protracted litigation at Rakofsky's initiative. Most disturbingly, though, and evident from the *Deaner* transcripts, is that Rakofsky knew this defamation action was unsupported by any fact before he ever filed it. Lest this Court stamp such actions with its imprimutur, sanctions against plaintiffs and their counsel are proper and necessary.

[10] A *danegeld* ("Dane Money") was a tax commoners paid to Viking raiders in the eleventh and twelfth centuries to prevent their lands from being ravaged. Today, this practice is called a protection racket.

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On this 2nd day of January 2013

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