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

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JOSEPH RAKOFSKY,

Plaintiff,

—against—

WASHINGTON POST COMPANY, *et. al.,*

Defendants.

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AFFIRMATION IN SUPPORT & OPPOSITION

Index No.: 105573/2011

MATTHEW H. GOLDSMITH, an attorney admitted to practice law in New York, affirms the following under penalties of perjury:

1. This affirmation is submitted in support of plaintiffs' cross-motion for sanctions against Marc J. Randazza, Esq. and in opposition to the motion for sanctions, dated January 2, 2013, of those defendants[1] represented by the Randazza Legal Group and Turkewitz Law Firm (collectively, "defendants"). Citations to the defense memorandum of law and accompanying exhibits are designated as "[p./*Ex.* _]."

2. Plaintiffs' cross-motion, affirmation in support and opposition are based on the affirmation of Richard D. Borzouye, Esq., dated June 13, 2011, proposed second amended complaint annexed to plaintiff's cross-motion, dated May 9, 2012 (copy of relevant portions annexed as *Exhibit A*), and the referenced exhibits.

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[1] (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) "Tarrant 84", (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 Mystel, (34) AboveTheLaw.com, and (35) Breaking Media, LLC.

PRELIMINARY STATEMENT

3. Mark J. Randazza, Esq. brazenly moves for sanctions against plaintiffs and counsel in the shadow of his own criminal conduct, which includes threats of unwarranted criminal charges solely to obtain an advantage in this action and attempted extortion against plaintiffs' former counsel, as well as unauthorized practice of law and harassment.

4. Defendants' motion fails to provide any satisfactory legal analysis or factual basis warranting sanctions against plaintiffs or counsel, but merely reads as a re-argument of its motion to dismiss.

Statement of Relevant Facts & Proceedings

5. In 2011, the plaintiff, Joseph Rakofsky ("Rakofsky"), and Sherlock Grigsby, Esq. ("Grigsby"), appeared as co-counsel for Dontrell Deaner ("Deaner") at a murder trial presided over by Hon. William Jackson ("J. Jackson"). [*Ex. E*, p. 1].

6. On March 30, 2011, Deaner requested a new lawyer after two attorney-client conflicts arose, one with Rakofsky, and another involving contrary legal advice offered by Rakofsky and Grigsby:

> "THE COURT: … [T]his [request for new counsel] arose in the context of counsel, Mr. Rakofsky, indicating that there was a conflict that had arisen between he and Mr. Deaner … ***and*** … a conflict as well between local counsel, Mr. Grigsby's legal advice and Mr. Rakofsky's legal advice (emphasis added)." [*Ex. E*, p. 2].

7. Upon that request, J. Jackson advised Deaner to renew his application the following day to consider that retrial and continued detention would almost certainly result. [*Ex. E*, p. 2-3]. On April 1, 2011, Deaner renewed his request, which J. Jackson determined to be "knowingly and intelligently made" and with "underst[anding] that it's a waiver of his

rights." [*Ex. E*, pp. 3-4].

8. At the time when granted, J. Jackson also stated that "if there had been a conviction in [the] case … [he] would have granted a motion for a new trial… ." [*Ex. E*, p. 4]. He added that Deaner's request was "[a]lternatively … based on [his] observation of the conduct of the trial manifest necessity." [*Ex. E*, p. 4].

9. J. Jackson's characterization of Rakofsky's performance included the following remarks, [*Ex. E*, pp. 4-5]:

> "… I was astonished that someone would purport to represent someone in a felony murder case who had never trial a case before and that local counsel, Mr. Grigsby, was complicit in this."
>
> "… It appeared to the Court that there were … defense theories out there, but the inability to execute those theories."
>
> "It was apparent to the Court that there was a - - not a good grasp of legal principles and legal procedure of what was admissible and what was not admissible that inured, I think, to the detriment of Deaner."
>
> "I believe that [Rakofsky's] performance was below what any reasonable person could expect in a murder trial."
>
> "It became readily apparent that the performance was not up to par under any reasonable standard of competence under the Sixth Amendment."

10. J. Jackson also make reference to an e-mail "delivered to" the court, though not filed, by a defense investigator he described as, "raising ethical issues" against Rakofsky. [*Ex. E*, p. 7].

11. Defendants later published the following statements regarding Rakosky personally and his trial performance, which are alleged to be defamatory, (*Ex. A*):

COA	*Def.*	*Statements*
FIFTH	7,8	"[Rakofsky] lists other lawyers on his website, holding them out as members, though that wasn't the case for Grigsby."
SIXTH	3-6	1) "[Rakofsky ate one of his own] to gain [ ] a mistrial for

		ineffective assistance of counsel." 2) "… the judge [ ] found Rakofsky too [dishonest] to handle the case." 3) "… Rakofsky's willingness to lie on the internet is reflected in his character as a lawyer." 4) "… every young lawyer is [not] as dishonest as Rakofsky." 5) "… many [lawyers] lie about themselves just as this mutt, [Rakofsky], did." 6) Rakofsky [committed] career suicide."
SEVENTH	11,12	1) "[Rakofsky is a] [l]ying piece of s__." 2) "… the mistrial was because of Rakofsky's blatant ineptitude."
EIGHTH	17	"lead counsel [Rakofsky] [was] grotesquely incompetent."
EIGHTEENTH	1,2	1) "[Rakofsky's] [e]thics [came] into play with deception." 2) "[Rakofsky] was utterly incompetent to [defend a murder case]."
TWENTY-FIRST	23,24	"[Rakofsky] solicited himself for the case"
TWENTY-SECOND	18,19	"Rakofsky's performance … so dismayed the trial judge that the court declared a mistrial on the spot… "
TWENTY-THIRD	31,32	1) "[Rakofsky] blatantly broke ethical rules …" 2) "[Rakofsky] … promised more than he could deliver."
TWENTY-SIXTH	20-22	"The judge declared a mistrial because [Rakofsky] was so bad …"
THIRTY-FIRST	25,26	"This week's joy in the misfortune of others comes courtesy of infamously-incompetent lawyer Joseph Rakofsky"
THIRTY-SECOND	13,14	"[Rakofsky's] … performance was so bad that the judge had to declare a mistrial."

12. After this action commenced, Mark J. Randazza, Esq. ("Randazza"), purportedly on behalf of the defendants, contacted plaintiffs' formerly appearing counsel, Richard D. Borzouye, Esq. ("Borzouye"), for multiple requests for an extension of time to answer the amended complaint, which were granted. (*Borzouye Aff.*, ¶ 5).

13. On May 16, 2011, Borzouye responded to a phone call of Randazza with Rakofsky, during which time Randazza "vilely and insultingly told Mr. Rakofsky to 'shit

the f--- up." (*Borzouye*, ¶ 6).

14. Subsequent to those conversations, plaintiffs' learned that Randazza, an out-of-state attorney, was not yet admitted to practice law in New York State and seeking admission to appear in this case *pro hac vice*. (*Borzouye*, ¶¶ 3 & 5).

15. Randazza later threatened Borzouye and, "'vowed to file grievances and a wiretapping crim[inal] complaint' against [him] if Mr. Rakofsky were to oppose Mr. Randazza's admission *pro hac vice*." (*Borzouye*, ¶ 9)(copy of Randazza e-mail, dated June 24, 2011, annexed as *Exhibit B*).

16. Due solely to Randazza's threats, Borzouye withdrew as attorney of record. (*Borzouye*, ¶¶ 9-10).

CROSS-MOTION FOR SANCTIONS

17. Under 22 NYCRR § 130-1.1(c)(2), "conduct is frivolous if it is undertaken … to harass or maliciously injure another." Among the most malicious and unethical actions that can be taken by any attorney is to present or threaten to present criminal charges solely to obtain an advantage in a civil matter. *See*, In re Geoghan, 253 A.D.2d 205, 686 N.Y.S.2d 839 (2d Dep't 1999)(attorney disbarred, in part for violating 22 NYCRR 1200.36[a]), In re Supino, 23 A.D.3d 11, 806 N.Y.S.2d 178 (1st Dep't 2005)(suspending an attorney for, *inter alia*, threatening to present criminal charges to obtain an improper advantage in a civil matter).

18. Specifically, such threats of criminal prosecution have been held to constitute conduct, "'undertaken primarily to … harass or maliciously injury' … sufficient to impose sanction upon [ ] counsel" for purposes of 22 NYCC § 130-1.1. Jalor Color Graphics, Inc. v.

Universal Advertising Systems, Inc., 183 Misc.2d 294, 298, 703 N.Y.S.2d 370, 373 (Sup. Ct. NY Co. 1999). *See also*, In re Supino,

19. In Jalor, the Court awarded sanctions against an attorney for a letter sent "'suggest[ing] that should plaintiff not abandon pursuit of its claim ...[,] defense counsel will 'saddle plaintiff – *and its counsel* –with criminal liability for alleged perjury and related offenses,' … ." 183 Misc.2d 294, 703 N.Y.S.2d 370.

20. While Randazza's frivolous conduct began with harassing and obscene language directed at Rakofsky, it escalated to repeated threats of criminal prosecution for wiretapping against Borzouye if plaintiffs' opposed his admission *pro hac vice* and culminated in the crime of attempted extortion in the amount of $1,000.00 in exchange for Randazza's abandonment of criminal prosecution. *See*, NY Penal Law § 155.05(e):

> "A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor [ ] will: … (iv) Accuse some person of a crime or cause criminal charges to be instituted against him."

21. Randazza's egregious acts are compounded by his unauthorized practice of law in this action prior to admission *pro hac vice*, which not included the foregoing, but occurred on behalf of multiple and likely unknowing clients.

22. Randazza's actions were indisputably undertaken to harass Rakofsky, maliciously injure both plaintiffs' and Borzouye, and amounted to so conduct reprehensible to be expected of any attorney, that it falls within the precise definition of frivolous and thereby warrants sanctions as intended by 22 NYCRR § 130-1.1.

OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS

23. From a legal perspective, defendants make nearly no attempt to argue why sanctions are appropriate on the grounds alleged, but merely cut and pastes its arguments made by its earlier motion to dismiss. Factually, defendants' offer this Court merely a small slice of the relevant litigation in support of its conclusion that it should be deemed frivolous. Even when considering the scant legal and factual arguments actually made, they are patently without merit as follows.

24. Defendants move for sanctions against both the plaintiff and the undersigned, under CPLR § 8303-a and 22 NYCRR § 130.1.1(c)(3), which may be awarded in instances where a party or attorney: 1) brings or proceeds in an action solely to delay, harass or maliciously injure another; 2) engages in frivolous litigation, defined as having no basis in fact or law, and which could not be supported by a good faith argument for an extension, modification or reversal of existing law; or, 3) makes a material false statement of law or fact. McGill v. Parker, 179 A.D.2d 98, 112, 582 N.Y.S.2d 91, 100 (1st Dep't 1992)("it is not enough that the action be meritless"), *citing*, (Grasso v. Mathew, 164 A.D.2d 476, 480, 564 N.Y.S.2d 576, *app.dism.*, 77 N.Y.2d 940, 569 N.Y.S.2d 613, 572 N.E.2d 54, *app. den.*, 78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443; CPLR 8303-a[c][ii]).

I. Personal Jurisdiction

25. The inherent weakness of the defendants' motion is apparent by its lead argument that no personal jurisdiction exists over a "majority" of the out-of-state defendants under CPLR § 302(a)(2).

26. As a threshold matter, defendants have previously and affirmatively waived

this defense as to ten (10) defendants by the Turkewitz Memorandum of Law offered in support of defendants' earlier motion to dismiss, dated December 14, 2011. (copy of relevant portion annexed as *Exhibit C*, ¶ 20). Notwithstanding, the defendants fail to even name the defendants that were improperly served by frivolous means.

27. Defendants support offered on this position totals one citation to a glaringly inapplicable judicial opinion, Messenger ex rel. Messenger v. Gruner + Jahr Printing and Pub., a case which it alleges that holds a defamation claim against a foreign defendant is subject to dismissal as a matter of law. [p. 5], *citing*, 727 N.E.2d 549 (2000). Other than this action also alleging defamation, Gruner speaks nothing of the applicability of CPLR § 302(a)(2) to foreign defendants in a defamation action, but rather considers the issue of whether Civil Rights Law §§ 50 & 51 is applicable to a defendant who uses the photo of a plaintiff in a fictionalized way without consent. Gruner, 94 N.Y.2d 436, 440. It is almost as if this authority was cited in error, for it engages in no discussion of that defendant's out-of-state residence whatsoever.

28. Defendants' continue to anemically argue lack of personal jurisdiction by alleging that blog communications fail to establish such a basis as a matter of law. [p. 5]. Here too, no discussion is included to support its overly broad and erroneously stated holding, but only passing reference to Best Van Lines Inc. v. Walker, 490 F.3d 239, 250 (2d Cir. 2007) and Competitive Technologies, Inc. v. Press, 836 N.Y.S.2d 492 (Sup. Ct. Suffolk Co. 2007), the latter having neither factual nor precedential value.

29. Contrary to the defendants' portrayal of Best Van Lines, the Second Circuit did not sweepingly hold that blog posts preclude personal jurisdiction *carte blanche*. [ ]. Rather, it stated that defamatory posts on a website do not confer jurisdiction *without more*.

Id. The essential question of whether the defendant's acts reached the threshold of "more," is wholly unmentioned in Best or the defendants' motion, but is discussed in Citigroup Inc. v. City Holding Co., 97 F.Supp.2d 549 (SDNY 2000).

30. In Citigroup, the Southern District specifically contemplated, "what type of internet activity" must be taken by an out-of-state website to deem it as "transacting any business within [New York]," and hence conferring personal jurisdiction via CPLR § 302(a)(1). Citigroup prefaced its discussion by noting that even "[a] single transaction of business is sufficient to give rise to jurisdiction." 97 F.Supp.2d at 564, *citing*, (Pilates, 891 F.Supp. at 179; Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 527 N.Y.S.2d 195, 522 N.E.2d 40, 43 (1988); *see also*, Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970)). It continued by differentiating a "spectrum of cases involving a defendant's use of the internet," where at one end a defendant "makes information available on what is essentially a 'passive' web site," as opposed to "cases in which the defendant clearly does business over the internet, such as where it knowingly and repeatedly transmits computer files to customers in other states. Id., at 565. Citigroup also refers to a "middle ground" of that spectrum, where one "maintains an interactive web site which permits the *exchange of information* between users in another state and the defendant (emphasis added)," for which the "level and nature of the exchange *may* be a basis for jurisdiction." Id., at 565, *citing*, (American Homecare Fed. Inc. v. Paragon Scientific Corp., 27 F.Supp.2d 109, 113 (D.Conn.1998); Zippo, 952 F.Supp. at 1124). The web site at issue in Citigroup, which allowed users the ability to apply for commercial contracts, send e-mails and click hyper-links to chat with defendant-agents, were held to "[a]t the very least" bring it "within the middle category of internet commercial activity," and "thus rises to the level of

transacting business required under CPLR § 302(a)(1). Id., at 565-66, *citing*, (K.C.P.L., 1998 WL 823657, at *6; Zippo, 952 F.Supp. at 1124; *see also,* American Network, Inc. v. Access America/Connect Atlanta, Inc., 975 F.Supp. 494, 498-99 (S.D.N.Y.1997).

31. As fully discussed in the May 10, 2012 affidavit of Osvaldo Alayon ("Alayon"), an analytical internet specialist and expert, he concludes that "Bannination.com [ ], [a webite] created to 'discuss' Joseph Rakofsky is filled with links to the websites of the Turkewitz Law Firm" and that "each time any of these links were clicked, the target websites, in this case, owned or operated by the Turkewitz Defendants, … received commercial benefits as a result." (*Alayon Aff.,* ¶ 39).

32. Applying the Citigroup holding in light of Alayon's testimony, the defendants' websites not only exceed the "middle ground" of the spectrum, which alone "may" confer personal jurisdiction, but rather "clearly [did] business over the internet" by receiving commercial benefits within the meaning of CPLR § 302(1)(a).

II. Defamation

33. On a motion for sanctions alleging a frivolous defamation action, if an issue of as to the truth of a defamatory statement exists, sanctions are unwarranted. Themed Rests., Inc. v. Zagat Survey, LLC, 4 Misc.3d 974, 983, 781 N.Y.S.2d 441 (Sup. Ct. NY Co. 2004), *citing*, (CPLR 8303-a; 22 NYCRR part 130; Entertainment Partners Group v Davis, 155 Misc.2d 894, 897-901 [Sup. Ct., NY Co. 1992, Lebedeff, J.], *aff'd*, 198 AD2d 63 [1st Dept 1993]).

34. Defendants focus its arguments regarding defamation as to one element, that the statements at issue are "provably true." [p. 6]. The only statements offered in its motion as true and allegedly frivolous include [p. 6]:

1) "During the *Deaner* trial, Judge Jackson told Rakofsky that a new trial for his client was manifestly necessary to protect his client's rights, …"

2) "… Rakofsky's performance was 'below what any reasonable person could expect in a murder trial."

35. Neither the defendants first or second statement offered as "provably true" is alleged in any cause of action *alone* as defamatory. *See*, ¶ 10. Relevant to a consideration for relief under CPLR § 8303-a and 22 NYCRR § 130, is whether the "[moving party] [does] not oppose" causes of action asserted against it and/or portions thereof. Themed Rests., Inc., 4 Misc.3d 974 at 983, 781 N.Y.S.2d at 450.

36. Again the defendants fail to mention whether the nineteen (19) statements actually alleged as defamatory were true to the degree of frivolous, thus again rendering an incomplete factual basis to support its conclusion, (*see*, ¶ 11, *supra*):

> "[Rakofsky] lists other lawyers on his website, holding them out as members, though that wasn't the case for Grigsby."
>
> "[Rakofsky ate one of his own] to gain [ ] a mistrial for ineffective assistance of counsel."
>
> "… the judge [ ] found Rakofsky too [dishonest] to handle the case."
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> "… Rakofsky's willingness to lie on the internet is reflected in his character as a lawyer."
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"Rakofsky's performance … so dismayed the trial judge that the court declared a mistrial on the spot… "

"[Rakofsky] blatantly broke ethical rules …"

"[Rakofsky] … promised more than he could deliver."

"The judge declared a mistrial because [Rakofsky] was so bad …"

"This week's joy in the misfortune of others comes courtesy of infamously-incompetent lawyer Joseph Rakofsky"

"[Rakofsky's] … performance was so bad that the judge had to declare a mistrial."

37. Defendants by Banned Ventures, LLC and "Bannination" next suggest that they are immunized against liability under 47 U.S.C. § 230, yet offer no explanation as to its reasoning or the applicability of its only cited case, Shiamili v. Real Estate Group of N.Y., Inc., 17 N.Y.3d 281, 952 N.E.2d 1011 (2011).

38. The Shiamili Decision actually eviscerates the defendants' argument, by its concession that "[The Court of Appeals] [has] not yet had the occasion to address the scope of [47 U.S.C. § 230's] protections." Id. From a further reading of that decision, it seems reasonable that the defendants would have to at least make a evidentiary showing as to whether Banned Ventures, LLC and "Bannination" were "content providers" prior to succeeding on a motion for sanctions.

III. Alleged Misrepresentations of Fact and Law to the Court

39. Defendants' next argue that Rakofsky made material misrepresentations of

fact and law to this Court warranting sanctions under 22 NYCRR § 130-1.1(c)(3). [p. 20]. In an attempt to prove its argument, the defendants candidly make its own material misrepresentations of fact to this Court by its motion. It must be noted that while the defendants offer citations to the statements it alleges are contrary, it offers none as to those it alleges are misrepresentations.

40. Defendants allege that Rakofsky misrepresented that he "moved to withdraw as counsel, rather than the court declaring a mistrial." [p. 10]. By doing so Rakofsky is erroneously accused of maintaining, throughout the course of this action, that *Deaner* did not end in a mistrial. [p. 10]. As indicated in the *Amended Complaint*, since the inception of this action Rakofsky has maintained that *Deaner* did in fact end in a mistrial. (*Ex. A*, ¶ 112)("As RAKOFSKY had anticipated, Judge Jackson explained to the client that if he granted RAKOFSKY's request to withdraw, it would result in a mistrial").

41. With a more subtlety, defendants next attempt to contradict an allegedly made false statement, *i.e.*, that the *Deaner* trial ended by Rakofsky's motion to withdraw and not a declaration of a mistrial. Defendants paraphrase this alleged misrepresentation by alleging that "the *Deaner* case did not end in a mistrial due to his incompetence, … ." [p. 20]. This statement is improperly attributed to Rakofsky as a result of its erroneous derivation from the March 31 transcripts. A more careful reading of those minutes and all other materials in this case unambiguously demonstrate that Rakofsky never asserted his motion to withdraw and the declaration of a mistrial to be mutually exclusive. To the contrary, Rakofsky consistently maintains that he both moved to withdraw *and* a mistrial was declared, which is in full accord with the statements cited by the defendants to contradict the conclusion it illogically infers.

Conclusion

42. Plaintiffs respectfully request that sanctions be awarded against Randazza and the defendants motion be denied in its entirety.

DATED: New York, New York
February 15, 2013

Respectfully Submitted,

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