EXHIBIT B

Honorable Shlomo Hagler
Supreme Court of the State of New York
111 Center Street, Room 581
New York, N.Y. 10013

Re: Joseph Rakofsky v. Washington Post, *et al*.
Index Number: 105573-2011

Dear Judge Hagler,

It is our understanding and assumption that, at the argument on June 28, 2012, Your Honor suggested to Plaintiffs' counsel, in effect, that it was duplicative for Plaintiffs to plead both Defamation and Negligence (leading to Defamation) as alternative remedies, the cause of action for defamation subsuming within it both knowingly false statements of fact and false statements of false made as a result of negligent failure to exercise due investigation of facts to determine their truth or falsity. Your Honor asked Plaintiffs' counsel to provide any contrary authority. We have found authority in other jurisdictions, notably *Dornhecker v. Ameritech Corp.*, 99 F.Supp.2d 918 (2000), *Cincinnati Ins. Co. v. Pro Enterprises, Inc.*, 394 F.Supp.2d 1127 (2005) and *Hazelwood v. Harrah's*, 109 Nev. 1005 (1993), but none in New York.

We stress that Plaintiffs included such alternative cause of action in Negligence because they found and alleged both forms of actual defamation in the case at bar.

As we have noted at various points in our responses in opposition to motions of the various defendants to dismiss Plaintiffs' Amended Complaint, the acts of alleged defamation occur in two specific contexts herein: the first being the publication of matter relating to published statements that Plaintiffs, or, more particularly, Plaintiff Joseph Rakofsky, were guilty of unethical (indeed, criminal) acts in and by the email from Mr. Rakofsky to his then-investigator, Adrian Bean, on October 6, 2010, in which he stated:

> "Please trick _____ (old lady) into admitting: a) she told the 2 lawyers that she did not see the shooting and, b) she told 2 lawyers she did not provide the Government any information about shooting.) This happened a couple of months ago."

There is no factual dispute that Mr. Rakofsky sent such an email to Mr. Bean on that date. However, there is a question as to the interpretation of that email. The Washington Post, on April 1, 2011, stated that, in his email, Mr. Rakofsky was guilty of instructing Mr. Bean to perform an unethical or illegal act (*i.e.*, witness tampering). Plaintiffs maintain that the instructions given by Mr. Rakofsky to Mr. Bean in that email were devoid of any unethical or illegal content and that, as a matter of fact and law, the instructions given by Mr. Rakofsky to Mr. Bean could not, in and of themselves, constitute directions to perform unethical or illegal acts, since the only action Plaintiffs directed Mr. Bean to perform therein was to cause the individual referred to as "the old lady" simply to repeat to Mr. Bean -- not to change -- statements she had

made on a previous date to Mr. Rakofsky, his co-counsel, Sherlock Grigsby, Esq. and the mother of Dontrell Deaner, the defendant whom Mr. Rakofsky and Mr. Grigsby were then representing. We respectfully submit that merely asking someone to repeat a statement she previously made cannot be, in and of itself, either unethical or illegal. The fact that Mr. Bean was requested to "trick the old lady" to repeat to him (Bean) the statement she had previously made to Mr. Rakofsky *et al*. cannot alter this conclusion, particularly since what Mr. Rakofsky meant by the work "trick" (an ambiguous word he later regretted using because of its ambiguity), as Mr. Bean knew, was that Mr. Bean should conceal from the old lady the fact that, in requesting her to repeat her previously-made statement, he was acting on behalf of the defendant, Dontrell Deaner. Mr. Rakofsky considered concealment of that fact necessary to prevent the old lady from offering a contrary, untrue, statement to the District of Columbia police, who were known to be, and had testified to, paying multiple fact witnesses money for statements inculpating Dontrell Deaner. Transcripts and other evidence demonstrating this fact were included as Exhibits 10 and 42 in Plaintiffs' Opposition to Defendants' Motions to Dismiss the Amended Complaint. Defendant The Washington Post Company (the "Post") and other defendants who republished such statements that Mr. Rakofsky's email to Mr. Bean instructed him to perform an unethical or an illegal act without having exercised due care in their investigation to determine the truth or falsity of the statement that, therefore, constituted negligence due to a lack of care in their investigation to determine the operative facts. The publication of a false and defamatory statement of fact without knowledge of its falsity due to insufficient and inadequate investigation to determine the truth or falsity of such statements constitutes actionable defamation.

At the same time, the Post's publication of the same false statement of fact was due, not to any negligence on its part, but to its characterization of the "the old lady" as a "Government witness" and to its forgery of Mr. Rakofsky's email to Mr. Bean to make it appear that Mr. Rakofsky had intentionally instructed Mr. Bean to get the old lady to change her statement (*i.e.*, subornation of perjury) and had, in his email, directed Mr. Bean to engage in unethical or willful illegal acts that would constitute actionable defamation by intentionally false statements if based upon a forged version of Mr. Rakofsky's email created and first published by the Washington Post, which stated:

> "Thank you for your help. Please trick the old lady to say that she did not see the shooting or provide information to the lawyers about the shooting."

Although counsel for The Washington Post has stated that there is no difference between the *bona fide* email sent by Mr. Rakofsky to Mr. Bean and the forged version thereof published by The Washington Post, a comparison of the two documents demonstrates conclusively that such statement by counsel is not correct and truthful. Indeed, if the two versions were identical, as counsel for The Washington Post Company suggest in their Memorandum of Law in support of their client's motion to dismiss the Amended Complaint, there would be no reason for The Washington Post Company to have deliberately forged and published their version of the true email. Quite clearly, that was done solely and intentionally to enable the Post to say in its article that Mr. Rakofsky

instructed Mr. Bean to get the old lady to change what the "Government witness" told Mr. Rakofsky *et al.* in their earlier meeting. That act was an intentional false statement of fact.

The same possibility of concurrence of negligence and willful misstatement can exist with respect to the second act in which defendants are alleged to have committed actionable libel of Plaintiffs. We refer to the issue raised by defendants' statements that the mistrial that occurred in the *Deaner* case occurred as a result of Joseph Rakofsky's lack of legal competence in his representation of Dontrell Deaner. That statement is directly inconsistent with both the facts that transpired of record on Thursday, March 31, 2011 and Judge Jackson's own statement on April 1, 2011 that:

> Let me say that this arose in the context of counsel, Mr. Rakofsky, approaching the bench and indicating that there was a conflict that had arisen between he and Mr. Deaner. Mr. Deaner, when I acquired of him, indicated that there was, indeed a conflict between he and Mr. Rakofsky. Mr. Rakofsky actually asked to withdraw mid-trial…

That fact appears clearly in the record on proceedings on Thursday, March 31, 2011 and, of course, is acknowledged expressly by Judge Jackson in his own statement on Friday, April 1, 2011. The transcripts of proceedings on both days have been submitted by Plaintiffs as Exhibits 5 and 6 and are part of the record in the case at bar. To the extent that the allegedly false statements of fact are made by The Washington Post Company, which has claimed that it had direct factual knowledge of the acts that transpired on Thursday, March 31, 2011, their statement must constitute a willful misstatement of fact constituting actionable libel of Plaintiffs. To the extent that any other defendants have made the same false statements of fact, through a negligent failure to engage in the due investigation of the truth or falsity of such facts prior to their publishing them, would give rise to actionable libel by reason of a negligent failure to investigate the truth or falsity of the facts prior to publishing them. Thus, actionable libel resulting from both willfully and knowingly false statements and actionable libel resulting from negligent statements can inhere in the same statements, depending upon who has published the statements and their knowledge of the truth or falsity of the statements published.

We understand that Your Honor has suggested the possibility that the cause of the mistrial may be affected by the concurrence of more than one possible cause. We respectfully submit that such reasoning misapplies the meaning of "cause" and that a ruling of a mistrial during trial can have only one cause: that, without which, the subject of the cause could not exist, better referred to, perhaps, as the "proximate cause." Respectfully, at the *Deaner* trial, there could only be one specific event which caused the mistrial (i.e., the proximate cause). That can only be the motion by Mr. Rakofsky to withdraw as the lead counsel for Dontrell Deaner on Thursday, March 31, 2011, since that was the act without which the mistrial would never have arisen and which preceded any acts that might be thought by the Court to have affected Judge Jackson's subjective statements on Friday, April 1, 2011, which necessarily followed in point of time to Mr. Rakofsky's motion to withdraw. To the extent that Judge Jackson

may be thought to have been affected in his statements of Friday April 1, 2011, to have been influenced in those statements by acts other than Mr. Rakofsky's motion, those influences necessarily followed, in point of time, the motion to withdraw and thus, cannot be said to be the cause of the mistrial. Further, any suggestion that unethical or illegal acts attributed to Mr. Rakofsky "partially" caused the mistrial (as certain defendants have published), therefore, cannot stand, since Judge Jackson stated on the record that His Honor learned about such allegations on Friday, April 1, 2011, only after Mr. Rakofsky moved to withdraw as lead counsel for Mr. Deaner.

In fact, the only statement of record by Judge Jackson on April 1, 2012 that might be so construed --that is, taking into consideration Judge Jackson's negative view of Mr. Rakofsky's competence as a lawyer as a factor in his conclusion to grant Mr. Rakofsky's motion to withdraw on which he based his determination to declare a mistrial on March 31, 2011 -- is in his sentence that began with "Alternatively…"[1] However, that assumed and presupposed a completed trial ending in a guilty jury verdict. Thus, that could not have been a factor in, much less the basis for, the declaration of a mistrial during the prosecution phase of the case while the Government's first substantive witness still remained on the stand.

Further, it should be noted that Judge Jackson's grant of a mistrial was totally devoid of any findings of even a single act of Sixth Amendment incompetence in Mr. Rakofsky's defense of Mr. Deaner. Not only that, but to consider Mr. Rakofsky's competence as having any factor in the grant of the mistrial is inconsistent with Judge Jackson's ruling out that issue in his colloquy with the prosecutor on Thursday, March 31, 2011. (The entire transcript for the afternoon of March 31, 2011 is included as Exhibit 5 in Plaintiffs' Opposition documents).

We were unable to find any cases in which courts held that pleading Defamation and Negligence in the alternative constituted frivolous conduct. Thus, in the absence of any decisions of New York courts on this point, we believe it proper to consider and rely upon common-law decisions from other jurisdictions. If the Court should disagree, we would be amenable to striking the Negligence cause of action in the proposed Second Amended Complaint and shall take Your Honor's view as we understand it to be authoritative. Thus, Plaintiffs would be amenable to withdrawing their alternative cause of action sounding in Negligence.

Thank you.

Respectfully submitted,

_____/s/__ _____
By: Joseph Rakofsky

[1] *See* Page 4, Line 22 in Plaintiffs' Exhibit 6.