SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

ELENA RUTH SASSOWER and DORIS L. SASSOWER, Individually and as Director and President, respectively, of the Center for Judicial Accountability, Inc., and CENTER FOR JUDICIAL ACCOUNTABILTY, INC., Acting *Pro Bono Publico*,

Index #10-12596

Justice Peter Fox Cohalan

Plaintiffs,

-against-

GANNETT COMPANY, INC., The Journal News, LoHud.com HENRY FREEMAN, CYNDEE ROYLE, BOB FREDERICKS, D. SCOTT FAUBEL, KEITH EDDINGS, DOES 1-10,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' DISMISSAL MOTION
& IN SUPPORT OF PLAINTIFFS' CROSS-MOTION

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This memorandum of law is submitted in opposition to the October 22, 2010 pre-answer motion of Satterlee, Stephens, Burke & Burke, LLP, attorneys to all defendants except defendant Keith Eddings and defendants DOES 1-10, to dismiss plaintiffs' Verified Complaint pursuant to CPLR §3211(a)(1): "a defense is founded upon documentary evidence"; and CPLR §3211(a)(7): "the pleading fails to state a cause of action". It is also submitted in support of plaintiffs' accompanying cross-motion.

As hereinafter shown, the Satterlee dismissal motion is not just frivolous, but, from beginning to end, a "fraud on the court"[1] – which would be unacceptable if perpetrated by an ordinary lawyer or party. That it has been perpetrated by a pre-eminent law firm specializing in media law (Exhibit 18)[2], with limitless resources on behalf of a $5.6 billion corporate media giant (Verified Complaint, ¶6), cannot be tolerated by any court having respect for the judicial process. Such litigation misconduct reinforces plaintiffs' entitlement to all the relief sought by their cross-motion, including summary judgment, following notice, pursuant to CPLR §3211(c).

The fundamental legal principle is as follows:

> "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party." Corpus Juris Secondum, Vol 31A, 166 (196 ed., p. 339);
>
> "It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause...and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and

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[1] "Fraud on the court" is defined by Black's Law Dictionary (7th ed. 1999) as:

> "A lawyer's or party's misconduct in a judicial proceeding so serious that it undermines or is intended to undermine the integrity of the proceeding."

[2] Exhibits 10-18 are annexed to plaintiff Elena Sassower's accompanying affidavit, continuing the sequence begun by the Verified Complaint, which annexes Exhibits 1-9 (with Exhibits A-K annexed to Exhibit 7).

merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause." II John Henry Wigmore, Evidence §278 at 133 (1979).

The "documentary evidence" supporting summary judgment to plaintiffs is, in the first instance, the same "documentary evidence" on which Satterlee purports to rely for its dismissal motion: plaintiffs' Verified Complaint with its incorporated Exhibit 7 analysis of the news article, as well as the corroborating videotape of the May 4, 2009 Common Council meeting, whose existence the Satterlee motion conceals. That videotape, a copy of which is believed to be in Satterlee's possession, as set forth at ¶¶3-4 of plaintiff Elena Sassower's accompanying affidavit, is now furnished on this cross-motion in support of summary judgment to plaintiffs (Exhibit 10). Also furnished: copies of the law review articles identified by the Complaint's footnote 14 for recognition of its "Third Cause of Action: Journalistic Fraud" – and, additionally, for recognition of a fourth cause of action: "Institutional Reckless Disregard for Truth" ("WHEREFORE" clause, fn. 18). Like the videotape (Exhibit 10), whose existence Satterlee entirely conceals, its dismissal motion also entirely conceals these two law review articles (Exhibits 16, 17) – because they are dispositive.

. THE LEGAL STANDARDS GOVERNING CPLR §3211 MOTIONS

The Satterlee memorandum of law (at p. 10) uses a truncated quote from *Salvatore v. Kumar*, 45 A.D.3d 560 (2d Dep't 2007) to identify the legal standard for a dismissal motion under CPLR §3211(a)(7). The full quote from that case, underlining the initial two sentences that Satterlee deletes, is as follows:

> "Upon a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), the court must determine whether from the four corners of the pleading 'factual allegations are discerned which taken together manifest any cause of action cognizable at law' (*Morad v Morad*, 27 AD3d 626, 627 [2006] [internal quotation marks omitted]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, '[w]hile the allegations in the complaint are to be accepted as true

> when considering a motion to dismiss . . . , 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.'" (underlining added).

Similarly, in identifying the legal standard for a dismissal motion under CPLR §3211(a)(1), the Satterlee memorandum of law (at p. 10) uses a truncated quote from *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383 (1st Dep't 2002), also misidentifying it as a Second Department case. The full quote, with underlining to the initial part Satterlee deletes, is as follows:

> "On a motion to dismiss pursuant to CPLR 3211(a)(1), the defendant has the burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim." (underlining added).

The deleted portions underscore that a defendant bears the burden of showing that all allegations of the complaint do not state a cause of action[3] and, as to any stated cause of action, it is rebutted by "documentary evidence".

Such controlling standard made it frivolous, *as a matter of law*, for Satterlee to bring a dismissal motion under CPLR §§3211(a)(7) and (1) if it could not identify (a) ALL the presumed-true allegations of the Complaint which taken together fail to state a cause of action; and (b) ALL these allegations which, stating a cause of action, are documentarily-rebutted.

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[3] See *Gjobnlekaj v. Sot*, 208 A.D.2d 472 (2d Dep't 2003) –which Satterlee cites elsewhere (at p. 19) and for other purposes:

> "It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and according the plaintiff the benefit of every possible inference (*see Leon v Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994])." (underlining added).

Also, *Silsdorf v. Levine*, 59 NY2d, 8, 12 (1983):

> "...we accept as true each and every allegation made by plaintiff...If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action." (underlining added).

The Satterlee dismissal motion does neither. Indeed, it so conceals the Complaint that it does not even identify that in addition to a "First Cause of Action: Libel" (¶¶36-56), there is a "Second Cause of Action: Libel *Per Se*" (¶¶57-64). Only a single paragraph of the libel *per se* "Second Cause of Action" is cited by the motion – and that, in a footnote materially concealing its content and falsifying the law (fn. 14, at p. 21).[4] As for the libel "First Cause of Action", the Satterlee motion cites to only two of its paragraphs – and only passingly, without confronting their content (fn. 7, at p. 6; p. 8). As for the "Third Cause of Action: Journalistic Fraud" (¶¶65-79), none of its paragraphs are either cited or identified. The accuracy of ALL 44 of these paragraphs, comprising the Complaint's three causes of action are not denied or disputed by Satterlee – including ALL the legal authority they furnish, both in the body of those paragraphs and by their annotating footnotes.

As for the 35 paragraphs of the Complaint that precede its three causes of action, the Satterlee motion, to the extent it does cite them, materially distorts, falsifies, and omits their content. The accuracy of these, too, are all undenied and undisputed.

That the Satterlee motion is crafted on the pretense that the Complaint itself, by its incorporated Exhibit 7 analysis, is the "documentary evidence" for its own dismissal pursuant to CPLR §3211(a)(1) is a measure of how extreme its falsification of the Complaint is.

THE SATERLEE MOTION TO DISMISS THE COMPLAINT IS LEGALLY INSUFFICIENT & A FRAUD ON THE COURT

The Satterlee motion consists of a notice of motion signed by Meghan H. Sullivan, Esq., whose name appears below that of another Satterlee attorney, Mark A. Fowler, Esq. It appends two affidavits: one by Ms. Sullivan, which is four sentences long, and the other by a different Satterlee attorney, Emily S. Smith, Esq., which is three sentences. Accompanying these are a 24-page

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[4] See pp. 39-40, *infra*.

memorandum of law, which Ms. Sullivan alone has signed. As with the notice of motion, her name appears below that of Mr. Fowler.

As for the affidavits of the two Satterlee attorneys, each is non-probative and intentionally false and misleading. They are not sworn as being true and do not identify that they are based on familiarity with the facts, papers, and proceedings herein. To further avoid the penalties of perjury[5], each is limited to annexing documents, whose purpose they do not identify, and which, in fact, do not substantiate "a defense...founded upon documentary evidence" as to either the libel and libel *per se* causes of action or the journalistic fraud cause of action. The particulars as to the three documents they annex are set forth at ¶¶5-19 of plaintiff Elena Sassower's accompanying affidavit.

As for the Satterlee memorandum of law, its deceit is hereinafter particularized.

SATTERLEE's FRAUDULENT "PRELIMINARY STATEMENT" (pp. 1-3)

Satterlee's "Preliminary Statement" summarizes the themes which the subsequent sections of its memo of law repeat. All these themes – the basis for its motion – are frauds on the Court.

The first theme, reprised in Satterlee's footnote 8 to its Point IA (at p. 11)[6], where it is an express basis for dismissal, is that the Complaint is "overlong", with "hundreds of pages of exhibits", setting out "a long and convoluted attack on *The Journal News*", with "[m]any of the events

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[5] Penal Law §210.10 pertaining to perjury, makes it a felony for a person to swear falsely when his false statement is:

> "(a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved."

"Those who make affidavits are held to a strict accountability for the truth and accuracy of their content.", 2 Carmody-Wait 2d §4:12, citing *In re Portnow*, 253 AD 395 (2nd Dept. 1938).

[6] *See* fn. 16, *infra*.

described occur[ring] fifteen years ago", and that the "threadbare allegations purporting to give rise to Plaintiffs' lawsuit" are "[b]uried in this mass of paper" (at p. 1).

This is a deceit. There is nothing "overlong" about the Complaint, whose 33 pages[7] contain 79 discrete paragraphs, separated by the following title headings:

"VENUE" (¶2);
"THE PARTIES & BACKGROUND FACTUAL ALLEGATIONS" (¶¶3-12);
"FACTUAL ALLEGATIONS" (¶¶13-35);
"AS AND FOR A FIRST CAUSE OF ACTION: LIBEL" (¶¶36-56).
"AS AND FOR A SECOND CAUSE OF ACTION: LIBEL *PER SE*" (¶¶57-64)
"AS AND FOR A THIRD CAUSE OF ACTION: JOURNALISTIC FRAUD" (¶¶65-79)
"WHEREFORE" Clause (pp. 31-33).

As for the Complaint's exhibits, they are not "hundreds of pages". The nine exhibits are 109 pages total. The most significant of these, Exhibit 7, is the lengthiest. It is plaintiffs' analysis of the news article, consisting of 67 pages: 15 pages are the analysis itself, with 11 annexed substantiating exhibits numbering 52 pages – the first of which is the news article (Exhibit A), both as it appeared in The Journal News' newspaper and on its lohud.com website.

Nor is there anything "convoluted", "buried", or "threadbare" about the Complaint and its exhibits. Rather, they are clear and substantiated, factually and legally, and establish, overwhelmingly, plaintiffs' three causes of action for libel, libel *per se*, and journalistic fraud – which, pursuant to CPLR §3016(a) and (b), requiring particularity for causes of action for libel and fraud, are so-pleaded.

At the heart of the Complaint is Exhibit 7: plaintiffs' analysis – expressly so-entitled and referred-to in 21 separate paragraphs of the Complaint: ¶¶12, 20, 23, 24, 26, 28, 29, 31, 32, 37, 38, 39, 40, 41, 44, 53, 67, 68, 70, 71, 75, and in the "WHEREFORE" clause. The analysis presents a nine-page paragraph-by-paragraph deconstruction of the article, reinforcing, by its particulars:

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[7] The Complaint is followed by a 1-page verification, a 1-page certification, and a 3-page inventory

(a) the Complaint's ¶¶32-34, 52, 58, 60 as to the express facts stated by the article which are false; and

(b) the Complaint's ¶¶14, 42, 48-54, 58, 61 as to the undisclosed implied facts which the article conceals in order to craft its false characterizations.

Yet, nowhere in the Satterlee memo, except in footnote 7 (at p. 6), is the document title "analysis" even used and virtually none of the Complaint's 21 paragraphs referring to the analysis are cited, or their content disclosed. This includes ¶¶31-35, 37, 39, 41 pertaining to the substantiating video. Indeed, Satterlee's motion wholly conceals the existence of the video (Exhibit 10) – and that it corroborates the analysis in establishing the knowing falsity of the article's recitation as to what took place "during" Judge Hansbury's confirmation at the Common Council meeting and as to plaintiffs' purported "pursu[it] of Judge Hansbury from the Council chamber (¶¶32-35).

As for the Complaint's "[m]any...events described [as having] occurred fifteen years ago", reprised in footnote 13 to Satterlee's Point ID (at pp. 20-22) with the assertion that there is no cause of action based thereon and that "any conceivably applicable limitations period would have, in most instances, long ago expired", such events, spanning more than 20 years, are recited by the Complaint succinctly, without undue detail, and essentially cumulatively, primarily in its section entitled "The Parties & Background Factual Allegations" (pp. 2-11), for the purpose reflected by the Complaint's ¶42 of establishing the common law malice underlying plaintiffs' two libel causes of action, as well as for the purpose reflected by the Complaint's "WHEREFORE" clause of calculating the "punitive or exemplary damages" due on plaintiffs' journalistic fraud cause of action (at pp. 32-33).[8]

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of exhibits

[8] "Common-Law Malice and Punitive Damages – Whereas constitutional malice, as defined in *New York Times Co.*, focuses on the defendant's knowledge or state of mind relationship to the veracity of the statement in question and does not rise to the level of outrage or malice necessary to engender punitive damages common-law malice is 'hatred, ill will, spite or wanton, reckless, or willful disregard of the rights of another or the injurious effect of the defendant's conduct upon another,' which supports an award to plaintiff of punitive damages. (2 NY PJI3d 261 [2002]; *Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d*

The second theme, reprised in Satterlee's Point IA (pp. 11-15), Point IB (pp 15-18), and Point IC (pp. 18-20) as the basis for dismissal, is that

> "[Plaintiffs'] own...Complaint conclusively establishes that each of the statements complained of is either non-defamatory, substantially true, or constitutionally protected opinion." (at p. 1).

This is a deceit. Plaintiffs' Complaint, by its two causes of action for libel and libel *per se* (¶¶36-56, ¶¶57-64), each citing to, and quoting from, substantiating legal authority, "conclusively establishes" that the article – which is a news article, not an opinion piece – is knowingly false and defamatory and not constitutionally protected. This is why the Satterlee motion, in its Points IA, IB, and IC, confronts none of the allegations of these two causes of action, including their cited and quoted law, and conceals what the Complaint identifies in 39 paragraphs[9]: that the article is a "news article", which was "prominently published as news, at the top of [the newspaper's] third page" (¶13).

The third theme, reprised in Satterlee's Point IA (pp. 11-15) as a basis for dismissal, is that

> "Even a cursory review of Plaintiffs' own account of their conduct during the meeting demonstrates that the 'gist or sting' of the article is substantially true[fn.3]" (at p. 2).

This is a deceit. "Plaintiffs' own account" – by which Satterlee means the Exhibit 7 analysis – contextually demonstrates that the "gist or sting" of the article is false and identifies (at pp. 6-7, 11-12) the video as corroborating the falsity of the article's description of what took place "during"

466, 479-480, 605 N.Y.S.2d 218, 626 N.E.2d 34 [1993]; Stukuls [v. State of New York [], 42 N.Y.2d [272] at 272; Shapiro [v. Health Ins. Plan, [] 7 N.Y.2d [56] at 61.) Common-law malice is not concerned with a defendant's general feelings or past actions toward the plaintiff, or even exclusive falsity of the statement, but rather the defendant's motivation for making the alleged defamatory statement. (*Liberman [v. Gelstein, []* 80 N.Y.2d 429] at 437; *Stukuls, supra* 42 N.Y.2d at 281-282.)", *Shahla Zaidi v. United Bank*, 194 Misc. 2d 1, 9 (S.Ct/NY Co. 2002).

[9] ¶¶9a, 10a, 11a, 12, 13, 14, 15, 20, 24, 34, 37, 38, 39, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 60, 61, 62, 63, 66, 67, 68, 70, 71, 74, 75, 76.

Judge Hansbury's confirmation at the Common Council meeting and as to plaintiffs' purported "pursu[it]" of Judge Hansbury from the Council chamber (Exhibit 10).

As for Satterlee's annotating footnote 3:

> "Alternatively, some, if not all, factual statements in the Article enjoy the protections of the fair report privilege under New York Civil Rights Law §74." (at p. 2).

It is also deceitful – and Satterlee does not reprise it in its Argument or even identify the assertion in ¶37 of the Complaint as to the inapplicability of New York Civil Rights Law §74 "by its express language" – language the Satterlee motion does not even quote (*see* pp. 35-36 *infra*).

The fourth theme, reprised in Satterlee's Point IA (p. 15) as a basis for dismissal, is that there is only "one respect" in which "Plaintiffs quarrel with the Article's factual account of their actions at the Common Council meeting" – *to wit*, "Elena Sassower insists that she called out, 'a corrupt judge and a corrupt process' not when Judge Hansbury *entered* the Council chambers, but when he was *leaving*." (at p. 2, italics in the original).

This is a deceit. Plaintiffs' Complaint (¶¶14, 32-34, 42, 48-54, 52, 54, 58, 60, 61) and its incorporated Exhibit 7 analysis identify a succession of "respects" in which they "quarrel with the Article's factual account of their actions at the Common Council meeting". As to the "respects" corroborated by the video (Exhibit 10) and particularized by the Complaint's ¶¶32-34, 39, they are:

- that plaintiffs "did not 'heckle' or otherwise make any 'protest' 'during' the Common Council's meeting confirming Judge Hansbury, which took place without disturbance (at 18:50 minutes)", contrary to the news article;

- that "during Reverend Carol Huston's invocation...(at 4:45 minutes), there is no audible 'Hummph' from plaintiff ELENA SASSOWER...Nor is there any visible reaction from anyone reflective of a 'Hummph' having been heard.", contrary to the news article;

- that plaintiffs left the Council Chamber before Judge Hansbury and his wife (at 22:19 – 22:22 minutes), thus not "pursu[ing] them, contrary to the news article.

Other "respects" presented by the Complaint's ¶¶39, 52, 60, and also verifiable, pertain to the extraneous matter injected into the news article to buttress its false characterizations of plaintiffs, establishing:

- that plaintiff Elena Sassower did not interrupt the U.S. Senate Judiciary Committee confirmation hearing that gave rise to her arrest, conviction, and imprisonment for "disruption of Congress" (Exhibits 11a, 11b), contrary to the news article; and

- that plaintiffs had not sued John McFadden in a federal lawsuit in response to eviction proceedings arising from their rejection by the "condominium board", contrary to the news article, Judge Friia's July 3, 2008 decision did not say they had sued McFadden, contrary to the news article, and their federal lawsuit was meritorious, contrary to the implication of the news article.[10]

Further "respects" presented by the Complaint's ¶¶39, 41, 48-52, 54-55, 58, 62, and also verifiable, are the implied facts all purposefully concealed by the article to advance its false and reputationally-damaging characterizations of plaintiffs as:

> "'hecklers', whose behavior was unruly, disrespectful, impertinent, argumentative, harassing, and 'pursu[ing], creating a spectacle by their 'fireworks' and 'slings and arrows' – all "in vain"" (¶58).

The fifth theme, reprised in Satterlee's Point IA (p. 15), Point IB (p. 18), Point ID (p. 21), and Point II (p. 23), including as a basis for dismissal, is that this action is "equally frivolous" as plaintiffs' lawsuit, "Sassower v. The New York Times, No. 05-19841 (Sup. Ct. Westchester Co. 2006)" – as to which "a court in Westchester County held... 'no jurisdiction has embraced [a] cause of action' for journalistic fraud".

This is a deceit. Plaintiffs' lawsuit herein is not "frivolous", as evidenced by Satterlee's inability to confront the allegations of the Complaint, except by fraud and deceit. Indeed, the reason Satterlee conceals footnote 14 to the Complaint, not even identifying, let alone confronting, its two

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[10] See plaintiffs' Exhibit 7 analysis (at pp. 13-14), as well as plaintiff Elena Sassower's accompanying affidavit (at p. 9), identifying the record documents establishing the true facts of the federal lawsuit.

cited law review articles (Exhibits 16, 17) and its cited New York Court of Appeals decision, *Brown v. State of New York*, 89 N.Y. 2d 172, 181-182 (1996), is because such cited authorities make manifest that asserting that "no jurisdiction has embraced [a] cause of action' for journalistic fraud" is NOT a legally-sufficient argument for why such cause of action should not be recognized.

The sixth theme, reprised in Satterlee's "Factual Background: A. The Parties" (pp. 3-5) and inferred by its Point IA (p. 14), Point IB (pp. 17-18), Point ID (p. 21), and Point II (p. 23), is that:

> "Regrettably, this is far from the first time that the Sassowers have taken up the courts' time with less than meritorious claims. This lawsuit is simply the latest episode in a history of frivolous and abusive litigation spanning more than three decades. Plaintiffs Elena and Doris Sassower have attempted time and time again to air their grievances against an ever-expanding list of targets (many of them judges) in lawsuits that routinely have been dismissed as without merit. Indeed, Doris Sassower was suspended from the practice of law in 1991. Both she and her daughter Elena have been sanctioned for their 'vexatious litigating tactics' and enjoined from further pursuing exhaustively litigated claims. Undeterred, here again, Plaintiffs have filed an entirely meritless claim, improperly using the court system as a soapbox for their diatribes against the 'judicial bench[,] with corrupt judges who use their judicial power for ulterior, retaliatory purposes.' Compl. ¶23."

This is a deceit. The Complaint herein is neither "less than meritless" nor "entirely meritless", as Satterlee well knows in endeavoring to prejudice and mislead the Court as to plaintiffs' so-called "history of frivolous and abusive litigation", which – even were it true, which it is not[11] – has no relevance to the issue before the Court: the sufficiency of the Complaint in establishing plaintiffs' causes of action.

SATTERLEE'S FRAUDULENT "FACTUAL BACKGROUND"

Satterlee's Section A: "The Parties" (pp. 3-6)

This section of the Satterlee memo, consisting of six paragraphs, does not deny or dispute the accuracy of any of the Complaint's allegations pertaining to the parties, set forth at ¶¶3-12 of the Complaint under the heading "The Parties & Background Factual Allegations". Instead, it distorts,

falsifies, and conceals the allegations to minimize and besmirch plaintiffs and to conceal the specifics as to the individual defendants Satterlee represents.

As for the defendants Satterlee does not represent – defendant Eddings and defendants DOES 1-10 – Satterlee's Section A does not cite to the paragraphs of the Complaint pertaining to them, ¶¶11-12. It relegates mention of defendant Eddings to its footnote 6 – with no explanation as to why Satterlee is not representing him, other than the inference that it is because "upon information and belief, Mr. Eddings was not timely served with the summons with notice in this action and the claims against him are therefore a nullity". By contrast, it does not even give a footnote to defendants DOES 1-10, who are nowhere mentioned and who, without explanation, Satterlee is not representing, presumably because it cannot: Satterlee being among them[12] (*see* pp. 54-56, *infra*).

Satterlee's Section A also smears plaintiffs by injecting false and misleading matter drawn from judicial decisions which, even were they not judicial frauds (see fn. 11), would be irrelevant, as they rebut none of the paragraphs of the Complaint. Nor are they purported to rebut any of its paragraphs.

The first paragraph (at p. 3) of this section, consisting of two sentences, misrepresents the Complaint's allegations to falsely make it appear that the activism of plaintiffs Elena and Doris Sassower has been as individuals, with no organizational affiliation or titles. Such concealment, like its concealment of the Complaint's "Cause of Action for Libel *Per Se*", follows upon its stripping of their organizational titles "as Director and President, respectively, of the Center for Judicial

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[11] *See* ¶¶20-23 of plaintiff Elena Sassower's accompanying affidavit.

[12] *Cf.* CPLR §1024: "Unknown parties. A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly."

Accountability, Inc." and removal of the words "Acting *Pro Bono Publico*" from the caption of its papers – which Satterlee does without identifying that it has done so and without providing any legal authority for materially changing the caption as to plaintiffs.[13]

With respect to the second sentence of this section, characterizing plaintiffs' activism in unflattering ways:

> "Over the years, their efforts have involved protracted letter-writing campaigns and unsolicited appearances before local, state and national governing bodies.",

its citation is to ¶3(b) of the Complaint. However, ¶3(b) does not identify any "protracted letter-writing campaigns and unsolicited appearances before local, state, and national governing bodies."[14] Rather, it states:

> "In those capacities [as coordinator of the Ninth Judicial Committee and, thereafter, as coordinator of the Center for Judicial Accountability and, ultimately, its director], plaintiff ELENA SASSOWER has spent the past two decades examining, researching, and interacting with the processes of judicial selection and discipline on

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[13] Satterlee's legally-unauthorized, if not proscribed, revision of the caption as to plaintiffs, changes it from:

> "ELENA RUTH SASSOWER and DORIS L. SASSOWER, Individually and as Director and President, respectively, of the Center for Judicial Accountability, Inc., and CENTER FOR JUDICIAL ACCOUNTABILTY, INC., Acting *Pro Bono Publico*,

to

> "ELENA RUTH SASSOWER, DORIS L. SASSOWER, and CENTER FOR JUDICIAL ACCOUNTABILITY, INC."

Conspicuously, Satterlee has not taken such liberties in revising the caption as to defendants, notwithstanding footnote 1 of its memo:

> "As noted in Defendants' Notice of Appearance and Demand for Complaint, The Journal News is merely a business unit of Gannett Satellite Information Network, Inc., and 'LoHud.com' is merely the name of a website maintained by The Journal News. Both are improperly identified as parties to this lawsuit."

[14] Satterlee attempts to give resonance to its false "unsolicited appearances" inclusion in this first paragraph by its next paragraph, which purports: "Elena Sassower...appeared, uninvited, at the United States Senate Judiciary Committee's hearing to oppose the confirmation of Richard Wesley to the United States Court of Appeals for the Second Circuit" (underlining added). This deceit is addressed at fn. 7 of plaintiff Elena Sassower's accompanying affidavit.

local, state, and federal levels. Among the bodies before whom she has testified and/or submitted written statements concerning the fitness of judicial candidates and the screening processes that have produced them: the New York State Senate Judiciary Committee, the United States Senate Judiciary Committee, and, in New York City, the Mayor's Advisory Committee on the Judiciary. Among the bodies before whom she has testified and/or submitted written statements pertaining to judicial discipline are the New York State Senate and Assembly Judiciary Committees, the United States Senate and House Judiciary Committees, and the United States Judicial Conference."

The second paragraph (at pp. 3-4) of this section, consisting of four sentences, opens with the sentence: "In the process, the Sassowers have repeatedly engaged in conduct that has gotten them into trouble." – for which no citation to the Complaint is given. However, the next two sentences do cite ¶4(g) of the Complaint, for the following:

> "On October 18, 1990, following multiple complaints to the Grievance Committee for the Ninth Judicial District[fn] against attorney Doris Sassower, and the resulting initiation of disciplinary proceedings against her, the Second Department ordered Sassower to submit to a medical examination to determine whether she was mentally capable of practicing law....When she declined to submit to an examination, Doris Sassower was suspended from the practice of law." (at pp. 3-4).

This neither reflects nor rebuts ¶4(g), which reads:

> "This sensationalized and false reporting [by Gannett's Journal News], causing plaintiff DORIS SASSOWER to collapse, became the pretext for counsel of the Ninth Judicial District Grievance Committee to make a legally unauthorized motion to have her medically examined, ultimately resulting in her being unlawfully suspended from the practice of law by an interim order of the Appellate Division, Second Department that gave no reasons, was without findings, was not preceded by any hearing, and was immediate, indefinite, and unconditional – an order issued five days after The New York Times published her letter to the editor about the *Castracan v. Colavita* case and Justice Fredman."

Nor is ¶4(g) rebutted – or purported to be rebutted – by Satterlee's additional reference:

> "see also Sassower v. Mangano, 927 F.Supp. 113, 115-117 (S.D.N.Y. 1996) (reviewing history of Sassower's professional misconduct and noting the issuance of three separate disciplinary petitions against her)." (at p. 4).

The fourth and final sentence of this paragraph shifts to plaintiff Elena Sassower's arrest, conviction, and incarceration for "disruption of Congress", citing to and quoting from the

Complaint's ¶3(c) and Exhibit 7 (at p. 7), followed by an additional reference identified as:

> "see also Transcript of sentencing hearing on June 28, 2004 before Judge Brian Holeman of the Superior Court of the District of Columbia, sentencing Sassower to six months incarceration, attached to the Affidavit of Meghan H. Sullivan ('Sullivan Aff.') as Exhibit A[fn 5]" (at p. 4).

This June 28, 2004 sentencing transcript is altogether irrelevant as plaintiff Elena Sassower's arrest, conviction, and incarceration for "disruption of Congress" are not the basis upon which the news article is alleged by the Complaint's ¶60 to be false. Rather, the falsity is in its express and implied assertion that plaintiff Elena Sassower had "interrupt[ed]" the U.S. Senate Judiciary Committee hearing confirming Judge Richard Wesley to the Second Circuit Court of Appeals, when, in fact she was "completely silent", as verifiable from the Senate Judiciary Committee transcript of that May 22, 2003 hearing and its video (Exhibits 11a, 11b), both identified by the Complaint's incorporated Exhibit 7 analysis (at p. 6).

As to the annotating footnote 5:

> "This Court may take judicial notice of undisputed court records and files. See, e.g., Khatibi v. Weill, 8 A.D.3d 485, 778 N.Y.S2d 511 (2d Dep't 2004); see also Skippers & Maritime Servs. Ltd v. KfW, 2008 WL 5215990, at *3 (S.D.N.Y. Dec. 8, 2008) ('[I]n reviewing a motion for judgment on the pleadings, the Court may properly consider...matters subject to judicial notice, including court records.')" (at p. 4),

this is irrelevant, as Satterlee does not, except by inference, request that the Court take judicial notice of the June 28, 2004 sentencing transcript – and, moreover, furnishes a copy to the Court as Exhibit A to Ms. Sullivan's affidavit. It would appear, therefore, that the true purpose of Satterlee's "judicial notice of undisputed court records and files" footnote is to mislead the Court into taking "judicial notice" of other cases involving plaintiffs. As set forth by ¶¶20-22 of plaintiff Elena Sassower's accompanying affidavit, the "court records and files" of those cases do NOT corroborate the judicial decisions to which Satterlee cites. Rather, the "court records and files" of those cases – the only basis upon which to evaluate the legitimacy of the judicial decisions rendered, ("*Legal Autopsies:*

Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases", 73 Albany Law Review 1 (2009), by Gerald Caplan) – establish them to be judicial frauds, upending all cognizable adjudicative standards by falsifying and omitting the material facts and citing law either inapplicable to the true facts or otherwise materially misrepresented.

The third paragraph (at pp. 4-5) of this section, consist of two sentences to which are appended citations to, and/or quotations from, four separate appellate decisions:

> "In addition, both Elena and Doris Sassower have a long history of relentlessly pursuing frivolous lawsuits that have been dismissed as without merit. They have collectively and individually been sanctioned for their vexatious litigation tactics as well as enjoined from bringing further actions related to repeatedly dismissed claims. See Sassower v. Field, 973 F.2d 75, 77-78 (2d Cir. 1992) (affirming imposition of sanctions against both Elena and Doris Sassower for engaging in an 'extraordinary pattern of vexatious litigating tactics' and pursuing the litigation 'as if it was a holy war and not a court proceeding'); Wolstencroft v. Sassower, 235 A.D.2d 540, 540, 651 N.Y.S.2d 609, 609-10 (2d Dep't 1996 (affirming an order sanctioning Doris Sassower in the amount of $10,250 and directing that $100,000 of settlement monies be returned to plaintiff); Sassower v. Comm'n on Judicial Conduct of State, 289 A.D.2d 119, 734 NY.S.2d 68, 69 (1st Dep't 2001) ('The imposition of a filing injunction against both petitioner [Elena Sassower] and the Center for Judicial Accountability was justified given petitioner's vitriolic ad hominem attacks on the participants in this case, her voluminous correspondence, motion papers and recusal motions in this litigation and her frivolous requests for criminal sanctions'); see also Sassower v. Signorelli, 99 A.D.2d 358, 359, 472 N.Y.S.2d 702, 704 (2d Dep't 1984)."

Even were there any basis in fact and law for the foregoing decisions – which there is none (fn. 11, *supra*) – they have no bearing on the merit of plaintiffs' Complaint herein. Such scurrilous matter, wholly irrelevant to the Court's determination of the Complaint's merit, is injected by Satterlee precisely because it cannot and does not confront the Complaint's allegations.

The fourth paragraph (at p. 5) of this section, consists of three sentences pertaining to plaintiff CJA. Without denying or disputing the accuracy of ¶¶3(a), 4(a), 5, 46-47 – the paragraphs of the Complaint it cites – it minimizes plaintiff CJA as a "citizens' group", rather than "a national, non-partisan, non-profit citizens' organization, incorporated under the laws of the State of New

York", set forth in the Complaint's ¶5. It also materially truncates CJA's mission and how it is accomplished, also set forth in ¶5. Most notably, Satterlee makes it appear as if plaintiff CJA *directly* provides "the public" with "the results of its 'investigati[ons]...in independently-verifiable documentary form"— rather than, as stated in ¶5:

> "providing the results, in independently-verifiable documentary form, to individuals and institutions charged with protecting the public from corruption. Among such institutions, The Journal News and its parent entity, defendant GANNETT COMPANY, INC." (underlining in the original).

In so doing, Satterlee conceals that the press is the conduit to the public on "issues of legitimate public concern" – and that this vital role is reflected not only in what it has expurgated from ¶5, but throughout the Complaint, beginning with its opening quote.

The fifth paragraph (at p. 5) of this section consists of six sentences, which do not deny or dispute the accuracy of the Complaint's cited ¶¶6-10, except to state that "Defendant Gannett Company, Inc. engaged in none of the conduct at issue in this case" and that the "real party in interest" is Gannett Satellite Information Network, Inc., of which defendant Gannett is "the parent company". In so-asserting, Satterlee conceals what ¶6(e) specified as "the conduct at issue" with respect to defendant Gannett, *to wit*, failing to take "appropriate supervisory steps" upon:

> "prior notice from plaintiffs of The Journal News' violation of its First Amendment responsibilities to inform the public of issues of legitimate public concern and its defamation and black-balling of plaintiffs".

The sixth paragraph (at p. 6) of this section consists of two sentences, the second materially expurgating ¶6(e) to remove that defendant Gannett received "prior notice from plaintiffs...but took no appropriate supervisory steps". As to the first sentence, Satterlee conceals that ¶3(d), to which it cites, identified how defendants responded to plaintiffs' "barrage of letters" and "primary source documentary evidence" "requesting that they 'investigate or independently verify this documentary evidence of corruption", *to wit*:

"Virtually without exception, The Journal News has refused to investigate or independently verify this documentarily evidence...or to editorialize for its investigation and verification. Instead, it has engaged in knowingly false and misleading reporting and editorializing about these very processes [of judicial selection and discipline] and [the complicit] public officers, concealing their corruption, thwarting reform, and rigging elections – which it has accomplished by minimizing and maligning, if not altogether suppressing, the corruption-exposing achievements of the Ninth Judicial Committee, the Center for Judicial Accountability, and the individual plaintiffs." (underlining added).

Satterlee's Section B (pp. 6-8):
"Plaintiff's Own Account of the White Plains Common Council Meeting"

The first sentence of this section is annotated by a footnote stating:

"In addition to the allegations of their Complaint, Plaintiffs provide a detailed account of [the May 4, 2009 Common Council] meeting in a document annexed as Exhibit 7 and incorporated by reference to the Complaint..." (fn. 7, at p. 6, underlining added).

However, virtually none of the Complaint's allegations pertaining to the Common Council meeting are cited to, or quoted by, this section of Satterlee's memo – and, to the limited extent they are, Satterlee materially distorts them. Thus, the second sentence of this section cites to ¶¶32-34 for its text:

"The meeting's agenda included the nomination of White Plains City Court Judge Brian Hansbury for an additional judicial term."

This is materially false. The Complaint's cited ¶¶32-34 are as follows:

"32. ***The video*** corroborates the analysis, establishing that plaintiffs ELENA and DORIS SASSOWER did not 'heckle' or otherwise make any 'protest' 'during' the Common Council's meeting confirming Judge Hansbury, which took place without disturbance (at 18:50 minutes).

33. ***The video*** further shows that during Reverend Carol Huston's invocation, where she says 'White Plains is a community that cares for its people' (at 4:54 minutes), there is no audible 'Hummph' from plaintiff ELENA SASSOWER, whose back is directly in front of the camera and whose face is seen when she turns around and gives an incredulous look to plaintiff DORIS SASSOWER, standing behind her. Nor is there any visible reaction from anyone reflective of a 'Hummph' having been heard.

34. ***The video*** also shows that immediately following the confirmation, several audience members got up to leave, as Judge Hansbury and his wife went around the council tables, shaking hands with the Council Members and Mayor. Thereafter, a disembodied voice – belonging to plaintiff ELENA SASSOWER – and emanating from the left, in the direction of the door (at 22:14 minutes) – is heard to say 'a corrupt judge and a corrupt process'. At that point, Judge Hansbury and his wife have not left the Council chamber, contrary to the news article." (bold and italics added).

Although nine separate paragraphs of the Complaint identify the video of the Common Council meeting (¶¶31-35, 37, 39, 41, 53), with the video further identified by the Complaint's Exhibit 7 analysis (at pp. 6, 7-8, 11), this section completely conceals the video's existence – as likewise that it corroborates plaintiffs' analysis in demonstrating that:

(1) plaintiffs did not "heckle" or otherwise make any "protest" "during" the Common Council's meeting confirming Judge Hansbury, which took place without disturbance (at 18:50 minutes), contrary to the news article;

(2) plaintiff Elena Sassower's "hummph" during Reverend Huston's invocation (at 4:54 min.), more than 10 minutes before the confirmation, not only did not "interrupt[]" what the reverend was saying, but was so not "loud" as to be inaudible, contrary to the news article;

(3) plaintiffs did not "pursue" Judge Hansbury and his wife from the council chamber, as they left at the conclusion of the confirmation before Judge Hansbury and his wife, contrary to the news article.

As for the recitation in this section, purportedly drawn from "Plaintiffs' own allegations", Satterlee's time sequencing is materially false.[15] Thus, while reciting at the outset of the section's second paragraph (at p. 6) that "According to Plaintiffs' own allegations, both Elena and Doris Sassower 'testif[ied]' during a 'citizens' half-hour preceding the Common Council meeting'", the section's last two paragraphs (at pp. 7, 8) make it appear that plaintiffs' "own allegations" have "the Common

[15] Not involving time sequencing are Satterlee's characterizations (at p. 7) – as if they were "plaintiffs' own allegations" – that Councilwoman Malmud's remarks as to rules against "personal attacks" was "In response to Elena Sassower's invective" and that "Sassower initially refused to comply" with Mayor Delfino's request that she sit down. Such characterizations by Satterlee do not comport with plaintiffs' analysis (Exhibit

Council proceed[ing] with its nomination of Judge Hansbury" BEFORE Reverend Huston's invocation and that Judge Hansbury and his wife left the council chamber BEFORE plaintiffs. This is not only false, based on the analysis (Exhibit 7, at pp. 10, 12), but a flagrant fraud, based on the Complaint's ¶¶31-35 pertaining to the video, whose truth is verifiable from the video (Exhibit 10).

Satterlee's Section C (pp. 8-10)
"The Allegedly Defamatory Article"

This section is crafted on material concealment and falsification, including with respect to the cherry-picked paragraphs of the Complaint it cites.

Thus, Satterlee begins by citing ¶13 for publication of the article – materially omitting that ¶13 had identified that the article was "prominently published as news, at the top of [The Journal News'] third page". Indeed, neither in this section nor in any other section of the memo is the article acknowledged as a "news article" or as printed on a page reserved for news – which, together with the video of the Common Council meeting (Exhibit 10) are decisive, material facts.

Satterlee's next citation, after quoting the article in its entirety (at pp. 8-9), is to ¶¶18-19 of the Complaint, which is for the online feature that allowed readers of the article to post comments and the six posted comments, four unfavorable. In so doing, Satterlee skips four of the Complaint's material paragraphs: ¶14: identifying respects in which the "news article, on its face, was non-conforming with standards for news articles"; and ¶¶15-17: identifying The Journal News' notices and masthead as to its "**READERS' REPRESENTATIVE**" and policy as to "**ACCURACY**" and Corrections".

Satterlee's final citations in this section are to ¶¶20-29 of the Complaint for a single sentence:

> "The Sassowers responded to the Article with repeated e-mails and telephone calls to *The Journal News*, demanding that the Article be retracted and replaced 'with a story written about the issues of legitimate public concern...the judicial appointment

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7).

process by which White Plains gets its City Court judges and the case file evidence establishing Judge Hansbury's on-the-bench corruption.'"

In fact, this sentence mostly reflects ¶20 – including as to the quote expurgated to materially omit that "the issues of legitimate public concern...[about] the judicial appointment process by which White Plains gets its City Court judges and the case file evidence establishing Judge Hansbury's on-the-bench corruption" had been "the subject of plaintiff Elena Sassower's public presentation before the Mayor and Common Council on May 4, 2009", which the article had "purposefully concealed".

Satterlee concludes its Section C with a sentence unaccompanied by any citation to the Complaint:

> "Finding Defendants' responses to these demands lacking, Plaintiffs filed a summons with notice on May 4, 2010, served in on certain of the named defendants within 120 days of filing, and, in response to Defendants' demand, served the Verified Complaint on October 4, 2010." (underlining added).

Such is flagrantly deceitful. ¶¶23-30 of the Complaint could not be clearer that there was NO RESPONSE from defendants to plaintiffs' retraction demand – with the ramifications of this made explicit in the Complaint's causes of action (¶¶44, 52, 68, 71, 72, 76), including their citations of law in their footnotes 8 and 10.

SATTERLEE's FRAUDULENT "ARGUMENT" (pp. 10-23)

Satterlee's Point IA (pp. 11-15)
"Plaintiffs' Own Submissions Establish That the 'Gist or Sting' of the Article is Substantially True"

Satterlee's Point IA rests on the sanctionable deceit set forth in its first paragraph:

> "Plaintiffs' claim that the Article defamed them is fatally flawed because Plaintiffs own Complaint establishes that the factual 'gist or sting' of the Article is substantially true. As the Complaint alleges, on June 14, 2009 (sic), Plaintiffs sent a 'nine page paragraph-by-paragraph deconstruction of the news article' to Defendants, which provides Plaintiffs' own account of their conduct during the May 4, 2009 Common Council meeting. Compl. ¶¶23-24. This document, attached and incorporated into the Complaint as Exhibit 7, expressly corroborates the Article's description in all material respects[fn8]," (at p. 11, underlining added)

This is a flagrant fraud on the Court.[16]

Plaintiffs' nine-page paragraph-by paragraph deconstruction, constituting their analysis of the article, expressly states, in the very first sentence of its six-page Introduction, that it

> "demonstrates that...the article... is knowingly false and misleading, intentionally crafted to defame [the plaintiffs], while simultaneously concealing the issue of legitimate public concern [they] sought to expose: the corruption of the judicial appointments process to White Plains City Court, as established by primary-source documentary evidence." (Exhibit 7, p. 1).

Similarly, the Complaint's ¶38 – the same paragraph as "repeat[s], reiterate[s], and reallege[s]" the analysis "as if more fully set forth" – expressly states:

> "[The analysis] establishes that the news article, by its parts and in context[fn3], is knowingly false and defamatory as to plaintiffs ELENA and DORIS SASSOWER" (underlining in the original).

As to the Complaint's annotating footnote 3, it quotes four separate New York Court of Appeals cases as to the importance of context to determining defamation claims:

> "'It has long been our standard in defamation actions to read published articles in context...not to isolate particular phrases but to consider the publication as a whole...', 'statements must first be viewed in their context...' *Immuno v. J. Moor-*

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[16] Likewise fraudulent is the annotating footnote 8:

> "It is virtually impossible to parse from the hundreds of pages comprising the Complaint and the exhibits exactly what statements in the Article Plaintiffs contend are actionable. As a result, Plaintiffs have failed to comply with CPLR 3016(a) requiring that, in defamation actions, 'the particular words complained of shall be set forth in the complaint.' See also Hausch v. Clarke, 298 A.D.2d 429, 748 N.Y.S.2d 264 (2d Dep't 2002) (holding that it was insufficient under CPLR to attach the entirety of the accused article). The Complaint should be dismissed for this reason as well." (at p. 11).

As hereinabove demonstrated (at pp. 6-7, *supra*), the Complaint and exhibits are not "hundreds of pages" and the statements that plaintiffs contend are "actionable" are readily-apparent from the Complaint's ¶¶32-34, 42, 60, and, additionally, ¶¶14, 42, 48-54, 58, 61, and the incorporated Exhibit 7 analysis.

As for *Hausch*, its purported "holding" that it is "insufficient under CPLR to attach the entirety of the accused article" – implying that such is a general proposition, rather than limited to the specifics of that case – is false. Indeed, that attaching "the entirety of the accused article" can be perfectly adequate to comply with CPLR 3016 is evident from *Hausch*, distinguishing that case from *Pappalardo v Westchester Rockland Newspapers* (101 AD2d 830, *affd for reasons stated at App Div* 64 NY2d 862).

Jankowski, 77 N.Y.2d 235, 250, 254 (1991) (underlining added); 'The entire publication...must be considered...', *Silsdorf v. Levine*, 59 N.Y.2d 8, 13 (1983) (underlining added); 'offending statements can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences', *Gaeta v. New York News*, 62 N.Y.2d 340, 349 (1984) (underlining added); '...the court will not pick out and isolate particular phrases but will consider the publication as a whole...', *James v. Gannett*, 40 N.Y.2d 415, 420 (1976) underlining added)." (underlining in the original fn. 3).

Although Satterlee's own case law citations recognize the controlling importance of context,[17] Satterlee repudiates context in favor of doing precisely what case law instructs should not be done: "pick[ing] out", "isolating", and "disembod[ying] words, phrases, and sentences" from the article.

Thus, unsupported by legal authority, Satterlee proffers to the Court a "side-by-side comparison" of the article and plaintiffs' analysis in a 10-box grid (at pp. 13-14) that is completely a-contextual as to both the fragments of the article and analysis it plucks. It is also fraudulent. The following is illustrative:

As to the first box (at p. 13), which reprints the article's two titles "*Hecklers try to derail new city judge/White Plains woman heckles city judge during confirmation*" as the "Allegedly Defamatory Statement", the "side-by-side comparison" falsifies "Plaintiffs' Own Descriptions" by

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[17] "The challenged language must not be viewed in isolation, but rather the language must be afforded a fair reading in the context of the article as a whole. [***Celle [v. Filipino Reporter Enters., Inc.]***, 209 F.3d at 177 [2nd Cir. (2000] **(quoting *Aronson v. Wiersma*,** 493 N.Y.S.2d 1006, 1007 (N.Y. 1985)]", ***Croton Watch Co. v. Nat'l Jeweler Magazine, Inc.***,2006 WL 2254818 at *5 (S.D.N.Y. Aug. 7, 2006) – all three cases cited by Satterlee (at pp. 12, 16, 19), for other purposes;

"The court must look at the content of the whole communication, its tone and apparent purpose, to determine whether a reasonable person would view it as conveying any facts about the plaintiff (see ***Brian v Richardson***, 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347, 660 N.E.2d 1126 [1995]; ***Gross v New York Times Co.***, 82 N.Y.2d 146, 152-153, 603 N.Y.S.2d 813, 623 N.E.2d 1163 [1993]; ***600 W. 115th St. Corp. v. Von Gutfeld***,*supra* at 145, *Miness v Alter*, [262 A.D.2d 374, 691 N.Y.S.2d 171 [1999])", ***Gjonlekaj v. Sot***, 308 AD2d 471, 273 (2d Dept 2003) – all four (bold) cases cited by Satterlee (at pp. 17, 16, 19), the latter three for other purposes;

"In determining whether a claim for defamation has been adequately pleaded 'the words must be construed in the context of the entire statement or publication as a whole'", ***Cutler v. Ensage***, *Inc.* 856 N.Y.S.2d 23 (S.Ct/NY Co. 2007) – cited by Satterlee (at p. 19) for other purposes.

the preface "During the meeting". Items (i), (ii), and (iii) of "Plaintiffs' Own Descriptions" are NOT "During the meeting" – as verifiable from the video (Exhibit 10) and so-highlighted by plaintiffs' Exhibit 7 analysis (at pp. 1, 2, 6-8) and ¶¶31-35, 42 of their Complaint, to which Satterlee does not cite, deceitfully citing pp. 9, 10 of the analysis instead. As to item (iv) of "Plaintiffs' Own Descriptions", Satterlee's citation to ¶34 materially conceals its content. Most importantly, that plaintiff Elena Sassower's words were not spoke "during" the confirmation, but "following the confirmation", as established by the video, and that those words included "a corrupt process". Nor does Satterlee identify the definition of "heckling", set forth at p. 6 of plaintiffs' analysis.

As to the second box (at p. 13), which reprints as the "Allegedly Defamatory Statement" that plaintiff Elena Sassower was "once jailed by Congress for interrupting a judicial confirmation", the "side-by-side comparison" materially conceals from its "Plaintiffs' Own Descriptions" that this gratuitous inclusion served NO purpose but to buttress the article's FALSE depiction that plaintiff Elena Sassower had been "heckl[ing]", unruly, and "protest[ing]" "during" Judge Hansbury's confirmation, when, as verifiable from the video of the Common Council meeting (Exhibit 10), she had been "completely silent" – just as she had been:

> "completely silent during the judicial confirmation hearing that resulted in [her] being jailed by Congress – as verifiable from the videotape of the U.S. Senate Judiciary Committee's May 22, 2003 public hearing to confirm the nomination of Richard Wesley to the Second Circuit Court of Appeals[fn4]".

Such was set forth at pp. 6-7, 14 of the analysis and ¶¶52, 60 of the Complaint, to which Satterlee does not cite, except to p. 6 for purposes of referencing plaintiff Elena Sassower's conviction for "disruption of Congress in 2004 arising from her conduct at a U.S. Senate hearing on the nomination of Richard Wesley to the U.S. Court of Appeals for the 2nd Circuit.", concealing the alleged "conduct", established by the video and transcript of the Senate Judiciary Committee's May 22, 2003 hearing (Exhibits 11a, 11b).

As to the third through eighth boxes (at pp. 13-14), which reprints as the "Allegedly Defamatory Statement" what purportedly occurred in the Common Council chamber (materially omitting the "protest" that plaintiffs allegedly "carried on" upon "return[ing] to their seats"), the "side-by-side comparison" materially conceals from its "Plaintiffs' Own Descriptions" that NONE of this occurred "during" Judge Hansbury's confirmation, as verifiable from the video of the Common Council's meeting (Exhibit 10) and identified by pp. 1, 2, 6-8 of plaintiffs' analysis and ¶¶32-35 of their Complaint.

As to the ninth box (at p. 14), which includes in its "Allegedly Defamatory Statement" that "the Sassowers stepped up their pursuit" of Judge Hansbury and his wife, the "side-by-side comparison" materially omits from its "Plaintiffs' Own Descriptions" that plaintiffs had NOT followed Judge Hansbury and his wife out of the Common Council chamber – as verifiable from the video of the Common Council meeting (Exhibit 10) and stated at ¶¶34-35 of the Complaint – such being the predicate for the news article's false claim that they had "pursued" Judge Hansbury and his wife, identified by pp. 8, 11, 12 of their analysis (Exhibit 7).

As for the tenth box (at p. 14), which reprints as the "Allegedly Defamatory Statement" that "the [Sassowers] had responded to their eviction by suing McFadden, a suit a federal appeals court dismissed in 1993", the "side-by-side comparison" reveals from its "Plaintiffs' Own Descriptions" that such is false, while concealing the further particulars set forth by pp. 12-14 of their analysis and ¶¶14, 52, 60 of their Complaint that the article's inclusion of the irrelevant federal case, purportedly derived from the July 3, 2008 decision of White Plains City Court Judge Friia, when, in fact, such decision did not state that plaintiffs had sued McFadden, served no purpose but to foster the false illusion that investigative journalism had discredited plaintiffs' opposition to Judge Hansbury, which it had not.

The foregoing demonstrates that Satterlee's "side-by-side comparison" is a flagrant deceit, crafted to conceal what the video establishes (Exhibit 10), *to wit*, that plaintiffs were completely silent "during" Judge Hansbury's confirmation, neither "protest[ing]" nor "heckl[ing]", and did not "pursue" Judge Hansbury and his wife from the Council chamber.

For Satterlee to instead pretend that its "side-by-side comparison...definitively demonstrates the substantial truth of the Article" (at p. 13) and that "Plaintiffs' own admissions make clear that the Article offers a substantially true account of the Sassower's (sic) conduct during the May 4, 2009 Common Council meeting." (at p. 15) are outright frauds on the Court, as is Satterlee's pretense that:

> "the only purported factual inaccuracies Plaintiffs appear to allege concern the exact timing of Elena Sassower's outburst that Judge Hansbury was 'a corrupt judge' and the procedural posture of a convoluted lawsuit that ultimately resulted in the Sassowers' removal from their home." (at p. 15)

– each exposed by the video-supported, analysis-incorporated Complaint.

As for Satterlee's cited case law, it has no relevance other than to reinforce that defendants have no defense based on truth, substantial truth, "gist", or "sting" because, as established by the Complaint, video, and analysis, the news article is, by its parts and in context pervasively and knowingly false.

Satterlee's Point IB (pp. 15-18)
"Certain of the Article's Statements Qualify as Protected Opinion"

Satterlee's Point IB rests on a succession of deceits – beginning with its threshold deceit that plaintiffs "hav[e] effectively acknowledged that the sum and substance of the Article is accurate". As established by their Complaint, analysis (Exhibit 7), and substantiating video (Exhibit 10), they have not.

Pervading this Point IB is Satterlee's concealment that the subject article is a news article,

where a reporter's own "opinion" does not belong. Thus, although 39 paragraphs of the Complaint[18] plus the "WHEREFORE" clause refer to the "news article" – including the two paragraphs at the outset of the Complaint's "Factual Allegations" section:

> "13. On May 6, 2009, The Journal News prominently published as news, at the top of its third page, an article headlined '*Hecklers try to derail new judge*' by defendant EDDINGS (Exhibit A-1). The identical news article was posted on its website, LoHud.com, though with a different headline, '*White Plains woman heckles city judge during confirmation*' (Exhibit A-2).
>
> 14. Upon information and belief, such news article, on its face, was non-conforming with standards for news articles, *inter alia*: (a) by its disparaging characterization 'slings and arrows' in lieu of even a single quote of what plaintiffs ELENA and DORIS SASSOWER publicly stated; (b) by its characterization, with no attributing source, that they 'pursued' and 'stepped up their pursuit' of Judge Hansbury and his wife, upon their leaving the Council chamber; and (c) by implying that by obtaining and reporting on 'a related decision signed by another City Court judge, JoAnn Friia, on July 3, 2008', The Journal News had investigated – and discredited – plaintiffs' publicly-expressed 'alleg[ations]' of Judge Hansbury's 'corruption and conflict of interest...demonstrated by his 2007 decision to evict [them]'". (underlining in the original),

Satterlee does not acknowledge, either in this Point or anywhere in its memo, that the article is a news article or that it is governed by different standards than opinion pieces. Instead, it offers up disingenuous legal argument with expurgated quotes and skewed descriptions to makes it appear that its cited case law support its assertion that defendants' own characterizations in the article are "protected opinion" – when they do not.

Most flagrant is its skewed, indeed false, description of *Mann v. Abel*, 10 N.Y.3d271 (2008) as

> "(holding that news article describing plaintiff as 'political hatchet Mann' and 'one of the biggest powers behind the throne' in the local town government, who 'pulls the strings' and might be 'leading the Town...to destruction' constituted non-actionable expressions of opinion)." (at pp. 16-17, underlining added).

Mann is categorically not about a news article – and the second and third sentences of the Court of

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[18] These are ¶¶9a, 10a, 11a, 12, 13, 14, 15, 20, 24, 34, 37, 38, 39, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51,

Appeals' decision in *Mann* could not be more explicit:

> "The newspaper's founder, defendant Abel, wrote the article as part of his regularly featured column called 'The Town Crier.' The column is located on the opinion page of the newspaper and is identified by an editor's note that it represents the opinion of the author and 'not necessarily that of this newspaper.'" (at 274).

This is reiterated at the outset of the Court's holding:

> "...we note that the column was on the 'opinion' page of the newspaper and accompanied by an editor's note that the article was an expression of opinion by the author." (at 276-277).

Satterlee quotes (at p. 16) *Mann* for the factors "this Court must consider" in determining whether a statement constitutes fact or opinion:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal...readers or listeners that what is being read or heard is likely to be opinion, not fact."—

identifying this quote from *Mann*, 10 NY3d 271, 276 (2008), as taken from *Brian v. Richardson*, 87 NY2d 46, 51 (1995). In fact, *Mann* identifies the more extensive lineage for this quote. *Richardson* quotes it from *Gross v. New York Times Co*, 82 N.Y.2d 146, 153 (1993), which quotes it from *Steinhilber v. Alphonse*, 68 NY2d, 283, 292 (1986) – all New York Court of Appeals cases that Satterlee puts forward to create the misimpression that the characterizations in the article are not actionable, when a reading of these cases and the other cited New York Court of Appeals cases of *600 West 115th St. Corp. v. Von Gutfeld*, 80 NY2d 130 (1992), and *Immuno AG v J. Moor-Jankowski*, 77 NY2d 235 (1991), makes obvious that the characterizations are.

Thus, Satterlee cites (at p. 16) *Gross v. The New York Times* for the proposition:

> "(because 'falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging

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52, 54, 55, 56, 60, 61, 62, 63, 66, 67, 68, 70, 71, 74, 75, 76.

> facts can properly be the subject of a defamation action') (quoting 600 West 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 139, 589 N.Y.S.2d 825, 603 N.E.2d 930 (1992))",

thereupon declaring (at p. 16), with a quote from *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286 (1986):

> "Accordingly, '[i]t is a settled rule that expressions of opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.'".

This, without disclosing that *Steinhilber* had qualified this unequivocal assertion about opinion by distinguishing between "pure opinion" and "mixed opinion":

> "A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts...When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading...it, it is a 'mixed opinion' and is actionable...The element of a 'mixed opinion' is not the false opinion itself – it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking..." (at pp. 289-90, underlining added).

Satterlee's Point IB does not distinguish between "pure opinion" and "mixed opinion", the latter of which it does not identify in inferring that the article's characterizations are "pure opinion", which it does:

- by its footnote 11 (at p. 16), quoting *Ansonian v. Zimmerman*, 215 A.D.2d 614, 614, 627 N.Y.S2d 706 (2d Dep't 1995), ("Expressions of pure opinion are afforded greater protection under the New York State Constitution than under the Federal Constitution.")[19]; and

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[19] The very next sentence of this quote, not included by Satterlee, contains the definition of "pure opinion" which Satterlee's motion conceals:

> "Pure opinion is defined as a statement of opinion which is accompanied by a recitation of the facts upon which it is based or does not imply that it is based upon undisclosed facts *(see, Steinhilber v Alphonse,* 68 NY2d 283, 289)."

Similarly, in *Fleiss v. Wiswell*, 2005 WL 3310014 (2d Cir. December 7, 2005), 157 Fed. Appx. 417; 2005 U.S. App. LEXIS 28981 – cited by Satterlee (at p. 17) for other purposes – *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986) is identified as:

- by the final paragraph of its Point IB (at pp. 17-18), purporting that the "same rationale applies" for dismissal of the Complaint herein as in *Sassower v. The New York Times*, whose "challenged statements" were held to constitute "pure opinion".

In so doing, Satterlee does not directly state that the article's characterizations are "pure opinion". Nor does it acknowledge that even "pure opinion" is actionable when it is:

> "ostensibly accompanied by a recitation of the underlying facts upon which the opinion is based, but those underlying facts are either falsely misrepresented or grossly distorted (*Silsdorf v. Levine*, 59 NY2d 8, cert denied 464 U.S. 831, *Chalpin v. Amordian Press*, 128 AD2d 81.)", *Parks v. Steinbrenner, et al.*, 131 A.D.2d 60, 62-3 (1st Dept. 1987).

Nor does Satterlee assert that the article's characterizations do not imply undisclosed facts, also actionable. Restatement (Second) of Torts, §566). Indeed, although acknowledging:

> "It is well-settled that only statements that can be reasonably interpreted as stating or implying facts about the plaintiff that are objectively provable as true or false are actionable." (at p. 16, underlining added),

Satterlee limits itself to purporting that the article's characterizations "could [not] even remotely be interpreted as stating facts" (at p. 15, underlining added) and that "The allegedly defamatory phrases Plaintiffs identify simply do not constitute statements of fact under any of the three factors governing this determination." (at p. 17, underlining added) – avoiding any affirmative assertion that there are no undisclosed, implied facts.

Yet, even in asserting that the "allegedly defamatory phrases...do not constitute statements of fact under any of the three factors", Satterlee limits itself to baldly asserting as to the first factor:

> "First, the Article's characterizations of the Sassowers as 'hecklers' who 'took on the Common Council' with 'slings and arrows' in no way have 'a precise meaning which is readily understood.'".

It stops there – not even making bald assertions as to the second and third factors, thereby conceding

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"recognizing a distinction between pure opinion, which 'does not imply that it is based upon undisclosed facts,' and mixed opinion, which 'implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it'".

that the limited characterizations it has identified are "capable of being proven...false" and that "the full context of the communication...signal[s] readers that what is being read...is likely to be...fact", *Mann*, at 276 – and making its Point IB frivolous by its own citation (at pp. 16-17) of the three factors "this Court must consider".

Indeed, evident from the six Court of Appeals cases cited by Satterlee's Point IB, as well as its other cited cases[20], is that confronting "the full context of the communication" would have required Satterlee to acknowledge that not only does the article present additional characterizations and descriptions with a "precise meaning" – as, for instance, the words "loud", "protest", and pursu[e]", but that the article, because it is a news article, is in a format recognized as one where "the reader expects to find factual accounts", *Richardson, supra*, at 52; "articles...in the news section rather than the editorial or 'op-ed' sections...'encourag[e] the reasonable reader to be less skeptical and more willing to conclude that [they] stat[ed] or impl[ied] facts', *Gross, supra*, at 156, quoting *600 W. 115th St. Corp. v. Von Gutfeld, supra*, at 142, and that other "signals" of factual content are also present, *to wit*, that the news article bears the by-line of a news reporter – defendant Eddings – who carries the presumption of being a neutral, "disinterested observer" and that the news article's pejorative descriptions, not attributed to any source, would reinforce, for the reader, that this is fact, not opinion: *cf. Gross, supra*, at 151, citing Appellate Division, First Department.: "[e]specially when attributed to a source, the average reader will recognize that criticisms, allegations and

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[20] *Fleiss v. Wiswell*, 2005 WL 3310014 (2d Cir. December 7, 2005), 157 Fed. Appx. 417; 2005 U.S. App. LEXIS 28981, whose appellate determination is expressly based on:

> "review of 'the content of the whole communication, its tone and apparent purpose,' *Immuno AG. v. Moor-Jankowski* [], as well as the three factors laid out by the New York Court of Appeals in *Gross*, 82 N.Y.2d at 153".

assertions are not statements of fact but rather expressions of opinion' (180 A.D.2d 308, 316)."

Satterlee's Point IC (pp. 18-20)
"Any Alleged False Statements of Fact Are Not Defamatory"

Satterlee's Point IC also rests on a succession of deceits, beginning with "Even assuming *arguendo* that any of the Article's descriptions could reasonably be understood as conveying facts rather than opinions" (at p. 18). As hereinabove shown, the article – which is a news article – conveys false facts, both express and implied – beginning with those whose falsity is verifiable from the video (Exhibit 10).

Satterlee's Point IC deceitfully purports that plaintiffs "fall far short of explaining" (at p. 18) and "do not and cannot explain" (at p. 19) how the following statements are defamatory:

> "An (sic) statement implying that an individual was a trifle rude on (e.g. 'interrupting' an invocation at a community government meeting with a 'Hummph,' which the Complaint, in any event acknowledges is true) or the statements in the Article relating to the Sassowers' past litigation over their eviction..." (at p. 18),

thereafter repeating this as

> "(namely, the history of their litigation over their apartment or their 'interrupt[ion]' of Reverend Carol Huston's invocation)" (at pp. 19-20).

This is utterly disingenuous, as plaintiffs' defamation claims are not based on these – and, tellingly, Satterlee provides no citation to the Complaint in purporting that they are. Rather, as ¶63 of the Complaint makes clear, plaintiffs' defamation claims are based on the news article's cumulatively false depiction of them as:

> "'hecklers', whose behavior was unruly, disrespectful, impertinent, argumentative, harassing, and 'pursu[ing]', creating a spectacle by their 'fireworks' and 'slings and arrows' – all 'in vain'" –

a depiction which the article achieves by the false facts, identified by ¶¶32-34, 42, 60 of the Complaint and by the false characterizations concealing the undisclosed true facts, identified by the Complaint's ¶¶14, 42, 48-54, 58, 61.

As for the defamation accomplished by this cumulatively false depiction, plaintiffs "amply explain[ed]" it by their Complaint's two libel causes of action and incorporated analysis (¶¶36-56; ¶¶57-64). Indeed, they proved it by the six on-line reader-reaction comments, four unfavorable – annexed to the Complaint as Exhibit 5, recited at ¶19, "This nut belongs in the loony bin, plain and simple"; "Doris there are meds for this"; "Here is a picture of the nutjob...and of her mother"; "Ms. Sassower-the-Younger...is in dire need of professional help".

That such posted on-line reader comments are dispositive of the news article's defamatory effect is evident from Satterlee's own case law, as for instance:

> ***Cutler v. Ensage, Inc.*, 856 NYS 2d 23 (S.Ct/NY Co. 2007):** "In determining whether a claim for defamation has been adequately pleaded 'the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader'", (underlining added) – cited by Satterlee (at p. 19) for other purposes.

The "average reader[s]" are those who posted comment. Satterlee does not deny or dispute this– and by its deceitful Point IE, (p. 41, *infra*), reinforces it.

As with Points IA and IB, all Satterlee's cited case law in Point IC is corroborative of plaintiffs' two libel causes of action. This includes *Mencher v. Chesley*, 297 NY 94 (1974) – Satterlee's first cited case in this section (at 19), also cited in its Point IA (at p. 13) – wherein, and reinforcing the jury demand asserted by plaintiffs' Complaint – the New York Court of Appeals said:

> "...In upholding the complaint...we do no more than determine that it presents an issue of fact for a jury to decide. (*Balabanoff* v. *Hearst Consolidated Publications*, [294 NY 351 (1945)], at p. 356; *Katapodis* v. *Brooklyn Spectator, Inc.*, [287 NY 17 (1941)], at p. 21; *Sweeney* v. *United Feature Syndicate*, 129 F. 2d 904, 907 [1942].) As this court wrote in the *Katapodis* case *(supra)*, p. 21, 'We think it is not for us to say that the publication of such a piece of news did not hurt the plaintiffs by tending to deprive them of friendly association with a considerable number of respectable members of their community. We believe it is the right of the plaintiffs to have a jury say whether the false words did, in fact, so defame them.'" (at p. 102, underlining added).

Satterlee's Point ID (pp. 20-21)
"There Can Be No Liability for Defendants' Alleged Failure to Include Themes and Details Advanced by Plaintiffs"

Satterlee's Point ID is also fashioned on a succession of deceits. It begins:

> "Plaintiffs' difficulties with identifying an actionable statement in the Article stems from the reality that, at base, Plaintiffs' actual problem is not with what the Article says. Plaintiffs' true grievance is with what the Article does not say." (at p. 20).

As hereinabove demonstrated, plaintiffs had no such "difficulties" and by their Complaint identified numerous "actionable statement(s)", beginning with "what the Article says" took place "during" Judge Hansbury's confirmation, the falsity of which is verifiable from the video (Exhibit 10).

To fashion its deceitful argument, Satterlee's Point ID prunes (at p. 20) the five paragraphs of the Complaint it quotes to make it appear that plaintiffs' objection is to what defendants did not say, rather than what they did. Thus, its expurgation of ¶¶3(d) and 4(j) of the Complaint removes their references to "knowingly false and misleading reporting and editorializing" and "dishonest editorial endorsements". Similarly, its expurgation of ¶¶12, 20, and 28 removes their references to the "knowingly false and defamatory" article, as established by their fact-specific, document-supported analysis underlying their demands for retraction and a proper new story.

Based on nothing more than these expurgated paragraphs – along with an expurgation from plaintiffs' analysis – Satterlee purports:

> "Plaintiffs' suggestion that they are somehow entitled to dictate the substance of defendants' news coverage is entirely unfounded." (at p. 20)

This is utterly false – and even the expurgated and cherry-picked quotes in Satterlee's Point ID do not support its pretense as to "Plaintiff's suggestion" of what "they are somehow entitled to".

Satterlee's four legal citations (at p. 21) are equally deceitful. Indeed, the inappositeness of *Miami Herald Pub. Co. v. Tornillo*, 418 US 241, 258 (1974), and *Holy Spirit Ass'n v. New York*

Times Co., 49 NY2d 63, 68 (1979), may be seen from the paragraph of the unpublished decision in *Sassower v New York Times* from which they were plucked. That paragraph, whose finding Satterlee does not reveal, purports:

> "based solely on the complaint and exhibits annexed thereto, it is apparent that the article is a fair and substantially accurate description of the official proceedings it purported to cover (see NY Civil rights law §74)."

Satterlee presents no argument that the news article that is the subject of plaintiffs Complaint is a "fair and substantially accurate description of the official proceedings it purported to cover", notwithstanding its footnote 3 in its Preliminary Statement (at p. 2) purports: "Alternatively, some, if not all, factual statements in the Article enjoy the protections of the fair report privilege under New York Civil Rights Law §74". Indeed, in contrast to Satterlee's repetitions that the article is "substantially true", including by its Point IA (at pp. 11-15), its memo nowhere purports that the article is "fair".

The inapplicability of New York Civil Rights Law §74 is directly stated by ¶37 of plaintiffs' Complaint as follows:

> "37. As demonstrated by plaintiffs' analysis (Exhibit 7) and the video, the news article... is not a 'fair and true report' of what took place 'during' the May 4, 2009 White Plains Common Council meeting – nor of what took place in the citizens' half-hour preceding it.
>
> (a) Such vitiates any privilege under New York Civil Rights Law §74, by its express language[fn2]" (underlining in the original).

The Complaint's annotating footnote 2 reprints the statute, in full.

> "fn.2 'New York Civil Rights Law §74. 'Privileges in action for libel
>
> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.
>
> This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.'"

Treatise authority, such as Law of Defamation (2nd ed.) by Rodney A. Smolla, further establishes the inapplicability of New York Civil Rights Law §74, especially with respect to fairness:

§8:75 "'Fair report' privilege – Requirement of accuracy and fairness":

> "To be protected by the privilege, the report must be fair and even-handed[fn]. Thus, reports that are 'partial' and reports that are not 'impartial' may not be deemed covered.
>
> ...
>
> Since the rationale of the fair report privilege is that the reporter acts as a substitute for the citizen's personal observation of public proceedings, the privilege is lost if the report is not an accurate and fair summary of what transpired. Editorializing or writing a one-sided account will cause a privilege to be lost.

§8:76 "'Fair report' privilege – Requirement of accuracy and fairness – substantial accuracy test":

> "The fair report privilege thus contemplates a degree of arms-length objectivity on the part of the reporter, an objectivity that goes beyond the far less demanding standards of the actual malice test. Whereas the orthodoxy is that a lack of balance in the presentation of a story is not enough, standing alone, to establish actual malice,[fn] a lack of balance *is* enough to disqualify a reporter from the benefits of the fair reports privilege...To be fair a report must therefore present the abridged account of the proceedings neutrally and impartially, without spin, distortion, commentary, or editions that change the meaning. A journalist is not entitled, under the privilege, to make additions of his or her own that would convey a defamatory impression, nor to impute corrupt motives to anyone, nor to indict expressly or by innuendo the veracity or integrity of any of the parties. Where an article reporting on a judicial case goes beyond the mere factual account of the judicial proceeding and adds additional matter from unrelated judicial proceedings that may be deemed false when so joined, the privilege is lost, and the journalist's defense must stand or fall on the underlying truth or falsity of the account, and the fault or lack of fault by the journalist presenting it. (italics in the original).

To the same effect, Libel and Privacy (2nd edition, 2006) by Bruce W. Sanford:

> §10.3.2 Fairness – "including in the publication of material which is not in the public record may result in loss of the privilege. Nor, in view of some courts, will an account qualify for the privilege if it is one-sided, or unfairly selective in the excerpts of the public record it reports."

As for Satterlee's quotation (at p. 21) of *Miami Herald Pub. Co. v. Tornillo*, it is a two-fold deceit. First, *Miami Herald* was not about libel or journalistic fraud, but the constitutionality of a

statute requiring newspapers criticizing political candidates to afford them a right of reply – which Satterlee does not disclose. Second, the implication of its quotation from *Miami Herald*: "the choice of material to go into a newspaper, and the decisions made as to limitations on the...content of the paper, and treatment of public issues...– whether fair or unfair – constitute the exercise of editorial control and judgment" is that a newspaper's exercise of editorial control and judgment is limitless – which is false. Satterlee certainly knows that in *Herbert v. Lando, et al.*, 441 U.S. 153, 166-7 (1979), the Supreme Court expressly rejected any notion that *Miami Herald* "had announced unequivocal protection for the editorial process" and powerfully reaffirmed that the editorial process is a proper and essential subject of inquiry by libel plaintiffs. As for *Holy Spirit Ass'n v. New York Times Co.*, which is a libel case, Satterlee quotes it (at p. 21) for the proposition "a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author", without revealing that the New York Court of Appeals, in so-asserting, first found that the articles in that case were "'fair and true' accounts" under New York Civil Rights Law §74.

As for the final case, *Rinaldi v. Holt, Reinhart & Winston, Inc.*, 42 NY2d 369, cert denied, 434 US 969 (1977), a libel case which Satterlee cites (at p. 21) for the proposition "the omission or inclusion of details is 'largely a matter of editorial judgment in which the courts and juries, have no proper function.'", without indicating the page of the decision wherein the New York Court of Appeals so-stated, examination of that page – p. 383 – shows that Satterlee has materially omitted the relevant preceding text:

> "omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts, and juries, have no proper function. (*James v. Gannett Co.*, 40 NY2d 415, 424, *supra.*)"

In other words, where omitted "details" are not "minor" and the account is not "basically accurate", such is actionable – as at bar, where the proof, identified by ¶37 of the Complaint, is plaintiffs' analysis (Exhibit 7) and the video (Exhibit 10).

Tellingly, Satterlee's Point ID does not identify, let alone deny or dispute, any of the legal authority presented by plaintiffs' Complaint, including with respect to "non-reporting", for which the Complaint's footnote 7 was as follows:

> "Law of Defamation, 2nd ed. (2005), Rodney A. Smolla, §3:69:
>
> > 'Courts have held that the defendant's choice of which facts to report, or the defendant's resolution of inference or ambiguities in a manner adverse to the plaintiff, while not alone constituting actual malice, may be probative of the existence of actual malice.
> >
> > There is a subtle difference between the principle that a defendant may select from among various interpretations of the 'truth' and conscious manipulation of evidence at hand. At some point on the continuum of journalistic judgment 'honest selectivity' gives way to distortion – the evidence is deliberately mischaracterized or edited in such a way as to create the possibility that the defendant acted with knowledge of falsity or reckless disregard for the truth. A lack of balance may, therefore, in some cases be probative of actual malice.'
>
> 'Fraud may be committed by suppression of the truth, that is, by concealment, as well as by positive falsehood and misrepresentation. Where a failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentation is tenuous; both are fraudulent.', 60A New York Jurisprudence 2d §91: 'Concealment Generally'; 'the distinction between concealment and affirmative misrepresentation faded into legal insignificance, both being fraudulent', *Hadden v. Consolidated Edison Company of New York*, 45 N.Y.2d 466, 470 (1978), citing cases."

As stated by ¶54 of plaintiffs' Complaint:

> "54. Defendants' editorial decisions to expunge from the news article the evidence-based issues of legitimate public concern about which plaintiffs publicly spoke, in favor of false and defamatory characterizations and negative embellishments, are not 'sustainable' and 'clear abuses', as to which the courts have a 'supervisory function'.[fn.11] (underlining in the original).

The annotating footnote 11 is "*Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 349 (1984),

citing *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975)." Both these New York Court of Appeals cases are libel actions and the referred-to quote from *Gaeta* is as follows:

> "Determining what editorial content is of legitimate public concern is a function of editors. While not conclusive, 'a commercial enterprise's allocation of its resources to specific matters and its editorial determination of what is 'newsworthy', may be powerful evidence of the hold those subjects have on the public's attention.' (*Cottom v. Meredith Corp.*, 65 AD2d 165, 170 [1978]) The press, acting responsibly, and not the courts must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable. (*Chapadeau v. Utica Observer-Dispatch*, 38 NY2d 196, 199 [1975])." (underlining added).

As established by plaintiffs' analysis (Exhibit 7) and the video (Exhibit 10), defendants' news article is not a "fair and true report" of the Common Council's May 4, 2009 meeting and neither "responsibl[e]" nor "sustainable".

Finally, the last sentence of Satterlee Point ID (at p. 21), in reprising its false argument that plaintiffs are seeking to "impose liability on Defendants for declining" to "publish the arguments and 'documentary evidence' of Plaintiffs' choosing", appends a footnote, flagrantly falsifying both fact and law. It is Satterlee's footnote 14 and reads:

> "The Sassowers also find fault with Defendants' failure to mention their affiliation with the CJA, which is named as a party to this action notwithstanding Plaintiffs' admission that the Article makes no mention of it whatsoever. See Compl. ¶47 (faulting the Article's 'purposeful concealment that the individual plaintiffs had expressly identified themselves as CJA's Co-Founders, Director, and President'). Plaintiffs essentially ask this Court to hold Defendants liable for defamation by omission, a finding that would fundamentally contradict the well-established case law holding that there can be no defamation in the absence of a statement 'of and concerning' the plaintiff. See Chicherchia v. Cleary, 207 A.D.2d 855, 855, 616 N.Y.S.2d 647, 648 (2d Dep't 1994) ('For there to be recovery in libel, it must be established that the defamation was 'of and concerning the plaintiff' .... The burden it has been held, is not a light one.') (internal citations and quotations omitted); Diaz v. NBC Universal, Inc., 536 F. Supp. 2d 337, 342 (S.D.N.Y. 2008) aff'd. 337 F.App'x. 94 (2d Cir. 2009) (a court 'properly may dismiss an action pursuant to Rule 12(b)(b) where the statements are incapable of supporting a jury's finding that the allegedly libelous statements refer to plaintiff'). Because, by Plaintiffs' own admission, the Article is not 'of and concerning' Plaintiff CJA, the claims asserted on its behalf must be dismissed as a matter of law."

This is utterly false. The Complaint nowhere alleges that because plaintiff CJA is not mentioned by the article, therefore the article was not "of and concerning" CJA. To the contrary, the Complaint's ¶61 makes clear that CJA and plaintiffs' professional affiliation to it did not have to be mentioned – as these "would be independently known by a substantial number of readers in the community". ¶61 ALSO furnished evidentiary proof of the independent knowledge that readers in the community would have, citing to the Complaint's Exhibits 1b, 1c, and 1f. Additionally, it provided case law and treatise authority by an annotating footnote 13:

> "*Hinsdale v. Orange County Publications, Inc.*, 17 N.Y.2d 284 (1966), '...a fact not expressed in the newspaper but presumably known to its readers is part of the libel.'; LEXSTAT AT NY JUR DEFAMATION PRIVACY 7: 'extrinsic facts may be considered in determining whether a writing is libelous per se where the extrinsic facts are presumably known to the readers of the statement'; *Michaels v. Gannett Co., Inc., 10 A.D.2d 417*, 420-421 (App. Div. 4th Dept. 1960), 'The test is...what the readers of the article reasonably understood the defendant to have intended (*Corrigan v. Bobbs-Merrill Co., 228 N. Y. 58*; Restatement, Torts, §§564, 579)'."

Not only does Satterlee not deny or dispute the sufficiency of plaintiffs' Exhibits 1b, 1c, and 1f, but, because its <u>own</u> legal authority reflects the same proposition as the Complaint's footnote 13, materially truncates the quote from *Chicherchia* in its footnote 14 to mislead the Court with a <u>false</u> proposition of law. The continuation of the quote from *Chicherchia*, which Satterlee cuts from its footnote 14, is:

> "The party alleging defamation need not be named in the publication but, if, as is the case here, he or she is not, that party must sustain the burden of pleading and proving that the defamatory statement referred to him or her (Prosser and Keeton, Torts § 111, at 783 [5th ed]). The reference to the party alleging defamation may be indirect and may be shown by extrinsic facts. But where extrinsic facts are relied upon to prove such reference the party alleging defamation must show that it is reasonable to conclude that the publication refers to him or her and the extrinsic facts upon which that conclusion is based were known to those who read or heard the publication (*Geisler v Petrocelli*, [616 F2d 636, 639];Prosser and Keeton, Torts § 111, at 783 [5th ed])."[21]

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[21] Also, *Smith v. Long Island Youth Guidance, Inc.*, 181 A.D.2d 820, 821 (2nd Dept. 1992):

Satterlee's Point IE (pp. 22-23)
"Section 230 of the Communications Decency Act Shields Defendants From any Liability for Comments Posted by Readers"

Satterlee's Point IE is a deceit as the Complaint does not seek to impose liability on defendants for comments posted on-line by readers[22]. Rather, as ¶¶18-19, 55 of the Complaint make evident, the on-line comments of readers are proof of the news article's defamation.

Satterlee's Point II (p. 23)
"There is No Cause of Action for Journalistic Fraud"

Satterlee's Point II is a single deceitful paragraph as to why the Court should reject a journalistic fraud of action:

> "Re-treading familiar ground, the Sassowers attempt to supplement their legally deficient libel claims with a claim for 'journalistic fraud,' a non-existent cause of action never recognized in New York or in any other state. As the Supreme Court of New York stated five years ago in rejecting the Sassowers' invitation to create the identical 'journalistic fraud' claim, 'no jurisdiction has embraced such cause of action.' Sassower v. The New York Times Co., No. 05-19841, Order (Sup. Ct. Westchester County Jul. 6, 2006), attached as Sullivan Aff. Exhibit B. The same holds true today. This Court should decline to invent entirely new grounds for relief on the basis of allegations that are uniformly without merit."

As hereinabove demonstrated, there is nothing "legally deficient" about plaintiffs' "libel claims". Nor did Judge Loehr's unpublished decision in *Sassower v. The New York Times Co.* actually reject the viability of a journalistic fraud cause of action. Rather, without challenging the argument and legal authorities of the law review article, "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*", 14 Fordham Intellectual Property, Media and Entertainment Law Journal 1 (2003) (Exhibit 16), positing the viability and value of a

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> "a libel cause of action may, under certain circumstances, be maintained by a person not actually named in the allegedly libelous text (see, *Harwood Pharmacal Co. v. National Broadcasting Co.*, 9 NY2d 460, *Bee Publ. v. Cheektowaga Times*, 107 AD2d 382, 284)."

[22] *Cf.* Satterlee's p. 10 assertion "Plaintiffs do not and cannot allege that Defendants authored these statements". (underlining added).

journalistic fraud cause of action, Judge Loehr asserted "To date, based on the Court's research, no jurisdiction has embraced such cause of action".

This is insufficient – as Satterlee well knows in concealing the Complaint's annotating footnote 14 to the title heading "As and for a Third Cause of Action: Journalistic Fraud". Footnote 14 states:

> "Such proposed cause of action, designed to foster media accountability and facing no First Amendment bar, is discussed in the law review article '*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*', 14 Fordham Intellectual Property, Media & Entertainment Law Journal 1 (2003), by Professors Clay Calvert and Robert D. Richards, Co-Directors of the Pennsylvania Center for the First Amendment at the Pennsylvania State University.
>
> That the law evolves, with new causes of action constantly emerging, is further reflected by the law review article, '*Institutional Reckless Disregard for Truth in Public Defamation Actions against the Press*', 90 Iowa Law Review, 887 (2005), proposing yet a further cause of action for media accountability.
>
> Recognition of these causes of action is consistent with what the New York Court of Appeals articulated in *Brown v. State of New York*, 89 N.Y.2d 172, 181-182 (1996): 'new torts are constantly being recognized'."

Satterlee does not deny or dispute any aspect of this footnote – most importantly, that a journalistic fraud cause of action faces no First Amendment bar. As stated in "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*" (Exhibit 16), whose two authors, the co-directors of the Center for the First Amendment at Pennsylvania State University, are professors of journalism/communications and law, with law degrees:

> "It is well-settled U.S. Supreme Court precedent that news organizations lack immunity from generally applicable tort liability.[fn.62] Moreover, as one federal appellate court recently concluded, 'allowing recovery of damages for common law misrepresentation...does not offend the First Amedment.'.[fn.63] Similarly, a Minnesota appellate court observed in 1988, 'There is no inherent conflict or tension with the First Amendment in holding media representatives liable for the tort of

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"fn. 62 *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991)."

"fn.63 *Veilleux v. NBC*, 206 F3d 92, 129 (1st Cir. 2000)."

fraud.[fn.64]'" (Exhibit 16, at p. 12)

"...the U.S. Supreme Court has made it abundantly clear that when an entity knowingly publishes false speech or recklessly disregards whether speech is false, then the speech merits no First Amendment protection – even if it involves a public official or an issue of public concern. This is the lesson from *New York Times v. Sullivan*,[fn.140] in which the Court adopted the actual malice standard to protect the press when reporting on matters affecting government policy. The Court held in *Sullivan* that even false speech about government officials and matters of official conduct deserves protection *unless* it is published 'with knowledge that it was false or with reckless disregard of whether it was false or not'.[fn.141] Indeed, the Court has written that reckless disregard for truth on the part of media defendants is concomitant with 'a high degree of awareness of their probable falsity.'[fn.142] The Court also noted that reckless disregard for the truth exists when 'the defendant in fact entertained serious doubts as to the truth of his publication.'[fn.143]" (Exhibit 16, at p. 25, italics in the original).

"Without legal liability, only marketplace accountability protects *Times* consumers.[fn.151] Readers who object to fraudulent and negligent reportage may take action by canceling their subscriptions and refraining from future newspaper purchases. Yet such action only punishes the *Times* and fails to compensate readers for the harm they suffered in their beliefs, opinions, and actions on matters of public concern. Subjects of defamatory statements must not remain the only parties who can recover for falsehoods and fabrications. Readers also should have the opportunity to recover, and language of the U.S. Supreme Court supports this proposition. The Court has noted that '[f]alse statements of fact *harm* both the subject of the falsehood *and the readers of the statement.*'[fn.152] The Court has added that a state has a valid interest in 'safeguarding its populace from falsehoods.'[fn.153]"

"fn.64 *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 793 (Minn. App. 1998)."

"fn.140 376 U.S. 254 (1964)."

"fn.141 *Id.* at 279-80."

"fn.142 *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)."

"fn.143 *St Amant v. Thompson*, 390 U.S. 727, 731 (1968)."

"fn.151 *See generally* Theodore L. Glasser, *Press Responsibility and First Amendment Values*, in RESPONSIBLE JOURNALISM 81, 82 (Deni Elliott ed., 1986) (observing that the press is 'wedded to a marketplace model of press accountability')."

"fn.152 *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (emphasis added)."

"fn.153 *Id.* at 777."

(Exhibit 16, at p. 27, underlining added)

> "The Court has also held that there is 'no constitutional value in false statements of fact.'[fn.154] Moreover, the Court has made clear that a news organization can face legal accountability for publishing false statements about matters of public concern when it recklessly disregards whether those statements are false.[fn. 155] ... Furthermore, the Court has indicated that fraud and negligence are generally applicable torts and that 'enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or oganizations.'[fn.156]" (Exhibit 16, at p. 28).

Nor does Satterlee deny or dispute that recognition of a journalistic fraud cause of action by the courts, as likewise recognition of a cause of action for libel based on institutional reckless disregard for truth, would be consistent with the New York Court of Appeals' decision in *Brown v. State of New York*. As stated therein:

> "...it is well to recognize that the word tort has no established meaning in the law. Broadly speaking, a tort is a civil wrong other than a breach of contract (see, Prosser and Keeton, [5th ed.] §1). There are no fixed categories of torts, however, and no restrictive definitions of the term (*see, Advance Music Corp. v. American Tobacco Co.*, 296 NY 79; *see also*, Prosser and Keeton, *op. cit.*). Indeed, there is no necessity that that a tort have a name; new torts are constantly being recognized (see, the extensive analysis by Justice Breitel, as he then was, in *Morrison v. National Broadcasting Co.*, 24 A.D.2d 284, *revd on other grounds* 19 N.Y.2d 453; *see also*, 16 ALR3d 1175). Tort law is best defined as a set of general principles which, according to Prosser and Keeton, occupies a 'large residuary field' of law remaining after other more clearly defined branches of the law are eliminated (Prosser and Keeton, *op. cit.*, §1, at 2.)."

Thus, that "no court has recognized a journalistic fraud cause of action" is no argument for why such cause of action should not be recognized by this Court. Indeed, even had the unpublished *Sassower v. New York Times* decision purported, based on Judge Loehr's claimed "research", that the journalistic fraud cause of action had been previously tested and rejected – <u>which it conspicuously did not</u> – such would be worthless unless the decision gave reasoned explanation confronting the

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"fn.154 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)."

"fn. 155 See *supra* note 140 and accompanying text."

constitutional and other arguments in "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*" (Exhibit 16) supporting its recognition. This is clear from the masterful exposition of "Procedure as a Source of Judicial Legitimacy" in "*Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*", 53 University of Kansas Law Review, 531, 522-556 (2005), by Amanda Frost, discussing the components of such legitimacy: "A. Litigants Initiate and Frame Disputes"; B. Adversarial Presentation of Disputes", "C. Reasoned Decisionmaking"; "D. Reference to Governing Body of Law"; and "E. Impartial Decisionmaker".

Tellingly, the only case Satterlee identifies as having tested the journalistic fraud cause of action is *Sassower v. New York Times* – giving rise to the inference that it is the only case to have done so prior to this one.

As more fully particularized by ¶¶11-16 of plaintiff Elena Sassower's accompanying affidavit, the record in *Sassower v. New York Times* establishes that Judge Loehr's unpublished decision on which Satterlee relies is a complete fraud, Even still, Judge Loehr was not adverse to recognizing a cause of action for journalistic fraud were the allegations of the complaint therein within the purview of such cause of action, which he held they were not:

> "as opposed to the Blair case in which there was admitted widespread fabrication of news stories and plagiarism, the gravamen of plaintiffs' claim as alleged in the complaint is not defendants' misstatement of fact... Thus, even if such cause of action existed, plaintiffs have failed to allege a claim thereunder." (at p. 9).

Here, because the facts specified by the Complaint as giving rise to the journalistic fraud cause of action are so obviously within its purview, Satterlee avoids them entirely. Thus, Satterlee neither cites to, nor identifies the content of, the paragraphs of the Complaint's journalistic fraud cause of action (¶¶65-79). Indeed, Satterlee's so-called "Factual Background" (pp. 3-10) also skips the paragraphs of the Complaint's "Factual Allegations" which are at the heart of the journalistic

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"fn.156 *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991)."

fraud cause of action (¶¶70-75) – *to wit*, those pertaining to the "**READERS' REPRESENTATIVE**" and "**ACCURACY**"/"Corrections" Policy (¶¶15-17).

With respect to ¶¶15-17, 21, 73-75 pertaining to the "**READERS' REPRESENTATIVE**" – a position intended to ensure the integrity of The Journal News' journalism – defendant Journal News' abolishment of that position, or at very least its failure to staff it, cannot be seen as having journalistic justification. Such decision, irrespective of whether it was failure to staff or abolition of the position, may be presumed to be financially-driven, impelled by a desire to increase defendant Gannett's renowned profit margin[23]. As such, this case is perfect for recognizing the cause of action proposed by the law review article "*Institutional Reckless Disregard for Truth in Public Defamation Actions against the Press*" (Exhibit 17), additionally referred-to in the Complaint's footnote 14.

The authors of that law review, Randall P. Bezanson, a professor of law, and Gilbert Cranberg, a professor of journalism emeritus and a former editorial page editor, detail the changed "media landscape" since *New York Times v. Sullivan*, 376 U.S. 254 (1964), where, in addition to media consolidation, newspapers are publicly-traded, with a focus on "the bottom line", not journalism:

> "...when newspaper companies opted to go public, they declared in essence that they wanted to be treated the same as any other enterprise in the marketplace.
> Increasingly media companies resemble and behave the same as any other business..." (Exhibit 17, at p. 890).

Under the title heading: "THE MEANING OF THE INSTITUTIONAL RECKLESS STANDARD", they state:

> "We propose a public defamation action that plaintiffs would bring against the publisher or parent company of a news organization rather than the reporter or editor of the story. The action would be a common law defamation claim that would require a plaintiff to prove the common law elements of defamation and would also

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[23] *See* ¶6(a) of the Complaint, quoting "*Institutional Reckless Disregard for Truth in Public Defamation Actions against the Press*", at 890.

require the plaintiff to overcome a First Amendment privilege by showing that the publisher, parent company, or its agents contributed to the defamation by acting in institutional reckless disregard of the truth.[fn] The institutional reckless disregard question, in turn, is whether, at the level of a publisher or in the higher corporate reaches of a parent company, decisions were made for financial and financial-market-based reasons unrelated to journalism in the face of known risks of falsity that would result from the decision.

The question, in other words, is not simply whether the editors or news staff disagreed or were substantially hampered by the decisions, but whether the persons making the financial and market-based decisions were aware of the consequences and nonetheless acted without journalistic justification. For purposes of liability, therefore, the question is not exclusively focused on the particular false and defamatory statement that was published, but on procedure that caused a heightened risk of falsity, and whether the decision to adopt the policy or procedure was made without journalistic justification, but with knowledge of its systematic consequences.

...

Our proposed defamation action against a parent company for libel based on institutional reckless disregard would be a separate claim from one against the paper via the reporter or editor for defamation based on actual malice. The two claims might be filed together...A given plaintiff might bring one or the other or both. It is possible that a plaintiff might prevail on both, though we think that unlikely since a finding of actual malice by the reporter would ordinarily mean that any bad corporate decisions had no legally material effect on the particular story. This would be the case unless, of course, the corporate decision was that reporters need no worry about the truth or should publish big and profitable stories even if the reporter doubts the truth of those stories.

If, in a rare case, a plaintiff prevails on both claims, he or she will recover from the parent on the intentional reckless disregard claim. In all likelihood he or she will also collect on the actual malice claim from the parent. Likewise, success on one or the other claim will, in the end, result in payment for damages by the parent or at least the wholly owned newspaper company, which will cost the parent just the same." (Exhibit 17, at pp. 901-903).

The Complaint's "WHEREFORE" clause (at p. 33) expressly seeks "assessment of...damages as part of a cause of action for Institutional Reckless Disregard for Truth, to the extent warranted by the evidence adduced" as part of its "other and further relief as may be just and proper" – citing to the Complaint's footnote 14 in support thereof.

Satterlee's failure to address the Complaint's suggested recognition of a cause of action for Institutional Reckless Disregard for Truth, combined with its obliteration of the allegations of the

Complaint pertaining to the "**READERS' REPRESENTATIVE**" that would be its essence, gives rise to the inference that Satterlee has no defense thereto.

Satterlee's Point III (p. 23)
"Plaintiffs' Claims against Defendant Eddings are a Nullity"

Satterlee's Point III is also based on multiple deceits. The same sentence of CPLR §306-b as allows a court, "upon motion', to dismiss a claim against a defendant who has not been served within the 120 days of the filing of the summons and notice, allows it "upon good cause shown or in the interest of justice, [to] extend the time for service." (underlining added).

In tandem with concealing the full sentence of CPLR §306-b it only partially quotes, Satterlee furnishes no case law and no facts in admissible form in this Point III, reflective of its frivolousness. Based on *Leader v. Maroney*, 97 NY2d 95 (2001), wherein the New York Court of Appeals consolidated and affirmed three decisions certified to it by the Appellate Division, Second Department, interpreting the "good cause" and "interest of justice" language of CPLR §306-b, plaintiffs could easily make a motion for both "good cause" and "interest of justice". Satterlee may be presumed to know this, unless it is unfamiliar with *Leader v. Maroney* and did not confer with its clients as to the service made upon defendant Eddings.

In urging dismissal of plaintiffs' claims against defendant Eddings on the "separate and independent grounds" of CPLR §306-b – which Satterlee does in the last sentence of Point III (at p. 24) – Satterlee infers:

(1) that its motion is a motion under CPLR §306-b;

(2) that it has legal capacity to make a CPLR §306-b motion for defendant Eddings; and

(3) that it has evidentiary facts for such CPLR §306-6 motion.

These are all false.

The relief sought by Satterlee's notice of motion is dismissal of plaintiffs' Complaint pursuant to CPLR §§3211(a)(1) and (7) – not CPLR §306-b. Had Satterlee's notice of motion included dismissal pursuant to CPLR §306-b, which would be limited to defendant Eddings, it would have had to confront what its motion essentially conceals: that Satterlee does not represent defendant Eddings – or, at least, purports not to represent him.[24]

Although defendant Eddings is the author of the subject article and his name appears in ¶¶9(a), 10(a), 11, 12, 22, 23, 25, 26, 29, 35, 41, 49, 52, 67 of the Complaint, Satterlee barely mentions him in its motion. Apart from its scant Point III and a passing quote from plaintiffs' analysis with his name, included in its bogus side-by-side comparison (at p. 14), Satterlee's memo of law relegates defendant Eddings to a footnote – its footnote 6 (at p. 6), which reads:

> "Plaintiffs have also named Keith Eddings, who was formerly a reporter with The Journal News, as a defendant. But, upon information and belief, Mr. Eddings was not timely served with the summons with notice in this action, and the claims against him are therefore a nullity."

In other words, and unsupported by an affidavit from anyone at defendant Gannett attesting that defendant Eddings is not presently "a reporter with The Journal News" or attesting to what footnote 6 conspicuously does not say, *to wit*, that defendant Eddings is not otherwise employed by defendant Gannett and was not timely served through it – and without any affidavit from defendant Eddings himself, Satterlee fashions its Point III on inadmissible factual assertions, the truth of which neither Ms. Sullivan nor Ms. Smith even attest by their affidavits. Such footnote 6 is altogether non-

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[24] The defendants Satterlee purports to represent are identified by its motion and thereupon designated as "(collectively, 'Defendants')" – without any note that this collective does not include defendant Eddings and defendants DOES 1-10. Thus, the first paragraph of its notice of motion, the first paragraph of Ms. Sullivan's affidavit, the first paragraph of Ms. Smith's affidavit, and the first paragraph of its memo of law. Indeed by the footnote to the first paragraph of its memo of law, clarifying its representation of defendants The Journal News and LoHud.com as being through Gannett Satellite Information Network, Inc., Satterlee conveys the false impression that other aspects of its representation (and non-representation) would be clarified. Yet, Satterlee does not explain why defendant Eddings and defendant DOES 1-10 are not among its clients – the latter effectively wiped from its motion, except in its truncated caption of this action.

probative – and its deceit is further reflected by Satterlee's juxtaposition of two inconsistent sentences in its Point III: one an unqualified affirmative assertion and one "upon information and belief", whose source is not identified:

> "Plaintiffs have not yet served named defendant Keith Eddings. Upon information and belief, they have not done so." (at p. 23)

These two contradictory sentences, neither having evidentiary value, cannot support a §306-b motion to dismiss the Complaint as to defendant Eddings – even if such motion could be made by Satterlee, which it does not claim and for which it furnishes no legal authority.

PLAINTIFF'S CROSS-MOTION

THIS COURT'S MANDATORY DISCIPLINARY RESPONSIBILITIES PURSUANT TO §100.3D OF THE CHIEF ADMINISTRATOR'S RULES GOVERNING JUDICIAL CONDUCT

This Court's duty to ensure the integrity of the judicial process is set forth in Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct, as well as in the Code of Judicial Conduct, adopted by the New York State Bar Association. Part 100.3D relates to a judge's "Disciplinary Responsibilities". In mandatory language it states:

> "(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action." (emphasis added).

Such "appropriate action" includes costs and sanctions pursuant to 22 NYCRR §130.1.1, referrals to appropriate disciplinary authorities, and assessment of treble damages under Judiciary Law §487.

A. Plaintiffs' Entitlement to Costs & Sanctions against Satterlee Pursuant to 22 NYCRR §130-1.1

Under 22 NYCRR §130-1.1-a(a), "Every pleading, written motion, and other paper, served on another party or filed or submitted to the court" is required to be signed. §130-1.1(b) identifies

this signature requirement as constituting certification that "to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, (1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c)"

§130-1.1(c) defines conduct as "frivolous" if:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false."[25]

Satterlee's dismissal motion, signed by Ms. Sullivan, meets the test for frivolous on all three counts. As hereinabove demonstrated, the legal presentation, where not itself materially false and misleading, is inapplicable to the Verified Complaint, whose pleaded allegations Satterlee brazenly omits and falsifies in fashioning its dismissal motion. Such motion, having no legitimate purpose, being based in fraud, can only be seen as "undertaken primarily to delay or prolong the resolution of the litigation or maliciously injure [the plaintiffs herein]".

§130-1.1(c) specifically identifies two factors to be considered in determining whether costs and sanctions should be imposed:

> (1) "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis for the conduct"; and
>
> (2) "whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party".

Satterlee is a prestigious mid-size law firm. According to its website, whose pertinent pages

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[25] Under §130-1.1, the court is empowered to impose "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct". "[F]inancial sanctions" of up to $10,000 may additionally be imposed, payable to the Lawyers' Fund for Client Protection (§130-1.2, §130-1.3).

are annexed to plaintiff Elena Sassower's affidavit (Exhibit 18), "For over 100 years, Satterlee Stephens Burke & Burke has enjoyed a national reputation for expertise and leadership in the practice of media law". Its "media law department includes a corps of accomplished trial lawyers, with extensive trial and appellate experience in actions involving...libel defense" (Exhibit 18b).

Under the heading "A Dedication to Quality", the website describes the law firm as "prid[ing] itself on its rigorous research and scholarship, on its clear and careful draftsmanship...and on its cogent and persuasive litigation documents" (Exhibit 18a).

Three separate attorneys of the firm have put their names to this motion – Mark A. Fowler, Esq. (Exhibit 18c), a partner of the firm, whose background includes having been editor of the First Amendment and Media Litigation Newsletter and co-chair of the American Bar Association's Litigation Section of its First Amendment and Media Litigation Committee; Meghan H. Sullivan, Esq. (Exhibit 18d), a litigation associate who, before joining the term, clerked for a U.S. district court judge; and Emily S. Smith, a contract attorney in the firm.

Such circumstances – and the fact that Satterlee is doubtlessly handsomely paid by its $5.6 billion corporate client for its services – mandates that maximum costs and sanctions be imposed on Satterlee, as there can be no excuse whatever for the pervasively fraudulent motion this prestigious law firm and its expert, well-paid attorneys have interposed.

B. Plaintiffs' Entitlement to Disciplinary Referral of Satterlee

New York Rules of Professional Conduct are promulgated as joint rules of the Appellate Divisions of the Supreme Court (22 NYCRR Part 1200).

Rule 3.1, entitled "Non-Meritorious Claims and Contentions", states:

> "a lawyer shall not...defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...". (subsection a).

The definition of "frivolous" is the same as that under 22 NYCRR §130.1.1(c) and includes "knowingly assert[ing] material factual statements that are false" (subsection b).

Rule 3.3, entitled "Conduct Before a Tribunal", states:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false..."

Rule 8.4, entitled "Misconduct", states:

"A lawyer or law firm shall not:
(a) violate or attempt to violate the Rules of Professional Conduct...
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice."

As demonstrated by this memorandum of law and by plaintiff Elena Sassower's accompanying affidavit, Satterlee's dismissal motion flagrantly violates the Rules of Professional Conduct and, specifically, Rule 3.1, Rule 3.3, and Rule 8.4. Such substantial violations require that the Court "take appropriate action" by referring the culpable Satterlee attorneys to disciplinary authorities, consistent with the unequivocal directive of the New York Court of Appeals:

> "the courts are charged with the responsibility of insisting that lawyers exercise the highest standards of ethical conduct...Conduct that tends to reflect adversely on the legal profession as a whole and to undermine public confidence in it warrants disciplinary action (see *Matter of Holtzman*, 78 NY2d 184, 191 cert denied, ___ US __, 112 S.Ct 648; *Matter of Nixon*, 53 AD2d 178, 181-182; cf., *Matter of Mitchell*, 40 NY2d 153, 156).", *Matter of Rowe*, 80 NY2d 336, 340 (1992).[26]

[26] "A Court cannot countenance actions, on the part of an attorney, which are unethical and in violation of the attorney's Canon on Ethics... ...A Court cannot stand idly by and allow a violation of law or ethics to take place before it.", *People v. Gelbman*, 568 N.Y.S2d 867, 868 (Just. Ct. 1991).

C. Plaintiffs' Entitlement to Damages against Satterlee Pursuant to Judiciary Law §487

Judiciary Law §487, "Misconduct by attorneys", states, in pertinent part:

> "An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party;
> ...
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

Consistent with the New York Court of Appeals' decision in *Amalfitano v. Rosenberg*, 12 NY3d 8, 14 (2009), recognizing "the evident intent" of Judiciary Law §487 "to enforce an attorney's special obligation to protect the integrity of the court and its truth-seeking function", plaintiffs are entitled to such determination as would afford them "treble damages" in this civil action.

PLAINTIFFS' ENTITLEMENT TO SATTERLEE'S DISQUALIFICATION FOR CONFLICT OF INTEREST, AS IT IS A DEFENDANT DOE

In *Greene v. Greene*, 47 NY2d 447, 451 (1979), the New York Court of Appeals articulated key principles governing attorney disqualification for conflict of interest:

> "It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law (Code of Professional Responsibility, canon 7). For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests (see, e.g., *Cardinale v Golinello, 43 NY2d 288, 296; Eisemann v Hazard, 218 NY 155, 159;* Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large.
>
> ...where it is the lawyer who possesses personal, business or financial interest at odds with that of his client, these prohibitions apply with equal force (Code of Professional Responsibility, DR 5-101, subd [A]). Viewed from the standpoint of a client, as well as that of society, it would be egregious to permit an attorney to act on behalf of the client in an action where the attorney has a direct interest in the subject matter of the suit. ...the conflict is too substantial, and the possibility of adverse

impact upon the client and the adversary system too great, to allow the representation."

The former DR 5-101 is now reflected in Rule 1.7 of New York's Rules of Professional Conduct. Rule 1.7(a)(2) bars a lawyer from representing a client if a "reasonable lawyer" would conclude:

> "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests."[27]

As hereinabove stated (at p. 12, *supra*), Satterlee's Section A entitled "The Parties" does not even give a footnote to defendants DOES 1-10, who are nowhere mentioned in the Satterlee memo and, without explanation, are not being represented by Satterlee. ¶12 of the Complaint describes these unnamed defendants as follows:

> "12. Defendant DOES 1-10 are the reporters, editors, management, legal personnel, or other staff at defendant GANNETT, Journal News, and LoHud.com, who directed and/or advised defendant EDDINGS in the fashioning of his news article, including its two titles (Exhibits A-1, A-2), who failed to discharge their supervisory responsibilities to enforce defendants' own journalistic standards and who, upon receipt of plaintiffs' analysis demonstrating the news article to be false, defamatory, and knowingly so (Exhibit 7), failed to retract it, failed to correct it, and failed to report on the issue of legitimate public concern the article had purposefully concealed: the corruption of the judicial appointments process to White Plains City Court, thereby necessitating this lawsuit.
>
> (a) DEFENDANT DOES 1-10 are also such persons at defendant GANNETT and Journal News who have collusively participated in, aided and abetted, and/or acquiesced in, defendants' long-standing pattern and practice of journalistic fraud, willfully misleading the public as to issues of legitimate public concern, thwarting reform and rigging elections, while, simultaneously, suppressing, minimizing, and maligning plaintiffs' corruption-exposing achievements."

The only explanation for Satterlee's NOT representing these defendants DOES (and concealing that the defendants DOES, though properly served, have not appeared), is that Satterlee is

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[27] Such is permitted under Rule 1.7(b) only if, *inter alia*, "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"; and "(4) each affected client gives informed consent, confirmed in writing".

among them – being "legal personnel" who, *inter alia*, received from The Journal News defendants the plaintiffs' analysis supporting their retraction demand and advised those defendants to ignore it. In other words, Satterlee is a defendant DOE, directly responsible for generating this lawsuit against its clients, who are here its fellow defendants. Such gives it a direct interest in the subject matter of this suit. Certainly, from Mr. Fowler's December 21, 1995 letter to plaintiff Elena Sassower, annexed to the Complaint as Exhibit 3d, it is evident that The Journal News turned to Satterlee to counsel it about plaintiffs.

The fraudulent dismissal motion made by Satterlee in defense of the non-DOE defendants, simultaneous with its non-representation of the DOE defendants, who it has allowed to default, reflects impaired judgment that is consistent with conflict of interest.

PLAINTIFFS' ENTITLEMENT TO A DEFAULT JUDGMENT AGAINST THE NON-APPEARING DEFENDANTS EDDINGS AND DOES 1-10

CPLR §3215 entitled "Default judgment", allows a plaintiff to seek a default judgment against a defendant who has failed to appear or plead. Subsection (e) entitled 'Proof', states:

> "On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney..."

Proof of service of the Summons with Notice, consisting of the affidavit of Nina Best, attesting to service on August 31, 2010, and affidavit of Raymond Bennett, also attesting to service on August 31, 2010, are annexed to plaintiff Elena Sassower's accompanying affidavit (Exhibit 15a).

Proof of service of the Verified Complaint, consisting of the affidavit of plaintiff *pro se* Elena Sassower, attesting to service and supplying, in substantiation, her e-mail exchange with Ms.

Sullivan and Satterlee's receipted first page of the Complaint, are annexed to her accompanying affidavit as Exhibit 15b.

Defendant DOES 1-10, though served, have not appeared. Defendant Eddings has also not appeared and the record contains no probative evidence that at the time plaintiffs served him, he was not employed by defendant Journal News or defendant Gannett.[28]

PLAINTIFFS' ENTITLEMENT TO A COURT ORDER EXTENDING PLAINTIFFS' TIME TO SERVE DEFENDANT EDDINGS PURSUANT TO CPLR §306-b

As hereinabove set forth, there is no probative evidence in the record, sworn to as true under penalties of perjury, as to defendant Eddings' status at either defendant Journal News or defendant Gannett. As recited by ¶¶ 24-29 of plaintiff Elena Sassower's affidavit, he was served with the Summons with Notice on August 31, 2010 – within the 120 days allowed under CPLR §306-b.

Inasmuch as it is undisputed that defendant Eddings wrote and published the subject article while he was an employee of defendant Gannett, such corporate defendant, which Satterlee identifies as Gannett Satellite Information Network, Inc., bears liability for his workproduct and has the deep pocket to pay the substantial compensatory and punitive damages sought, without contribution from any individual defendant. As such, plaintiffs' lawsuit faces no impediment even were Satterlee to come forth, belatedly, with an affidavit that at the time plaintiffs served defendant Eddings, he was, in fact, no longer in defendant Gannett's employ. Yet, even were plaintiffs' service upon him to be deemed deficient by reason thereof, Satterlee would still not be entitled to dismissal of plaintiffs' Complaint against defendant Eddings pursuant to CPLR §306-b, based on the showing herein and in plaintiff Elena Sassower's accompanying affidavit (at ¶¶24-29). Such resoundingly establish that,

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[28] If defendant Eddings believes he has a sound objection, based on lack of personal jurisdiction by reason of defective service, he can make a motion to vacate the default. New York Practice, by David D. Siegel, 4th ed. (2005); §111: "Making and Preserving a Jurisdictional Objection".

pursuant to CPLR 306-b and the New York Court of Appeals controlling decision in *Leader v. Maroney*, 97 NY2d 95 (2001), plaintiffs are entitled to an extension of time to serve defendant Eddings both for "good cause" and "the interest of justice". Specifically, (1) plaintiffs made diligent efforts to serve defendant Eddings; (2) their mailed envelope addressed to him containing his copy of the Summons with Notice was not returned; (3) there is no evidence that he did not have notice of the suit; (4) there is no evidence that he suffered any prejudice by such service as plaintiffs made upon him; and (5) the evidence is overwhelming – and established by plaintiffs' opposition/cross-motion – as to the merit of their Complaint.

PLAINTIFFS' ENTITLEMENT TO A COURT ORDER GIVING NOTICE, PURSUANT TO CPLR §3211(c) THAT SATTERLEE'S DISMISSAL MOTION IS BEING CONSIDERED FOR SUMMARY JUDGMENT IN PLAINTIFFS' FAVOR

CPLR §3211(c), entitled "Evidence permitted; immediate trial, motion treated as one for summary judgment", reads as follows:

> "Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion."

Pursuant to CPLR §105(u), "A 'verified pleading' may be utilized as an affidavit whenever the later is required.[29]

Plaintiffs rest on the allegations of their Verified Complaint and the legal authority cited therein and hereinabove – as well as plaintiff Elena Sassower's accompanying affidavit to support their request for a court order under CPLR §3211(c) giving notice that it is treating defendants' motion as entitling plaintiffs to summary judgment on each of their three causes of action. Indeed,

the brazen fraud that pervades Satterlee's dismissal motion reinforces plaintiffs' entitlement under controlling legal principles, hereinabove quoted (at pp. 1-2).

As the "WHEREFORE" clause of the Verified Complaint further seeks "such other and further relief as may be just and proper" (at p.33), plaintiffs additionally request that the Court, simultaneous with its notice pursuant to CPLR §3211(c), give notice that it will determine whether defendant Journal News should be ordered to remove from its masthead its "**ACCURACY**" policy as a false and misleading advertising claim, in violation of public policy, including General Business Law, Article 22-A, §§349 and 350, *et seq.*

Such is eminently appropriate as the "**ACCURACY**" inclusion in the masthead exacerbates and reinforces the libel and journalistic fraud committed by defendants – and the same allegations of the Complaint as support these causes of action support this additional relief. Indeed, the same law review article "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*" (Exhibit 16) as underlies the journalistic fraud cause of action identifies (at p. 12) the "well settled U.S. Supreme Court precedent", from which it is clear that there is no First Amendment impediment to judicial determination that its "**ACCURACY**" policy promoted on its masthead is a false and misleading advertising claim to lull consumers of the newspaper.

General Business Law, Article 22-A, §349, entitled "Deceptive acts and practices unlawful", describes "Deceptive acts and practices in the conduct of any business, trade or commerce in the furnishing of any service in this state". Its subsection (h) permits "any person who has been injured by reason of any violation...[to] bring an action in his own name to enjoin such unlawful act or practice". Such plaintiff may recover up to $1,000 in damages "if the court finds the defendant willfully or knowingly violated this section" and may be awarded "reasonable attorney's fees".

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[29] 2 Carmody-Wait 2d §4:12 "a sworn complaint may be regarded as an affidavit."

Similarly, General Business Law, Article 22-A, §350, entitled "False advertising, unlawful", proscribes "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state". Likewise, §350-d allows "any person who has been injured by reason of any violation...[to] bring an action in his own name to enjoin such unlawful act or practice" and to recover up to $1,000 in damages "if the court finds the defendant willfully or knowingly violated this section" and, additionally, "reasonable attorney's fees".

> "The genesis of both subdivision 3 of section 350-d and its companion provision, subdivision (h) of section 349 of the General Business Law, was in large measure the inability of the New York State Attorney-General to adequately police false advertising and deceptive trade practices. In a memorandum approving the enactment of both subdivision (h) of section 349 and section 350-d, Governor Carey observed that subdivision (h) of section 349 and subdivision 350-d 'by authorizing private actions, providing for a minimum damage recovery and permitting attorney's fees will encourage private enforcement of these consumer protection statutes [General Business Law §§349, 350], add a strong deterrent against deceptive business practices and supplement the activities of the Attorney General in the prosecution of consumer fraud complaints' (Governor's Approval Memorandum, NY Legis Ann, 1980, p. 147; see, also, memorandum of Senator James J. Lack, NY Legis Ann, 1980, p. 147; memorandum of Assemblyman Harvey L. Strelzin, NY Legis Ann, 1980, p. 146.
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> The courts have traditionally taken an expansive view of what constitutes 'false advertising' (General Business Law §350-a; *Geismar v. Abraham & Straus, 109 Misc 2d 495*; Note, New York Creates a Private right of Action to Combat Consumer Fraud: Caveat Venditor, *48 Brooklyn L Rev 509, 545-546*; *Guggenheimer v. Ginzburg, 43 NY2d 268*). In *People v Volkswagon of Amer. (47 AD2d 868)*, the court in defining 'false advertising' observed: 'The test is not whether the average man would be deceived. Sections 349 and 350 of the General Business Law were enacted to safeguard the 'vast multitude which includes the ignorant, the unthinking and the credulous' (*Floersheim v. Weinburger, 346 F Supp 950, 957*).'", *Beslity v. Manhattan Honda*, 120 Misc.2d 848, 852 (Appellate Term: 1st Dept. 1983).

As set forth at ¶6 of the Complaint, Defendant Gannett is a "money-making business". The masthead of its "business unit",[30] Journal News, purporting a policy of "**ACCURACY**" – on a page reserved for news, not editorials – has no purpose but to mislead consumers that the newspaper

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30 See fn. 1 to Satterlee's memo of law and ¶¶6(c), 16 of the Verified Complaint.

adheres to fundamental standards of accurate, truthful journalism. As demonstrated by its willful failure to respond to appellant's analysis – detailed by ¶¶20-30 of the Complaint and concealed and falsified by Satterlee's memo of law (at p. 10) – it does not.

CONCLUSION

Satterlee's dismissal motion must be denied, *as a matter of law*, with plaintiffs' cross-motion granted consistent with the facts and law, herein particularized.

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Individually & Acting Pro Bono Publico

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