To Be Argued By:
Elena Ruth Sassower
(30 minutes requested)

NEW YORK SUPREME COURT
Appellate Division – Second Department

ELENA RUTH SASSOWER, individually and as Coordinator of the Center for Judicial Accountability, Inc., CENTER FOR JUDICIAL ACCOUNTABILITY, INC., and The Public as represented by them,

App Div. #2006-8091
#2006-10709
#2007-186

Plaintiffs-Appellants,

-against-

Westchester Co. #19841/05

THE NEW YORK TIMES COMPANY, The New York Times, ARTHUR SULZBERGER, JR., BILL KELLER, JILL ABRAMSON, ALLAN M. SIEGAL, GAIL COLLINS, individually and on behalf of THE EDITORIAL BOARD, DANIEL OKRENT, BYRON CALAME, MAREK FUCHS, and DOES 1-20,

Defendants-Respondents.

PLAINTIFFS-APPELLANTS' BRIEF

ELENA RUTH SASSOWER, *Pro Se*
Individually & for The Public
16 Lake Street, Apartment 2C
White Plains, New York 10603
Tel: 914-421-1200

ELI VIGLIANO, Esq.
Attorney for CENTER FOR JUDICIAL ACCOUNTABILITY, INC.,
& for Plaintiff ELENA RUTH SASSOWER as Coordinator,
& for The Public
4901 Henry Hudson Parkway
Bronx, New York 10471
Tel: 718-884-3747

STATEMENT PURSUANT TO CPLR §5531

(1) The index number of the case in the court below is 19841/05.

(2) The full names of the parties are as set forth in the caption herein.

(3) This action was commenced in Supreme Court/Westchester County.

(4) The action was commenced on November 4, 2005 by plaintiffs' filing of a summons with notice.

(a) On February 14, 2006, the summons with notice was served on all defendants, with additional service on defendant The New York Times Company on February 21, 2006.

(b) On March 1, 2006, George Freeman, Esq., Assistant General Counsel of defendant The New York Times Company Legal Department, served a notice of appearance and demand for complaint on behalf of defendants The New York Times Company, Arthur Sulzberger, Jr., Bill Keller, Jill Abramson, Allan M. Siegel, Gail Collins, and Byron Calame. No appearance was made for defendants The New York Times, The Editorial Board, Daniel Okrent, Marek Fuchs, and Does 1-20.

(c) On March 21, 2006, plaintiffs served their verified complaint on defendant New York Times Company's Legal Department. On April 13, 2006, in lieu of an answer, Mr. Freeman served a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7).

(d) On June 1, 2006, plaintiffs served their opposition, combined with a six branch cross-motion for: (i) maximum costs and sanctions pursuant to 22 NYCRR §130-1.1 *et seq.* against Mr. Freeman, The New York Times Company Legal Department, and the defendants they represent; (ii) disciplinary referrals of Mr. Freeman and the Legal Department pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct; (iii) disqualification of Mr. Freeman and the Legal Department as counsel; (iv) default judgment against the non-appearing defendants pursuant to CPLR §3215; (v) summary judgment against the appearing defendants pursuant to

CPLR §3211(c); and (vi) such other and further relief as may be just and proper.

(e) By July 5, 2006 Decision and Order, Westchester County Court Judge/"Acting Supreme Court Justice" Gerald E. Loehr granted the dismissal motion and denied the cross-motion. On July 21, 2006, Mr. Freeman served said Decision and Order on plaintiffs, with notice of entry. On August 1, 2006, the Westchester County Clerk signed an *ex parte* Judgment, submitted by Mr. Freeman, which he never thereafter served on plaintiffs.

(f) On August 21, 2006, simultaneous with their filing of a notice of appeal, plaintiffs made a motion (i) to disqualify Judge Loehr for "demonstrated actual bias and interest" pursuant to Judiciary Law §14 and §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and, based thereon, to vacate his July 5, 2006 Decision and Order for "fraud and lack of jurisdiction", with an alternative request, if disqualification were denied, for disclosure by Judge Loehr pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct and referral to the Administrative Judge of the notice assigning Judge Loehr to the case; (ii) reargument and renewal pursuant to CPLR §2221, with vacatur of the July 5, 2006 Decision and Order based thereon for "fraud and lack of jurisdiction"; (iii) vacatur of the August 1, 2006 *ex parte* Judgment pursuant to CPLR §5015(a)(3) for "fraud, misrepresentation, and other misconduct of an adverse party", with maximum costs and sanctions on Mr. Freeman and The New York Times Company Legal Department pursuant to 22 NYCRR §130-1.1. *et seq.*; and (iv) such other and further relief as may be just and proper.

(g) By September 27, 2006 Decision and Order, Judge Loehr denied the disqualification/disclosure/reargument/renewal/vacatur motion. Mr. Freeman never served said Decision and Order on plaintiffs.

(h) On December 21, 2006, in conjunction with their filing of a notice of appeal, plaintiffs served Mr. Freeman with the September 27, 2006 Decision and Order, with notice of entry.

(5) This is an action for defamation, defamation *per se*, and journalistic fraud, seeking compensatory and punitive damages totaling $906 million and demanding a jury trial.

(6) These are consolidated appeals from:

(i) the July 5, 2006 Decision and Order of Westchester County Court Judge/"Acting Supreme Court Justice" Gerald E. Loehr, bearing a filed and entered date of July 6, 2006 [#2006-8091];

(ii) the *ex parte* August 1, 2006 Judgment signed by the Westchester County Clerk, bearing a filed and entered date of August 1, 2006 [#2006-10709]; and

(iii) the September 27, 2006 Decision and Order of Westchester County Court Judge/"Acting Supreme Court Justice" Gerald E. Loehr, bearing a filed and entered date of September 27, 2006 [#2007-186].

(7) These appeals are on the full record, excepting the June 14, 2006 oral argument of the Legal Department's dismissal motion and plaintiffs' cross-motion, which is not transcribed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional Provisions

Statutes

Rules and Regulations

Treatises & Texts:

Law Review Articles:

Published Opinion Columns:

QUESTIONS PRESENTED

(1) Was it lawful and constitutional for County Court Judge Gerald E. Loehr, who had served on the bench for less than two years, to be assigned by the Administrative Judge as an Acting Supreme Court Justice for this Supreme Court case and could he lawfully and constitutionally assume jurisdiction?

Judge Loehr's September 27, 2006 decision and order, denying plaintiffs-appellants' August 21, 2006 motion for his disqualification and for disclosure/referral, did not identify that it had challenged the lawfulness of his assignment by the Administrative Judge as an Acting Supreme Court Justice for this case.

(2) Was plaintiffs-appellants' August 21, 2006 motion to disqualify Westchester County Court Judge Loehr for "demonstrated actual bias and interest" sufficient to require his disqualification and could it be constitutionally denied?

Judge Loehr's September 27, 2006 decision and order, denying the motion, did not identify that it had sought his disqualification for "demonstrated actual bias and interest" – nor identify any of the facts, law, or legal argument the motion had presented in substantiation.

(3) Was plaintiffs-appellants' August 21, 2006 motion sufficient to require disclosure by Judge Loehr, including as to his relationships with, and dependencies on, the Administrative Judge who had handpicked him for assignment, and sufficient to require referral of the case assignment back to the Administrative Judge?

Judge Loehr's September 27, 2006 decision and order, denying the motion, did not identify this two-fold relief, alternatively requested by the motion in the event Judge Loehr did not disqualify himself – nor identify any of the facts, law, or legal argument the motion had presented in substantiation.

(4)a. Does the record before Judge Loehr support any interpretation other than that his July 5, 2006 decision and order granting defendants' motion to dismiss plaintiffs-appellants' verified complaint, is a judicial fraud, requiring vacatur/reversal, *as a matter of law*, and the granting of all six branches of plaintiffs-appellants' cross-motion, which the July 5, 2006 decision and order denied?

Judge Loehr's September 27, 2006 decision and order did not identify that plaintiffs-appellants' August 21, 2006 motion had asserted that the record supported no interpretation other than that his July 5, 2006 decision and order was a knowing and deliberate fraud by him[1] *– nor identify any of the facts, law, or legal argument the motion had presented in substantiation.*

(4)b. Does the record before Judge Loehr support any interpretation other than that his September 27, 2006 decision and order is a judicial fraud, additionally reinforcing plaintiffs-appellants' entitlement to his disqualification for "demonstrated actual bias and interest"?

Judge Loehr's September 27, 2006 decision and order did not identify any of the facts, law, or legal argument presented by plaintiffs-appellants' August 21, 2006 motion – all establishing the fraudulence of this further decision and order.[2]

(5) Does the record before this Court require that the Court discharge its mandatory "Disciplinary Responsibilities" under §100.3D of the Chief Administrator's Rules Governing Judicial Conduct by referring Judge Loehr for disciplinary and criminal investigation and prosecution, as likewise referring defense counsel George Freeman, Esq. and The New York Times Company Legal Department.

Judge Loehr's July 5, 2006 and September 27, 2006 decisions and orders did not identify plaintiffs-appellants' requests for disciplinary referral of defense counsel – nor any of the facts, law, or legal argument they had presented in substantiation.

---

[1] On these appeals, plaintiffs-appellants seek specific factual findings with respect to their showing by Point I of their August 21, 2006 memorandum of law that Judge Loehr's July 5, 2006 decision and order is a judicial fraud [R-787-809, R-824-836].

[2] On these appeals, plaintiffs-appellants seek specific factual findings as to the fraudulence of Judge Loehr's September 27, 2006 decision and order, based on their showing by their August 21, 2006 motion [R-700-836, R-843-900].

INTRODUCTION

These consolidated appeals seek redress from the obliteration of all cognizable legal and adjudicative standards. At issue is a Supreme Court case, removed from computerized random judicial assignment, without basis in fact and law and without affording the parties notice or opportunity to be heard. This was done by an Administrative Judge who was disqualified for interest and whose hand-picked choice, a County Court judge, was ineligible for assignment. The County Court judge then "threw" the case by a decision which falsified and concealed the record before him to grant defendants relief to which they were not entitled, *as a matter of law*, and deny plaintiffs relief to which the law and mandatory rules of judicial conduct absolutely entitled them. He then adhered to the decision upon plaintiffs' motion to vacate it for "fraud and lack of jurisdiction", made as part of their motion to disqualify him for "demonstrated actual bias and interest".

These appeals are not about legal error or mistake by the County Court judge. They are about a record which permits of no interpretation other than of judicial misconduct so flagrant and deliberate as to trigger this Court's mandatory disciplinary responsibilities under §100.3D(1) of the Chief Administrator's Rules Governing Judicial Conduct to refer him for disciplinary and criminal prosecution and to make similar referrals against defense counsel for the litigation fraud which the County

Court judge was required to make against them under §100.3D(2) of the Chief Administrator's Rules, but did not. Such record – dispositive of the appeals – is herein summarized by the "STATEMENT OF THE CASE", whose first section is based on the Unified Court System's own records, of which this Court may take judicial notice.[1]

STATEMENT OF THE CASE

Background Facts as to Westchester County Court Judge Loehr

In November 2004, Gerald E. Loehr was elected as a Westchester County Court judge and took office two months later, on January 1, 2005. By then, and although he had never before held judicial office, he was already included on a list of judges:

> "designated for assignment to the Supreme Court on a temporary, ad hoc basis to matters expected to take twenty (20) calendar days or less to complete, particularly to matters brought pursuant to CPLR Article 78." [R-912].

This list for 2005 was part of a December 29, 2004 Administrative Order of Chief Administrative Judge Jonathan Lippman, made "with the consultation and agreement" of Appellate Division, Second Department Presiding Justice A. Gail Prudenti, "on behalf of the Appellate Division, Second Department" [R-911]. A comparable list for 2006 was part of a comparable December 20, 2005 Administrative Order [R-913-5].

---

[1] See Fisch on New York Evidence, §§1063-4; 21 C. Wright & K. Graham, Federal Practice and Procedure, §5106 at 505 (1977). The pertinent records of the Unified Court System and Office of Court Administration are included in a supplement to the record herein [R-904-935].

Both lists identified that "the requirements of §121.2(b) of the Rules of the Chief Administrator are waived", with no specificity as to what these requirements were or the legal authority that would permit their waiver. The waived requirements are judicial qualifications, including:

> "scholarship, including knowledge and understanding of substantive, procedural and evidentiary law of New York State, attentiveness to factual and legal issues before the court, application of judicial precedents and other appropriate sources of authority, and quality and clarity of written opinions."

Plaintiffs' Verified Complaint

Plaintiffs' lawsuit, filed in Supreme Court/Westchester County, is not a "matter" that could be "expected to take twenty (20) calendar days or less to complete". It is an action for defamation, defamation *per se*, and journalistic fraud, seeking compensatory and punitive damages totaling $906 million and demanding a jury trial. The verified complaint consists of 175 allegations, spanning 60 pages [R-30-89], buttressed by 67 exhibits totaling another 322 pages [R-93-414].

The defamation and defamation *per se* causes of action [R-79-86] are based on a column "*When the Judge Sledgehammered The Gadfly*", published on the front page of The New York Times' Westchester Section on Sunday, November 7, 2004 [R-97-8], analyzed by an 18-page, paragraph-by-paragraph contextual analysis, annexed to the complaint as Exhibit A [R-99-116]. The analysis is "expressly repeated, reiterated, and

realleged as if more fully set forth" at the outset of the first cause of action for defamation [R-79-80: ¶¶140-1]. It demonstrates that each of the column's 17 paragraphs is fashioned on a succession of "express and implied facts shown to be both false and knowingly so" [¶142, underlining in the original]. This knowing falsity is alleged throughout the complaint, as is the column's defamatory nature [¶¶2, 101, 140, 142, 149, 151, 152]. The defamation causes of action plead actual malice, as well as common-law malice [¶144], with the complaint's "Factual Allegations" [¶¶16-138] and Exhibit A contextual analysis [R-99-116] providing the substantiating particulars by "clear and convincing evidence" [¶144].

The journalistic fraud cause of action [R-86-89: ¶¶163-175] is based on the complaint's showing that "*When the Judge Sledgehammered The Gadfly*" is part of a pattern and practice of collusive conduct by defendant New York Times and the other defendants. It alleges that for nearly 15 years prior thereto and continuing to the present, defendants have wilfully and deliberately misled the public by knowingly false and deceptive news reports and editorials about the processes of judicial selection and discipline, whose readily-verifiable corruption they have deliberately concealed, as likewise the readily-verifiable corruption of complicit public officers, including those seeking re-election or further public office. As to these "matters of legitimate public concern", the complaint alleges that defendants have violated their "First Amendment

obligations" [¶164] in favor of their "own business and other self-interests" [¶175], thwarting reform and rigging elections [¶¶169-71, 174].

The viability of a cause of action for journalistic fraud and its support within First Amendment jurisprudence are based on the law review article "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*" [R-634] by the co-directors of the Pennsylvania Center for the First Amendment at Pennsylvania State University, citation to which appears at the outset of the complaint [R-30], with the quote:

> "'The First Amendment goes beyond protection of the press...'...'it is the right of the [public], not the right of the [media], which is paramount,'...for 'without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally,'..."

The appended attribution is:

> "*Cohen v. Cowles Media Co.*, 501 U.S. 663, 678 (1991), Justice Souter, writing in dissent with Justices Marshall, Blackmun, and O'Connor, citing cases culminating in *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-279 (1964), cited in '*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*', 14 Fordham Intellectual Property, Media & Entertainment Law Journal 1, footnotes 62 and 156 (2003)."

Mr. Freeman's Dismissal Motion and RJI

Defendants did not answer the verified complaint, served upon them on March 21, 2006. Rather, defendant New York Times Company's Assistant General Counsel,

George Freeman, appearing for defendants The New York Times Company, Arthur Sulzberger, Jr., Bill Keller, Jill Abramson, Allan M. Siegel, Gail Collins, and Byron Calame – who are the defendants-respondents herein – made a motion to dismiss the complaint "in its entirety and with prejudice" for failure to state a cause of action pursuant to CPLR §3211(a)(7). The motion, dated April 13, 2006, was returnable on May 8, 2006, with answering papers due on May 1, 2006 [R-415].

Upon plaintiffs' receipt of the dismissal motion, they faxed and e-mailed a letter to Mr. Freeman, requesting his consent to a month's adjournment [R-516]. He faxed back his consent, giving them until June 1, 2006 for their opposing papers and stating that they should so-apprise the assigned judge and obtain a new return date for mid-June [R-517].

On April 25, 2006, Mr. Freeman filed his motion with the Westchester County Clerk's Office, together with a request for judicial intervention (RJI) [R-724]. His RJI identified May 8, 2006 as the return date of the motion, without indicating that it had been adjourned on consent. In the section of the RJI entitled "Pre-Note Time Frames", inquiring as to "Estimated time period for case to be ready for trial (from filing of RJI to filing of Note of Issue)", Mr. Freeman marked "Standard: 9-12 months". This was the second category between "Expedited: 0-8 months" and "Complex: 13-15 months" [R-725].

Administrative Judge Nicolai's Assignment of the Case to Judge Loehr

The Calendar Clerk's Office received Mr. Freeman's motion and RJI on April 26, 2006, but did not put the case into the computer for assignment to a judge until May 3, 2006 [R-705: ¶6]. The computer then randomly assigned the case to Supreme Court Justice Mary Smith, then to Supreme Court Justice Nicolas Colabella, and then to Supreme Court Justice John LaCava – each of whom the computer operator rejected.

The apparent reason for the computer operator's rejection of these three computer-generated randomly-assigned Supreme Court justices was her mistaken belief that they were disqualified. This was based on a recusal list maintained by the Calendar Clerk's Office, containing the last name "Sassower", without any first name, and the names of nine Supreme Court justices who had issued recusal orders [R-705: ¶7].

Upon information and belief, there is a locking feature in the computer system that prevents the computer from generating more than three randomly-selected judges for a given case. In the mistaken belief that there were no available Supreme Court justices, the Deputy Calendar Clerk referred the case to the Administrative Judge for the Ninth Judicial District, Francis A. Nicolai [R-705: ¶8].

Upon information and belief, it is normal and customary procedure that before the Administrative Judge removes a case from the computer-generated random

assignment, he will have the pertinent records before him [R-705: ¶5]. From the records, Administrative Judge Nicolai would have seen that neither Justice Smith nor Justice LaCava were, in fact, disqualified – as the recusal orders in the possession of the Calendar Clerk's Office showed they had not issued standing recusal orders [R-726, R-728]. As for Justice Colabella, the Calendar Clerk's Office was not in possession of any recusal order, standing or otherwise [R-706: ¶10].

Nevertheless, Administrative Judge Nicolai did not refer the case back to Justice Smith, as the first randomly-assigned Supreme Court justice. Instead, he issued a notice dated May 8, 2006 which, without explanation and with no citation to legal authority, assigned the case "to the HON. GERALD E. LOEHR, Acting Supreme Court Justice, Westchester County, until disposition" [R-721]. Such notice was not sent to plaintiffs, who – like defendants – were not indicated recipients thereof.

Plaintiffs' Correspondence to Mr. Freeman Pertaining to the Sanctionable Nature of his Dismissal Motion

On May 1, 2006, plaintiffs sought to inform the assigned judge of the consented-to adjournment. However, the County Clerk's Office had no record of any judge being assigned – nor of Mr. Freeman's dismissal motion and RJI. This was recounted by plaintiffs in a faxed and e-mailed May 1, 2006 letter to Mr. Freeman, entitled "NOTICE OF INTENT TO SEEK SANCTIONS AGAINST YOU" [R-518], which specified that his dismissal motion was:

> "from beginning to end...fashioned on flagrant falsification and material omission of the complaint's pleaded allegations and on law either inapplicable by reason thereof or itself falsified by [the] motion."

Plaintiffs stated their intent to cross-move against Mr. Freeman for sanctions and for an order referring him to disciplinary authorities, further pointing out that he was disqualified for interest from representing the defendants as he was among the complaint's defendant DOES.

Mr. Freeman did not respond until May 8, 2006, when he sent plaintiffs a letter by regular mail [R-521]. Such letter, not received by plaintiffs until May 12, 2006 [R-522], apprised them that his dismissal motion and RJI had been properly served and filed and that although there might have been "some sort of confusion in the clerk's office because at least one judge apparently has recused him/herself...there is no question that the motion is now properly before the court."

On May 15, 2006, plaintiffs learned that Judge Loehr had been "specially assigned to the case" by Administrative Judge Nicolai, purportedly after "recusals by three randomly-assigned judges" [R-522]. They immediately contacted Judge Loehr's law clerk, who had no knowledge of the consented-to adjournment. They provided him copies of their past correspondence with Mr. Freeman pertaining to the adjournment and, thereafter, a copy of their May 23, 2006 letter to Mr. Freeman, which reiterated that they would be making a cross-motion for sanctions and disciplinary

referral against him based on his dismissal motion. The May 23, 2006 letter further stated:

> "So that there is no question that your fraudulent dismissal motion is interposed with the knowledge and consent of your superiors in the New York Times Company Legal Department, as well as of the defendants – both those for whom you have appeared and for whom you should have appeared, all of whom are, in fact, your co-defendants – please apprise them that [plaintiffs'] cross-motion will also be directed against them." [R-523].

Mr. Freeman's e-mailed response, dated May 23, 2006, was to baldly deny plaintiffs' "allegations of flagrant falsification, etc." [R-524].

Plaintiffs' June 1, 2006 Opposition and Cross-Motion

On June 1, 2006, plaintiffs served Mr. Freeman with their opposition to his dismissal motion – joined with their cross-motion [R-469-471, R-589-607, R-479-489], containing six branches of relief:

> "(1) imposing maximum costs and $10,000 sanctions against defense counsel George Freeman, Esq., The New York Times Company Legal Department, and the defendants they represent pursuant to NYCRR §130-1.1, *et seq.*;
>
> (2) referring defense counsel George Freeman, Esq. and The New York Times Company Legal Department to appropriate disciplinary authorities pursuant to this Court's mandatory 'Disciplinary Responsibilities' under the Chief Administrator's Rules Governing Judicial Conduct, 22 NYCRR §100.3D(2), for their knowing and deliberate violation of New York's Disciplinary Rules of the Code of Professional Responsibility...;
>
> (3) disqualifying defense counsel George Freeman, Esq. and The New

York Times Company Legal Department, both as attorneys for the corporate defendant, THE NEW YORK TIMES COMPANY, and as attorneys for the individual defendants on grounds of conflict of interest and because they are witnesses;

(4) granting a default judgment against the non-appearing defendants OKRENT, FUCHS, DOES 1-20, The New York Times and its EDITORIAL BOARD pursuant to CPLR §3215;

(5) giving notice, pursuant to CPLR §3211(c), that defendants' motion is being considered by the Court as one for summary judgment in plaintiffs' favor on their verified complaint's three causes of action: for defamation (¶¶139-155), for defamation *per se* (¶¶156-162), and for journalistic fraud (¶¶163-175), with additional notice, as part thereof, that the Court will be determining whether defendant THE NEW YORK TIMES COMPANY should be ordered to remove the words 'All the News That's Fit to Print' from The New York Times' front-page as a false and misleading advertising claim, in violation of public policy, including General Business Law, Article 22-A (§§349 and 350, *et seq.*) and New York City Administrative Code §20-700, *et seq.*;

(6) for such other and further relief as may be just and proper, including $100 motion costs pursuant to CPLR §8202."

Plaintiffs' cross-motion was supported by their 64-page memorandum of law [R-542-608] and Sassower's 18-page affidavit [R-472-89], annexing 22 exhibits [R-490-541].

Under a caption heading "**MR. FREEMAN'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION IS A FRAUD UPON THE COURT**" [R-545], plaintiffs' memorandum opened as follows:

"Mr. Freeman's 22-page memorandum of law in support of his motion conspicuously omits the legal standard to be applied on a motion to

dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7). That standard is recited in *Silsdorf v. Levine*, 59 N.Y.2d 8, 12 (1983) – a case presenting a cause of action for defamation wherein our New York Court of Appeals stated:

> 'The issues raised on this appeal come before the court in the procedural posture of a motion to dismiss the complaint for failure to state a cause of action. Thus, we accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim. 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 (*219 Broadway Corp. v. Alexander's, Inc.*, 46 NY2d 506, 509).' (underlining added)

It is because the complaint's allegations are legally sufficient in establishing its two causes of action for defamation and defamation *per se* (¶¶139-155, ¶¶156-162) arising from defendant FUCHS' column '*When the Judge Sledgehammered The Gadfly*', as well as its third cause of action for journalistic fraud (¶¶163-175), that Mr. Freeman's memorandum flagrantly falsifies, omits, and distorts the complaint's allegations and cites law that is either inapplicable by reason thereof or falsified and distorted to support his otherwise insupportable dismissal motion. As demonstrated by the first 44 pages of this memorandum, as well as by plaintiff SASSOWER's accompanying affidavit, such motion is a fraud on the court -- from beginning to end and in virtually every sentence." [R-545-46, underlining in the original].

The fraudulence and insufficiency of Mr. Freeman's dismissal motion, demonstrated by plaintiffs' opposition/cross-motion, included:

(1) that Mr. Freeman's notice of motion sought dismissal of the entire complaint, but identified the action only as one for defamation – not even specifying that there were two separate defamation causes of action: defamation and defamation *per se*, the latter nowhere identified by Mr. Freeman's dismissal motion [R-547-8];

(2) that Mr. Freeman's motion obscured that Sassower was a plaintiff in two separate capacities, individually and as Coordinator of the Center for Judicial Accountability, Inc. (CJA), that she and plaintiff Center for Judicial Accountability, Inc. were also appearing for "The Public as represented by them", and that the complaint's causes of action were pleaded with respect to these separate plaintiffs [R-548];

(3) that Mr. Freeman's motion omitted any mention of the non-appearing defendant DOES 1-20 – thereby concealing that he and The New York Times Company Legal Department were among them – and was non-probative, insufficient, false, and misleading with respect to the other non-appearing defendants: Daniel Okrent, Marek Fuchs, The New York Times, and its Editorial Board [R-549, R-475: ¶¶5-7, R-482: ¶¶20-31, R-563-4];

(4) that Mr. Freeman's motion concealed the allegations of the complaint's three causes of action for defamation, defamation *per se*, and journalistic fraud – none of which it confronted [R-548, R-550, R-557, R-561, R-564-6];

(5) that Mr. Freeman's motion falsely purported that plaintiffs had not and could not allege any falsity [R-554-6, R-563-4, R-567-70];

(6) that Mr. Freeman's motion concealed virtually the entire content of plaintiffs' Exhibit A contextual analysis [R-548, R-566, R-575-88].

As to this analysis – which plaintiffs asserted to be "decisive" of their defamation causes of action – Sassower's affidavit stated:

> "25. No independent attorney, with such expertise in libel law as Mr. Freeman and his colleagues and superiors in The New York Times Company Legal Department...have, could fail to have recognized that a lawsuit based on my analysis...and my correspondence with defendants... based thereon...would present viable causes of action for defamation and defamation *per se*. Such was obvious from caselaw of the U.S. Supreme Court and New York Court of Appeals, with which Mr. Freeman was well familiar[fn], requiring that defamatory statements be viewed in context. As they surely recognized, my analysis was nothing less than the most breathtaking of contextual examinations – highlighting with line-by-line, paragraph-by-paragraph precision how the column's

defamatory characterizations of me and CJA were built on a succession of knowingly false and misleading implied and express facts and innuendos, buttressed by unidentified 'staunchest defenders', 'defenders', and a 'most earnest listener', who I contended were fictions." [R-484, underlining in the original].

(7) that the law and legal argument presented by Mr. Freeman's motion as to "Defamatory Meaning and Substantial Truth"; "Report of Official Proceedings"; and "Opinion" were inapplicable, misleading, and false and were additionally so-exposed by the Exhibit A contextual analysis [R-567-75];

(8) that the two sentences of Mr. Freeman's motion pertaining to the journalistic fraud cause of action were insufficient and fraudulent [R-564-5].

As to these, plaintiffs' memorandum of law stated:

> "As to the specific allegations constituting plaintiffs' cause of action for journalistic fraud (¶¶163-175), Mr. Freeman does not address them. His single-sentence excuse:
>
> > "'journalistic fraud' has never been recognized as a cause of action in New York -- or elsewhere insofar as we can ascertain'.
>
> This is wholly insufficient. Mr. Freeman does not say that a cause of action for journalistic fraud has been rejected by any court – or even that such cause of action has ever been tested. Such is all the more significant as the law review article, '*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*', cited on the complaint's front page directly underneath the caption, posits the validity of a cause of action for journalistic fraud – without dispute from Mr. Freeman.
>
> Adding to this is Mr. Freeman's extensive background and expertise in media law[fn] and his access to unparalleled legal resources, including to the most stellar academicians and practitioners of media law and the First Amendment. Plainly, if legitimate arguments could be advanced for dismissal of such meritorious cause of action – which is essentially a cause of action for fraud, in the context of a constitutional

tort – Mr. Freeman has been in a position to provide them to the Court...

As Mr. Freeman well knows, the law evolves, with new causes of action emerging. As stated by the New York Court of Appeals in *Brown v. State of New York*, 89 N.Y.2d 172, 181-2 (1996):

> '...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 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.).'

As for Mr. Freeman's footnote 4 (at p. 9) – constituting his second sentence pertaining to the journalistic fraud cause of action – he states, 'plaintiff fulfils none of the requirements of a traditional fraud case – reliance on a misrepresentation that caused her financial loss'. This is false. Firstly, there is more than a single 'plaintiff' to this action. Secondly, the separate plaintiffs have amply fulfilled the requirements for pleading fraud, including with respect to defendants' misrepresentations causing them damages. Mr. Freeman's failure to confront any of the paragraphs of the third cause of action for journalistic fraud (¶¶163-175) makes this evident."

Mr. Freeman's June 9, 2006 Reply Affidavit and Plaintiff Sassower's June 13, 2006 Reply Affidavit

Mr. Freeman's response was a 5-1/4 page "reply affidavit", dated June 9, 2006, unsupported by any law [R-609-14]. It made no mention of the fourth, fifth, and sixth branches of the cross-motion (for default judgment, summary judgment, and other relief), confronted none of the particularized facts and law plaintiffs had presented in support of their cross-motion's first, second, and third branches (sanctions, disciplinary referral, and disqualification of counsel), and rested throughout on false and conclusory claims.

This was highlighted by Sassower's 14-page June 13, 2006 reply affidavit, [R-620-33] which demonstrated that Mr. Freeman's "reply affidavit" – like his dismissal motion – was "from beginning to end and in virtually every sentence, a fraud on th[e] court", warranting additional imposition of costs and financial sanctions pursuant to 22 NYCRR §130-1.1 *et seq*, and reinforcing Judge Loehr's mandatory duty under §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct to refer him and The New York Times Company Legal Department to disciplinary authorities [R-620-1: ¶2]. In so doing, Sassower's affidavit laid out the applicable legal standards [R-622: ¶7]:

> "7. The legal principle governing answering affidavits – such as Mr. Freeman's reply affidavit – is that "Answering affidavits, in addition to complying with the formal requisites of the affidavits supporting the

motion, should meet traversable allegations of the latter. Undenied allegations will be deemed to be admitted", 2 Carmody-Wait 2d §8:56, citing *Whitmore v. J. Jungman, Inc.*, 129 N.Y.S. 776 (Sup 1911). The standard is thus the same as for summary judgment: 'failing to respond to a fact attested to in the moving papers...will be deemed to admit it', Siegel, New York Practice, §281 (4th ed. - 2005), p. 464) -- citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539 (1975), itself citing Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. 'If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it'.

Further, '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 Secundum, Vol. 31A, 166 (1996 ed., p. 339).

All this is against the backdrop that 'Those who make affidavits are held to a strict accountability for the truth and accuracy of their contents.', 2 Carmody-Wait 2d §4:12, citing *In re Portnow*, 253 A.D. 395 (2nd Dept. 1938)."

With respect to the defamation causes of action, Sassower's reply affidavit highlighted that Mr. Freeman had not denied or disputed "the decisive significance" of plaintiffs' Exhibit A contextual analysis and provided a long list of caselaw from which this "decisive significance" was additionally "obvious" [R-627-8: ¶¶15-6]:

"...*Immuno v. J. Moor-Jankowski*, 77 N.Y.2d 235, 250 (1991): '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....' (at 250); 'statements must first be viewed in their context...' (at 254); *James v. Gannett*, 40 N.Y.2d 415 (1976): '...the court will not pick out and isolate particular phrases but will consider the publication as a whole...' (at 420); *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (1986): 'we first examine the content of the whole communication...' (at 293); *600 West 115th Street Corp. Gutfeld*, 80 N.Y.2d 130 (1992): 'In *Immuno*, we endorsed a methodology derived from *Steinhilber v.*

> *Alphonse*...that requires that a court look 'at the content of the whole communication...' (at 145).
>
> ...Silsdorf v. Levine, 59 N.Y.2d 8 (1983): 'The entire publication...must be considered...' (at 13); Gaeta v. New York News, 62 N.Y.2d 340 (1984): 'offending statements can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences' (at 349); Gross v. New York Times Co., 82 N.Y.2d 146 (1993): 'In all cases..the courts are obliged to consider the communication as a whole...' (at 155); Armstrong v. Simon & Schuster, Inc., 85 N.Y.2d 373 (1995): '...the court must give the disputed language a fair reading in the context of the publication as a whole'; Brian v. Richardson, 87 N.Y.2d 46 (1995): '...the courts must consider the content of the communication as a whole...' (at 51); Huggins v. Moore, 94 N.Y.2d 296 (1999): 'allegedly defamatory statements 'can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences'', quoting *Gaeta* (at 302)."

With respect to the journalistic fraud causes of action, Sassower's reply affidavit reiterated that it was "essentially a cause of action for fraud, in the context of a constitutional tort" and that "Mr. Freeman has NOT advanced a single argument, constitutional or otherwise, nor put forward ANY legal authority to impede a cause of action for fraud against these media defendants." [R-630: ¶20, capitalization in the original].

Sassower also stated that explicit from "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*" – which Mr. Freeman had not addressed "on the pretense that it has 'no...applicability' beyond the circumstances of the Jayson Blair case – is that 'It is well-settled U.S. Supreme Court precedent that news organizations lack immunity from generally applicable tort liability'" [R-631:

¶21].

Asserting "Fraud is a tort – and recognized cause of action", Sassower stated:

> "Applying such recognized cause of action to the media would be an appropriate 'legal intervention' to secure the 'marketplace of ideas' on which a healthy democracy and First Amendment jurisprudence rest. The necessity of devising a 'legal intervention' for such purpose was recognized 40 years ago in the law review article "*Access to the Press – A New First Amendment Right*", 80 Harvard Law Review 1641 (1967)" [R-631: ¶22].

Sassower closed by noting that Mr. Freeman's reply affidavit had urged the Court to consider "not the voluminous submissions of the parties, but simply whether anything in the 17-paragraph column is actionable as a legal matter". Protesting this as "yet a further fraud" by Mr. Freeman, she stated:

> "As Mr. Freeman well knows, being a seasoned practitioner with 30 years experience, the Court is not free to act, independent of the motions before it – and it is the sufficiency of these, Mr. Freeman's dismissal motion and plaintiffs' cross-motion, that are before the Court for adjudication." [R-632: ¶25, underlining in the original].

The June 14, 2006 Oral Argument

Oral argument was held the following day, June 14, 2006. Although it was plaintiffs – not Mr. Freeman – who had requested oral argument, Judge Loehr permitted Mr. Freeman to orally argue his dismissal motion [R-714: ¶24]. Mr. Freeman's argument repeated the false and misleading claims he had made in his dismissal motion and reply – all of which plaintiffs had already exposed in their papers

and Sassower so-stated in her argument. Sassower reiterated that plaintiffs' opposition to Mr. Freeman's dismissal motion was so dispositive of the insufficiency and fraudulence of that motion as to entitle plaintiffs to all six branches of their cross-motion.

In addition to emphasizing the significance of plaintiffs' Exhibit A contextual analysis of the column [R-97-116] in establishing their defamation causes of action [R-79-86], Sassower handed up to the Court the two law review articles [R-634, R-662] in substantiation of the journalistic fraud cause of action [R-86-9].

Judge Loehr's July 5, 2006 Decision and Order

Twenty-one days after oral argument, Judge Loehr signed an 11-page decision and order, dated July 5, 2006 [R-7-17], purporting to grant Mr. Freeman's dismissal motion and to deny plaintiffs' cross-motion. In so doing, Judge Loehr did not identify plaintiffs' contention that the threshold issue before him was the sufficiency of the motions – and did not determine their sufficiency. Nor did Judge Loehr even identify that plaintiffs had opposed Mr. Freeman's dismissal motion or identify any of the facts, law, or legal argument they had presented to support their complaint's three causes of action. Indeed, Judge Loehr also did not identify any of the facts, law, or legal argument Mr. Freeman had presented.

Instead, after setting forth the grounds of Mr. Freeman's dismissal motion, the decision cited *Silsdorf* for the legal standard "Deeming the allegations of the complaint as true" [R-8] – without stating that Mr. Freeman had adhered to such standard. The decision then purported to recite the complaint's "deemed true" allegations [R-8-11], when, in fact, it recited only nine of the complaint's 175 allegations and these it distorted and mischaracterized, including by interjecting ¾ page of matter not part of the complaint. None of these "deemed-true" allegations were from the complaint's three causes of action – and the defamation *per se* cause of action was not even identified as existing.

The decision then reprinted the defamatory column, in full, followed by a series of characterizations plucked from the column [R-11-13]. Such characterizations related only to Sassower, not CJA – and did not distinguish between Sassower individually and as CJA's Coordinator. The decision made no mention of the complaint's Exhibit A contextual analysis of the column, nor plaintiffs' contention that it was "decisive" of their defamation causes of action. This, notwithstanding the decision recited the legal standard:

> "The Court must look at the content of the entire communication, its tone and apparent purpose, to determine whether a reasonable person would consider it as conveying facts about the plaintiffs" [R-13].

By making it appear that the plucked characterizations were the basis of plaintiffs' defamation claims, the decision was able to purport that the complaint had not stated a cause of action for defamation. The decision also cited to legal precepts whose inapplicability and actual falsity plaintiffs had already demonstrated by their opposition to Mr. Freeman's dismissal motion, uncontested by his reply. Among these:

- that "it is a settled rule that expressions of an opinion, false or not, libelous or not, are constitutionally protected an[d] may not be the subject of a defamation action" [R-13] – already rebutted [R-571-3];

- that "the challenged statements are not reasonably susceptible of a defamatory meaning" and "in any event merely rhetorical hyperbole constituting pure opinion" and "therefore constitutionally-protected" [R-14] – already rebutted [R-573-5];

- that "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" [R-14] – already rebutted [R-570-1, R-578-86];

- that "The only factual inaccuracy plaintiffs have identified is that the article reported that Sassower had been arrested for disorderly conduct when in fact the charge was disruption of Congress" and such "minor discrepancy does not amount to falsity as a matter of law" [R-14] – already rebutted [R-567-88; R-582-3];

- that the "gravamen" of the complaint was defendants' "failure...to have included in the article all of the history...which led to Sassower's arrest and conviction" – but these are "editorial" decisions, "protected by the First Amendment" [R-14] – already rebutted [R-568-70; R-556, R-562-3; R-579-80]

With respect to the journalistic fraud cause of action, the decision also did not address any of the facts, law, or legal argument plaintiffs had presented, except to say that such cause of action was based on "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*" [R-14-5]. In so doing, the decision confronted none of the article's legal arguments as to the viability of such cause of action under First Amendment principles [R-634] – or plaintiffs' further arguments, including those based on "*Access to the Press – A New First Amendment Right*" [R-662]. Instead, the decision echoed Mr. Freeman's assertion that "no jurisdiction has embraced such cause of action" [R-15, R-543-4] – already demonstrated by plaintiffs to be insufficient [R-564-5]. The decision further asserted that "even if such cause of action existed, plaintiffs have failed to allege a claim thereunder" [R-15] – repeating the same boilerplate it had used in dismissing the defamation causes of action, namely: "the gravamen of plaintiffs' claim as alleged in the complaint is not defendants' misstatement of fact..." and that defendants' decisions as to coverage are "editorial, necessarily subjective, and protected under the First Amendment" [R-15] – already rebutted by plaintiffs, factually and legally [R-568-70; R-556, R-562-3, R-579-80].

Having purported to grant Mr. Freeman's dismissal motion, the decision then used it as the basis to deny, either in whole or part, the three branches of plaintiffs' six-

branch cross-motion it identified: disqualification of counsel, sanctions, and a default judgment – in that order [R-15-6]:

– the decision denied the third branch of plaintiffs' cross-motion to disqualify Mr. Freeman and The New York Times Company Legal Department, asserting, as the reasons: "[i]nasmuch as there is no cause of action for journalistic fraud" and because it is "moot" [R-16];

– the decision denied the first branch of plaintiffs' cross-motion for sanctions, asserting that its granting of the dismissal motion constitutes a "find[ing]" that the motion is "not frivolous" [R-16];

– the decision denied the fourth branch of plaintiffs' cross-motion for a default judgment against Okrent, Fuchs, and the unnamed DOES – all non-appearing defendants – based on its "[h]aving decided that the instant complaint does not state a cause of action" and dismissed the complaint "on the Court's own motion" "with respect to the remaining defendants" [R-16] – these being the non-appearing New York Times and its Editorial Board.

As to "[t]he remaining relief requested in plaintiffs' cross-motion", the decision denied it, without reasons, and without identifying this "remaining relief" as the second, fifth, and sixth branches of the cross-motion for disciplinary referrals, summary judgment against the defendants who had appeared, and other relief [R-16].

As for a judgment, Judge Loehr made no mention – including as to whether such should be settled or submitted.

On July 21, 2006, Mr. Freeman served plaintiffs with a copy of the July 5, 2006 decision with notice of entry [R-781] – which he never thereafter filed in the Westchester County Clerk's Office [R-903].

The *Ex Parte* August 1, 2006 Judgment Signed by the Westchester County Clerk

On August 1, 2006, the Westchester County Clerk signed a Judgment [R-18-9] which purported to be made "upon motion of George Freeman, attorney for The Times". Its three decretal paragraphs read:

> "ADJUDGED AND DECREED, that The Times' motion to dismiss the complaint is granted; and it is further
>
> ADJUDGED AND DECREED, that plaintiffs' verified complaint and all of the claims made therein, be and hereby are dismissed with prejudice in their entirety; and it is further
>
> ADJUDGED AND DECREED, that plaintiffs' cross-motion, and all of the claims made therein, is denied." (R-19, underlining added)

In fact, Mr. Freeman had not made any motion and none had been served on plaintiffs. Nor had the July 5, 2006 decision stated that the claims of the verified complaint had been dismissed "with prejudice in their entirety" [R-7-17].

Mr. Freeman did not serve the Judgment upon plaintiffs. They only learned of it by examining the computerized docket in the Clerk's Office, where it was identified as a "declaratory judgment" [R- 778-80]. Plaintiffs thereupon inquired of Judge Loehr's law clerk, who knew nothing of it. They also inquired of personnel of the Clerk's Office, who, upon reviewing the decision, were of the view that Mr. Freeman's *ex parte* Judgment should not have been signed with the additional language "with prejudice in their entirety" [R-716: ¶31].

Plaintiffs' August 21, 2006 Notice of Appeal and Their Motion for Judge Loehr's Disqualification, Disclosure/Referral, Reargument/Renewal, Vacatur, and Other Relief

On August 21, 2006, plaintiffs filed their notice of appeal from the July 5, 2006 decision and order and August 1, 2006 Judgment [R-1]. Simultaneously, they filed a motion before Judge Loehr [R-700], seeking an order:

> "(1) disqualifying [Judge Loehr] for demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14 and vacating [his] July 5, 2006 decision and order by reason thereof for fraud and lack of jurisdiction; and, if denied:
>
> > (a) for disclosure by [Judge Loehr], pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, including as to [his] relationships with, and dependencies on, Francis A. Nicolai, Administrative Judge of the Ninth Judicial District, and the basis upon which Administrative Judge Nicolai assigned this case to [Judge Loehr] by his May 8, 2006 notice;
> >
> > (b) for referral of the May 8, 2006 notice back to Administrative Judge Nicolai so that he may reconsider whether to vacate it for lack of jurisdiction based on his own disqualifying interest pursuant to Judiciary Law §14 or because, based on the record of May 8, 2006, it was improvidently issued in that the first randomly-assigned judge, Supreme Court Justice Mary H. Smith, had not disqualified herself;
>
> (2) for reargument and renewal of [Judge Loehr's] July 5, 2006 decision and order pursuant to CPLR §2221 and, upon the granting of same, vacating it for fraud and lack of jurisdiction;
>
> (3) for vacatur of the Westchester County Clerk's August 1,

2006 judgment pursuant to CPLR §5015(a)(3) for 'fraud, misrepresentation, or other misconduct of an adverse party', with imposition of maximum costs and sanctions pursuant to NYCRR §130-1.1 *et seq.* against defense counsel George Freeman and The New York Times Company Legal Department, themselves defendant DOES;

(4) for such other and further relief as may be just and proper, including $100 motion costs pursuant to CPLR §8202."

Supporting the motion were plaintiffs' 38-page memorandum of law [R-784-823], to which were appended a 13-page **"IN-DEPTH ANALYSIS OF THE 'DEEMED TRUE' ALLEGATIONS OF THE VERIFIED COMPLAINT RECITED BY THE JULY 5, 2006 DECISION & ORDER"** [R-824-36] and, additionally, a 15-page affidavit by Sassower [R-703-17], with 19 exhibits annexed [R-718-83].

The introduction to plaintiffs' memorandum of law stated:

"As hereinafter shown, no fair and impartial tribunal could render the July 5, 2006 decision and order as it flagrantly violates ALL cognizable legal standards and adjudicative principles to grant defendants relief to which they are not entitled, *as a matter of law*, and to deny plaintiffs relief to which the law – and mandatory rules of judicial conduct – absolutely entitle them. Such decision is, in every respect, a knowing and deliberate fraud by the Court and 'so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause' of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960)." [R-786, capitalization and underlining in the original].

The memorandum's POINT I [R-787-809] chronicled how Judge Loehr's failure to identify and rule on the threshold issue of the sufficiency of the motions before him

was with knowledge that such would require him to deny Mr. Freeman's dismissal motion and grant plaintiffs' cross-motion. Indeed, it demonstrated that Judge Loehr's dismissal of the complaint not only replicated the fraudulent factual and legal claims of Mr. Freeman's motion which plaintiffs had already exposed, but did so even more egregiously than Mr. Freeman.

Sassower's accompanying affidavit particularized [R-703-14] Judge Loehr's disqualification for interest arising, in the first instance, from the disqualification for interest of Administrative Judge Nicolai, on whom Judge Loehr was dependent for judicial assignments and privileges. Sassower showed that Administrative Judge Nicolai had been a direct beneficiary of The Times' cover-up of the judicial corruption exposed by both the defamation and journalistic fraud causes of action and was, therefore, "personally and professionally" interested in a decision adverse to plaintiffs. In demonstrating that Administrative Judge Nicolai had no basis for assigning the case to Judge Loehr other than "to guarantee the outcome he desired: dismissal of the action" [R-708, ¶15, underlining in the original], Sassower showed that the three computer-selected randomly-assigned Supreme Court justices were not, in fact, disqualified, as no standing orders for their disqualification were in the possession of the Calendar Clerk's Office on May 8, 2006 or since and that Judge Loehr, a newly-elected County Court judge, with an exclusively criminal docket, had no qualifying

expertise over other eligible judges.

As stated:

> "14. The brazen fraud committed by [Judge Loehr's] July 5, 2006 decision and order...undermines any view that Administrative Judge Nicolai referred this case to [him] because he believed [Judge Loehr] would render fair and impartial judgment or because [he] had some expertise not held by other eligible judges based in the White Plains courthouse.[fn3] Indeed, one would reasonably believe that if a County Court judge is specially assigned to a case by an Administrative Judge – thereby enabling him to assume the title of 'Acting Supreme Court Justice', which he is otherwise not[fn4] – he would do as conscientious a job as possible so as to merit such designation and recognition in the future." [R-708: ¶14, underlining in the original].

Sassower further showed that Judge Loehr had his own "direct financial and career interests". After reciting Judge Loehr's past political ties – and his failed Supreme Court electoral bid in 2002 – her affidavit stated:

> "21. ...[Judge Loehr's] aspirations for higher judicial office or even for re-election upon expiration of [his] term can only be achieved by the favor of political patrons and a legal/governmental establishment whose corruption, covered up by The Times, is embodied by this action. Indeed, under The Times-perpetuated *status quo*, [Judge Loehr's] fraudulent July 5, 2006 decision and order is not only no bar to [his] continued public service and advance up the judicial ladder, but is a credential of [his] usefulness to the political power structure that controls judicial selection.
>
> ...

"fn3 Upon information and belief, the Court – before ascending to the bench – had no specialization in First Amendment or media law."

"fn4 The May 8, 2006 notice does not disclose that the Court is not an 'Acting Supreme Court Justice'– but, only so-designated for purposes of hearing this case []."

23. In any event, the July 5, 2006 decision and order, in and of itself, gives the Court an immediate and direct interest in the case, as it exemplifies the judicial corruption that The Times has been purposefully suppressing from coverage..., in violation of its First Amendment responsibilities, namely, fraudulent judicial decisions obliterating any semblance of the rule of law and judicial 'process' in cases of profound public import." [R-713-4].

Plaintiffs' memorandum also asserted:

"Should the Court not disqualify itself based on this motion, it must justify its July 5, 2006 decision and order by confronting and addressing, with specificity, the facts and law which the motion presents. Only by so doing can it demonstrate that there are no grounds on which its impartiality might 'reasonably be questioned'." [R-814].

The memorandum also observed that "the infirmities of Administrative Judge Nicolai's May 8, 2006 assignment affect [Judge Loehr's] jurisdiction to have rendered the July 5, 2006 decision and order in the first instance" [R-815] and questioned

"whether Administrative Judge Nicolai, appointed to that position in 1999 when he was an elected Supreme Court justice, could lawfully retain that office, following his election in 2004 as a County Court judge, and whether as a County Court judge, albeit his purported designation as Administrative Judge, he could then legally appoint another County Court judge to be an 'Acting Supreme Court Justice' for purposes of taking jurisdiction of this Supreme Court case – which he did without citation to any specific legal authority." [R-815].

Plaintiffs' memorandum further showed that the words in the August 1, 2006 Judgment [R-19] that plaintiffs' claims were dismissed "with prejudice in their entirety" gave *res judicata* effect to the dismissal – contrary to settled law. As stated:

"It is settled law that *res judicata* does not apply where the granting of a dismissal motion brought under CPLR §3211(a)(7) is based solely on the facial insufficiency of the pleaded causes of action. In such case, 'the plaintiff may sue anew with a complaint that corrects the deficiency. See *Addeo v. Dairymen's League Co-op, Ass'n*, 47 Misc. 2d 426, 262 N.Y.S.2d 771 (1965).' McKinney's Consolidated Laws of New York Annotated, Practice Commentaries by David D. Siegel, C:3211:67 'Impact of Dismissal under CPLR 3211(a)(7)'; David D. Siegel, New York Practice §276: Res Judicata Effect of CPLR 3211 Disposition' (2005 ed.).

> 'When a complaint is dismissed for legal insufficiency or another defect in the pleading, the dismissal does not act as a bar to the commencement of a new action for the same relief unless the dismissal is expressly made on the merits...',

9A Carmody-Wait 2nd, §63.566 (2006 ed.); *Asgahar v Tringali Realty, Inc.*, 18 A.D.3d 408 (2nd Dept. 2005)." [R-818-19].

Mr. Freeman's September 19, 2006 Opposing Affidavit and Plaintiff Sassower's September 25, 2006 Reply Affidavit

Mr. Freeman's response was a 5-1/4 page opposing affidavit, dated September 19, 2006 [R-837-42]. It did not address any of the facts, law, or legal argument presented by plaintiffs' motion, virtually all of which it concealed, and was fashioned on knowingly false conclusory claims. This was demonstrated by Sassower's 17-page reply affidavit, dated September 25, 2006 [R-843-60], which reiterated the standard governing adjudication of opposing papers, prefaced by the assertion that Mr. Freeman's affidavit – like his prior submissions – was:

> "from beginning to end and in virtually every sentence, a fraud on this Court, warranting additional imposition of costs and financial sanctions,

pursuant to 22 NYCRR §130-1.1 *et seq.*, and reinforcing the Court's duty to refer him and culpable colleagues and supervisory personnel in the New York Times Company Legal Department to disciplinary authorities' pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct." [R-844: ¶3].

Among the deceits, exposed by Sassower's reply affidavit:

(1) Mr. Freeman's bald assertions that plaintiffs' motion had "showed no basis whatsoever for [its] claims of bias and corruption" [R-838: ¶5]; and had "fail[ed] to point to any omissions or misapprehensions" [R-389: ¶6] in Judge Loehr's July 5, 2006 decision – when he had not addressed or identified any of the facts, law, or legal argument presented by plaintiffs' motion;

(2) Mr. Freeman's concealment that plaintiffs' motion sought Judge Loehr's disqualification for interest [R-388: ¶3] – when such was explicit in plaintiffs' notice of motion and particularized by the motion;

(3) Mr. Freeman's concealment that plaintiffs' motion had requested, in the event disqualification was denied, disclosure by Judge Loehr and referral of the May 8, 2006 assignment notice back to Judge Nicolai – when such was explicit in plaintiffs' notice of motion and particularized by the motion;

(4) Mr. Freeman's bald pretense that he did "not believe there was anything the slightest bit inappropriate or improper, let alone fraudulent or corrupt, in the appointment of Justice Loehr to sit on this matter" [R-383: ¶5] – when he neither identified nor confronted any of the facts pertaining to the appointment, particularized by plaintiffs' motion, including that Judge Loehr had been hand-picked by Administrative Judge Nicolai on a record showing that the randomly-assigned, computer-selected Supreme Court justices were not disqualified;

(5) Mr. Freeman's bald assertion that plaintiffs' motion had offered "no new fact" for its requested renewal [R-839: ¶7] – when their motion had explicitly identified the "new and newly-discovered facts" as pertaining to Judge Loehr's disqualification;

(6) Mr. Freeman's bald assertion that "government reports and transcripts" supported the words he had added to the Judgment [R-841: ¶9], when plaintiffs'

motion expressly pointed out that Judge Loehr had based dismissal "solely on the complaint and exhibits annexed thereto".

Sassower closed by introducing an additional law review article, "*Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*" by Professors Randall Bezanson and Gilbert Cranberg, 90 Iowa Law Review 887 (March 2005) [R-867-900], "in further support of reargument and express recognition of a journalistic fraud cause of action". She stated:

> "26. Professors Bezanson and Cranberg 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', rather than journalism. They state:
>
> > '...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...'. (at 890)
>
> 27. The professors describe how media companies, in dealing with market pressures, have cast aside journalistic considerations as the basis for their policy and other decisions – resulting in increased risks of flawed journalism, including defamatory falsehood. They posit a 'tort action' 'against the corporation' (at 891) which recognizes that there are 'decisions and policies at the institutional level that produce, facilitate, or influence the harmful conduct' involved in libel actions, 'over which writers and editors may have little or no control' (at 891). Stating that '[t]he conditions under which [journalists] work are often major contributing factors to, if not chiefly responsible for, errant reporting and editing' (at 895), they assert that 'when a damaging falsehood is published, and the injured party looks to the courts for redress...the legal system [should] address the issues of institutional responsibility.' (at

899):

'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 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 whether that statement was causally related to the changed policy or 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 not worry about the truth...' (at 901-903).

28. Not only does this law review article reflect an evolution of media law and causes of action, but the proposed 'public defamation action' is precisely what is embodied by the instant case for libel and journalistic fraud against the corporation and newspaper, its chairman-publisher and highest echelons of the newspaper's editorial and management staff, in addition to MAREK FUCHS, the author of '*When the Judge Sledgehammered The Gadfly*'. The verified complaint particularizes that these highest ranks were knowledgeable of, and acquiesced in, a pattern and practice of knowingly false and misleading news reporting and editorializing, covering up systemic governmental corruption and blackballing and besmirching plaintiffs, whose result – consistent therewith – was FUCHS' knowingly false and defamatory column. The last allegation of the complaint (¶175), culminating the journalistic fraud cause of action, is that:

> 'THE NEW YORK TIMES COMPANY has subordinated its First Amendment obligations to its own business and other self-interests. These include its interest in procuring the site for its new corporate headquarters, as well as favorable tax abatements and financial terms worth hundreds of millions of dollars. Upon information and belief, because THE NEW YORK TIMES COMPANY could not obtain same without the backing of Governor Pataki, other powerful government officials -- and the cooperation of the courts -- it has been motivated to 'steer clear' of coverage exposing their official misconduct, to the detriment of the public.'

29. The excision of this important final allegation from the Court's July 5, 2006 decision, as likewise ALL the complaint's allegations reflecting that 'The Times is a for-profit, money-making, corporate entity'[fn8], and that its highest echelons were knowledgeable of,

---

[fn8] See footnote 5 to plaintiffs' June 1, 2006 memorandum of law:

'Newspapers, magazines, and broadcasting companies are businesses

and involved in, a First-Amendment-violating course of conduct – all elements of the proposed 'public defamation action' for 'institutional reckless disregard for truth' – is laid out by plaintiffs' 13-page '**IN-DEPTH ANALYSIS OF THE 'DEEMED TRUE' ALLEGATIONS OF THE VERIFIED COMPLAINT RECITED BY THE JULY 5, 2006 DECISION & ORDER**', annexed to their memorandum of law. Needless to say, Mr. Freeman's opposing affidavit does not contest ANY aspect of this analysis, including its legal argument. Indeed, his affidavit does not even identify that the analysis exists." [R-856-859, capitalizations and bold in the original].

Judge Loehr's September 27, 2006 Decision and Order

Two days after the return date of plaintiffs' motion, Judge Loehr disposed of it by a 2-1/4 page decision and order dated September 27, 2006 [R-26-9].

The decision opened by materially misrepresenting the relief sought by the first branch of plaintiffs' notice of motion. Most significantly, it did not identify that plaintiffs' request for Judge Loehr's disqualification was for "demonstrated actual bias and interest". Nor did it identify their two-fold alternative request: for disclosure by him and referral of the May 8, 2006 notice of assignment back to Administrative Judge Nicolai for vacatur of the notice based on Judge Nicolai's own "disqualifying interest". Instead, the decision identified only that plaintiffs had sought Judge Loehr's "recusal",

---

conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public...they must pay the freight; and injured persons should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand.' *Buckley v. New York Post Corp.*, 373 F.2d 175, 182 (2nd Cir. 1967), quoted in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967)."

which it described as follows:

> "The basis of the application is, as alleged by plaintiffs, that Judge Nicolai, the Administrative Judge of the District, has been engaged in an on-going retaliatory vendetta against the plaintiffs due to their crusade against judicial corruption; that Judge Nicolai wanted plaintiffs' complaint dismissed; and that Judge Nicolai assigned this case to this Court so as 'to guarantee the outcome he desired: dismissal of the action.'" [R-27, emphasis in the original].

In other words, the decision made it appear as if plaintiffs were contending that Judge Loehr was disqualified not for any reasons having to do with him, but for reasons relating only to Administrative Judge Nicolai, and that, with respect to Administrative Judge Nicolai, their contentions were not – as they were – that Administrative Judge Nicolai had his own "disqualifying interest" in the case which deprived him of jurisdiction to assign it to Judge Loehr [R-708: ¶¶15 – 20, R-810].

The decision then denied disqualification, purporting:

> "Suffice it to say, the Court has no knowledge of Judge Nicolai's opinion with respect to this matter, assuming he has an opinion at all. Moreover, the case was not assigned to this Court to guarantee any particular result but because of the number of judges who had already recused themselves.[fn]" [R-27].

The appended footnote then explained:

> "It appears that at least nine of the Supreme Court or Acting Supreme Court Judges in this courthouse had issued standing recusal orders recusing themselves from any action involving the plaintiffs." [R-27].

Such completely ignored the contrary documentary evidence annexed to plaintiffs' motion, consisting of copies of the recusal orders of two of the three computer-assigned Supreme Court justices, on file with the Calendar Clerk's Office on May 8, 2006, which were not standing disqualification orders [R-726, R-728]. It was also without identifying the motion's evidentiary showing that the "particular result" reached by Judge Loehr's decision was completely fraudulent and inconsistent with anything but a determination to achieve a "particular result".

This concealment of evidence was the predicate for Judge Loehr's denying the second branch of plaintiffs' motion: for reargument and renewal – which he likewise achieved by concealing all the facts, law, and legal argument plaintiffs had presented in support. Thus, although plaintiffs had expressly identified that renewal rested on "new and newly-discovered facts" pertaining to Judge Loehr's "demonstrated actual bias and interest" [R-704-14: ¶¶4-24, R-814], Judge Loehr stated:

> "Renewal is denied based on plaintiffs' failure to submit any new facts or demonstrate a change in the law (CPLR 2221[a])." [R-27].

Similarly, notwithstanding plaintiffs' reargument request was based on their 35-page showing that Judge Loehr's July 5, 2006 decision was unfounded factually and legally [R-787-809; 824-36], Judge Loehr stated:

> "Reargument is denied for the reasons stated in the original Decision: the Court did not misapprehend the facts or the law" [R-27],

As for plaintiffs' third branch of relief: vacatur of the August 1, 2006 Judgment [R-18-19], Judge Loehr baldly asserted: "Although the Decision did not state that the dismissal was with prejudice, the dismissal was clearly on the merits" [R-26] and "inasmuch as the Decision was on the merits, the dismissal was necessarily with prejudice" [R-27]. This, without explaining or showing how his granting of a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action – "based solely on the complaint and exhibits annexed thereto" – could be "on the merits" and, therefore, "with prejudice". Here, too, Judge Loehr did not identify any of the facts, law, or legal argument which plaintiffs had presented to show that such could not be.

As for Judge Loehr's citation to three readily-distinguishable cases [R-27-8] – none provided by Mr. Freeman – the first did not indicate that it involved a CPLR §3211(a)(7) dismissal and the second case certainly did not. As for his third cited case – buttressing his fall-back proposition, "Moreover, even if the 'with prejudice' language was included in the Judgment in error, this Court would be without authority to remove it. Plaintiffs remedy would be an appeal" [R-27], such case involved "resettlement of a Judgment" and not, as here, a motion to vacate pursuant to CPLR §5015(a)(3) for "fraud, misrepresentation, or other misconduct of an adverse party". Likewise, here, Judge Loehr did not identify any of the facts, law, or legal argument presented by plaintiffs in support of vacatur on such ground.

Plaintiffs' December 21, 2006 Notice of Appeal

On December 21, 2006, plaintiffs filed a notice of appeal from the September 27, 2006 decision and order [R- 20]. Simultaneously, they served and filed a notice of entry for the September 27, 2006 decision and order [R-901], which Mr. Freeman had never served and filed [R-903].

ARGUMENT

POINT I

Judge Loehr Could Not Lawfully and Constitutionally Be Assigned to this Supreme Court Case, Nor Could He Lawfully and Constitutionally Assume Jurisdiction

Part 33 of the Rules of the Chief Judge is entitled "Temporary Assignment of Justices and Judges". §33.0 states:

> "Temporary assignments of judges and justices of the Unified Court System pursuant to article VI, section 26 of the Constitution shall be made by the Chief Administrator of the Courts, in his or her discretion, subject to the Constitution, article VI, section 28, subdivision b, after determining the need therefore and the advisability thereof consistent with the objectives of the Unified Court System; provided, however, that such temporary assignments shall be made with due regard for the courts from which and to which a temporary assignment is made and with due regard for the official and appropriate interests of the judge being assigned. When made for a period in excess of 20 calendar days, such temporary assignments shall be made by the Chief Administrator in consultation and agreement with the presiding justices of the appropriate appellate divisions on behalf of their respective courts, provided further that if the Chief Administrator and a presiding justice are unable to agree, the matter shall be determined by the Chief Judge."

§33.1 specifically addresses "Temporary Assignment of Judges to the Supreme Court" as follows:

> "In addition to the criteria set forth in section 33.0 of this Part, all assignments to the Supreme Court of judges of courts of limited jurisdiction, other than the Court of Claims, shall be made pursuant to rules promulgates by the Chief Administrator which shall provide for:
>
> (a) minimum standards of judicial service as a prerequisite for consideration;
>
> (b) recommendations by administrative judges, bar associations and others who may have knowledge of the capabilities of the judge under consideration; and
>
> (c) limited terms of assignment and a procedure for evaluation of the qualifications of the judge prior to a designation or redesignation for temporary assignment."

The implementing Rules of the Chief Administrator are set forth at Part 121, entitled "Temporary Assignment of Judges to the Supreme Court". §121.2(c) expressly limits eligibility:

> "No judge shall be eligible for temporary assignment pursuant to this Part for a period in excess of 20 calendar days unless that judge has served in a court of limited jurisdiction for a period of two years."

Administrative Judge Nicolai's May 8, 2006 notice assigning the case to Judge Loehr [R-721] gave no legal authority for what it was doing other than that it was "pursuant to the authority vested in him as Administrative Judge of the Ninth Judicial District". Yet it also concealed what it was doing by its description of Judge Loehr,

which falsely made it appear as if he was already and without limitation an "Acting Supreme Court Justice, Westchester County" on a standing basis, rather than, as he was, a Westchester County Court Judge whose designation as "Acting Supreme Court Justice, Westchester County" was the result of his assignment to plaintiffs' case. Plainly, the legal authority allowing Administrative Judge Nicolai to assign an already fully-designated Acting Supreme Court Justice to a Supreme Court case is not the same as that allowing him to assign a Supreme Court case to a Westchester County Court Judge with less than two years on the bench.

The Rules of the Chief Judge contain "Administrative Delegations". §80.1(b)(4) permits the Chief Administrator to:

> "designate deputies and administrative judges in accordance with section 80.2 of this Part. The Chief Administrator may delegate to any deputy, administrative judge, assistant or court any administrative power or function delegated to the Chief Administrator".

Pursuant to the Freedom of Information Law (FOIL) and §124 of the Rules of the Chief Administrator, appellants sought from the Office of Court Administration of the Unified Court System (OCA) copies of any orders and/or notices of Chief Administrative Judge Lippman delegating powers of judicial appointment to Administrative Judge Nicolai under §80.1(b)(4) [R-906, #10]. None have been forthcoming [R-918-29, R-932-5].

Even assuming Chief Administrative Judge Lippman could legally make a

delegation of judicial appointments to Administrative Judge Nicolai under §80.1(b)(4) – and did so – Administrative Judge Nicolai would be bound by the same procedural selection requirements and limitations as bind Chief Administrative Judge Lippman. Among these, §121.2(c).

Appellants' aforesaid FOIL request, dated November 27, 2006, enumerated 15 specific document requests [R-905], virtually all denied by the OCA. The OCA did, however, produce the May 8, 2006 notice [R-919] and a further page, entitled "2006 JUDICIAL ASSIGNMENTS – NINTH JUDICIAL DISTRICT", listing Judge Loehr and the names of three other judges beneath a text reading:

> "With respect to the following judges who have not yet served for more than two (2) years, the requirements of §121.2(b) of the Rules of the Chief Administrator are waived, and they are designated for assignment to Supreme Court on a temporary, ad hoc basis to matters expected to take twenty (20) calendar days or less to complete, particularly to matters brought pursuant to CPLR 78" [R-915].

This "2006 JUDICIAL ASSIGNMENTS" page bears no identification as to who made the designation for assignment, nor any signature. It does, however, reinforce that Judge Loehr was ineligible for assignment to appellants' case. Appellants' case was not a "matter[]" that could be "expected to take twenty (20) calendar days or less to complete" – and the May 8, 2006 notice made no claim that it was [R-721].

Based on information from the Unified Court System [R-908], the "2006 JUDICIAL ASSIGNMENTS" page [R-915] is an attachment to an Administrative

Order signed on December 20, 2005 by Chief Administrative Judge Lippman "with the consultation and agreement of" Presiding Justice Prudenti "on behalf of the Appellate Division, Second Department" [R-913]. Presiding Justice Prudenti's signature is part of the page, beneath a statement that, "on behalf of the Appellate Division, Second Department", she is approving an "attached" "assignment of Justices or Judges". Consequently, the assignment of this case to Judge Loehr and his acceptance of it violated not only §121.2(c) of the Chief Administrator's Rules, but the December 20, 2005 Administrative Order, as it would exceed 20 calendar days.

Adding to this violation is whether the waiver of requirements of §121.2(b), which the "2006 JUDICIAL ASSIGNMENTS" page reveals [R-915], is lawful. The page provides no legal authority for such waiver, whose egregiousness it conceals by not identifying what the waived "requirements of §121.2(b)" are.

§121.2(b) are judicial qualifications which the evaluatory panel set up under §121.2(a) is required to consider "[i]n determining the capability of the judges eligible for assignment". The "2006 JUDICIAL ASSIGNMENTS" page does not identify any basis for waiving these – and such could not be waived absent necessity born of "needs of the courts". Thus, §121.2(d) states:

> "The Chief Administrator, upon consultation with and agreement of the Presiding Justice of the appropriate Appellate Division, may except a judge from all or part of the requirements of section §121.2(b) in determining the judge's eligibility for an assignment not in excess of 20

calendar days if the needs of the courts warrant such action."

The "2006 JUDICIAL ASSIGNMENTS" page, which does not invoke §121.2(d) – albeit it is the only authority that would permit waiver – makes no claim of any "needs of the court" and does not substantiate such claim, not made. Although appellants' November 27, 2006 FOIL request sought rules, procedures, and guidelines pertaining to §121.2(d) [R-906, #6], as well as:

> "copies of all documents establishing 'the needs of the courts' which, pursuant to §121.2(d) would warrant excepting Westchester County Court Judge Gerald E. Loehr from the qualifications requirements of §121.2(b) of the Rules of the Chief Administrator" [R-906, # 7],

the OCA provided none [R-918, R-924, R-932]. Thus, there is no evidence that Judge Loehr's designation, by a waiver of §121.2(b), could lawfully be made. For that matter, there is no evidence of compliance with §121 *et seq.* in other respects, including that an evaluatory panel recommended Judge Loehr to be an Acting Supreme Court Justice. Indeed, it appears there was none.

Suffice to say, even under §121.2(d), a judge exempted from qualifications requirements is not eligible for a Supreme Court assignment "in excess of 20 calendar days", as was unlawfully and unconstitutionally done here.

POINT II

Plaintiff-Appellant's August 21, 2006 Motion to Disqualify Judge Loehr for "Demonstrated Actual Bias and Interest" was Sufficient to Require His Disqualification and Could Not Be Constitutionally Denied

The adjudicative standard for disqualification motions was stated by POINT II of plaintiffs' August 21, 2006 memorandum of law:

> "Adjudication of a motion for a court's disqualification must be guided by the same legal and evidentiary standards as govern adjudication of other motions. Where, as here, the motion details specific supporting facts, the court, as any adversary, must respond to those facts, as likewise the law presented relative thereto. To fail to do so would subvert the motion's very purpose of resolving the 'reasonable questions' warranting disqualification.
>
> The law is clear... that 'failing to respond to a fact attested to in the moving papers...will be deemed to admit it', Siegel, New York Practice, §281 (4th ed. – 2005, p. 464) – citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539 (1975), itself citing Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. 'If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it'.
>
> Moreover, '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 Secundum, Vol. 31A, 166 (1996 ed., p. 339)." [R-813].

Such adjudicative standard was not denied, disputed, or even identified by Mr. Freeman's opposing affidavit [R-837] – nor by Judge Loehr's September 27, 2006 decision [R-26]. Likewise, none of the law and legal argument presented by plaintiffs'

POINT II [R-809-815] establishing the sufficiency of their judicial disqualification motion were denied, disputed, or identified by either Mr. Freeman or Judge Loehr's September 27, 2006 decision.

As for the facts on which plaintiffs' POINT II relied, these were also not denied or disputed by Mr. Freeman and Judge Loehr. These uncontested facts were particularized by POINT I of plaintiffs' memorandum of law [R-787-809], the appended analysis [R-824-836], and by Sassower's accompanying affidavit [R-703-714].

That Judge Loehr's September 27, 2006 decision concealed the very basis upon which plaintiffs' motion sought his disqualification, *to wit*, his "demonstrated actual bias and interest" [R-700] – replicating, even more dramatically, the concealment of Mr. Freeman's opposing affidavit, which had omitted its ground of "interest" [R- 838] – compels the inference that Judge Loehr could not identify either ground without conceding plaintiffs' entitlement to his disqualification based on the facts and law they had presented, all completely concealed by his September 27, 2006 decision [R-26]. Likewise, that Judge Loehr falsely made it appear that plaintiffs' grounds for his disqualification related solely to Administrative Judge Nicolai, not him – and that as to Judge Nicolai, it did not involve interest – compels an inference against him.

> "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 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).

Comparison of the September 27, 2006 decision [R-26] with plaintiffs' August 21, 2006 motion for Judge Loehr's disqualification for "demonstrated actual bias and interest" [R-700] requires an appellate ruling as to the motion's sufficiency, *as a matter of law*, with an additional appellate ruling as to its sufficiency in establishing the "appearance" of his bias and interest, also *as a matter of law*.

Finally, plaintiffs' POINT II identified the appellate standard for evaluating judicial disqualification for "bias", with controlling caselaw, including of this Court, *to wit*, "a judge's denial of a motion to recuse will be reversed where the alleged 'bias or prejudice or unworthy motive' is 'shown to affect the result'", *People v. Arthur Brown,* 141 A.D.2d 657 (2nd Dept. 1988), citing *People v. Moreno*, 70 N.Y.2d 403, 405 (1987); *Matter of Rotwein*, 291 N.Y. 116, 123 (1943); 32 New York Jurisprudence §44, *Janousek v. Janousek*, 108 A.D. 2d 782, 785 (2nd Dept. 1986) [R-811]. Plaintiffs' POINT I demonstrated the July 5, 2006 decision to be the product of such "bias or prejudice or unworthy motive" by its record-based showing that the decision is not merely unsupported by fact and law, but a knowing and deliberate fraud by Judge

Loehr [R-787-809].

As to the appellate standard for evaluating judicial disqualification for interest, which is a statutory disqualification under Judiciary §14, such is *de novo*. Since Judge Loehr did not contest the facts as to his interest, particularized by plaintiffs' motion [R-713-4: ¶¶21-23], such must be deemed conceded, entitling plaintiffs to an adjudication by this Court of his disqualification on grounds of "interest" in addition to "demonstrated actual bias" – and the appearance of both.

POINT III

Plaintiffs-Appellants' August 21, 2006 Motion was Sufficient to Require Disclosure by Judge Loehr and Referral of the Case Assignment Back to Administrative Judge Nicolai

POINT II of plaintiffs' August 21, 2006 memorandum of law enunciated a judge's mandatory obligation to make disclosure, quoting from the New York State Commission on Judicial Conduct:

> "'All judges are required by the Rules of Judicial Conduct to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned.'...
>
> 'It is cause for discipline for a judge to fail to disclose on the record or offer to disqualify under circumstances where his impartiality might reasonable (sic) be questioned'" [R-812],

as well as treatise authority:

> "'The judge is ordinarily obliged to disclose to the parties those facts that would be relevant to the parties and their counsel in considering whether to file a disqualification motion', Flamm, Richard E., Judicial Disqualification: Recusal and Disqualification of Judges, p. 578, Little, Brown & Co., 1996." [R-812].

This obligation of disclosure was not denied or disputed by Mr. Freeman's opposing affidavit [R-837] or by Judge Loehr's September 27, 2006 decision [R-26]. Rather, each concealed that plaintiffs' motion requested disclosure in the event disqualification was denied, as well as the specifics of the requested disclosure.

Plaintiffs' motion expressly called upon Judge Loehr to demonstrate the absence of grounds on which his impartiality might reasonably be questioned by responding to the facts and law the motion presented. This was specified to include "his relationships with, and dependencies on, Administrative Judge Nicolai whose May 8, 2006 notice...assigned this case [to him] in violation of random assignment rules" [R-814].

The September 27, 2006 decision affirmatively concealed the violation of random assignment rules involved in Judge Loehr's selection. It did not identify anything about his relationships with, and dependencies on, Administrative Judge Nicolai, in purporting that he had been assigned "because of the number of judges who had already recused themselves". As to these, the decision stated "[i]t appears that at least nine of the Supreme Court or Acting Supreme Court Judges in this courthouse had issued standing recusal orders recusing themselves from any action involving the

plaintiffs" [R-27]. Yet, as the recusal orders annexed to plaintiffs' motion showed, at least two of the three computer-generated randomly-assigned Supreme Court justices, Justices Smith and LaCava, had not issued standing orders of recusals [R-726-8] – a fact the decision concealed.

That Justice Smith, the first randomly-assigned judge, had not disqualified herself was also evident from plaintiffs' further alternative request, that Judge Loehr refer the May 8, 2006 notice of assignment back to Administrative Judge Nicolai so that he could "reconsider whether to vacate it...because, based on the record of May 8, 2006, it was improvidently issued in that the first randomly-assigned judge, Supreme Court Justice Smith, had not disqualified herself" [R-701]. Yet, this further alternative request is also concealed by Judge Loehr's decision.

As a matter of law, Judge Loehr's concealment that plaintiffs' motion had requested disclosure, combined with his falsification of the record as to the three computer-generated randomly-assigned Supreme Court justices, must be deemed to concede that the requested disclosure would have required him to set forth facts establishing his disqualification, as likewise his obligation to have referred the May 8, 2006 notice of assignment back to Administrative Judge Nicolai.

POINT IV

Judge Loehr's July 5, 2006 and September 27, 2006 Decisions and Orders are Judicial Frauds, Requiring Vacatur/Reversal, as *a Matter of Law*, and the Granting of All Six Branches of Plaintiffs-Appellants' June 1, 2006 Cross-Motion

The record before Judge Loehr when he rendered his July 5, 2006 decision [R-7] establishes that his July 5, 2006 decision is a knowing and deliberate fraud, requiring vacatur/reversal, *as a matter of law*, and the granting of all six branches of plaintiffs' June 1, 2006 cross-motion. This was meticulously demonstrated by plaintiffs' August 21, 2006 motion to vacate it for "fraud and lack of jurisdiction", made as part of their motion for Judge Loehr's disqualification/disclosure and reargument/renewal [R-700]. Judge Loehr's September 27, 2006 decision [R-27] denying the motion underscores that he had no defense in fact and law to its showing, which he entirely concealed.

In the interest of judicial economy, plaintiffs rest on their August 21, 2006 motion [R-700-836] and, specifically, POINT I of their memorandum of law [R-787-809] and its appended 13-page analysis [R-824-836], as dispositive of the fraudulence of Judge Loehr's July 5, 2006 decision, as likewise of his September 27, 2006 decision. Based thereon – and on Sassower's September 25, 2006 reply affidavit [R-843] – plaintiffs seek an appellate ruling making specific findings, including as to the following:

(1) that Judge Loehr's threshold obligation with respect to Mr. Freeman's dismissal motion and plaintiffs' cross-motion was to rule on their sufficiency, which he wilfully and deliberately did not do with knowledge, based on the record before him, that such would compel a disposition opposite to that of his July 5, 2006 decision, *to wit*, denial of Mr. Freeman's dismissal motion, *as a matter of law*, and the granting of all six branches of plaintiffs' cross-motion, *as a matter of law*;

(2) that Judge Loehr's July 5, 2006 decision was a fraud in citing *Silsdorf* as the standard to be applied in determining whether the complaint stated a cause of action, thereby falsely making it appear that it was adhering to such standard, when, in fact, it was reciting only nine of the complaint's 175 allegations, which it materially distorted and misrepresented, with none of these nine being the allegations of the causes of action themselves;

(3) that Judge Loehr's July 5, 2006 decision was a fraud in purporting that the complaint had identified only a single "factual inaccuracy" in support of its defamation claims when the defamation causes of action alleged a myriad of false express and implied facts, as particularized by plaintiffs' 18-page contextual analysis, annexed to the complaint as Exhibit A;

(4) that Judge Loehr's July 5, 2006 decision was a fraud in purporting that this supposedly single "factual inaccuracy" was a "minor discrepancy [that] does not amount to falsity as a matter of law" when it had not confronted any aspect of plaintiffs' argument as to the difference between disorderly conduct and "disruption of Congress", either as set forth in the complaint's Exhibit A contextual analysis or by plaintiffs' opposition to Mr. Freeman's dismissal motion;

(5) that Judge Loehr's July 5, 2006 decision was a fraud in concealing the very existence of the complaint's Exhibit A contextual analysis, which it did because such analysis was dispositive of the viability of the complaint's defamation causes of action based thereon;

(6) that Judge Loehr's July 5, 2006 decision was a fraud in its boilerplate citation to legal precepts which plaintiffs had already

demonstrated as either false or inapplicable to the complaint's defamation causes of action;

(7) that Judge Loehr's July 5, 2006 decision was a fraud in concealing plaintiffs' law and legal argument in support of the viability of a journalistic fraud cause of action, which it did because such law and legal argument was dispositive of its viability;

(8) that Judge Loehr's September 27, 2006 decision was a fraud in concealing that plaintiffs sought his disqualification for "demonstrated actual bias and interest" – and all their substantiating facts, law, and legal argument;

(9) that Judge Loehr's September 27, 2006 decision was a fraud in concealing and falsifying the facts pertaining to his assignment to the case by Administrative Judge Nicolai.

As the July 5, 2006 decision purported to grant Mr. Freeman's motion to dismiss the verified complaint for failure to state a cause of action and denied plaintiffs cross-motion to convert such motion to one for summary judgment in their favor, this Court's review is *de novo*, thereby additionally presenting the Court with the decisive threshold issue as to the sufficiency of the motions for the relief sought.

POINT V

The Record Before this Court Requires that the Court Discharge its Mandatory "Disciplinary Responsibilities" under §100.3D of the Chief Administrator's Rules Governing Judicial Conduct

This Court's judges – as likewise all of the judges of the unified court system – are obligated to ensure the integrity of the judicial process. This is reflected by Part

100 of the Chief Administrator's Rules Governing Judicial Conduct which, pursuant to Article VI, §§20 and 28(c) of the New York State Constitution, has constitutional force. §100.3D of the Chief Administrator's Rules Governing Judicial Conduct, entitled "Disciplinary Responsibilities", states:

> "(1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.
>
> (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.
>
> (3) Acts of a judge in the discharge of disciplinary responsibilities are part of a judge's judicial duties."

Such mandatory disciplinary responsibilities are all the greater with respect to this Court's judges, whose higher position brings with it a duty to provide lower court judges with a role model example of adherence to codes of judicial conduct. *Cf.* "*The Judge's Role in the Enforcement of Ethics – Fear and Learning in the Profession*", John M. Levy, 22 Santa Clara Law Review, pp. 95-116 (1982).

The record before this Court constitutes more than "information" of "a substantial likelihood" of "a substantial violation" of Part 100 of the Chief Administrator's Rules by Judge Loehr. It is the hard evidence of the "substantial violations" themselves – violations demonstrated to be knowing, deliberate, and recurring.

As the record shows, Judge Loehr, in rendering his July 5, 2006 decision, had before him, by plaintiffs' opposition to Mr. Freeman's dismissal motion, all the facts and law he needed to be able to readily and resoundingly determine that Mr. Freeman's dismissal motion could not be granted, *as a matter of law*, and that his mandatory duty, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, which plaintiffs had invoked by the second branch of their cross-motion [R-469, R-592-4], was to take "appropriate action" against Mr. Freeman and The New York Times Company Legal Department for a dismissal motion which was a fraud, from beginning to end and in virtually every sentence. Judge Loehr's response, however, was to omit all reference to plaintiffs' opposition in his July 5, 2006 decision, as likewise all the facts, law, and legal argument it had presented, and to conceal their cross-motion's second branch, while replicating, even more egregiously the fraudulence of Mr. Freeman's motion which their opposition/cross-motion had exposed. Such itself reflects his knowledge that plaintiffs' opposition was dispositive. That Judge Loehr thereafter adhered to the July 5, 2006 decision upon plaintiffs' August 21, 2006 motion for his disqualification and to vacate it for fraud – and did so by his September 27, 2006 decision, which also failed to identify any of the facts, law or legal argument plaintiffs had presented – also because they were dispositive – further reinforces the wilful and deliberate nature of his violations.

No functioning judicial system can tolerate fraud committed by its judges[3] – and the record herein establishes that Judge Loehr's July 5, 2006 and September 27, 2006 decisions are judicial frauds and "'so totally devoid of evidentiary support as to render [them] unconstitutional under the Due Process Clause' of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960)." [R-786].

Nor can a functioning judicial system tolerate fraudulent defense tactics, such as Mr. Freeman's, abetted and rewarded by Judge Loehr. As stated by the New York Court of Appeals – and as plaintiffs brought to Judge Loehr's attention, on two separate occasions [R-621, R-844]:

> "'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 N.Y.2d 336, 340 (1992).

Here, too, the record before this Court is decisive. It constitutes more than "information" of "a substantial likelihood" of "a substantial violation" of the Code of

---

[3] According to a published column by Chief Judge Judith Kaye, "The court system has zero tolerance for jurists who act unethically or unlawfully", "*Court controversies aren't the whole picture*", Gannett, March 22, 2002.

Professional Responsibility by Mr. Freeman. It is the hard evidence of the "substantial violations" themselves – violations also established to be knowing, deliberate, and recurring.

As the record shows, plaintiffs' opposition to Mr. Freeman's dismissal motion demonstrated its fraudulence, virtually line-by-line, after he failed and refused to withdraw the motion, upon notice [R-469]. Thereafter, Mr. Freeman continued his fraudulent defense strategies, unabated, and this, too, was demonstrated by plaintiffs [R-620, R-843].

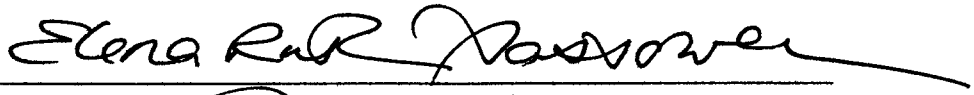
The record herein is clear and unambiguous. This Court's forceful decision as to its mandatory duties under §100.3D of the Chief Administrator's Rules Governing Judicial Conduct, with respect thereto, will go a long way to ending, overnight, judicial and lawyer misconduct that causes so much injustice and generates a significant volume of appeals in this and other courts.

CONCLUSION

Westchester County Court Judge Loehr's July 5, 2006 and September 27, 2006 decisions and orders must be vacated/reversed in their entirety and the *ex parte* August 1, 2006 Judgment vacated. Appellants' June 1, 2006 cross-motion must be granted as to all six branches, with further proceedings based thereon referred to Supreme Court

Justice Mary Smith as the first computer-selected randomly assigned judge. Pursuant to §100.3D of the Chief Administrator's Rules Governing Judicial Conduct, Judge Loehr must be referred to disciplinary and criminal authorities, with comparable referrals of George Freeman, Esq. and The New York Times Company Legal Department. All the foregoing are compelled, *as matters of law*.

Appellants additionally request such other and further relief as costs, disbursements, and an award of sanctions from this Court on their successful appeals.



ELENA RUTH SASSOWER, *Pro Se*
Individually & for The Public

ELI VIGLIANO, Esq.
Attorney for CENTER FOR JUDICIAL ACCOUNTABILITY, INC.,
& for Plaintiff ELENA RUTH SASSOWER as Coordinator,
& for The Public

Dated: White Plains, New York
April 23, 2007