SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

ELENA RUTH SASSOWER, DORIS L. SASSOWER, and CENTER FOR JUDICIAL ACCOUNTABILITY, INC.,	:	
Plaintiffs,	:	Index No. 10-12596
- against -	:	
GANNETT COMPANY, INC., THE JOURNAL NEWS, LOHUD.COM, HENRY FREEMAN, CYNDEE ROYLE, BOB FREDERICKS, D. SCOTT FAUBEL, KEITH EDDINGS, and DOES 1-10,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT

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Pursuant to CPLR 3211(a)(1) and (7), defendants Gannett Company, Inc., Gannett Satellite Information Network, Inc., Henry Freeman, CynDee Royle, Bob Fredericks, and D. Scott Faubel (collectively, "Defendants")[1] by their undersigned counsel, respectfully submit this memorandum of law in support of their Motion to Dismiss the Verified Complaint dated October 4, 2010 (the "Complaint"), filed by Plaintiffs Elena Sassower, Doris Sassower, and the Center for Judicial Accountability. (A copy of the Complaint is attached to the affidavit of Emily S. Smith as Exhibit A.)

PRELIMINARY STATEMENT

Plaintiffs in this action purport to assert claims for "libel and journalistic fraud." Compl. ¶ 1. However, their own overlong Complaint conclusively establishes that each of the statements complained of is either non-defamatory, substantially true, or constitutionally protected opinion. And, as a court in Westchester County held just four years in dismissing an equally frivolous action brought by these same plaintiffs against The New York Times, "no jurisdiction has embraced [a] cause of action" for journalistic fraud. See Sassower v. The New York Times, No. 05-19841 (Sup. Ct. Westchester Co. 2006).

The Complaint and its hundreds of pages of exhibits set out a long and convoluted attack on *The Journal News* for its supposed "cover-up of governmental corruption, its suppression, minimizing and/or malignment of the corruption-exposing achievements of all three plaintiffs, and its knowing and deliberate election-rigging and dishonest editorial endorsements" in the newspaper's coverage. Compl. ¶ 4(j). Many of the events described occurred fifteen years ago. Buried in this mass of paper are the threadbare allegations purporting to give rise to Plaintiffs'

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

lawsuit. Stripped of their rhetoric, these allegations consist of a claim that a May 6, 2009, article (the "Article") in *The Journal News* describing the Sassowers' vocal protests during a White Plains Common Council meeting defamed them by characterizing them as "hecklers," by calling their statements opposing the re-appointment of Judge Brian Hansbury as "slings and arrows," and by reporting on a prior judicial "decision to evict [Elena Sassower] and her mother from their Lake Street apartment of 21 years."[2]

These allegations do not come close to stating a cause of action. Plaintiffs by no means dispute the fact that they attended the Common Council meeting and protested the confirmation of Judge Brian Hansbury to a new term on the White Plains City Court. Even a cursory review of Plaintiffs' own account of their conduct during the meeting demonstrates that the "gist or sting" of the article is substantially true.[3] In fact, Plaintiffs quarrel with the Article's factual account of their actions at the Common Council meeting in only one respect: Elena Sassower insists that she called out, "a corrupt judge and a corrupt process" not when Judge Hansbury *entered* the Council chambers, but when he was *leaving*. The majority of the remaining statements challenged by Plaintiffs – such as the characterization of the Sassowers as "hecklers," and of their comments as "slings and arrows" – are unquestionably either non-defamatory or constitute constitutionally protected opinion. For these reasons, as well as those discussed in more detail below, Plaintiffs' claims should be dismissed as a matter of law.

Regrettably, this is far from the first time that the Sassowers have taken up the courts' time with less than meritorious claims. This lawsuit is simply the latest episode in a history of

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[2] The Plaintiffs' judicial battle over the apartment on Lake Street in White Plains has similarly spanned decades, resulting in, among other things, the sanctions imposed upon them in Sassower v. Field, 973 F.2d 75 (2d Cir. 1992).

[3] Alternatively, some, if not all, factual statements in the Article enjoy the protections of the fair report privilege under New York Civil Rights Law § 74.

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

FACTUAL BACKGROUND

A. The Parties

By their own account, Plaintiffs Doris and Elena Sassower have spent the past two decades on a campaign to expose what the Complaint describes as "the corruption of public officers and of the processes of judicial selection and discipline." Compl. ¶ 7(a). Over the years, their efforts have involved protracted letter-writing campaigns and unsolicited appearances before local, state and national governing bodies. Compl. ¶ 3(b).

In the process, the Sassowers have repeatedly engaged in conduct that has gotten them into trouble. On October 18, 1990, following multiple complaints to the Grievance Committee for the Ninth Judicial District[4] against attorney Doris Sassower, and the resulting initiation of disciplinary proceedings against her, the Second Department ordered Sassower to submit to a

[4] Pursuant to Judiciary Law § 90(2), the Appellate Division, Second Department of the Supreme Court of the State of New York (the "Second Department") is authorized to discipline members of the New York State bar within the Second Department. Pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, § 691.4(a), the Second Department appointed the Grievance Committee for the Ninth Judicial District to investigate and prosecute matters involving attorney misconduct in the Ninth Judicial District.

medical examination to determine whether she was mentally capable of practicing law. Compl. ¶ 4(g); see also Sassower v. Mangano, 927 F. Supp. 113, 115-17 (S.D.N.Y. 1996) (reviewing history of Sassower's professional misconduct and noting the issuance of three separate disciplinary petitions against her). When she declined to submit to such an examination, Doris Sassower was suspended from the practice of law. Id. On May 22, 2003, Elena Sassower was arrested and charged with "disruption of Congress" after she appeared, uninvited, at the United States Senate Judiciary Committee's hearing to oppose the confirmation of Judge Richard Wesley to the United States Court of Appeals for the Second Circuit. Compl. ¶ 3(c) (noting that she "serv[ed] a six-month jail sentence on a trumped-up 'disruption of Congress' charge"); id. Ex. 7 at 7 (insisting that "my . . . request to testify in opposition to Judge Wesley's confirmation based on his documented corruption as a New York Court of Appeals judge . . . interrupted nothing"; see also Transcript of sentencing hearing on June 28, 2004 before Judge Brian Holeman of the Superior Court of the District of Columbia, sentencing Sassower to six months incarceration, attached to the Affidavit of Meghan H. Sullivan ("Sullivan Aff.") as Exhibit A [5]

In addition, both Elena and Doris Sassower have a long history of relentlessly pursuing frivolous lawsuits that have been dismissed as without merit. They have collectively and individually been sanctioned for their vexatious litigation tactics as well as enjoined from bringing further actions related to repeatedly dismissed claims. See Sassower v. Field, 973 F.2d 75, 77-78 (2d Cir. 1992) (affirming imposition of sanctions against both Elena and Doris Sassower for engaging in an "extraordinary pattern of vexatious litigating tactics" and pursuing

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

the litigation "as if it was a holy war and not a court proceeding"); Wolstencroft v. Sassower, 234 A.D.2d 540, 540, 651 N.Y.S.2d 609, 609-10 (2d Dep't 1996) (affirming an order sanctioning Doris Sassower in the amount of $10,250 and directing that $100,000 of settlement monies be returned to plaintiff); Sassower v. Comm'n on Judicial Conduct of State, 289 A.D.2d 119, 734 N.Y.S.2d 68, 69 (1st Dep't 2001) ("The imposition of a filing injunction against both petitioner [Elena Sassower] and the Center for Judicial Accountability was justified given petitioner's vitriolic *ad hominem* attacks on the participants in this case, her voluminous correspondence, motion papers and recusal motions in this litigation and her frivolous requests for criminal sanctions"); see also Sassower v. Signorelli, 99 A.D.2d 358, 359, 472 N.Y.S.2d 702, 704 (2d Dep't 1984).

Plaintiff Center for Judicial Accountability, Inc. ("CJA") is a "citizens' group" created in 1993 by the Sassowers, who have traded leadership titles in the organization since its founding. Compl. ¶¶ 3(a), 4(a), 5. According to Plaintiffs, the "patriotic purpose" of the CJA is to "safeguard the public interest in the integrity of the processes of judicial selection" by providing the public the results of its "investigati[ons] . . . in independently-verifiable documentary form." Compl. ¶ 5 (emphasis in original). Although the Sassowers purport to join the CJA in their claim for libel, Plaintiffs' own claims establish that the Article makes no mention whatsoever of the CJA. See Compl. ¶ 46-47.

Defendant Gannett Company, Inc. is the parent company of Gannett Satellite Information Network, Inc. Despite the sweeping and othen undifferentiated allegations in the Complaint, Gannett Company, Inc., engaged in none of the alleged conduct at issue in this case. The real party in interest is instead Gannett Satellite Information Network, Inc., which owns a number of newspapers and online news outlets throughout the United States. Compl. ¶ 6. *The Journal*

News, a newspaper primarily serving the New York counties of Westchester, Putnam and Rockland, is a business unit of Gannett Satellite Information Network, Inc. Compl. ¶ 6(c). *The Journal News* also operates an online news resource at www.LoHud.com. Defendants Henry Freeman, CynDee Royle, Bob Fredericks and D. Scott Faubel are members of *The Journal News* editorial staff. Compl. ¶¶ 7-10. [6]

Over the course of the past twenty years, Plaintiffs have sent a barrage of letters and "primary source documentary evidence supporting . . . the corruption of the processes of judicial selection" to Defendants requesting that they "investigate or independently verify this documentary evidence of corruption." Compl. ¶ 3(d). Plaintiffs also claim to have repeatedly objected to what they characterize as *The Journal News*'s "violation of its First Amendment responsibilities to inform the public of issues of legitimate public concern." Compl. ¶ 6(e).

B. Plaintiffs' Own Account of the White Plains Common Council Meeting

On May 4, 2009, the White Plains Common Council, the policy-making and legislative body for the City of White Plains, held a meeting.[7] The meeting's agenda included the nomination of White Plains City Court Judge Brian Hansbury for an additional judicial term. Compl. ¶¶ 32-34.

According to Plaintiffs' own allegations, both Elena and Doris Sassower "testif[ied]" during a "citizens' half-hour preceding the Common Council meeting." Compl. Ex. 7 at 7.

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

[7] In addition to the allegations in their Complaint, Plaintiffs provide a detailed account of this meeting in a document annexed as Exhibit 7 and incorporated by reference to the Complaint. Compl. ¶ 24 (describing the Analysis as "a nine-page paragraph-by-paragraph deconstruction of the news article . . . prefaced by a six-page 'Introduction'"); ¶ 38 ("Plaintiffs' analysis is herein repeated, reiterated, and realleged, as if more fully set forth."); Ex. 7. Plaintiffs' account of the Common Council meeting is accepted as true solely for purposes of this motion to dismiss.

Elena Sassower prefaced her comments with a "request to testify under oath as to Judge Hansbury's documented corruption as a White Plains City Court judge." Id. By her own admission, Elena Sassower proceeded to "state[] . . . that Judge Hansbury had demonstrated his corruption by two fraudulent decisions, each unfounded in fact and law . . . resulting in my being dispossessed from my home of 21 years." Id. at 8. These comments "recapt[] [*sic*] for the Mayor and Common Council Judge Hansbury's misconduct in office." Id. at 9. When Judge Brian Hansbury arrived in the Common Council chambers while Sassower or her mother was speaking, Sassower addressed her comments directly to him, demanding that he "justify his decisions." Id. at 10.

In response to Elena Sassower's invective, Councilwoman Rita Malmud informed Sassower that Common Council rules prohibited personal attacks during these sessions. Id. at 9 (describing Malmud's "attempt to distort the relevance and seriousness of my remarks as to Judge Hansbury's on-the-bench corruption"). As Sassower's "testimony" continued, City Clerk Anne McPherson instructed her that she had used her allotted three minutes of speaking time. Id. (complaining that "neither Councilwoman Malmud's 'protest' nor Clerk McPherson's 'reminder' were appropriate. . . . '[T]hree minutes of speaking time' was plainly inadequate for such serious presentation . . . ."). When Mayor Joseph Delfino requested that Elena Sassower take her seat, Sassower initially refused to comply, and instead continued what Plaintiffs deem a "responsive exchange." Id. at 7. Eventually, Doris Sassower joined her daughter at the lectern and picked up where the younger Sassower left off. Id. at 9.

After the Sassowers had resumed their seats, the Common Council proceeded with its nomination of Judge Hansbury. Id. at 10. In offering an invocation during the meeting, the Reverend Carol Huston remarked that "White Plains is a community that cares for its people."

Id. at 10; Compl. ¶ 33. Elena Sassower responded by making a "grunt" and giving her mother "an incredulous look." See Compl. Ex. 7 at 10 (arguing that "my grunt 'Hummph' . . . did not 'interrupt[]' what the reverend was saying," and was nonetheless "not just appropriate, but understated"); see also Compl. ¶ 39 ("[Exhibit 7] is true and correct as to: . . . its analysis of the news article's paragraph 4 (at p. 10)").

Judge Hansbury's nomination was confirmed by a unanimous vote of the Common Council, and he was sworn in by the Mayor of White Plains. Compl. Ex. 7 at 1. As Judge Hansbury and his wife shook hands with the Council members and the Mayor, Elena Sassower called out, "a corrupt judge and a corrupt process." Compl. ¶ 34. Judge Hansbury and his wife then left the Common Council chambers. Compl. Ex. 7 at 12. As the Sassowers left the chambers, two police officers stopped them and prevented them from leaving the building until the Hansburys had departed. Id.

C. The Allegedly Defamatory Article

Two days later, on May 6, 2009, *The Journal News* published an article titled "Hecklers try to derail new city judge" (the "Article"). Compl. ¶ 13. The Article was also published online at the website maintained by *The Journal News*, http://www.lohud.com, under the headline "White Plains woman heckles city judge during confirmation." Id. The Article states in its entirety:

> A city woman once jailed by Congress for interrupting a judicial confirmation took on the Common Council and a city judge this week, when she talked through Mayor Joseph Delfino's requests to take a seat, heckled the judge during his confirmation by the council, then pursued him out of City Hall.
>
> The fireworks began even before Judge Brian Hansbury arrived in the council chambers Monday when Elena Sassower asked the council to reject Hansbury's renomination and instead turn him over to prosecutors for the corruption and conflict of interest she alleges he demonstrated in his 2007 decision to evict her and her mother from their Lake Street apartment of 21 years.

Sassower disregarded Councilman Rita Malmud's protest that council rules do not allow for personal attacks and City Clerk Anne McPherson's reminder that her three minutes of speaking time were up. She then handed the microphone to her mother, who continued with the slings and arrows.

The two eventually returned to their seats, where they carried on the protest. When Hansbury arrived in the council chambers, Elena Sassower greeted him by shouting, 'He's a corrupt judge!' prompting Delfino to steer Hansbury to the council side of a rail that separates the council from the audience. During an invocation by the Rev. Carol Huston, Sassower interrupted Huston's observation that 'White Plains is a city that cares for all its people' with a loud 'Hummph!'

The protests were in vain. The council confirmed Hansbury in a 7-0 vote. He thanked the council and walked from the chambers, accompanied by his wife and followed by the Sassowers and two cops.

As the Sassowers stepped up their pursuit, the officers blocked them from descending a staircase to the first floor until the Hansburys were out of the building. That prompted another protest.

"I'll go when I'm good and ready," Doris Sassower told the officers. "I don't need to be escorted out. This is a public building. I came here to perform a public service."

City Court clerks yesterday responded to a request for records in the eviction case by providing a related decision signed by another City Court judge, Jo Ann Friia, on July 3, 2008.

In it, Friia noted that the eviction proceedings began in 1988 when the condominium board at 16 Lake St. rejected the Sassowers' application to buy a unit they were renting from John McFadden. The women responded to the eviction by suing McFadden, a suit a federal appeals court dismissed in 1993.

They appealed to the U.S. Supreme Court, which refused to hear the case. In 2004, Elena Sassower served a six-month sentence for 'disruption of Congress' during the confirmation hearing of Judge Richard Wesley, a nominee for the federal appeals circuit. Wesley's connection to her case could not be determined yesterday.

In his chambers yesterday, Hansbury shrugged off the incident with the Sassowers the night before.

"It would be inappropriate for me to comment on her or her case," he said.

The online version of the Article included a feature allowing readers to post their own comments. Compl. ¶ 18. Six comments were posted on the website, four of which reflected

unfavorable reactions. Compl. ¶ 19; id. Ex. 5 (compiling comments, including "This nut belongs in the loony bin, plain and simple."; "Doris there are meds for this."; and "Ms. Sassower-the-Younger . . . is in dire need of professional help."). Plaintiffs do not and cannot allege that Defendants authored these statements.

The Sassowers responded to the Article with repeated e-mails and telephone calls to *The Journal News*, demanding that the Article be retracted and replaced "with a story written about the issues of legitimate public concern . . . the judicial appointments process by which White Plains gets its City Court judges and the case file evidence establishing Judge Hansbury's on-the-bench corruption." Compl. ¶¶ 20-28; id. ¶ 29 (quoting October 27, 2009 email to certain Defendants, which stated "Voters must be IMMEDIATELY informed of the true facts and important issues suppressed by the May 6, 2009 article . . . ."). Finding Defendants' responses to these demands lacking, Plaintiffs filed a summons with notice on May 4, 2010, served it on certain of the named defendants within 120 days of filing, and, in response to Defendants demand, served the Verified Complaint on October 4, 2010.

ARGUMENT

On a motion to dismiss for failure to state a claim under 3211(a)(7), "while the allegations in the complaint are to be accepted as true . . . allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." Salvatore v. Kumar, 45 A.D.3d 560, 562-63 (2d Dep't 2007) (quotation omitted); Mark Hampton, Inc. v. Bergreen, 173 A.D.2d 220, 220 (1st Dep't 1991).

A motion to dismiss based on documentary evidence under CPLR 3211(a)(1) should be granted where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc., 290 A.D.2d 383, 383 (2d Dep't 2002). As the Court of Appeals has often noted, summary

disposition is particularly appropriate in libel cases, so as to avoid the chilling effect of potentially protracted litigation on the freedom of speech and the press. See, e.g., Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 256 (1991).

Under these well-established standards, Plaintiffs' claims must be dismissed in their entirety.

I. PLAINTIFFS' LIBEL CLAIMS FAIL AS A MATTER OF LAW.

A. Plaintiffs' Own Submissions Establish That the "Gist or Sting" of the Article is Substantially True.

Plaintiffs' claim that the Article defamed them is fatally flawed because Plaintiffs own Complaint establishes that the factual "gist or sting" of the Article is substantially true. As the Complaint alleges, on June 14, 2009, Plaintiffs sent a "nine page paragraph-by-paragraph deconstruction of the news article" to Defendants, which provides Plaintiffs' own account of their conduct during the May 4, 2009 Common Council meeting. Compl. ¶¶ 23-24. This document, attached and incorporated into the Complaint as Exhibit 7, expressly corroborates the Article's description in all material respects.[8]

Under New York law, it is well-settled that "truth is an absolute, unqualified defense to a civil defamation action." Commonwealth Motor Parts Ltd. v. Bank of Nova Scotia, 44 A.D.2d 375, 378, 355 N.Y.S.2d 138, 141 (1st Dep't 1974). It is an equally fundamental concept that "'substantial truth' suffices to defeat a charge of libel." Id. (quoting Fairley v. Peekskill Star Corp., 83 A.D.2d 294, 297, 445 N.Y.S.2d 156, 159 (2d Dep't 1981)); see also Carter v. Visconti,

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

233 A.D.2d 473, 474, 650 N.Y.S.2d 32, 33 (2d Dep't 1996) ("Even if a publication is not literally or technically true in all respects, the absolute defense applies as long as the publication is substantially true."), leave to appeal denied, 89 N.Y.2d 811, 657 N.Y.S.2d 403, 679 N.E.2d 642 (1997). A statement is substantially true if the statement would not "have a different effect on the mind of the reader from that which the pleaded truth would have produced." Love v. William Morrow & Co., Inc., 193 A.D.2d 586, 588, 597 N.Y.S.2d 424, 426 (2d Dep't 1993) (quoting Fleckenstein v. Friedman, 266 N.Y. 19, 23, 193 N.E. 537 (1934); id. ("A comparison of the disputed language . . . with the plaintiff's own words . . . demonstrates the 'substantial truth' of [defendant's] words, rather than their falsity.").

Therefore, "it is not necessary to demonstrate complete accuracy to defeat a charge of libel. It is only necessary that the gist or substance of the challenged statements be true." Printers II, Inc. v. Professionals Publishing, Inc., 784 F.2d 141, 146 (2d Cir. 1986) (rejecting libel claim based on publication alleged to be "misleading in substance because they impliedly represent that [plaintiff] was neglecting to pay a debt," when monies had not yet come due); see also Croton Watch Co. v. Nat'l Jeweler Magazine, Inc., 2006 WL 2254818 at *5 (S.D.N.Y. Aug. 7, 2006) ("The purportedly defamatory statements need only be substantially true, so that minor inaccuracies cannot give rise to an actionable defamation claim."); Korkala v. W.W. Norton & Co., 618 F. Supp. 152, 155 (S.D.N.Y. 1985) ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance.") (internal quotation marks and citation omitted); Sharon v. Time, Inc., 609 F. Supp. 1291, 1294 (S.D.N.Y. 1984) ("Defendant is permitted to prove the substantial truth of this statement by establishing any other proposition that has the same 'gist' or 'sting' as the original libel, that is, the same effect on the mind of the reader.").

As a threshold matter, as discussed in Point I(C) below, virtually *none* of the allegedly defamatory statements come even close to meeting the "tend[ing] to expose a person to hatred, contempt or aversion . . . in the minds of a substantial number of the community" standard for defamation; the statements would therefore not be actionable, regardless of whether they are true or false. See, e.g., Mencher v. Chesley, 297 N.Y. 94, 100 (1947). In any event, a side-by-side comparison of the statements about Plaintiffs in the Article with the Plaintiffs' own description of the Common Council meeting definitively demonstrates the substantial truth of the Article:[9]

Allegedly Defamatory Statement	**Plaintiffs' Own Descriptions**
"Hecklers try to derail new city judge"; "White Plains woman heckles city judge during confirmation"	During the meeting, (i) Elena Sassower "recapt[] [*sic*] for the Mayor and Common Council Judge Hansbury's misconduct in office" (Compl. Ex. 7 at 9); (ii) a council member stated that Sassower was making improper personal attacks on Judge Hansbury (id. at 9); (iii) Sassower directed her comments directly to Judge Hansbury, demanding that he "justify his decisions" (id. at 10; and (iv) Elena Sassower called out "he is a corrupt judge" as she and her mother left the meeting room (Compl. ¶ 34).
"A city woman [Elena Sassower] once jailed by Congress for interrupting a judicial confirmation . . . ."	Elena Sassower was convicted of "disruption of Congress" in 2004 arising from her conduct at a U.S. Senate hearing on the nomination of Richard Wesley to the U.S. Court of Appeals for the 2nd Circuit. See Compl. Ex. 7 at 6; Compl. at ¶ 3(c); see also Transcript of sentencing hearing, attached hereto as Ex. A.
". . . [Plaintiff Elena Sassower] talked through Mayor Joseph Delfino's requests to take a seat . . ."	At "Mayor Joseph Delfino's request to take a seat . . . I sat down – and, to the extent such was not instantaneous, my responsive exchange with the Mayor presented issues of legitimate public concern – which should have been reported . . . ." (Compl. Ex. 7 at 7).

[9] Again, to be clear, in addressing each of these statements in this capsule analysis of "substantial truth" Defendants are by no means conceding that the statements are capable of being deemed defamatory. To the contrary, except for the (indisputably true) statement that Elena Sassower was once jailed for interrupting Congress, the statements are by no means defamatory.

Allegedly Defamatory Statement	Plaintiffs' Own Descriptions
". . . Elena Sassower asked the council to reject Hansbury's renomination and instead turn him over to prosecutors for the corruption and conflict of interest...."	Plaintiffs' submissions to the Common Council repeatedly ask the Mayor and the Councilmembers to "refer [Judge Hansbury] for disciplinary and criminal investigation and prosecution" for his "on-the-bench corruption." (Compl. Ex. B at 3; Ex. C. at 2; Ex. D at 1, 4).
"...[Judge Hansbury's] 2007 decision to evict her and her mother from their Lake Street apartment of 21 years."	"[T]wo fraudulent judicial decisions rendered by incumbent White Plains City Court Judge Hansbury in landlord-tenant proceedings, ultimately result[ed] in [Elena Sassower's] wrongful eviction from her White Plains co-op apartment, her home for 21 years." (Compl. Ex. 7 at 4-5.)
"Sassower disregarded Councilman Rita Malmud's protest that council rules do not allow for personal attacks and City Clerk Anne McPherson's reminder that her three minutes of speaking time were up."	"Rita Malmud is a councilwoman, not a councilman. . . . I was not engaged in 'personal attacks'...I was recapting [*sic*] ... Judge Hansbury's misconduct in office.... [N]either Councilwoman Malmud's 'protest' nor Clerk McPherson's 'reminder' were appropriate. . . . '[T]hree minutes of speaking time' was plainly inadequate for such serious presentation . . . ." (Compl. Ex. 7 at 7.)
"When Hansbury arrived in the council chambers, Elena Sassower greeted him by shouting 'He's a corrupt judge!'...."	"Judge Hansbury arrived in the council chamber . . . when either I or my mother was still at the lectern. My words ... were 'There's Judge Hansbury. Let him justify his decisions.'...[U]pon approaching the doorway [to exit, I] spoke the words... 'He's a corrupt judge'. That, however, was not the end of what I said. I continued with the further words 'and the process is corrupt.'" (Compl. Ex. 7 at 10-11).
"Sassower interrupted Huston's observation that 'White Plains is a city that cares for all its people' with a loud 'Hummph!'"	"[M]y grunt 'Hummph', ... did not 'interrupt[]' what the reverend was saying. Indeed...a 'Hummph' would have seemed not just appropriate, but understated." (Compl. Ex. 7 at 10).
"As the Sassowers stepped up their pursuit, the officers blocked them from descending a staircase to the first floor until the Hansburys were out of the building."	"That 'two cops' followed us and 'blocked' us from leaving until the Hansburys were out of the building – according to Mr. Eddings – does not mean that we were either pursuing them or stepping up our pursuit of them." (Compl. Ex. 7 at 12).
"The [Sassowers] responded to the eviction by suing McFadden, a suit a federal appeals court dismissed in 1993."	"Judge Friia's July 3, 2008 decision . . . does [not] say we had 'responded to the eviction by suing McFadden'. Nor would it as we had never sued McFadden, who was our co-plaintiff . . . . As for the federal appeals court decision in the case, it was <u>not</u> in 1993, but in 1992 ...." (Compl. Ex. 7 at 13-14).

Plaintiffs' own admissions make clear that the Article offers a substantially true account of the Sassower's conduct during the May 4, 2009 Common Council meeting. Indeed, the only purported factual inaccuracies Plaintiffs appear to allege concern the exact timing of Elena Sassower's outburst that Judge Hansbury was "a corrupt judge" and the procedural posture of a convoluted lawsuit that ultimately resulted in the Sassowers' removal from their home. Such minor inaccuracies do not amount to falsity as a matter of law. See Sassower v. The New York Times Co., No. 05-19841, Order (Sup. Ct. Westchester County Jul. 6, 2006), attached to the Sullivan Aff. as Exhibit B ("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. Such a minor discrepancy does not amount to falsity as a matter of law."); see also Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) ("Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.") (internal quotations omitted).

B. Certain of the Article's Statements Qualify as Protected Opinion.

Having effectively acknowledged that the sum and substance of the Article is accurate, Plaintiffs instead take issue with the Article's characterizations of them as "hecklers," who "took on the Common Council and a city judge," and whose comments were "slings and arrows." Because none of these figurative statements could even remotely be interpreted as stating facts about the Sassowers, their objections to this language cannot state a claim for libel as a matter of law.[10]

[10] Plaintiffs do not allege – nor could they – that the Article asserted that plaintiffs had been arrested for their protests at the Common Common Council meeting or that their conduct constituted a crime.

It is well-settled that only statements that can be reasonably interpreted as stating or implying facts about the plaintiff that are objectively provable as true or false are actionable. See, e.g., Gross v. New York Times Co., 82 N.Y.2d 146, 603 N.Y.S.2d 813, 623 N.E.2d 1163 (1993) (because "falsity is a necessary element of a defamation cause of action and only "facts" are capable of being proven false, "it follows that only statements alleging facts can properly be the subject of a defamation action") (quoting 600 West 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 139, 589 N.Y.S.2d 825, 603 N.E.2d 930 (1992)). Accordingly, "[i]t is a settled rule that expressions of opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.'" Steinhilber v. Alphonse, 68 N.Y.2d 283, 286, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986).[11]

"The question [of whether a statement constitutes fact or opinion] is one of law for the court and one which must be answered on the basis of what the average person hearing or reading the communication would take it to mean." Id. at 290. In making this determination, this Court must consider:

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

Mann v. Abel, 10 N.Y.3d 271, 276 (2008) (quoting Brian v. Richardson, 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347 (1995)); id. (holding that news article describing plaintiff as "political hatchet

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[11] This is particularly true in New York, where the State Constitution provides broader protection for opinions than does the Federal Constitution. Ansorian v. Zimmerman, 215 A.D.2d 614, 614, 627 N.Y.S.2d 706 (2d Dep't 1995) ("Expressions of pure opinion are afforded greater protection under the New York State Constitution than under the Federal Constitution."); Celle v. Filipino Reporter Enters., Inc., 209 F.3d 163, 178 (2d Cir. 2000) ("Unlike the Federal Constitution, the New York Constitution provides for absolute protection of opinions.").

Mann" and "one of the biggest powers behind the throne" in the local town government, who "pulls the strings" and might be "leading the Town . . . to destruction" constituted non-actionable expressions of opinion). This analysis must be conducted by "consider[ing] the content of the communication as a whole," Brian, 87 N.Y.2d at 51, rather than "isolating challenged speech" and subjecting it to "hypertechnical parsing." Immuno AG v. Moor-Janowski, 77 N.Y.2d 235, 255, 256, 566 N.Y.S.2d 906 (1991).

The allegedly defamatory phrases Plaintiffs identify simply do not constitute statements of fact under any of the three factors governing this determination. First, the Article's characterizations of the Sassowers as "hecklers" who "took on the Common Council" with "slings and arrows" in no way have "a precise meaning which is readily understood." These statements are, instead, the prime examples of the kind of "figurative and hyperbolic language" that is constitutionally protected under both New York and federal law. See Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 223 (2d Cir. 1985); see also Greenbelt Cooperative Publ. Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (rejecting plaintiff's defamation claim based on newspaper reporting that he had "blackmail[ed]" the city, noting that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable."); Fleiss v. Wiswell, 2005 WL 3310014 (2d Cir. Dec. 7, 2005) (statement that book was based on "lies and diatribe" protected opinion). Indeed, as at least one court has noted, "to deny to the press the right to use hyperbole . . . would condemn the press to an arid desiccated recital of bare facts." Time, Inc. v. Johnston, 488 F.2d 378, 384 (4th Cir. 1971).

This is not the first time the Sassowers have tried to mischaracterize constitutionally protected opinions as actionable defamation. In Sassower v. The New York Times Co., Elena

Sassower claimed that a November 7, 2004 *New York Times* article reporting her incarceration for disruption of Congress was defamatory based on its references to her as a "gadfly," "something of a handful," with a "relentless" and "exhausting" conversational style of "launch[ing] into polite but fulminating assaults" in debating legal issues, and its description that she "specializes in frontal assaults" against judicial nominees. Sassower v. The New York Times Co., No. 05-19841, Order (Sup. Ct. Westchester County Jul. 6, 2006), Sullivan Aff. Exhibit B. The court roundly rejected Sassower's arguments and dismissed the claims in their entirety, noting that "[c]ontrary to plaintiff's contentions, the challenged statements are not reasonably susceptible of a defamatory meaning, and were, in any event merely rhetorical hyperbole constituting pure opinion. They are therefore constitutionally protected." Id. The same rationale applies here.

C. Any Alleged False Statements of Fact Are Not Defamatory.

Even assuming *arguendo* that any of the Article's descriptions could reasonably be understood as conveying facts rather than opinions, Plaintiffs fall far short of explaining how these statements possibly could be considered defamatory. An statement implying that an individual was a trifle rude on (e.g., "interrupting" an invocation at a community government meeting with a "Hummph," which the Complaint, in any event, acknowledges is true) or the statements in the Article relating to the Sassowers' past litigation over their eviction simply do not qualify as "defamatory" under the standards established by the New York courts.[12] Compl. ¶¶ 14, 33, 34.

[12] Again, the only comment that could reasonably be construed as casting Plaintiffs in a negative light is the reference to Elena Sassower's incarceration for disruption of Congress – an observation that is indisputably true.

It is axiomatic that a writing is defamatory if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community. See, e.g., Mencher v. Chesley, 297 N.Y. 94, 100 (1947). Whether particular words are defamatory is a threshold question that must be resolved by the court in the first instance. Gjonlekaj v. Sot, 308 A.D.2d 471, 472 (2d Dep't 2003) "[I]f not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." Aronson v. Wiersma, 65 N.Y.2d 592, 594 (N.Y. 1985) (affirming dismissal of letter expressing dissatisfaction with plaintiff's job performance).

New York courts have consistently declined to extend the scope of defamation beyond its well-established boundaries. See, e.g., Cutler v. Ensage, Inc., 856 N.Y.S.2d 23 (Table) at *8 (2007) (statement that plaintiff "was terminated for violating the company's vacation policy" was not defamatory); Clemente v. Impastato, 274 A.D.2d 771, 774, 711 N.Y.S.2d 71, 74 (3d Dep't 2000) (statement that engineer harassed landowner and trespassed on her property was not defamatory); Aponte v. Cosmopolitan Employment Agency, 226 A.D.2d 299, 642 N.Y.S.2d 862, 863 (1st Dep't 1996) ("[A]lthough factual in nature rather than opinion", statements that plaintiff verbally harassed the police and interfered with their raid were "not defamatory as a matter of law."). See also Wecht v. PG Pub. Co., 353 Pa. Super. 493, 498, 510 A.2d 769, 772 (1986) (cartoon characterizing plaintiff as "vocal, abusive, and quarrelsome" was not defamatory). Cf. Gallagher v. Connell, 123 Cal. App. 4th 1260, 1270, 20 Cal. Rptr. 3d 673, 681 (Cal. Ct. App. 2004) (statement that plaintiff was "extremely rude" was not defamatory because it was protected opinion, not a factual assertion).

Here, Plaintiffs do not and cannot explain how any allegedly factual statements in the Article (namely, the history of their litigation over their apartment or their "interrupt[ion]" of

Reverend Carol Huston's invocation) could have exposed them to hatred, contempt or aversion. Because these statements do not constitute defamation, Plaintiffs' claims must be dismissed.

D. There Can Be No Liability for Defendants' Alleged Failure to Include Themes and Details Advanced by Plaintiffs.

Plaintiffs' difficulties with identifying an actionable statement in the Article stem from the reality that, at base, Plaintiffs' actual problem is not with what the Article says. Plaintiffs' true grievance is with what the Article does not say. The Complaint and its Exhibits repeatedly return to the Sassowers' insistence that the Defendants "refused to investigate or independently verify [] documentary evidence of corruption" and engaged in "suppression, minimizing and/or malignment of the corruption-exposing achievements of all three plaintiffs."[13] Compl. ¶¶ 3(d), 4(j). Specifically, Plaintiffs complain that the Article "purposefully concealed" and "failed to report on the issue of legitimate public concern . . . the corruption of the judicial appointments process to White Plains City Court." Compl. ¶ 12; see also Compl. ¶ 20 (alleging that the Article "needed to be retracted, with a story written about the issues of legitimate public concern it had purposefully concealed: the judicial appointments process...and the case file evidence establishing Judge Hansbury's on-the-bench corruption"); Ex. 7 at 2 ("The only thing that readers need to know ... is what I stated at the hearing – (1) that I have direct, first-hand knowledge of Judge Hansbury's corruption on the bench . . . ."); Compl. ¶ 28 (recounting Elena Sassower's insistence that defendants "retract the May 6, 2009 article and publish a proper investigative story").

[13] Notably, many of these purported failures to investigate and failures to publish information occurred years ago. There is no cause of action based upon such editorial decisions. But, even if there could be such a claim, any conceivably applicable limitations period would have, in most instances, long since expired.

Plaintiffs' suggestion that they are somehow entitled to dictate the substance of Defendants' news coverage is entirely unfounded. It has long been established that "the choice of material to go into a newspaper, and the decisions made as to limitations on the . . . content of the paper, and treatment of public issues . . . – whether fair or unfair – constitute the exercise of editorial control and judgment." Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974). Here, as was the case in the Sassowers' lawsuit against The New York Times Co., "the gravamen of plaintiffs' complaint is, in reality, the failure of the defendants to have included in the article all of the history...which led to Sassower's arrest and conviction. Such coverage decisions are, however, editorial and protected by the First Amendment." Sassower v. The New York Times Co., No. 05-19841, Order (Sup. Ct. Westchester County Jul. 6, 2006), attached as Sullivan Aff. Exhibit B; see also Holy Spirit Ass'n v. New York Times Co., 49 NY2d 63, 68 (1979) ("a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author."); Rinaldi v. Holt, Reinhart & Winston, Inc., 42 N.Y.2d 369, 397 N.Y.S.2d 943, 952, cert. denied, 434 U.S. 969 (1977) (noting that the omission or inclusion of details is "largely a matter of editorial judgment in which the courts and juries, have no proper function.").

Notwithstanding Plaintiffs' repeated demands that Defendants publish the arguments and "documentary evidence" of Plaintiffs' choosing, Plaintiffs simply cannot impose liability on Defendants for declining to do so.[14]

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[14] The Sassowers also find fault with Defendants' failure to mention their affiliation with the CJA, which is named as a party to this action notwithstanding Plaintiffs' admission that the Article makes no mention of it whatsoever. See Compl. ¶ 47 (faulting the Article's "purposeful concealment that the individual plaintiffs had expressly identified themselves as CJA's Co-Founders, Director, and President"). Plaintiffs essentially ask this Court to hold Defendants liable for defamation by omission, a finding that would fundamentally contradict the well-established case law holding that there can be no defamation in the absence of a statement "of

E. Section 230 of the Communications Decency Act Shields Defendants From any Liability for Comments Posted by Readers.

To the extent the Complaint's reference to the reader comments posted online in response to the Article purports to state a basis for Plaintiffs' claims, this effort is unavailing. Section 230 of the Communications Decency Act provides a statutory protection for providers of interactive computer services, such as the reader comment forum included with the Article, and explicitly provides that no such provider "shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute also provides that "[n]o cause of action may be brought and liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

Plaintiffs expressly allege that "readers of [the Article]" were permitted "to write and read comments about the [A]rticle." Compl. ¶¶ 18-19. Because plaintiffs do not, and cannot, allege that Defendants wrote any of the reader-submitted comments identified in the Complaint, Defendants cannot be held liable for any claim for libel based on these comments. See, e.g., Gibson v. Craigslist, Inc., 2009 WL 1704355 at *4 (S.D.N.Y. Jun. 15, 2009) ("It is clear that Plaintiff's claims are directed toward Craigslist as a 'publisher' of third party content and Section 230 specifically proscribes liability in such circumstances."); Novak v. Overture Services, Inc., 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) ("Under Section 230(c), an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content

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and concerning" the plaintiff. See Chicherchia v. Cleary, 207 A.D.2d 855, 855, 616 N.Y.S.2d 647, 648 (2d Dep't 1994) ("For there to be recovery in libel, it must be established that the defamation was 'of and concerning the plaintiff' . . . . The burden, it has been held, is not a light one.") (internal citations and quotations omitted); Diaz v. NBC Universal, Inc., 536 F. Supp. 2d 337, 342 (S.D.N.Y. 2008) aff'd, 337 F. App'x. 94 (2d Cir. 2009) (a court "properly may dismiss an action pursuant to Rule 12(b)(6) where the statements are incapable of supporting a jury's finding that the allegedly libelous statements refer to plaintiff"). Because, by Plaintiffs' own admission, the Article is not "of and concerning" Plaintiff CJA, the claims asserted on its behalf must be dismissed as a matter of law.

provider' for the portion of the statement or publication at issue."). Accordingly, any claim based on the statements included in Paragraph 19 of the Complaint fails as a matter of law.

II. THERE IS NO CAUSE OF ACTION FOR "JOURNALISTIC FRAUD".

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

III. PLAINTIFFS' CLAIMS AGAINST DEFENDANT EDDINGS ARE A NULLITY.

Under the clear and unequivocal requirements of CPLR § 306-b, Plaintiffs were required to serve their Complaint "within one hundred twenty days after the filing of the . . . summons with notice." CPLR § 306-b. Plaintiffs apparently filed their Summons with Notice on May 4, 2010; accordingly, they were required to serve their Complaint on or before September 4, 2010. Plaintiffs have not yet served named defendant Keith Eddings. Upon information and belief, they have not done so.

Section 306-b provides for the dismissal of the claims where a plaintiff fails to comply with its service requirements. Id. ("If service is not made upon a defendant within the time period provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant . . . ."). Defendants respectfully submit that the claims asserted against defendant Keith Eddings, which are deficient as a matter of law for all the reasons described herein, should also be dismissed on this separate and independent ground.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the claims in the Verified Complaint fail as a matter of law and must be dismissed.

Dated: New York, New York
October 22, 2010

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