SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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ELENA RUTH SASSOWER and DORIS L. SASSOWER,
Individually and as Director and President, respectively,
of the Center for Judicial Accountability, Inc., and
CENTER FOR JUDICIAL ACCOUNTABILTY, INC., Index #10-12596
Acting *Pro Bono Publico*,

Justice Peter Fox Cohalan

Plaintiffs,

-against-

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

Defendants.

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PLAINTIFFS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF THEIR CROSS-MOTION

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INTRODUCTION

This memorandum of law is submitted in reply to the incompletely titled "Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss Complaint" of Satterlee, Stephens, Burke & Burke, LLP, which – by failing to identify that it is opposition to plaintiffs' cross-motion – conceals plaintiffs' right of reply thereto.

As hereinafter demonstrated, Satterlee's mistitled December 8, 2010 memorandum of law is no less a "fraud on the court"[1] than its October 22, 2010 dismissal motion, whose pervasive fraud and deceit, *both as to fact and law*, were particularized by plaintiffs' exhaustive November 29, 2010 opposition/cross-motion – and the basis for its eight branches of cross-motion relief, including disqualification of Satterlee as a defendant DOE and summary judgment in plaintiffs' favor. As plaintiffs stated on the very first page of their November 29, 2010 memorandum of law – and equally appropriate to the first page of this memorandum of law – Satterlee's fraudulent litigation conduct:

> "would be unacceptable if perpetrated by an ordinary lawyer or party. That it has been perpetrated by a pre-eminent law firm specializing in media law (Exhibit 18)[fn.2], with limitless resources on behalf of a $5.6 billion corporate media giant (Verified Complaint, ¶6), cannot be tolerated by any court having respect for the judicial process."

It is simply impossible to litigate – and for this Court to properly adjudicate – when the judicial forum is, as here, flooded with falsehood. Consequently, the threshold issue before this Court is the integrity of these proceedings and fundamental litigation standards. The statutory and rule provisions invoked by plaintiffs' cross motion – NYCRR §130-1.1, *et seq.*, Judiciary Law §487,

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[1] The definition of "fraud on the court", previously set forth, is:

> "A lawyer's or party's misconduct in a judicial proceeding so serious that it undermines or is intended to undermine the integrity of the proceeding.", Black's Law Dictionary (7th ed. 1999).

[fn.2] Exhibits 10-18 are annexed to plaintiff Elena Sassower's [November 29, 2010] affidavit, continuing the sequence begun by the Verified Complaint, which annexes Exhibits

and §100.3(D)(2) of the Chief Administrator's Rules Governing Judicial Conduct – provide the Court with the means and obligation to protect itself and plaintiffs from abuse. Such is not ancillary to a "merits" determination of defendants' dismissal motion and plaintiffs' cross-motion for summary judgment, but preliminary to it and a component thereof. As also stated on the first page of plaintiffs' November 29, 2010 memo of law:

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

Inasmuch as 22 NYCRR §130-1.2 was amended to enable the Court to impose $10,000 sanctions for each "single occurrence of frivolous conduct", this memorandum of law is expressly submitted in support of plaintiffs' request herein for imposition of additional $10,000 sanctions against Satterlee, with an additional award of maximum costs to plaintiffs, as well as further treble damages under Judiciary Law §487, based on Satterlee's further frivolous and fraudulent conduct by its December 8, 2010 memorandum of law, as hereinafter demonstrated. Such demonstration reinforces plaintiffs' entitlement to all the relief sought by their cross-motion – including the fourth and seventh branches that Satterlee conceals:

1-9 (with Exhibits A-K, annexed to Exhibit 7)."

"(4) disqualifying defense counsel for violation of Rule 1.7 of the Rules of Professional Conduct for Attorneys 'Conflict of Interest: Current Clients', as they are themselves parties, being defendant DOES;

...

(7) giving notice, pursuant to CPLR §3211(c), that defendants' dismissal 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 libel (¶¶36-56), libel *per se* (¶¶57-64), for journalistic fraud (¶¶65-79), and on a fourth cause of action related thereto: institutional reckless disregard for truth; with additional notice, as part thereof, that the Court will be determining whether defendant Journal News should be ordered to remove from its masthead its '**ACCURACY**' policy as a false and misleading advertising claim, in violation of public policy, including General Business Law, Article 22-A (§§349 and 350, *et seq.*)."

Indeed, as hereinafter demonstrated, Satterlee's so-called "reply" memorandum of law, which conceals virtually the entire content of plaintiffs' opposition/cross-motion, is, NO OPPOSITION, *as a matter of law*, to any of plaintiffs' eight branches of cross-motion relief.

Satterlee's December 8, 2010 "Reply" Dismissal Memorandum of Law & the Two Insufficient Affidavits Accompanying It

As with its October 22, 2010 memorandum of law in support of its dismissal motion [hereinafter "dismissal memo"], Satterlee's December 8, 2010 "reply memorandum of law in support of defendants' motion to dismiss complaint" [hereinafter "'reply' dismissal memo"], is signed by Satterlee attorney Meghan H. Sullivan, Esq. (Exhibit 18d), whose name appears below that of Satterlee partner Mark A. Fowler, Esq. (Exhibit 18c). Accompanying it are two affidavits: a three-sentence affidavit by Minnie Stanley, Director of Employee Relations at The Journal News, sworn to December 7, 2010, and a four-sentence affidavit by Ms. Sullivan, sworn to December 8, 2010.

Like Satterlee's dismissal memo which flagrantly falsified and concealed the content of plaintiffs' Verified Complaint[2], so Satterlee's "reply" dismissal memo flagrantly falsifies and

[2] For purposes of simplicity, plaintiffs' Verified Complaint is hereinafter mostly referred to as "plaintiffs' Complaint". Such shorthand should not obscure that it is a "verified pleading" and, as such, has evidentiary value equivalent to an affidavit. (see p. 58 and footnote 29 of plaintiffs' opposition/cross-motion memo).

conceals the content of plaintiffs' November 29, 2010 opposition/cross-motion memorandum of law [hereinafter "opposition/cross-motion memo"]. Simultaneously, it entirely ignores plaintiff Elena Sassower's November 29, 2010 affidavit, whose ¶2 swears to the truth of plaintiffs' opposition/cross-motion memo, which it incorporates by reference, with ¶¶3-32 setting forth additional particulars as to Satterlee's litigation misconduct, as follows:

> ¶¶3-5: that prior to making its dismissal motion, concealing the existence of the video of the May 4, 2009 White Plains Common Council meeting and falsifying the content of the Complaint's ¶¶32-34 to further conceal it, Satterlee had obtained and viewed the video (Exhibit 10) and thereby knew the truth of the Complaint's ¶¶32-35:
>
> > "that the news article is not a 'fair and true report' of what took place 'during' Judge Hansbury's confirmation at the May 4, 2009 Common Council meeting, corroborating plaintiffs' analysis of the news article – annexed to the Complaint as Exhibit 7 – and that plaintiffs did not 'pursue' Judge Hansbury and his wife from the Council chamber, contrary to the news article (Exhibits A-1, A-2)." (at ¶3, underlining in the original);
>
> ¶¶6-19: that the two exhibits annexed to Ms. Sullivan's non-probative affidavit were known by her to be false and misleading – and that the reason for the non-probative affidavit of Satterlee contract attorney Mary Smith, Esq., annexing what she purported was the Verified Complaint – was because of Ms. Sullivan's direct knowledge that same had been superseded, with the final version adding the words "contrary to the news article" at the end of the Complaint's ¶34 to highlight that plaintiffs had "left the Common Council chamber BEFORE Judge Hansbury and his wife and, therefore, had not 'pursue[d]' him in leaving the Council chamber, as the article implied";
>
> ¶¶20-23: that the adverse decisions involving plaintiffs, cited to and/or quoted by Satterlee's dismissal memo of law, had no legitimate purpose and were supplied to besmirch them and mislead the Court – and that Satterlee could reasonably have known and verified from the case records, posted on plaintiff CJA's website, www.judgewatch.org, that such decisions were judicial frauds;
>
> ¶¶24-29: that Satterlee's dismissal motion had not furnished any admissible evidence that defendant Eddings was no longer employed at defendant Journal News or by defendant Gannett;
>
> ¶¶30-32: that the credentials and media law expertise of Satterlee and its lawyers (Exhibit 18) make all the more indefensible the dismissal motion's concealment of

the arguments and legal authorities of the two law review articles underlying the proposed causes of action for journalistic fraud and institutional reckless disregard for truth – "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*", by Professors Clay Calvert and Robert D. Richards, 11 Fordham Intellectual Property, Media & Entertainment Law Journal, 1 (2003) (Exhibit 16); and "*Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*", by Professors Randall P. Bezanson and Gilbert Cranberg, 90 Iowa Law Review 887 (2005) (Exhibit 17).

Ms. Stanley's three-sentence affidavit is responsive to plaintiff Elena Sassower's affidavit only to the extent of confirming that defendant Eddings has not been employed at The Journal News since August 28, 2009, with no statement that he did not remain employed by defendant Gannett, including on the date of service.

As for Ms. Sullivan's four-sentence affidavit, it does not identify her familiarity with the facts, papers, and proceedings herein, let alone attest to the truth of the factual assertions in the two Satterlee memos she signed. Indeed, conspicuously absent – in view of the outrage expressed by her signed "reply" dismissal memo (at p. 1) at plaintiffs' assertion that "'Satterlee is a defendant DOE, directly responsible for generating this lawsuit against its clients, who are here its fellow defendants'" – is even a bald statement that Satterlee is not a defendant DOE or refutation of the facts presented by plaintiffs' opposition/cross-motion memo (at pp. 12, 54-56) in support thereof. Instead, Ms. Sullivan uses her affidavit for the sole purpose of giving evidentiary support for the implicit request in Satterlee's "reply" dismissal memo (at pp. 13-14) that the Court should strike plaintiffs' opposition/cross-motion on behalf of plaintiff Doris L. Sassower, plaintiff Center for Judicial Accountability, Inc., and plaintiff Elena Sassower, as Director of the Center for Judicial Accountability, Inc., pursuant to 22 NYCRR §130-1.1a(a), for lack of their attorney's signature.

Ms. Sullivan – and her colleagues at Satterlee, beginning with Satterlee partner Mr. Fowler – are charged with knowing that Ms. Sullivan's failure to come forward with any response to the particulars of her misconduct and that of the Satterlee firm, set forth by plaintiff Elena Sassower's

affidavit and its incorporated and expressly sworn-to opposition/cross-motion memo, is a concession of the truth of those particulars and that any dispute as to their accuracy required a sworn statement:

> "...if answering affidavits are not produced, the facts alleged in the movant's affidavits will usually be taken as true.
>
> Answering affidavits, in addition to complying with the formal requisites of the affidavits supporting the motion, should meet the traversable allegations of the latter. Undenied allegations will be deemed to be admitted. Answering affidavits not based on personal knowledge are of little, if any, probative value and for that reason may be deemed insufficient to traverse the allegations in the movant's affidavits.", 2 Carmody-Wait 2d §8:66 (2008 ed.).

Yet in contravention of such basic legal principles – and to avoid the penalties of perjury for a sworn statement[3] – Ms. Sullivan has not only improperly placed factual assertions into Satterlee's "reply" dismissal memo, but factual assertions that are contrary to those attested to by plaintiff Elena Sassower – and which are demonstrably false. These unsworn, false assertions pertain to:

(1) the video (Exhibit 10) – as to which Satterlee's "reply" dismissal memo (at pp. 5-6) falsely purports:

> "the events that the DVD does show clearly corroborate the Article's account of what happened while the cameras were rolling. Specifically, the video clearly shows Ms. Sassower's reaction during the Reverend Carol Huston's invocation, and unmistakably confirms that either Ms. Sassower or her mother called out 'a corrupt judge and a corrupt process' as Judge Hansbury and his wife were leaving the Meeting." (underlining in the original).

(2) plaintiffs' Exhibit 7 analysis – as to which Satterlee's "reply" dismissal memo (at pp. i, 3, 4) falsely purports: it "corroborates the Article's Account of the Meeting in All Material Respects"; it "admit[s] the substantial truth of the Article's account"; "confirms that the 'gist or

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[3] "An affidavit must state the truth, and those who make affidavits are held to a strict accountability for the truth and accuracy of their contents', Corpus Juris Secundum, Vol. 2A, §47 (1972 ed., p. 487). "False swearing in either an affidavit of CPLR 2106 affirmation constitutes perjury under Chapter 210 of the Penal Law', Siegel, New York Practice, §205 (1999 ed., p. 325). "Affidavits on any motion should be made only by those with personal knowledge of the facts, and nowhere is this rule more faithfully applied than on the motion for summary judgment." *Id.*, §281 (at p. 442).

sting' of the Article is 'substantially true'"; and is "fundamental[ly] similar[], in all pertinent respects" to the article.

(3) Judge Loehr's unpublished decisions in *Sassower v. New York Times* – which Satterlee's "reply" dismissal memo (at p. 2, 8, 9, 11, 12), urges on the Court, falsely implying that these are legitimate decisions when it has not denied or disputed plaintiff Elena Sassower's affidavit asserting, on personal knowledge, that they are "judicial frauds", and annexing, in substantiation, documentary record proof (Exhibits 12, 13, 14).

That Satterlee has not come forward with a substantive sworn statement is all the more significant as plaintiffs' opposition/cross-motion seeks summary judgment – relief which Satterlee's "reply" dismissal memo entirely conceals, just as it conceals the cross-motion relief for its disqualification as a defendant DOE – reflective of its knowledge that its opposition thereto would require a meaningful response under penalties of perjury.

Certainly, too, in face of ¶37 of plaintiffs' Verified Complaint that the news article was "not a 'fair and true report' of what took place 'during' the May 4, 2009 White Plains Common Council meeting – nor of what took place in the citizens' half-hour preceding it" (underlining in the original), a sworn statement was required to support Satterlee's contention, relegated to footnote 3 of its dismissal memo, that "some, if not all factual statements in the Article enjoy the protections of the fair report privilege under New York Civil Rights Law §74" – resoundingly rebutted by plaintiffs' opposition/cross-motion memo (at pp. 9, 35-39). Satterlee's "reply" dismissal memo does not even repeat such spurious claim in a footnote, thereby constituting an abandonment of same in face of plaintiffs' aforesaid rebuttal.

The affidavit is "the foremost source of proof on motions", Siegel, New York Practice §205 (1999 ed., p. 324). In dismissal motions, it is 'the primary source of proof', Siegel, McKinney's

Consolidated Laws of New York Annotated, Book 7B, C3211:43 (2004 ed.), as it is on summary judgment motions, Siegel, New York Practice, §281 (1999 ed., p. 442).

SATTERLEE'S FRAUDULENT "REPLY" DISMISSAL MEMORANDUM OF LAW

Satterlee's Untitled Preliminary Statement (at pp. 1-3)

Although Satterlee begins by identifying (at p. 1) plaintiffs' opposition/cross-motion memo as "devot[ing] over sixty pages to a paragraph-by-paragraph assault on Defendants' filing", its 14-1/2 page "reply" dismissal memo does not deny or dispute the accuracy of this "paragraph-by-paragraph assault" in any respect, except by a handful of bald claims, which are false. Nor does it excerpt ANY contextual portion of this "paragraph-by-paragraph assault" to illustrate the truth of its maligning characterizations that plaintiffs' opposition/cross-motion memo is "long on invective and short on substance"; a "rambling diatribe with repeated declarations that Defendants' motion is 'frivolous', a 'fraud on the court,' and 'a deceit'"; "a sustained *ad hominem* attack on the undersigned counsel" who it accuses of " 'engag[ing] in conduct involving dishonesty, fraud, or misrepresentation" and against whom it makes an "unabashedly baseless cross-motion for sanctions"; and which goes from "the untenable to the bizarre in asserting that [Satterlee] is a defendant DOE, directly responsible for generating this lawsuit" (at p. 1, underlining added).

All these characterizations, filling the first paragraph of Satterlee's "reply" dismissal memo, are false – as the most cursory examination of the 60 pages of plaintiffs' opposition/cross-motion memo reveals. Indeed, because plaintiffs' opposition/cross-motion memo is so meticulously documented, including as to the factual and legal basis for calling Satterlee's dismissal motion a "fraud on the court", Satterlee provides relatively few citations to it – with NONE substantiating its besmirchment. Illustrative are the three citations in Satterlee's untitled preliminary statement[4]:

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[4] Excluding footnote 1, citing page 61 of plaintiffs' opposition/cross-motion memo, for the absence of

Citation #1: Satterlee's maligning first paragraph provides only a single citation to plaintiffs' opposition/cross-motion memo – and that to page 56 for its claim:

> "Finally, the [opposition/cross-motion memo] takes a turn from the untenable to the bizarre in asserting that this law firm is, in fact, a defendant in this lawsuit: 'In other words, Satterlee is a defendant DOE, directly responsible for generating this lawsuit against its clients, who are here its fellow defendants.'"

Page 56 concludes plaintiffs' two-page cross-motion argument (pp. 54-56) entitled "Plaintiffs' Entitlement to Satterlee's Disqualification for Conflict of Interest as it is a Defendant Doe" – and there is nothing in the least "untenable" or "bizarre" about it. Nor is it an "invective"-filled, "rambling diatribe", "short on substance". Rather, it meticulously identifies the facts giving rise to the inference that Satterlee is a defendant DOE, as follows:

> "As hereinabove stated (at p. 12, *supra*), Satterlee's Section A entitled 'The Parties' does not even give a footnote to defendants DOES 1-10, who are nowhere mentioned in the Satterlee memo and, without explanation, are not being represented by Satterlee. ¶12 of the Complaint describes these unnamed defendants as follows:
>
> > '12. Defendant DOES 1-10 are the reporters, editors, management, legal personnel, or other staff at defendant GANNETT, Journal News, and LoHud.com, who directed and/or advised defendant EDDINGS in the fashioning of his news article, including its two titles (Exhibits A-1, A-2), who failed to discharge their supervisory responsibilities to enforce defendants' own journalistic standards and who, upon receipt of plaintiffs' analysis demonstrating the news article to be false, defamatory, and knowingly so (Exhibit 7), failed to retract it, failed to correct it, and failed to report on the issue of legitimate public concern the article had purposefully concealed: the corruption of the judicial appointments process to White Plains City Court, thereby necessitating this lawsuit.
> >
> > (a) DEFENDANT DOES 1-10 are also such persons at defendant GANNETT and Journal News who have collusively participated in, aided and abetted, and/or acquiesced in, defendants' long-standing pattern and practice of journalistic fraud, willfully misleading the public as to issues of legitimate public concern, thwarting reform and rigging elections, while, simultaneously, suppressing, minimizing, and maligning plaintiffs' corruption-exposing achievements.'

Mr. DeFelice's signature.

> The only explanation for Satterlee's NOT representing these defendants DOES (and concealing that the defendants DOES, though properly served, have not appeared), is that Satterlee is among them – being 'legal personnel' who, *inter alia*, received from The Journal News defendants the plaintiffs' analysis supporting their retraction demand and advised those defendants to ignore it. In other words, Satterlee is a defendant DOE, directly responsible for generating this lawsuit against its clients, who are here its fellow defendants. Such gives it a direct interest in the subject matter of this suit. Certainly, from Mr. Fowler's December 21, 1995 letter to plaintiff Elena Sassower, annexed to the Complaint as Exhibit 3d, it is evident that The Journal News turned to Satterlee to counsel it about plaintiffs.
>
> The fraudulent dismissal motion made by Satterlee in defense of the non-DOE defendants, simultaneous with its non-representation of the DOE defendants, who it has allowed to default, reflects impaired judgment that is consistent with conflict of interest." (capitalization in the original).

So plainly correct is plaintiffs' assessment that Satterlee is a defendant DOE that Satterlee's "reply" dismissal memo entirely conceals that plaintiffs' cross-motion seeks its disqualification as a defendant DOE, nowhere denies that it is one, does not explain why it is not representing the defendant DOES, and does not account for why its dismissal motion makes no mention of them.[5] As such, *as a matter of law*, Satterlee concedes the truth that it is a defendant DOE – and, based on the legal authority quoted by plaintiffs' opposition/cross-motion memo (at pp. 54-55), without challenge from Satterlee, plaintiffs are entitled to its disqualification, *as a matter of law*. (*See* pp. 31-32, *infra*).

Citation #2: Satterlee's second page contains – in its footnote 2 – a single citation to plaintiffs' opposition/cross-motion memo. It is to page 45 for the assertion: "Unsurprisingly, [plaintiffs] characterize [Judge Loehr's] rulings [in *Sassower v. The New York Times*] as 'a complete fraud'".

The two surrounding sentences on page 45 from which Satterlee has plucked the words "a complete fraud" read:

> "As more fully particularized by ¶¶11-16 of plaintiff Elena Sassower's accompanying affidavit, the record in *Sassower v. New York Times* establishes that Judge Loehr's

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[5] See pp. 11-12 of Satterlee's "reply" dismissal memo.

unpublished decision on which Satterlee relies is **a complete fraud**. Even still, Judge Loehr was not adverse to recognizing a cause of action for journalistic fraud were the allegations of the complaint therein within the purview of such cause of action, which he held they were not:..." (bold added, underlining in the original).

¶¶11-16 of plaintiff Elena Sassower's affidavit, completely ignored by Satterlee's "reply" dismissal memo, are as follows:

> "11. Ms. Sullivan's affidavit purports that Exhibit B is 'a true and correct copy of the July 6, 2006 Decision and Order in the case of Sassower v. The New York Times Co., No. 05-19841 (Sup. Ct. Westchester County)', but additionally includes the September 27, 2006 decision/order of the same judge in that case, Westchester County Court Judge Gerald Loehr. Ms. Sullivan also does not identify the source from which she obtained Judge Loehr's two unpublished decisions.
>
> 12. Upon information and belief, such source – whether CJA's website, the original court file of *Sassower v. The New York Times* from the Westchester County Clerk's Office, or *The Times*' own case file – would have disclosed that plaintiffs appealed Judge Loehr's two unpublished decisions to the Appellate Division, Second Department. Indeed, Satterlee would have found the published appellate decision in *Sassower v. The New York Times* from its computerized search for adverse decisions involving plaintiffs to include in its memo of law, which Ms. Sullivan signed (see ¶¶20-22, *infra*). Yet, Ms. Sullivan's affidavit does not acknowledge that Judge Loehr's two decisions were appealed – let alone the issues plaintiffs raised on their appeals, the state of the record on the appeals, and the Appellate Division's decision.
>
> 13. Based on Satterlee's memo of law, it appears that the unstated purpose of Ms. Sullivan annexing Judge Loehr's July 5, 2006 decision/order[fn.4] to her affidavit is three-fold: (a) to urge it as the basis for dismissing plaintiffs' cause of action for journalistic fraud (see pp. 1, 23); (b) to use it as authority for dismissing plaintiffs' libel causes of action (see pp. 15, 17-18, 21); and (c) to purport that plaintiffs' lawsuit is 'simply the latest episode in a history of frivolous and abusive litigation spanning more than three decades...' (at pp. 2-3), a history including *Sassower v. The New York Times*.
>
> 14. This is a deceit on all three counts. The record of *Sassower v. The New York Times*, which Ms. Sullivan may be presumed to have examined, from whatever source, establishes that plaintiffs were entitled to summary judgment on both their libel and journalistic fraud causes of action, *as a matter of law*, that Judge Loehr's two unpublished decisions therein are each 'judicial frauds' and were conclusively demonstrated as such by plaintiffs' appeals to the Appellate

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[fn.4] July 5, 2006 is the date the decision/order was signed. July 6, 2006 is the entry date."

Division, Second Department, and that the Appellate Division, Second Department covered this up, totally, in a decision that did not identify ANY of their appellate issues, ANY of the facts, law, or argument they presented in support, and which concealed the existence of the journalistic fraud cause of action in making it appear that plaintiffs' complaint therein was limited to a single defamation cause of action, when there were two.

15. In substantiation, annexed hereto are:

- plaintiffs' April 23, 2007 appellants' brief therein (Exhibit 12), whose recitation of *The Times*' dismissal motion, as demonstrated by plaintiffs' opposition/cross-motion therein (at pp. 11-20), bears uncanny resemblance to the dismissal motion that Satterlee has herein made[fn.5]. The brief summarizes (at pp. 20-24) the respects in which Judge Loehr's unpublished July 5, 2006 decision is a judicial fraud, being factually and legally baseless – and knowingly so;

- the written oral argument I delivered both orally and in writing to the Appellate Division on December 14, 2007 (Exhibit 13), at which *The Times* did not show up;

- the Appellate Division's February 5, 2008 decision (Exhibit 14), a published decision, appearing at 48 A.D.3d 440, 852 N.Y.S. 180, and accessible electronically – whose concealment by Satterlee is suggestive of its recognition that the Appellate Division's obliteration of plaintiffs' journalistic fraud cause of action in that case is not helpful to the defendants herein.

16. These documents, as likewise the entire record in *Sassower v. The New York Times*, are accessible from CJA's website, most conveniently *via* the left sidebar panel 'Suing *The New York Times*'." (underlining and capitalization in the original).

Here, too, there is no "invective"-filled, "rambling diatribe", "short on substance". It is fact-specific, document-supported – and Satterlee's failure to address it by an affidavit of Ms. Sullivan (or in its "reply" dismissal memo) is a concession of its truth and accuracy. As such, and in the absence of

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"fn.5 See, in particular, pp. 12-15, including that *The Times*' dismissal motion concealed the libel *per se* cause of action; concealed the individual and professional capacities of the plaintiff; concealed that plaintiffs were also representing the public; made no mention of the non-appearing DOES (thereby concealing that *Times* counsel was among them); and was non-

any denial by Satterlee that comparison with the record in *Sassower v. New York Times* establishes that Judge Loehr's decisions are "judicial frauds", it is a deceit and "fraud on the court" for Satterlee's "reply" dismissal memo to urge the Court to rely on those decisions, as it does in its footnote 2 and at pages 8, 9, 11, and 12.

Moreover, its scurrilous footnote 2 – having no purpose but to prejudice the Court against plaintiffs – typifies the unprofessional *ad hominem* tactics of which Satterlee is guilty in its two memos. By contrast, there are NO *ad hominem* attacks on Satterlee either in plaintiffs' dismissal/cross-motion memo or plaintiff Elena Sassower's November 29, 2010 affidavit. Rather, as the above quotation of ¶¶11-16 exemplify, plaintiffs have confined themselves to a painstaking exposition, setting forth the particulars of the sanctionable advocacy for which their cross-motion seeks the appropriate relief.

Citation #3: Satterlee ends its untitled preliminary statement (at p. 3) with a citation to pages 8, 26-29 of plaintiffs' opposition/cross-motion memo for its claim:

> "[Plaintiffs] also fundamentally misconstrue[] the axiomatic rule that 'only statements alleging facts can properly be the subject of a defamation action,' Gross v. New York Times Co., 82 N.Y.2d 146, 603 N.Y.S.2d 813 (1993), incorrectly suggesting that the only publications to which this rule applies are 'opinion piece[s]."

The quoted phrase "opinion piece" appears at page 27 of plaintiffs' opposition/cross-motion memo – and the paragraph from which it was extracted is as follows:

> "Pervading this Point IB is Satterlee's concealment that the subject article is a news article, where a reporter's own 'opinion' does not belong. Thus, although 39 paragraphs of the Complaint[fn.18] plus the 'WHEREFORE' clause refer to the 'news article' – including the two paragraphs at the outset of the Complaint's 'Factual Allegations' section:
>
> '13. On May 6, 2009, The Journal News prominently published as

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probative, insufficient, false and misleading as to the other non-appearing defendants."

[fn.18] These are ¶¶9a, 10a, 11a, 12, 13, 14, 15, 20, 24, 34, 37, 38, 39, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 60, 61, 62, 63, 66, 67, 68, 70, 71, 74, 75, 76."

news, at the top of its third page, an article headlined '*Hecklers try to derail new judge*' by defendant EDDINGS (Exhibit A-1). The identical news article was posted on its website, LoHud.com, though with a different headline, '*White Plains woman heckles city judge during confirmation*' (Exhibit A-2).

14. Upon information and belief, such news article, on its face, was non-conforming with standards for news articles, *inter alia*: (a) by its disparaging characterization 'slings and arrows' in lieu of even a single quote of what plaintiffs ELENA and DORIS SASSOWER publicly stated; (b) by its characterization, with no attributing source, that they 'pursued' and 'stepped up their pursuit' of Judge Hansbury and his wife, upon their leaving the Council chamber; and (c) by implying that by obtaining and reporting on 'a related decision signed by another City Court judge, JoAnn Friia, on July 3, 2008', The Journal News had investigated – and discredited – plaintiffs' publicly-expressed 'alleg[ations]' of Judge Hansbury's 'corruption and conflict of interest...demonstrated by his 2007 decision to evict [them]''. (underlining in the original),

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

As for plaintiffs having "fundamentally misconstrue[d] the axiomatic rule that 'only statements alleging facts can properly be the subject of a defamation action,'" for which Satterlee references no specific page of *Gross v. New York Times*, the cited pages 28-29 of plaintiffs' opposition/cross-motion memo include discussion of *Gross v. New York Times* as follows:

"Satterlee quotes (at p. 16) *Mann* [*v. Abel,* 10 N.Y.3d 271 (2008)] for the factors 'this Court must consider' in determining whether a statement constitutes fact or opinion:

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

identifying this quote from *Mann*, 10 NY3d 271, 276 (2008), as taken from *Brian v. Richardson*, 87 NY2d 46, 51 (1995). In fact, *Mann* identifies the more extensive lineage for this quote. *Richardson* quotes it from ***Gross v. New York Times Co*, 82**

N.Y.2d 146, 153 (1993), which quotes it from *Steinhilber v. Alphonse*, 68 NY2d, 283, 292 (1986) – all New York Court of Appeals cases that Satterlee puts forward to create the misimpression that the characterizations in the article are not actionable, when a reading of these cases and the other cited New York Court of Appeals cases of *600 West 115th St. Corp. v. Von Gutfeld*, 80 NY2d 130 (1992), and *Immuno AG v J. Moor-Jankowski*, 77 NY2d 235 (1991), makes obvious that the characterizations are.

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

> '(because 'falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging facts can properly be the subject of a defamation action') (quoting 600 West 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 139, 589 N.Y.S.2d 825, 603 N.E.2d 930 (1992))',

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

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

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

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

The continuation of plaintiffs' argument – at pages 31-32 of their opposition/cross-motion memo – not included in the pages to which Satterlee cites – embrace both the news article context and *Gross v New York Times*, as follows:

"...evident from the six Court of Appeals cases cited by Satterlee's Point IB, as well

as its other cited cases[fn.20], is that confronting 'the full context of the communication' would have required Satterlee to acknowledge that not only does the article present additional characterizations and descriptions with a 'precise meaning' – as, for instance, the words 'loud', 'protest', and 'pursu[e]', but that the article, because it is a news article, is in a format recognized as one where 'the reader expects to find factual accounts', *Richardson, supra*, at 52; 'articles...in the news section rather than the editorial or 'op-ed' sections...'encourag[e] the reasonable reader to be less skeptical and more willing to conclude that [they] stat[ed] or impl[ied] facts', ***Gross, supra*, at 156**, quoting *600 W. 115th St. Corp. v. Von Gutfeld, supra*, at 142, and that other 'signals' of factual content are also present, *to wit*, that the news article bears the by-line of a news reporter – defendant Eddings – who carries the presumption of being a neutral, 'disinterested observer' and that the news article's pejorative descriptions, not attributed to any source, would reinforce, for the reader, that this is fact, not opinion: ***cf. Gross, supra*, at 151**, citing Appellate Division, First Department.: '[e]specially when attributed to a source, the average reader will recognize that criticisms, allegations and assertions are not statements of fact but rather expressions of opinion' (180 A.D.2d 308, 316).'" (bold added, underlining in the original).

Again, there is no "invective"-filled, "rambling diatribe", "short on substance" here. Rather, plaintiffs' opposition/cross-motion memo makes cogent and legally-correct argument which Satterlee does not address other than by concealing and falsifying its content.

* * *

Satterlee's untitled preliminary statement additionally offers up (at p. 1) a self-serving simplification of the article's purported "gist or sting": that plaintiffs Elena and Doris Sassower "spoke vehemently and out of turn in protesting the confirmation of Judge Brian Hansbury", concealing, *inter alia*, that the article also falsely purports that they "pursu[ed]" Judge Hansbury and his wife from the Council chamber, and contains further false and extraneous matter pertaining to the "disruption of Congress" case and federal lawsuit involving the apartment, having no purpose but to

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

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

reinforce the article's intended defamation – these being expressly alleged by the Complaint's ¶¶14, 34-35, 52, 54, 58, 60. Satterlee then compounds its deceit by pretending (at pp. 1-2) that plaintiffs have "admi[tted] to this "gist or sting" – a pretense it accomplishes by falsifying and plucking from context words from their Complaint's Exhibit 7 contextual analysis of the article.

Having concealed the depiction in the news article that plaintiffs Elena and Doris Sassower "pursu[ed]" Judge Hansbury and his wife from the Council chamber, followed by "two cops", Satterlee purports (at p. 2) "The article makes no suggestion whatsoever that the Sassowers' conduct was illegal; at worst, the Article depicts them as ill-mannered in their opposition to Judge Hansbury.[fn2]". It thereupon declares (at p. 2) that plaintiffs' opposition/cross-motion memo "has no response to this irrefutable point" and that:

> "indeed, what is conspicuously absent from the [opposition/cross-motion memo] is any substantive rebuttal of the arguments set forth in Defendants' motion. Specifically, [the opposition/cross-motion memo] does not effectively contest that (1) plaintiffs' own account of the events surrounding the May 4, 2009 White Plains Common Council meeting (the 'Meeting') substantially mirrors the description of those events in the May 6, 2009 article in *The Journal News* (the 'Article'); and (2) the Article's characterizations of Elena and Doris Sassower as 'hecklers' who 'took on the Common Council and a city judge,' and whose comments were 'slings and arrows,' are figurative statements or vigorous epithets, and are not, as a matter of law, defamatory statements of fact." (at p. 2).

This is an outright fraud on the court – as Satterlee well knows in failing to identify here or elsewhere in its reply dismissal memo the particulars of plaintiffs' rebuttal at pages 21-41 of their opposition/cross-motion memo under the title heading "Satterlee's Fraudulent 'Argument'". Such rebuttal, pertaining to their libel and libel *per se* causes of action, establishes, resoundingly, that Points IA and IB of Satterlee's "reply" dismissal memo (at pp. 3-9) are sham as they essentially regurgitate claims that plaintiffs have already demonstrated as insupportable and deceitful, both factually and legally. [*See* fuller discussion at pp. 18-26, *infra*]

As for Satterlee's final claim in its untitled preliminary statement (at pp. 2-3):

> "Unable to point to any *false and defamatory* statements of fact, [plaintiffs] resort[] to trivially insisting that the Sassowers' protest occurred not 'during' Judge Hansbury's confirmation, but in the 'citizens' half hour' preceding the Meeting – exactly the type of 'minor inaccuracies' that New York courts routinely recognize do not give rise to a defamation claim. See, e.g., Croton Watch Co. v. Nat'l Jeweler Magazine, Inc., No. 06 CV 662 (GBD), 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.'); see also Def. Br. at 11-13 and cases cited therein." (italics in the original).

This is a further outright fraud on the court – and so-established by pages 21-26 of plaintiffs' opposition/cross-motion memo addressed to the cited pages of Satterlee's dismissal memo. As therein demonstrated, at issue are not "minor inaccuracies" – because, as particularized by plaintiffs' Exhibit 7 analysis of the news article and corroborated by the video– the article is not a "fair and true report" of what occurred before, during, or after Judge Hansbury's confirmation – with such willful and deliberate falsity and defamation amplified by the extraneous inclusion of the "disruption of Congress" case and the federal action, inclusions which themselves contain defamatory falsehoods.

SATTERLEE'S FRAUDULENT POINT I (at pp. 3-11)
"The Opposition Brief Does Not – And Cannot – Explain Away The Fatal Defects In Plaintiffs' Claims"

This title heading is itself a deceit – falsely implying that Satterlee will be critiquing the deficiencies of what plaintiffs have "explain[ed]" in their opposition/cross-motion memo. In fact, Satterlee's Point I materially conceals and distorts these "expla[nations]" in order to craft its argument.

Satterlee's Point IA (at p. 3-9)
"Exhibit 7 To the Complaint Corroborates The Article's Account Of The Meeting In All Material Respects"

Satterlee's Point IA, consisting of five paragraphs, begins with a title which does not assert that Exhibit 7 corroborates the article, but, rather, "the article's account of the meeting". Yet, the

meeting is NOT the totality of the article. The article contains additional matter pertaining to the "disruption of Congress" case and the federal action, which is false and serves no purpose but to reinforce the defamation intended by the article's other stated and implied facts. Point IA conceals this

Without citing to the prior Point IA of its dismissal memo (at pp. 11-15), Satterlee's instant Point IA largely replicates it – pretending that it has not been not rebutted – when plaintiffs rebutted it, *both factually and legally*, by pages 21-26 of their opposition/cross-motion memo. Thus, Satterlee continues to rely (at p. 3) on its side-by-side comparison, without identifying, let alone disputing, the accuracy of plaintiffs' assertion that it is violative of the legal standard for evaluating defamation because it is completely a-contextual, both as to the fragments it plucks from the article and plaintiffs' analysis. Nor does Satterlee identify, let alone dispute, plaintiffs' showing that this side-by-side comparison is also fraudulent – enabling Satterlee to continue to purport (at p. 4) that plaintiffs' Exhibit 7 analysis and defendants' article are "fundamental[ly] similar[], in all material respects"; that the analysis "confirms that the 'gist or sting' of the Article is 'substantially true'"; and that the analysis "admit[s] the substantial truth of the Article's account" – all utter frauds, verifiable from the most casual reading of plaintiffs' contextual Exhibit 7 analysis.

There can be no question, based on such analysis – whose accuracy is undenied and undisputed – that "A reader would be likely to view the plaintiff[s]' actions in a different light if he or she knew" such facts as therein set forth as to what transpired, *Matovcik v. Times Beacon Record Newspapers*, 46 AD3d 636 (2nd Dept. 2007), citing *Love v. Morrow & Co*, 193 AD2d 586, 588 (2nd Dept. 1993) (the test of substantial truth is 'whether the libel as published would have a different effect on the mind of the reader from which the pleaded truth would have produced."), quoted in "*A*

Peek at New York Defamation Law", by Mitchell H. Rubinstein, New York State Bar Association Journal, pp. 58-63, at 60, November/December 2010.

The instant Point IA does differ from Satterlee's prior Point IA in two material respects. First, unlike Satterlee's prior Point IA which had falsified plaintiffs' analysis to purport that it, like the article, recited the challenged events as having occurred "during" Judge Hansbury's confirmation, Satterlee now passingly acknowledges, without conceding its truth, plaintiffs' assertion that these events were not "during" the confirmation. In so doing, Satterlee conceals that this was asserted by both plaintiffs' analysis (pp. 6, 7-8, 10, 11, 12) and Complaint (¶¶32, 42) and pretends (at p. 4) that this is only a "minuscule purported discrepanc[y]"; a "convenient perception", "a feeble attempt to parse the meaning of the term 'during'" (at pp. 4-5).[6] Indeed, its Point IA, echoing its untitled preliminary statement (see pp. 16-17, *supra*), insinuates that this is the ONLY discrepancy, thereby making the article "substantially true". This is also outright fraud – verifiable from the analysis, Complaint, and opposition/cross-motion memo.[7]

Second, Satterlee now purports that the video (Exhibit 10), whose existence its dismissal motion had concealed, "provide[s] additional confirmation of the substantial truth of the Article", stating:

> "While the videotape does not include footage of all of the events described in the Article – those that occurred during the 'citizens' half hour' preceding Judge Hansbury's confirmation are omitted – the events that the DVD does show clearly corroborate the Article's account of what happened while the cameras were rolling.

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[6] See, also, the deliberate ambiguity of Satterlee's word choices: at p. 1, as to "plaintiffs' admission that they shouted 'a corrupt judge' during the proceedings"; and at pp. 6-7 as to the video "while the cameras were rolling". (underlining added).

[7] Yet another deceit is Satterlee's assertion (at p. 5) that plaintiffs have "claim[ed] that the Article's discussion should have been limited to what happened during the actual confirmation of Judge Hansbury" – for which it provides NO citation reference – reflective that plaintiffs never made such preposterous claim, which Satterlee uses for the further deceit (at p. 5) that it additionally "confirms that the 'gist or sting' of the Article is substantially true".

> Specifically, the video clearly shows Ms. Sassower's reaction during the Reverend Carol Huston's invocation, and unmistakably confirms that either Ms. Sassower or her mother called out 'a corrupt judge and a corrupt process' as Judge Hansbury and his wife were leaving the Meeting." (at pp. 5-6, underlining in the original).

Satterlee's intentionally ambiguous phrases "while the cameras were rolling" and "Ms. Sassower's reaction" are deceits because the true facts, as alleged at ¶¶32-35 of the Complaint, are not corroborative of the article. As for Satterlee's further assertion that "Judge Hansbury and his wife were leaving the Meeting" – inferring that Judge Hansbury and his wife left the Council Chamber BEFORE both plaintiffs had – this is false. One need only compare these unsworn assertions, which Satterlee relegates to the end of its Point IA (at pp. 5-6), with plaintiffs' own particularized descriptions, including time-meter readings, which ¶¶32-35 of their Complaint provides:

> 32. The video corroborates the analysis, establishing that plaintiffs ELENA and DORIS SASSOWER did not 'heckle' or otherwise make any 'protest' 'during' the Common Council's meeting confirming Judge Hansbury, which took place without disturbance (at 18:50 minutes).
>
> 33. The video further shows that during Reverend Carol Huston's invocation, where she says 'White Plains is a community that cares for its people' (at 4:54 minutes), there is no audible 'Hummph' from plaintiff ELENA SASSOWER, whose back is directly in front of the camera and whose face is seen when she turns around and gives an incredulous look to plaintiff DORIS SASSOWER, standing behind her. Nor is there any visible reaction from anyone reflective of a 'Hummph' having been heard.
>
> 34. The video also shows that immediately following the confirmation, several audience members got up to leave, as Judge Hansbury and his wife went around the council tables, shaking hands with the Council Members and Mayor. Thereafter, a disembodied voice – belonging to plaintiff ELENA SASSOWER – and emanating from the left, in the direction of the door (at 22:14 minutes) – is heard to say 'a corrupt judge and a corrupt process'. At that point, Judge Hansbury and his wife have not left the Council chamber, contrary to the news article.
>
> 35. The video further shows that after Judge Hansbury and his wife finish making their hand-shaking rounds and go left, leaving the Council chamber

(at 22:19 – 22:22 minutes), a male figure in the front row rises and also goes left (at 22:25 minutes). Upon information and belief, it is defendant EDDINGS." (underlining in the original).

Finally, Satterlee purports (at p. 5) that plaintiffs' opposition/cross-motion memo "makes no effort whatsoever to distinguish" the cases cited by its dismissal motion for the principle that "minor inaccuracies" will not support a defamation claim so long as the "gist or substance of the challenged statements be true". Asserting that plaintiffs "simply deem[ed] them of 'no relevance'", Satterlee cites to page 26 of plaintiffs' opposition/cross-motion memo. Examination of page 26 shows that Satterlee has expurgated plaintiffs' explanation of WHY those cases had "no relevance", set forth in the very SAME sentence, *to wit*,

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

Satterlee's Point IB (at p. 6-9)
"News Articles Are Equally Subject To The Rule That Statements Must Be Factual To Give Rise To Claims For Defamation"

Satterlee's Point IB, also consisting of five paragraphs, opens with a sarcastic first sentence (at p. 6) leading off a first paragraph whose material expurgations of page 32 of plaintiffs' opposition/cross-motion memo are the basis for its false argument. In full, that first paragraph reads:

> "Buried on page 32 of the Opposition Brief is a belated yet welcome clarification: for the first time Plaintiffs clearly state that the defamation claims asserted in the Complaint are not based on either the Article's mention that one of the Plaintiffs' 'interrupt[ed] Reverend Carol Huston's invocation' with a 'Hummph' or the statements in the Article relating to the Sassowers' past litigation over their eviction. Opp. Br. at 32 ('[P]laintiffs' defamation claims are not based on these [statements.]'). The Opposition Brief goes on to explain that plaintiffs' defamation claims are based on the news article's cumulatively false depiction of them as: 'hecklers', whose behavior was unruly, disrespectful, impertinent, argumentative, harassing, and 'pursu[ing]', creating a spectacle by their 'fireworks' and 'slings and arrows' – all 'in vain'.'). Opp. Br. at 32 ('Rather...plaintiffs' defamation claims are based on the news article's cumulatively false depiction of them as: 'hecklers', whose behavior was unruly, disrespectful, impertinent, argumentative, harassing, and

'pursu[ing]', creating a spectacle by their 'fireworks' and 'slings and arrows' – all 'in vain'.')" (underlining added).

Satterlee's three citations to page 32 – in a single paragraph no less – are a record. No page is cited more by Satterlee's "reply" dismissal memo. Nor is there another paragraph of its memo with three citations to plaintiffs' opposition/cross-motion memo.

Among the significant expurgations that Satterlee makes from page 32 is removing, from the very sentence it quotes, plaintiffs' identification of how the article had achieved its "cumulatively false depiction of them", *to wit*,

> "by the **false facts**, identified by ¶¶32-34, 42, 60 of the Complaint and by the **false characterizations concealing the undisclosed true facts**, identified by the Complaint's ¶¶14, 42, 48-54, 58, 61." (bold added).

Nor had plaintiffs' opposition/cross-motion memo "bur[ied]" these and comparable paragraphs of the Complaint – as Satterlee snidely purports. Thus, pages 6-7, in rebutting Satterlee's pretense that plaintiffs' Complaint was "convoluted", "buried", and "threadbare", had stated:

> "At the heart of the Complaint is Exhibit 7: plaintiffs' analysis – expressly so-entitled and referred-to in 21 separate paragraphs of the Complaint…. The analysis presents a nine-page paragraph-by-paragraph deconstruction of the article, reinforcing, by its particulars:
>
> (a) the Complaint's ¶¶32-34, 52, 58, 60 as to **the express facts stated by the article which are false**; and
>
> (b) the Complaint's ¶¶14, 42, 48-54, 58, 61 as to **the undisclosed implied facts which the article conceals in order to craft its false characterizations**." (bold added, underlining in the original).

This was followed by page 9 of plaintiffs' opposition/cross-motion memo which, rebutting Satterlee's pretense that there was only "one respect" in which the Complaint "quarrel[ed] with the Article's factual account of their actions at the Common Council meeting", specified ¶¶39, 41, 48-52, 54-55, 58, 62 as containing **the implied facts all purposefully concealed by the article to advance its false and reputationally-damaging characterizations** of plaintiffs as:

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

The significance of these repeatedly identified paragraphs of plaintiffs' Complaint – and of the Exhibit 7 analysis – is that they reveal that such phrases as "hecklers", "pursuit", "fireworks", "slings and arrow" – which Satterlee's Point IB goes on to baldly purport to be "figurative statements", "vigorous epithets", "rhetorical hyperbole" that "cannot constitute actionable statements of fact" and which "have neither a precise meaning nor are [] capable of being proven true or false (at pp. 6-7) – were **totally improper to a news article, where expressions of a reporter's <u>own</u> opinion do not belong, and, further, that their falsity is provable from contemporaneous record documents** – including Exhibits B, C, D, E, F, and G, annexed to the analysis.

It is without confronting these paragraphs of plaintiffs' Complaint or the relevant showing in their Exhibit 7 analysis that Satterlee offers up further case law having no relevance other than to reinforce that plaintiffs' rebuttal of Satterlee's prior Point IB, as set forth at pages 26-31 of their opposition/cross-motion memo, is completely correct.[8] Indeed, to hamper the Court from finding

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[8] *The Renco Group, Inc. v. Workers World Party, Inc.*, 13 Misc.3d 1213A; 824 NYS2d 758 (S.Ct/NY Co. 2006) (quoting from *Steinhilber v. Alphonse* as to the difference between "pure opinion" and "mixed opinion"; "considering the articles as a whole and the advocacy purpose for which the articles were published by the Party");

Lukahok v. Concerned Residents of North Salem, 160 A.D.2d 685 (2nd Dept. 1990) ("the statements by the defendants were 'pure opinion' and did not rest on any undisclosed facts"; "an examination of the full context of the communication");

Cohn v. National Broadcasting Co., Inc., 50 N.Y.2d 885 (1980) ("the cumulative effect of all such passages" "the courts 'will not strain' to interpret [allegedly defamatory works] 'in their mildest and most inoffensive sense to hold them nonlibelous'");

Hollander v. Cayton, 145 A.D.2d 605 (2d Dept. 1988) ("an examination of the full context of the communication as well as the setting in which these remarks were made");

Park v. Capital Cities Communications, Inc., 181 A.D.2d 192 (4th Dept. 1992) ("statements must be considered in the context of the entire publication and tested in terms of their effect upon the average...reader"; "This is not a case where an otherwise protected expression of opinion may be held to be actionable because the underlying facts are either unstated, falsely represented or distorted");

Immuno AG v. Moor-Janknowski, 77 N.Y.2d 235, 245, 250, 252-3 (1991) ("We did not, and do not hold,...that there is a wholesale exemption for anything that might be labeled 'opinion.'"; "It has long been our standard in defamation actions to read published articles in context to test their effect on the average reader, not

that rebuttal, Satterlee neither identifies that its instant Point IB argument draws on its prior Point IB – nor provides page citations to plaintiffs' rebuttal thereto. Thus, the last paragraph of its prior Point IB (at pp. 8-9) purports:

> "Contrary to Plaintiff[s]' suggestion, news articles are not exempted from the opinion defense; comments included therein that are inherently opinion or qualify as vigorous epithets are simply not actionable... Moreover, while [plaintiffs] attempt[] to muddy the waters by insisting that the distinction between 'pure opinion' and 'mixed opinion' is relevant to the question of whether the words such as 'heckle,' and 'slings and arrows' could feasibly constitute statements of fact, it is clear from even a cursory reading of the Article that these characterizations were 'accompanied by a recitation of the facts on which [they] were based,...[and therefore] are not actionable.' Gross v. New York Times Co., 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813 (1993)."

Such paragraph is the extent of what Satterlee's untitled preliminary statement had purported (at p. 3) would be "discussed more fully herein" with respect to its assertion (at p. 3):

> "[Plaintiffs] also fundamentally misconstrues the axiomatic rule that 'only statements alleging facts can properly be the subject of a defamation action,' Gross v. New York Times Co., 82 N.Y.2d 146, 603 N.Y.S.2d 813 (1993), incorrectly suggesting that the only publications to which this rule applies are 'opinion piece[s]."

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to isolate particular phrases but to consider the publication as a whole"; "Letters to the editor, unlike ordinary reporting, are not published on the authority of the newspaper or journal...Thus, any damage to reputation done by a letter to the editor depends on its inherent persuasiveness and the credibility of the writer, not on the belief that it is true because it appears in a particular publication.");

Zysk v. Fidelity Title Ins. Co., 14 A.D.3d 609 (2nd Dept. 2005) ("The statements at issue did not imply behavior that was incompatible with the proper conduct of the plaintiff's profession and made no reference to a matter of significance and importance to the plaintiff's ability to practice law.");

Palmieri v. Coalition of Landlords, 29 A.D.3d 658 (2nd Dept. 2006) ("Civil Rights Law 74 provides..." "The newspaper article upon which this defamation action is based is a substantially accurate report of the judicial proceedings...);

White v. Berkshire-Hathway, 10 Misc. 3d 254, 255-256 (S.Ct/Erie Co. 2005) ("If the headline is indeed a 'fair index' of the related news article, it is not actionable as a matter of law...Where, as here, the headline is an accurate reflection of the accompanying article, it is not defamatory...It is significant that plaintiff was not named in the headline at issue...the headline here fails not only to specifically refer to plaintiff by name, it omits a reference to any person whatsoever...A headline that does not directly name the plaintiff is not independently actionable...Plaintiff takes particular issue with the words '[u]nscrupulous' and 'gouges.' While these words are a far cry from flattery, they are supported by findings contained in the Department of Housing and Urban Development Inspector General's investigation reported in the news article").

– for which it gave an incomplete citation to pages 8, 26-29 of plaintiffs' opposition/cross-motion memo, omitting pages 30-32. Plaintiffs' exposition in those pages, establishing what plaintiffs actually said about news articles, opinion pieces, and *Gross v. New York Times*, is quoted hereinabove at pages 13-16, *supra*.

Suffice to say, Satterlee's Point IB makes no showing of the supposed "recitation of facts" supporting the article's characterizations, which it baldly purports (at p. 9). As detailed by the analysis and highlighted by the Complaint's ¶¶14, 42, 48-54, 58, 61, the article's characterizations are buttressed by a combination of false facts and other one-sided characterizations and innuendos substituting for the facts that readers of news article rightfully expect – and which defendants deliberately suppressed to craft the article's deliberately defamatory depictions.

Satterlee's Point IC (at p. 9)
"Plaintiffs Provide No Basis For The Creation Of An Entirely Unprecedented Cause Of Action For 'Journalistic Fraud'"

Satterlee's two-paragraph Point IC does not deny or dispute the accuracy of ANY of the facts, law, or legal argument presented by pages 41-48 of plaintiffs' opposition/cross-motion memo in support of this Court's recognition of the journalistic fraud cause of action – and entirely conceals the further proposed cause of action for institutional reckless disregard for truth for which recognition is also sought.

Here, too, Satterlee makes a succession of deceitful claims. Thus, it leads off with the assertion (at p. 9) that plaintiffs have "[c]ited to no case law whatsoever". This is false. Plaintiffs cited New York Court of Appeals case law, *Brown v. State of New York*, 89 N.Y.2d 172, 181-182 (1996), for this Court's power to recognize the proposed two causes of action. Adding to this, the two law review articles on which these proposed causes of action are based (Exhibits 16, 17) – whose concealment by Satterlee's dismissal motion was highlighted at page 2 of plaintiffs'

opposition/cross-motion memo and by ¶¶30-32 of plaintiff Elena Sassower's affidavit – both cite to and quote from a myriad of case law – a pertinent selection of which is identified in the footnotes spanning pages 42-45of plaintiffs' opposition/cross-motion memo.

Second, page 44 of plaintiffs' opposition/cross-motion memo does not – as Satterlee purports – "admit[] that no court has recognized a journalistic fraud cause of action". It is Satterlee's unsworn assertion, by its dismissal memo (at p. 23), that journalistic fraud is "a non-existent cause of action never recognized in New York or any other state." The full sentence of page 44, which Satterlee has plucked from context, is: "Thus, that 'no court has recognized a journalistic fraud cause of action' is no argument for why such cause of action should not be recognized by this Court" – a sentence which follows plaintiffs' quotation of *Brown v. State of New York*, *supra*, that "new torts are constantly being recognized."

Third, Satterlee's citation to page 45 of plaintiffs' opposition/cross-motion memo as asserting that Judge Loehr's unpublished decision in *Sassower v. The New York Times* is "a complete fraud" also removes it from context. The IMMEDIATELY-following sentence is:

> "Even still, Judge Loehr was not adverse to recognizing a cause of action for journalistic fraud were the allegations of the complaint therein within the purview of such cause of action, which he held they were not:..."(underlining in the original).

Satterlee does NOT deny or dispute this – or that there is "no bar" to the Court's recognizing a cause of action for journalistic fraud where a complaint makes sufficient allegations to warrant same. Indeed, Satterlee's last sentence of its Point IC admits as much:

> "There is simply no justification for basing the creation of an entirely new cause of action *on allegations as meritless as those asserted here*. See Dec. and Order at 9, Sassower v. New York Times Co., (Sup Ct. West. Co. Jul. 6, 2006) (No. 05-19841)." (italics added).

As evident from ¶¶65-79 of plaintiffs' Complaint, constituting their journalistic fraud cause of action, there is nothing remotely "meritless" about their allegations – and, indeed, based on the

record herein, they are entitled to the granting of summary judgment, *as a matter of law*, with recognition of the journalistic fraud cause of action, as well as the proposed cause of action for institutional reckless disregard of truth.

Satterlee's Point ID (at pp. 10-11)
"Plaintiffs' Purported Service Of Defendant Eddings Is Ineffectual"

Satterlee's two-paragraph Point ID does not address ANY of plaintiffs' argument pertaining to service upon defendant Eddings. Nor does it provide any citation reference to enable the Court to find that argument for itself. Plaintiffs' argument – to which Satterlee is not responsive – is at pages 48-50 and 57-58 of their opposition/cross-motion memo and, additionally, ¶¶24-29 of plaintiff Elena Sassower's affidavit.

Instead, in the first of its two paragraphs (at p. 10), Satterlee's Point ID falsifies the single "argument" of plaintiffs it purports to identify. Thus, without any citation reference, it asserts:

> "Although Ms. Sassower insists that the service of the Summons with Notice on certain Defendants constitutes proper service on all of the named Defendants, this argument is legally and factually incorrect." (underlining in the original).

That plaintiffs made no such argument is verifiable from the above-indicated pages and paragraphs of plaintiffs' opposition/cross-motion. These also reveal the unexplained reason why Satterlee has belatedly furnished Ms. Stanley's affidavit to support its claim that defendant Eddings was not employed at The Journal News on the date service was effected: plaintiffs' opposition/cross-motion had emphasized that no probative evidence had been furnished by Satterlee.

Tellingly, Ms. Stanley's affidavit does not contain the further statement that defendant Eddings is not otherwise employed by defendant Gannett – an omission all the more striking as

plaintiffs had pointed out its potential relevance.[9] Nor does Satterlee claim that service upon defendant Eddings would be "ineffectual" were he employed by defendant Gannet on that date.

Whereas the first of Satterlee's two paragraphs of its Point ID pertain to its own Point III of its dismissal memo (at p. 23), the second paragraph pertains to the sixth branch of plaintiffs' cross-motion: "extending plaintiffs' time to serve their Summons with Notice and Verified Complaint upon defendant Eddings pursuant to CPLR §306-b", for which plaintiffs' argument, unchallenged by Satterlee, is at pages 57-58 of their opposition/cross-motion memo.

The sole basis of Satterlee's opposition to this cross-motion relief is its assertion (at p. 10) that "courts routinely hold that, where plaintiffs fail to make a showing of a meritorious cause of action, the requirement that extensions of time to serve be granted only 'in the interest of justice' is not met" – implying, but not stating, that plaintiffs have failed to make such showing – and ignoring the further ground of plaintiffs' extension request, "good cause", and the sufficiency of plaintiffs' showing thereunder, as well as "in the interest of justice", based on the criteria articulated in *Leader v. Maroney*, 97 N.Y.2d 95 (2001).[10]

As demonstrated by plaintiffs' opposition/cross-motion and this memo, the merit of their Complaint is so overwhelmingly established as entitle them to summary judgment in their favor, *as a matter of law*. Consequently, and based on the sole criteria Satterlee has identified, plaintiffs are entitled to the granting of the sixth branch of their cross-motion.

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[9] See pp. 49, 57 of plaintiffs' opposition/cross-motion memo and ¶26 of plaintiff Elena Sassower's affidavit.

[10] *Sottile v. Islandia Home for Adults*, 278 A.D.2d 482, 484 (2d Dept. 2000), cited and quoted by Satterlee (at p. 11), is wholly inapt as this action is pending. It does, however, reinforce that plaintiffs have here followed the correct course by their cross-motion for an extension pursuant to CPLR §306-b, albeit Satterlee did not, in fact, make "a motion to dismiss for failure to timely serve" and lacks capacity to do so as it does not represent defendant Eddings, as particularized by pages 48-49 of plaintiffs' opposition/cross-motion-memo.

Satterlee's Point IE (at p. 11)
"Plaintiffs Are Not Entitled To A Default Judgment Against The Non-Appearing Defendants"

Satterlee's one-paragraph Point IE opposes only the default judgment sought against defendant DOES 1-10, without addressing the default judgment also sought against defendant Eddings, at pages 56-57 of plaintiffs' opposition/cross-motion memo, including its footnote 28:

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

Inasmuch as Satterlee is not representing the defendant DOES – and has given no explanation for not doing so and supplied no evidence rebutting service upon the defendant DOES, attested to by the affidavit of service of Nina Best (Exhibit 15a) and further attested-to by plaintiff Elena Sassower's affidavit (at ¶¶25-28) – Satterlee has no capacity to interpose opposition for the defendant DOES who it has willfully and deliberately chosen not to represent, presumably because it is among them, without disclosing such fact.[11] (*see* pp. 9-10, *supra*, p. 31, *infra*).

In any event, the sole basis of Satterlee's opposition is its pretense that plaintiffs' have not stated "a viable cause of action" – a deceit roundly exposed by plaintiffs' opposition/cross-motion and this memo.

Based on the merit of plaintiffs' causes of action, established by their opposition/cross-motion and this memo, plaintiffs are entitled to the granting of the fifth branch of their cross-motion.

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[11] "...defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them (*see Rokina Opt. Co. v Camera King*, 63 N.Y.2d 728, 730...[1984])", *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003), cited by Satterlee's "reply" dismissal motion (at p. 11) for other reasons.

SATTERLEE'S FRAUDULENT POINT II (at pp. 11-15)
"Plaintiff[s]' Cross-Motion For Sanctions, Costs, Disciplinary Referral And Damages Against This Firm Is Meritless"

Satterlee's introductory two paragraphs to its Point II (at pp. 11-12) continue its pattern of deceit. Purporting (at p. 11) that plaintiffs have "failed to demonstrate that [their] claims are even remotely meritorious" and that their claims against Satterlee are "equally baseless" to their "baseless claims against Defendants" – deceits only possible because it has concealed virtually the entire content of plaintiffs' opposition/cross-motion – Satterlee now conceals that plaintiffs' cross-motion seeks relief against Satterlee beyond "sanctions, costs, disciplinary referral and damages". Thus, it conceals that the cross-motion seeks its disqualification for conflict of interest as a defendant DOE, even as it acknowledges (at p. 11) that plaintiffs have asserted that it is "a heretofore unknown DOE", which it does not deny.

Rather than confronting, or even identifying, plaintiffs' cross-motion branch for its disqualification (at pp. 54-56) – clearly because it has no defense thereto because it is a defendant DOE (see pp. 9-10, *supra*) – Satterlee's second paragraph turns to its standard *ad hominem* besmirchment, stating (at p. 12):

> "[plaintiffs'] cross-motion treads what is, for [them], familiar ground: counsel for defendants in the case of Sassower v. The New York Times Co., faced virtually identical claims".

Satterlee then further demonstrates that it cannot confront the issue of its own disqualification by materially expurgating its quotation of Judge Loehr's unpublished July 5, 2006 decision in *Sassower v. New York Times* to remove references to plaintiffs' cross-motion in that case to disqualify *Times*' counsel on conflict of interest grounds as defendant DOES. As such cross-motion disqualification relief against *Times* counsel would be evident to the Court upon reading the July 5, 2006 decision, it would appear that Satterlee is attempting to create a subliminal impression that it

has confronted the fourth branch of plaintiffs' cross-motion herein for its disqualification, when it has not.

This fourth branch, entirely UNOPPOSED, is deemed conceded – and all the more so by reason of Satterlee's concealment of its existence. As such, and *as a matter of law*, plaintiffs are entitled to the requested relief of this fourth branch: "disqualifying defense counsel for violation of Rule 1.7 of the Rules of Professional Conduct for Attorneys 'Conflict of Interest: Current Clients', as they are themselves parties, being defendant DOES".

Satterlee's Point IIA (at pp. 12-14)
"Plaintiff[s]' Cross-Motion For Costs And Sanctions Against This Firm Pursuant to 22 NYCRR §130-1.1"

Only the first paragraph of Satterlee's two-paragraph Point IIA addresses the relief sought by the first branch of plaintiffs' cross-motion: "imposing maximum costs and $10,000 sanctions against defense counsel pursuant to 22 NYCRR §130-1.1 *et seq.*", discussed at pages 50-52 of plaintiffs' opposition/cross-motion memo.

Satterlee's response to this branch is to purport (at p. 12) that such is not warranted because "as thoroughly demonstrated by Defendants' filings, Defendants' Motion to Dismiss is meritorious and supported by established law" and that "the fatal flaws inherent in the Complaint render Plaintiffs' claims untenable as a matter of law" – deceits only possible because the previous 12 pages of its "reply" dismissal memo have completely falsified and concealed the content of plaintiffs' opposition/cross-motion, just as its dismissal motion had completely falsified and concealed the content of plaintiffs' Complaint. Satterlee then further perverts the record by purporting: "Plaintiff herself concedes that 'the legal presentation' in Defendants' Motion to Dismiss was 'not itself materially false and misleading'" – citing page 51 of plaintiffs' opposition/cross-motion memo,

when the very sentence from which it has plucked the words "not materially false and misleading" says the precise OPPOSITE. The full paragraph from page 51 is as follows:

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

As hereinabove demonstrated, Satterlee has not denied or disputed the particularized showing of its misconduct presented by plaintiffs' opposition/cross-motion memo. Rather, it has reinforced it by continued misconduct by its "reply" dismissal memo. As such, plaintiffs are entitled to the granting of the first branch of their cross-motion, *as a matter of law*, together with the granting of their further request, herein made (p. 2, *supra*), for the Court's imposition of additional $10,000 sanctions against Satterlee and for an additional award of maximum costs to plaintiffs by reason of its frivolous "reply" dismissal memo.

The second paragraph of Satterlee's Point IIA (at pp. 13-14), invoking 22 NYCRR §130.1.1a(a), inferentially seeks to have the Court strike plaintiffs' opposition/cross-motion on behalf of anyone but the *pro se* plaintiff Elena Sassower, individually, due to the failure of James DeFelice, Esq., representing the other plaintiffs, to have signed plaintiffs' notice of cross-motion and opposition/cross-motion memo. The referred-to December 5, 2010 e-mail – annexed to Ms. Sullivan's December 8, 2010 affidavit – was addressed to plaintiff Elena Sassower, with a copy to Mr. DeFelice, and stated:

> "The Memorandum of Law submitted in opposition to the Motion to Dismiss appears to be signed by you alone, and not by Mr. DeFelice. Please provide us with a fully executed version of your opposition brief as soon as possible. In the absence of opposition papers signed by counsel for all parties, the opposition and the cross-motion for sanctions would, of course, be deemed submitted only on your behalf."

Such e-mail neither cited nor quoted §130-1.1a(a). Nor did it give notice of anything other than that Satterlee, in the absence of "a fully executed version", would deem the opposition and cross-motion as submitted on behalf of plaintiff Elena Sassower alone. As conceded by Satterlee's "reply" dismissal memo (at p. 14) and Ms. Sullivan's December 8, 2010 affidavit, plaintiff Elena Sassower response to the e-mail was that "fully executed signature pages will be forthcoming".

Satterlee does not assert any prejudice to it by the absence of fully executed signature pages or any reason to believe that such will not be "forthcoming". As stated by plaintiff Elena Sassower's accompanying affidavit, it will be furnished in advance of oral argument on Satterlee's dismissal motion and plaintiffs' cross-motion.

Satterlee's Point IIB (at p. 14)
"Plaintiff[s]' Cross-Motion For Disciplinary Referral Of This Firm"

Satterlee's one-paragraph Point IIB addresses the relief sought by the second branch of plaintiffs' cross-motion:

> "referring defense counsel 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 violations of New York's Rules of Professional Conduct for Attorneys and, specifically, Rule 3.1 'Non-Meritorious Claims and Contentions', Rule 3.3 'Conduct Before A Tribunal', and Rule 8.4 'Misconduct'",

discussed at pages 52-53 of plaintiffs' opposition/cross-motion memo.

Satterlee's response to this branch is to purport (at p. 14) that plaintiffs' Complaint "does not state causes of action under New York Law"; that Satterlee's dismissal motion "unquestionably establishes that it is based in law and fact"; that plaintiffs' accusations of its dishonesty and fraud are "pure and simple fabrication"; and that Satterlee has "not engaged in any unethical conduct" – deceits likewise only possible because the previous 14 pages of its "reply" dismissal memo have

completely falsified and concealed the content of plaintiffs' opposition/cross-motion, just as its dismissal motion had completely falsified and concealed the content of plaintiffs' Complaint.

As for Satterlee's annotating footnote 6, plaintiffs' opposition/cross-motion does not rest its invocation of NY Professional Rule of Conduct 3.3(a)(2) (failing to disclose to the court "controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel") on Satterlee's concealment, by its dismissal motion, of the two law review articles on which their two proposed causes of action for journalistic fraud and institutional reckless disregard for truth rest. Rather, as evident from Satterlee's material distortion and misrepresentation of law and legal principles in its dismissal memo, particularized at pages 2-3, 21-50 of plaintiffs' opposition/cross-motion memo, it is clear from Satterlee's expertise not only in litigation, but media law (Exhibit 18) that it has failed to disclose a wealth of "controlling legal authority" not merely reinforcing plaintiffs' showing, but significantly enlarging upon it. This especially includes as to the substantiating case law cited by those two law review articles (Exhibits 16, 17), whose purported absence from plaintiffs' opposition/cross-motion memo Satterlee uses to mislead the Court in its Point IC (at p. 9) (discussed at pp. 26-27, *supra*).

Based on the mountain of undisputed specific facts and law presented by plaintiffs' opposition/cross-motion establishing Satterlee's pervasive litigation fraud – reinforced by the no less particularized showing herein – plaintiffs are entitled to the granting of the second branch of their cross-motion, *as a matter of law*.

Satterlee's Point IIC (at p. 15)
"Plaintiff[s]' Cross-Motion For Damages against This Firm Pursuant to Judiciary Law §487"

Satterlee's one-sentence Point IIC addresses the relief sought by the third branch of plaintiffs' cross-motion: "assessing damages against defense counsel for deceit and collusion proscribed

under Judiciary Law §487(1) as a misdemeanor and entitling plaintiffs to treble damages", discussed at page 54 of plaintiffs' opposition/cross-motion memo.

Satterlee's response to this branch is to purport (at p. 15) that plaintiffs are "not entitled to damages under Judiciary Law §487 or any other law or rule of professional conduct" because Satterlee has "committed no ethical violations, misconduct, or deceit". Such is itself a deceit – here, too, only possible because the previous 14 pages of its "reply" dismissal memo have completely falsified and concealed the content of plaintiffs' opposition/cross-motion, just as its dismissal motion had completely falsified and concealed the content of plaintiffs' Complaint.

Based on the mountain of specific facts and law presented by plaintiffs' opposition/cross-motion establishing Satterlee's litigation fraud – reinforced by the no less particularized showing herein – plaintiffs are entitled to the granting of the third branch of their cross-motion, *as a matter of law*.

PLAINTIFFS' ENTITLEMENT TO SUMMARY JUDGMENT

As with the fourth branch of plaintiffs' cross-motion to disqualify Satterlee for conflict of interest as a defendant DOE, which Satterlee's "reply" dismissal memo conceals, so Satterlee conceals – and even more totally – the cross-motion's seventh branch:

> "giving notice, pursuant to CPLR §3211(c), that defendants' dismissal 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 libel (¶¶36-56), libel *per se* (¶¶57-64), for journalistic fraud (¶¶65-79), and on a fourth cause of action related thereto: institutional reckless disregard for truth; with additional notice, as part thereof, that the Court will be determining whether defendant Journal News should be ordered to remove from its masthead its '**ACCURACY**' policy as a false and misleading advertising claim, in violation of public policy, including General Business Law, Article 22-A (§§349 and 350, *et seq.*)."

This requested summary judgment relief could not have been more clearly identified. In addition to ¶2 of plaintiff Elena Sassower's affidavit, plaintiffs' opposition/cross-motion memo

identified such relief on its very first page, then continuing, on its second page, with the following:

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

Plaintiffs' opposition/cross-motion memo then placed its supporting argument under the title heading "Plaintiffs' Entitlement to a Court Order Giving Notice, Pursuant to CPLR §3211(c), that Satterlee's Dismissal Motion is being Considered for Summary Judgment in Plaintiffs' Favor" (pp. 58-61). It began by quoting CPLR §3211(c), *in haec verba*:

> "CPLR §3211(c): Evidence permitted; immediate trial, motion treated as one for summary judgment –
>
> Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.",

thereupon also quoting, *in haec verba*, CPLR §105(u), "A 'verified pleading' may be utilized as an affidavit whenever the later is required", and treatise authority, 2 Carmody-Wait 2d §4:12, for the further proposition "a sworn complaint may be regarded as an affidavit". This, to underscore the evidentiary significance of plaintiffs' Verified Complaint.

. It is in face of this that Satterlee's "reply" memo of law totally conceals and ignores the summary judgment branch of plaintiffs' cross-motion – presumably because interposing opposition to it, as likewise to the cross-motion branch to disqualify Satterlee as a defendant DOE – would require it to come forward with sworn statements. Apparently, neither Satterlee nor its co-defendants are willing to swear under penalties of perjury to the evidence which plaintiffs' opposition/cross-motion memo so prominently identified as entitling them to summary judgment "in the first instance":

(1) **plaintiffs' Verified Complaint**, whose under penalties of perjury allegations, included:

¶14: that "[the] news article, on its face, was non-conforming with standards for news articles, *inter alia*, (a) by its disparaging characterizations 'slings and arrows' in lieu of even a single quote of what plaintiffs Elena and Doris Sassower publicly stated; (b) by its characterization, with no attributing source, that they 'pursued' and 'stepped up their pursuit' of Judge Hansbury and his wife, upon leaving the Council chamber; and (c) by implying that by obtaining and reporting on 'a related decision signed by another City Court judge, JoAnn Friia, on July 3, 2008', The Journal News had investigated – and discredited – plaintiffs' publicly-expressed 'alleg[ations]' of Judge Hansbury's 'corruption and conflict of interest...demonstrated by his 2007 decision to evict [them]'"

¶¶31-35: that the video of the May 4, 2009 White Plains Common Council meeting corroborates plaintiffs' Exhibit 7 analysis, establishing that plaintiffs Elena and Doris Sassower did not "heckle" or otherwise make any "protest" "during" the Common Council meeting confirming Judge Hansbury's confirmation, which took place without disturbance (at 18:50 minutes); that there was no "loud humph" by plaintiff Elena Sassower during Reverend Huston's invocation (at 4:54 minutes); and that Judge Hansbury and his wife left the Council chamber (at 22:19 – 22:22 minutes) after plaintiff Elena Sassower (at 22:14 minutes), contrary to the news article;

¶37: that, as demonstrated by plaintiffs' Exhibit 7 analysis and the video, the news article is "not a 'fair and true report' of what took place 'during' the May 4, 2009 White Plains Common Council meeting – nor of what took place in the citizens' half-hour preceding it" – vitiating any privilege under New York Civil Rights Law §74, by its express language;

¶38: that plaintiffs' incorporated Exhibit 7 analysis, establishes, "by its parts and in context", that the news article is knowingly false and defamatory as to plaintiffs Elena and Doris Sassower;

¶¶70: that The Journal News' prominently-featured policy as to "**ACCURACY**" and "Corrections" has exacerbated the journalistic fraud of the news article by inducing the public to believe that the article was accurate, fair, and balanced – when, as demonstrated by plaintiffs' analysis, it was grossly not;

¶74: that, upon information and belief, The Journal News ceased having a "READERS' REPRESENTATIVE"/"Reader Services Editor" long before the subject news article, but deliberately retained references to them in its "**ACCURACY**" and "Corrections" policy and elsewhere in its newspaper and on its website to mislead readers that their interest in quality journalism was being protected;

(2) **the video** of the May 4, 2009 Common Council meeting (Exhibit 10);

(3) **the two law review articles** supporting the Complaint's two proposed causes of action for "journalistic fraud" and "institutional reckless disregard of the truth":

- "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*", by Professors Clay Calvert and Robert D. Richards, 11 Fordham Intellectual Property, Media & Entertainment Law Journal, 1 (2003) (Exhibit 16); and

- "*Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*", by Professors Randall P. Bezanson and Gilbert Cranberg, 90 Iowa Law Review 887 (2005) (Exhibit 17).

Suffice to say, that as to these two law review articles, Satterlee's "reply" dismissal memo conceals them almost as totally as its dismissal memo had – relegating reference to them to its footnote 6, without identifying their titles, authors, or the publications in which they appeared, baldly purporting they are "merely speculative writings". As highlighted by ¶¶31-32 of plaintiff Elena Sassower's affidavit, "Satterlee has all the expertise and resources to have provided the Court with a fully responsive brief on behalf of its $5.6 billion corporate client" with respect to the argument and legal authorities these law review articles advance in support of the two proposed causes of action for journalistic fraud and institutional reckless disregard for the truth.

A law firm of the caliber of Satterlee may be presumed to be familiar with the legal standards governing summary judgment. They are rudimentary, known to any litigator:

> "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b]). Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form... We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form...or must demonstrate acceptable excuse for his failure to met the requirement of tender in admissible form; mere conclusions...or unsubstantiated allegations or assertions are insufficient' (*Alvord v. Swift & Muller Constr. Co.*, 46 NY2d 276, 281-282; *Fried v. Bower & Gardner*, 46 NY2d 765, 767; *Platzman v. American Totalisator Co.*, 45 NY2d 910, 912; *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290).'", *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

"[T]he basic rule followed by the courts is that general conclusory allegations, whether of fact or law, cannot defeat a motion for summary judgment where the movant's papers make out a prima facie basis for the grant of the motion', Vol. 6B Carmody-Wait 2d §39:66 (1996 ed.). "A party opposing a motion for summary judgment cannot rely on mere denials, either general or specific...it is not enough for the opponent to deny the movant's presentation. He must state his version and he must do so in evidentiary form." *Id* §39:56. The party seeking to defeat summary judgment "must avoid mere conclusory allegations and come forward to lay bare his proof...", Siegel, New York Practice, §281 (1999 ed., p. 442). "[M]ere general allegations will not suffice", Vol. 6B Carmody-Wait 2d §39:52 (1996 ed.). "[T]he burden is on the opposing party to rebut the evidentiary facts and to present evidence showing that there exists a triable issue of fact. Such party must assemble, lay bare, and reveal his proofs...some evidentiary proofs are required to be put forward", *Id.*, §39:53; *Stainless, Inc. v. Employers Fire Ins. Co.*, 418 NYS2d 76, aff'd 49 NY2d 924, as well as Siegel, McKinney's Consolidate Laws of New York Annotated, Book 7B, CPLR 3212:16).

"Failing to respond to a fact attested in the moving papers...will be deemed to admit it", Siegel, New York Practice, §281 (1999 ed., p. 442) – citing *Kuehne & Nagel, Inc. v. Baiden*, 36

N.Y.2d 599 (1975) and 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", *id.* (1992 ed., p. 324). "[I]f answering affidavits are not produced, the facts alleged in the movant's affidavits will usually be taken as true", 2 Carmody-Wait §8:52 (1994 ed., p. 353). Where answering affidavits are produced, they "should meet traversable allegations" of the moving affidavit. "Undenied allegations will be deemed to be admitted", *id*, citing *Whitmore v. J. Jungman, Inc.*, 129 NYS 776, 777 (S.Ct., NY Co. 1991).

> "A court reviewing a motion for summary judgment will tend to construe the facts 'in a light most favorable to the one moved against, but this normal rule of summary judgment practice will not be applied if the opposition is evasive, indirect, or coy' (Siegel, NY Prac §281, at 411 [2d ed]", *Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dept. 1994), cited in 6B Carmody Wait 2d §39-105 (2004 ed).

CONCLUSION

Consistent with fundamental legal and ethical standards, and reinforced by §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, plaintiffs are entitled to the granting of all eight branches of their November 29, 2010 cross-motion, with a further assessment of 22 NYRR §130-1.1 sanctions/costs against Satterlee, Stephens, Burke & Burke, LLP and treble damages pursuant to Judiciary Law §487.

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