SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Plaintiffs,

DECISION AND ORDER
Index No.: 05-19841

-against-

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

Defendants.

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LOEHR, J.

In this action for libel and journalistic fraud, plaintiffs Elena Sassower ("Sassower") and the Center for Judicial Accountability, Inc. ("CJA") seek to recover 906 million dollars in damages from defendant The New York Times Company ("The Times") and Merek Fuchs ("Fuchs") due to the publication by The Times of an article written by Fuchs which reported on Sassower's arrest at the United States Senate Judiciary Committee confirmation hearings on the nomination of former New York Court of Appeals Judge Richard Wesley to the United States Court of Appeals for the Second Circuit and her conviction for disruption of Congress (the defamation causes of action) and from all the defendants based on their refusal to cover, report on and publish what plaintiffs consider to be the more significant underlying facts and reasons which led to Sassower's arrest and conviction (the journalistic fraud cause of action).

The defendants[1] have moved to dismiss the complaint pursuant to CPLR 3211(a)(7) on the grounds that the allegedly libelous article is, on its face, not defamatory; is a fair and accurate summary of what appears in the official records of Congress with respect to Sassower's arrest for disruption of Congress and in the transcript of her sentencing therefor; and that the article's non-record characterizations of Sassower are constitutionally protected opinion. With respect to the cause of action for journalistic fraud, defendants moved to dismiss on the basis that no such cause of action exists.

Deeming the allegations of the complaint as true (*Silsdorf v Levine,* 59 NY2d 8, 12 [1983]), Sassower is a citizen of the United States of America and of the State of New York and is a reader of the New York Times. From 1990 to 1993, Sassower was Coordinator of the Ninth Judicial Committee, a local non-partisan, non-profit citizens group formed to oppose political manipulation of judicial elections in the Ninth Judicial District of New York. By 1993 Sassower had co-founded CJA, a national, non-partisan, non-profit citizens organization. CJA was incorporated under the laws of the State of New York in 1994. Sassower was its Coordinator until January 15, 2006 when she became its Director. Like the Ninth Judicial Committee, CJA 's purpose is to safeguard the public interest in the integrity of the processes of judicial selection and discipline.

Since at least 1999, plaintiffs were seeking legal redress and press coverage concerning what they believed to be the corruption of the process by which judges were being appointed to the New York State courts, including the New York Court of Appeals, which corruption, they asserted, extended to Governor Pataki and his judicial appointments. On March 26, 1999,

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[1] The moving defendants are The Times, Arthur Sulzberger, Jr., Bill Keller, Jill Abramson, Allan M. Siegal, Gail Collins and Byron Calame.

plaintiffs filed a complaint against Governor Pataki with the New York State Ethics Commission. Neither the Ethics Commission nor Attorney General Sptizer would pursue this complaint and it was apparently dismissed. Sassower then commenced an article 78 proceeding in the nature of mandamus against the Commission on Judicial Conduct of the State of New York seeking, among other relief, to compel the Commission to investigate her complaints of judicial misconduct. This proceeding was also dismissed (*Sassower v Commission on Judicial Conduct,* 289 AD2d 119 [1st Dept 2001], *lv denied* 98 NY2d 720 [2002] and 99 NY2d 504 [2002]). In numerous letters, plaintiffs wrote to The Times demanding press coverage of the foregoing and offering to provide "readily-verifiable" proof of the corruption of the process by which judges are appointed to our State's highest court. To the extent The Times provided press coverage of Governor Pataki's judicial appointments, it was, in plaintiffs' estimation, insufficient to alert the public to this issue.

Having been appointed by Governor Pataki to the New York Court of Appeals and having subsequently resigned therefrom, Judge Richard Wesley was nominated by President Bush to sit on the United States Court of Appeals for the Second Circuit. On May 22, 2003, Sassower attended the United States Senate confirmation hearings with respect to Judge Wesley's nomination and attempted to speak in opposition to the nomination. She was arrested, charged with disruption of Congress and ultimately convicted in the Superior Court for the District of Columbia.

By letter dated May 11, 2004, Sassower wrote to The Times reiterating her demand for press coverage concerning these issues. The letter provided in part:

> "My proposal is not about Senator Schumer's well-publicized role as an advocate for vigorous scrutiny of ideologically-objectionable federal judicial nominees, as featured by your front-page metro story, '*An Infuriating Success: Schumer Draw[s] Fire for Tactics Blocking Judicial Nominees*' (11/1/03). Rather, it is about the altogether different

fashion in which Senator Schumer operates with respect to ideologically 'moderate', 'consensus' nominees, who are the product of political deals. This includes his own deals with President Bush and Governor Pataki over Second Circuit judgeships -- unreported by your front-page metro story, '*Pataki Choice for Judgeship is Assailed*' (10/2/03), about the Senate Judiciary Committee's hearing to confirm Dora Irizzary's nomination for a district court judgeship in the Southern District of New York. Such glaring omission was pointed out by footnote 28 of my October 13, 2003 letter to Bill Keller, to which you were an indicated recipient and to which I referred when we spoke [fn].

As a case study, I proposed examination of Senator Schumer's 'agreement' with President Bush for the nomination to the Second Circuit Court of Appeals of Governor Pataki's first appointee to the New York Court of Appeals, Richard C. Wesley. Such examination would expose Senator Schumer's wilful disregard for documentary proof of Judge Wesley's on-the-bench corruption in two enormously important public interest cases affecting the rights and welfare of the People of New York -- one of which involved the corruption of the New York State Commission on Judicial Conduct and criminally implicated the Governor. Likewise, it would expose Senator Schumer's wilful disregard of documentary proof of the corruption of other 'safeguards' in the federal judicial conformation process -- bar association ratings and Senate Judiciary Committee review. Indeed, such examination would demonstrate why two years earlier, when Senator Schumer was chairman of the Senate Judiciary Committee's Courts Subcommittee, he ignored CJA's fact-specific, document-supported July 3, 2001 letter to him, submitted for the record of his June 26, 2001 hearing on the role of ideology in judicial selection. That letter not only alerted him to the long-ago made, but largely unimplemented, non-partisan recommendations of The Ralph Nader Congress Project, Common Cause, and the Twentieth Century Fund to reform the federal judicial confirmation process, but called for his leadership to repair a process that appeared to be nothing but a facade for cynical wheeling and dealing in judgeships. Quite simply, Senator Schumer ignored the latter because the facade satisfied his personal and political interests -- and those of his Senate colleagues. The same is true of the facade that passes for federal judicial discipline, also summarized by the July 3, 2001 letter (at pp. 16-18)."

When The Times declined to provide such coverage, in a letter dated May 24, 2004, Sassower concluded that such editorial decision was influenced by the "highest echelons" of The Times [2] and was the product of The Times' conflicts of interest. Sassower suggested that The Times' decision not to cover the Wesley nomination must had been predicated on the knowledge that such coverage would have revealed Senator Schumer's disregard of the corruption of both

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[2] According to plaintiffs, these included Arthur Sulzberger, Jr., Publisher of The Times, Bill Keller, Executive Editor of The Times, Jill Abramson, first Managing Editor for Newsgathering for The Times, Allan Siegal, Assistant Managing Editor for The Times and The Times' Editorial Board and all have been named as defendants herein.

Judge Wesley and Governor Pataki thereby derailing Senator Schumer's re-election campaign – a campaign which The Times had endorsed. The letter closed with Sassower informing The Times that she would be filing a complaint against "all concerned" with The Times' public editor/ombudsman, Daniel Okrent ("Okrent").

On June 17, 2004, plaintiffs filed a complaint with Okrent. In an e-mail dated June 21, 2004, Okrent responded:

> "I regret that I cannot provide you any comfort. The accusations you make are very serious, but do not remotely connect to any evidence you have provided in your correspondence. To suggest that any paper that chooses not to cover what you wish it to cover is therefore suppressing the news because of [a] conflict of interest is to suggest that any complaint at all requires coverage.
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> "I do not accept this premise, nor am I convinced by the evidence you present that The Times has erred."[3]

On June 28, 2004, Sassower was sentenced by Judge Brian Holeman of the Superior Court of the District of Columbia. Sassower was originally sentenced to 92 days in jail together with two years probation. One of the terms of the probation was that she was to prepare and forward to Senators Hatch, Leahy, Chambliss, Schumer and Clinton and to Judge Wesley letters of apology. When she refused, Judge Holeman sentenced her to six months incarceration.

On November 7, 2004, The Times published a column entitled "When the Judge Sledgehammered the Gadfly" by Mereck Fuchs. The article reads in full:

> "Elena Sassower, a White Plains Hebrew-school teacher and judicial activist, is -- as even her staunchest defenders note -- something of a handful. Her conversational style can be best described as relentless, and her passions, expressed in long recitations, can

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[3] Okrent has also been named as a defendant herein.

exhaust the most earnest listener.

"But even allowing for that, her defenders can't get past one little fact: that some of those relentless words, not threatening but apparently very annoying to a Washington judge, have landed her behind bars. For speaking out of turn at a Senate hearing in 2003, she is now more than four months into a six-month sentence in a medium security jail.

"Ms. Sassower and her mother, Doris, run a White Plains group called the Center for Judicial Accountability. It specializes in frontal assaults on the clubby process that often puts judicial nominees on the bench. Their beef is more systemic than ideological: nominations, they say, seem to go not to the most knowledgeable judges but the best connected.

"Obviously, this stance has not endeared her to the judicial establishment (or the elected officials who approve nominations) -- on top of which, add her reputation for delivering her views with the subtlety of a claw hammer.

"When she began to focus on the nomination of Richard Wesley to the Second Circuit of the United States Court of Appeals, she was warned by police officers at the Capital in Washington not to disrupt his confirmation hearing.

"She did not heed the warning. Toward the end of the hearing, she asked to speak, she says, persisting even after the gavel came down.

"Unseemly as officials may have found this behavior, it is rare that even cacophonous outbursts result in charges, let alone jail terms. In May, when protesters disrupted a House Armed Services Committee session by unfurling a banner and shouting at Defense Secretary Donald H. Rumsfeld to resign, they were ushered out -- but not charged or arrested.

"Ms. Sassower, however, was charged with disorderly conduct (and by the way, Mr. Wesley's nomination was confirmed). Court transcripts reveal that her trial, which took place in April, was a production, with Ms. Sassower, who has no law degree, conducting her own defense. She charmed neither the jury nor judge, but when she was found guilty, the prosecution recommended only a five-day suspended sentence.

"Judge Brian F. Holman of Superior Court gave her a three-month sentence, but expressed a willingness to suspend it as long as Ms. Sassower agreed to meet some conditions: to take anger-management classes; stay away from the Capital complex; sever all contact with members of the Senate Judiciary Committee; and apologize.

"The apology, according to the court transcripts and an interview with Ms. Sassower from a jail pay phone, was the biggest sticking point. She absolutely refused to apologize.

"So Judge Holman retracted his offer to suspend, then doubled her sentence.

"Said he: 'Ms. Sassower, once again, your pride has gotten in the way of what could have been a beneficial circumstance for you. This incarceration begins forthwith; step her back.'

"Even those who have found Ms. Sassower difficult emphasize that she has never been even remotely threatening. Ralph M. Stein, a Pace University Law professor, remembers her auditing his classes and attending talks he has given. She launched into "polite but fulminating" assaults, said Mr. Stein, but she never crossed the line.

"New York State Senator John A. DeFrancisco, who has served on the state judiciary committee for 12 years, said that just after he took over as chairmen, Ms. Sassower came to testify at a public hearing 'wielding a dolly with her and three or four big boxes of materials.' She was impossible to keep on message, he said, and he eventually had to tell

her that she could not continue. But in the end, she was harmless.

"Nathan Lewin, a well-known Washington lawyer, evidently agrees with that assessment; he is working pro bono to free Ms. Sassower, who is 48.

"'Elena makes things more difficult for herself than the ordinary person,' Mr. Lewin said, 'but judges are not supposed to lose their temper or be vindictive.'

"And Ms. Sassower, expressing few illusions about her relatively friendless state, put it this way: 'It's not a matter of who is on my side. But why are they not questioning what happened? I shouldn't be in jail. I'm just here because everyone is standing idly by.'"

This complaint followed. Sassower asserts that the article is defamatory based on its references to her as a "gadfly," "something of a handful," possessed of a "relentless" and "exhausting" conversational style; that she "specializes in frontal assaults" against judicial nominees; that her disruption of the Senate hearings was "unseemly;" that she "launched into polite but fulminating assaults" when debating legal issues; but was "harmless."

A writing is defamatory – that is, actionable without allegation or proof of special damages – if it tends to expose a person to hatred, contempt or derision, or to induce an evil or unsavory opinion of them in the minds of a substantial number of the community, even though it may impute no moral turpitude (*Mencher v Chesley*, 297 NY 94, 99 [1947]). Whether particular words are reasonably susceptible of a defamatory meaning is to be resolved by the court in the first instance (*see Golub v Enquirer/Star Group, Inc.* 89 NY2d 1074 [1997]; *James v Gannett Co.*, 40 NY2d 415, 419 [1976]; *Gjonlekaj v Sot,* 308 AD2d 471, 472 [2d Dept 2003]). The Court must look at the content of the entire communication, its tone and apparent purpose, to determine whether a reasonable person would consider it as conveying facts about the plaintiff (*Kamalian v Readers Digest Assoc., Inc.*, ___ AD3d ___ [2d Dept], NYLJ, May 8, 2006, at 37, col 4; *see Brian v Richardson,* 87 NY2d 46 [1995]; *Gross v New York Times Co.,* 82 NY2d 146, 151-52 [1993]). Moreover, it is a settled rule that expressions of an opinion, false or not, libelous or not, are constitutionally protected an may not be the subject of a defamation action (*Steinhilber v Alphonse,* 68 NY2d 283, 286 [1986]; *Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369, 380

[1977], *cert denied* 434 US 969).

Contrary to plaintiffs contentions, the challenged statements are not reasonably susceptible of a defamatory meaning, and were, in any event merely rhetorical hyperbole constituting pure opinion. They are therefore constitutionally protected (*see Immuno AG v Moor-Jankowski,* 77 NY2d 235, 245 [1989], *cert denied* 500 US 954 [1991]; *Steinhilber v Alphonse,* 68 NY2d 283, 291-92 [1986]; *Larchmont Professional Fire Fighters Assn. v Larchmont/Mamaroneck Volunteer Ambulance Corps.*, 206 AD2d 507, 508 [2d Dept 1994]).

Furthermore, and based solely on the complaint and exhibits annexed thereto, it is apparent that the article is a fair and substantially accurate description of the official proceedings it purported to cover *(see* NY Civil rights Law § 74). The only factual inaccuracy plaintiffs have identified is that the article reported that Sassower had been arrested for disorderly conduct when in fact the charge was disruption of Congress. Such a minor discrepancy does not amount to falsity as a matter of law (*Masson v New Yorker Magazine, Inc.,* 501 US 496 [1991]). Rather, the gravamen of plaintiffs' complaint is, in reality, the failure of the defendants to have included in the article all of the history – recited in part above -- which led to Sassower's arrest and conviction. Such coverage decisions are, however, editorial and protected by the First Amendment (*Miami Herald Publishing Co. v Tornillo,* 418 US 241, 258 [1974]; *cf. Holy Spirit Ass'n v New York Times Co.,* 49 NY2d 63, 68 [1979] ["a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author."]). Accordingly, the defamation causes of action must be and hereby are dismissed.

Plaintiffs third cause of action is denominated as one for journalistic fraud. It is based on an article by Professors Clay Calvert and Robert Richards entitled: "Journalistic Malpractice:

Suing Jayson Blair and the *New York Times* for Fraud and Negligence" and which appeared in the Fordham Intellectual Property, Media and Entertainment Law Journal in 2003 (*see* 14 Fordham Intell. Prop. Media & Ent. L.J. 1 [2003]). In this article, in the aftermath of the Jason Blair scandal,[4] the authors, after noting that a doctor or other professional who commits malpractice is liable under tort law to those injured thereby, posited that there should be an equivalent cause of action for journalistic fraud or malpractice in favor of the reading public.

To date, based on the Court's research, no jurisdiction has embraced such cause of action. Moreover, as opposed to the Blair case in which there was admitted widespread fabrication of news stories and plagiarism, the gravamen of plaintiffs' claim as alleged in the complaint is not defendants' misstatement of fact, but rather defendants' failure to provide such press coverage as plaintiffs believed to be appropriate, and their conclusion that such, ipso factor, must have been based on a conflict of interest. As indicated above, however, decisions concerning the extent that a newspaper will or will not cover a story are editorial, necessarily subjective and are protected under the First Amendment. Thus, even if such cause of action existed, plaintiffs have failed to allege a claim thereunder. Accordingly, defendants' motion to dismiss the complaint is granted.

Plaintiffs cross-moved to disqualify The Times Legal Department and George Freeman, Esq. ("Freeman"), a member of that Department and the attorney who filed the instant motion to dismiss, from representing The Times herein based on a conflict of interest. As best as the Court

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[4] Jason Blair was a young reporter for The Times who covered significant news events in 2002-2003. In a May 11, 2003 article, The Times confessed that Blair had "committed frequent acts of journalistic fraud," including "widespread fabrication and plagiarism." The article went on to state that Blair had:

"misled readers and *Times* colleagues with dispatches that purported to be from Maryland, Texas and other states, when often he was far away, in New York. He fabricated comments. He concocted scenes. He lifted material from other newspapers and wire services. He selected details from photographs to created the impression he had been somewhere or seen someone, when he had not."

can decipher plaintiffs' argument, it is that all of the members of The Times Legal Department including Freeman are liable with the named defendants as unnamed "Does" for above-alleged journalistic fraud but that the interests of the Legal Department and of Freeman and that of The Times are adverse thereby requiring disqualification. Inasmuch as there is no cause of action for journalistic fraud, there is no conflict and the motion to disqualify is denied. It is, of course, also denied as moot.

The plaintiffs have also cross-moved to sanction Freeman pursuant to 22 NYCRR 130-1.1 on the basis that the motion to dismiss is frivolous. Having granted the motion, the Court finds that it was not frivolous. The motion for sanctions is therefore denied.

The plaintiffs have also cross-moved for the entry of a default judgment against the non-moving defendants. Assuming, arguendo, that Okrent and Fuchs and the unnamed "Does" have been properly served, CPLR 3215 requires that the plaintiffs state a viable cause of action before a default judgment may be entered against them (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]; *Beaton v Transit Facility Corp.*, 14 AD3d 637 [2d Dept 2005]). Having decided that the instant complaint does not state a cause of action, the motion for a default judgment is denied and the complaint, on the Court's own motion, is dismissed with respect to the remaining defendants.

The remaining relief requested in plaintiffs' cross-motion is otherwise denied. The foregoing constitutes the decision and order of this Court.

In addition to oral argument, the Court considered the following papers in connection with this application: (1) Verified Complaint dated March 21, 2006 with exhibits attached; (2) Defendants' Notice of Motion dated April 13, 2006; (3) Affidavit of George Freeman, Esq., sworn to April 13, 2006 with exhibits attached; (4) Memorandum in Support of Motion to

Dismiss dated April 13, 2006; (5) Plaintiffs Notice of Cross-Motion dated Junel, 2006 together with the Affidavit of Elena Sassower, sworn to June 1, 2006 with exhibits attached; (6) Plaintiffs' Memorandum of Law dated June 1, 2006; (7) Reply Affidavit of George Freeman, Esq., sworn to June 9, 2006 with exhibit attached; (8) Reply Affidavit of Elena Sassower, sworn to June 13, 2006.

Dated: White Plains, New York
July 5, 2006

HON. GERALD E. LOEHR
Acting J.S.C.

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