SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT
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To be Argued by:
Elena Ruth Sassower
(15 Minutes Requested)

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Individually and as Director and President, respectively,
of the Center for Judicial Accountability, Inc., and
CENTER FOR JUDICIAL ACCOUNTABILITY, INC.,
Acting *Pro Bono Publico*,

Plaintiffs-Appellants,

App. Div. #: 2012-00126
App. Div. #: 2012-05360

Suffolk Co. # 10-12596

-against-

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

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

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"*What's A Lawyer To Do?: The Tension Between Zealous Advocacy and the Model Rules of Professional Conduct*", 21 American Journal of Trial Advocacy 357 (1997) by Angela Dawson Terry

PRELIMINARY STATEMENT

> "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." [R-545: appellants' December 15, 2010 memorandum of law in further support of their cross-motion, p.1, underlining in original]

This reply brief responds to the opposition brief of Satterlee, Stephens, Burke & Burke, LLP [hereinafter "Satterlee], representing all respondents except defendants Keith Eddings and DOES 1-10, and bearing the names of Mark Fowler, Esq., the Satterlee partner who signed the brief, and James Regan, Esq., another partner in the firm. As hereinafter demonstrated, the opposition brief is, like Satterlee's previous advocacy, not just frivolous but, from beginning to end, a "fraud on the court"[1] which:

> "would be unacceptable if perpetrated by an ordinary lawyer or party. That it has been perpetrated by a pre-eminent law firm specializing in media law ([R-442]), with limitless resources on behalf of a $5.6 billion corporate media giant (Verified Complaint, ¶6 [R-22-23]), cannot be tolerated by any court having respect for the judicial process." [R-454, R-545].

Such litigation misconduct reinforces what the lower court record evidentiarily establishes: that there is NO legitimate defense to these appeals and that appellants are entitled, *as a matter of law*, to reversal, if not vacatur, of Justice Cohalan's September 22, 2011 and April 23, 2012 short-form orders [R-3-8, R-11] and the granting of all the

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

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

relief sought by their November 29, 2010 cross-motion [R-241] and December 21, 2011 motion [R-586], most importantly summary judgment on their four causes of action, for libel, libel *per se*, journalistic fraud, and institutional reckless disregard for truth, and an order that respondent Journal News remove its '**ACCURACY**' policy from its masthead as a false and misleading advertising claim, violating public policy, including General Business Law, Article 22-A (§§349 and 350, *et seq.*) [R-242].

The fundamental legal principle is:

> "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 (1996 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).

To no avail, appellants recited this to Justice Cohalan as they sought summary judgment and affirmative relief against Satterlee for its identically-fraudulent litigation tactics [R-454, R-546] – there, as here, violating ALL codes of professional conduct.

Much as appellants' brief is about this Court's constitutionally-ordained appellate and supervisory duty to ensure the integrity of the judicial process in the

court below – trashed by Satterlee and Justice Cohalan – so this reply brief is about this Court's constitutionally-ordained appellate and supervisory duty to ensure the integrity of its own processes, trashed by Satterlee to cover-up what took place below.[2] Such duty – reinforced by this Court's mandatory "Disciplinary Responsibilities" under §100.3D of the Chief Administrator's Rules Governing Judicial Conduct – includes the striking of Satterlee's opposition brief and imposition of maximum costs and $10,000 sanctions pursuant to 22 NYCRR §130-1.1 *et seq.* against Mr. Fowler, personally, as signator of the brief, in addition to disciplinary and criminal referrals against him and other culpable attorneys at the Satterlee firm for their fraud.[3]

Satterlee's Concealment of Threshold Disqualification Issues, Which are "*Matters of Law*"

At the outset, there are two threshold disqualification issues which Satterlee entirely conceals – reflective of the fact that they are so completely dispositive that it cannot even contrive a defense. The first relates to Justice Cohalan. The second relates to Satterlee.

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2 "The function of an appellate brief is to assist, not mislead, the court", *Cicio v. City of New York*, 98 A.D.2d 38, 40 (2nd Dept. 1983).

3 "...punishment for giving a false statement of material fact to the court can range from suspension from the practice of law ...to the favorable outcome of the court setting aside the client's case.", "*What's A Lawyer To Do?: The Tension Between Zealous Advocacy and the Model Rules of Professional Conduct*", 21 American Journal of Trial Advocacy 357, 362 (1997), "The process of deciding cases on appeal involves the joint efforts of counsel and the court. It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both the litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state", *id*, 363, citing *Cicio* quoting *In re Greenberg*, 15 N.J. 132, 137-138 (1954).

As to Justice Cohalan's disqualification, Satterlee's opposition brief entirely conceals what is embodied in appellants' first "Question Presented" and focally presented by their brief (App.Br. viii-ix, 3, 55, 59-60, 61, 62, 64-65, 67-68) – *to wit*, that appellants' December 21, 2011 motion sought disclosure by Justice Cohalan of facts bearing on his fairness and impartiality, in the event he did not disqualify himself for demonstrated actual bias and interest [R-586], and that his April 23, 2012 short-form order not only made no disclosure, but concealed the motion's disclosure request [R-11].

Appellants' Point I (App.Br.67-68) highlighted the legal significance of this, as follows:

> 'Justice Cohalan's concealment of the disclosure sought by the motion leaves this Court with no choice but to disqualify him, *as a matter of law*, as it cannot make disclosure for him of the biases, relationships and interests identified by the motion and not contested by him."

This "*matter of law*" proposition, undenied and undisputed by Satterlee – and effectively conceded by its total concealment of the disclosure issue (*cf.* Opp.Br.1-4, 3, 15-17, 17-18, 35-39) – is now before this Court as appellants' threshold issue relating to Justice Cohalan's disqualification, itself the threshold issue.

As to Satterlee's disqualification, Satterlee's opposition brief entirely conceals what is embodied in appellants' second "Question Presented" and focally presented by their brief (App.Br. ix-x, 32, 36, 44-45, 47, 53, 56, 70), *to wit*, that appellants' November 29, 2010 cross-motion had sought Satterlee's disqualification for conflict of

interest as a party, being a defendant DOE [R-242], and that such relief was entirely unopposed by Satterlee, which not only did not deny or dispute that it was a defendant DOE, but concealed the whole issue before Justice Cohalan, who himself concealed it in his September 22, 2011 short-form order [R-3-8].

Such uncontested and concealed issue below, as here (*cf.* Opp. Br.1 & fn.1, 18), of Satterlee's disqualification as a party, unable to provide unconflicted representation of its co-defendants, presents this Court with a "*matter of law*" disqualification of Satterlee, as a threshold issue.

Satterlee Does Not Contest the Accuracy of Appellants' 58-Page "Course of the Proceedings" on which their Appeals Rest

The basis of appellants' appeals, explicitly and repeatedly stated by their brief, is the record before Justice Cohalan underlying his September 22, 2011 and April 23, 2012 short-form orders, whose particulars are summarized by 58 pages of their 73-page brief under the title "Course of the Proceedings" (App.Br.5-63). Unless Satterlee could deny or dispute the accuracy of this record-annotated recitation, highlighting Satterlee's litigation fraud at every stage of the proceedings before Justice Cohalan, covered-up by Justice Cohalan's two short-form orders, it was frivolous, indeed a fraud on this Court, for it to have interposed any opposition to appellants' appeals. Yet, this is precisely what Satterlee has done, fashioning its opposition brief from the same deceits as it employed before Justice Cohalan, summarized by appellants' "Course of the Proceedings".

Tellingly, Satterlee does not disclose the origin of its appellate presentation, which is mostly regurgitated, *verbatim*, from its October 22, 2010 motion to dismiss appellants' complaint and January 11, 2012 opposition to appellants' December 21, 2011 disqualification/vacatur motion, notwithstanding these were demonstrated to be frauds by appellants' November 29, 2010 opposition/cross-motion and December 15, 2010 reply memorandum of law and by their February 10, 2012 reply in further support of their disqualification/vacatur motion, with no findings of fact and conclusions of law made thereon by Justice Cohalan's short-form orders – the subject of these appeals. Such findings of fact and conclusions of law are now before this Court to make, enabling it to simultaneously discharge its duty to safeguard the integrity of its own processes and those in the court below.

Nothing better exemplifies that Satterlee has no defense to these appeals than its own "Summary of Proceedings and Decisions Below" (Opp.Br.17-18), which could not be a sharper contrast to appellants' "Course of the Proceedings", to which it is totally non-responsive. Consisting of six sentences on barely more than a page, it is meaningless, where not materially false:

- A single sentence pertaining to appellants' October 4, 2010 "complaint" [R-16-162]: which does not identify the complaint as verified, or who DOES 1-10 are alleged to be, or any of the complaint's allegations, or that, in addition to libel, libel *per se*, and journalistic fraud causes of action, a fourth cause of action for institutional reckless disregard for truth is specified in the complaint's "WHEREFORE" clause. By contrast, appellants' "Course of the Proceedings" (App.Br.7-25) furnishes

18 pages of specifics about the Verified Complaint – all uncontested by Satterlee.

- A single sentence pertaining to Satterlee's October 22, 2010 "motion to dismiss the Complaint in its entirety" [R-163-240]: which does not identify either the grounds or statutory provisions on which the dismissal motion was made or anything about its content. By contrast, appellants' "Course of the Proceedings" (App.Br.25-31) devotes 6-1/2 pages to Satterlee's dismissal motion – all uncontested by Satterlee.

- A single sentence pertaining to appellants' November 29, 2010 opposition/cross-motion [241-514], which does not identify anything about its content, other than the relief it sought, omitting entirely its third and fourth branches – the fourth branch being for Satterlee's disqualification as defendant DOES – and materially omitting the specifics of the other branches, most importantly, the seventh branch for summary judgment, including, specifically, on the institutional reckless disregard for truth cause of action, as well as removal of the "**ACCURACY**" policy from defendant Journal News' masthead as a false and misleading advertising claim, proscribed by General Business Law, Article 22-A. By contrast, appellants' "Course of the Proceedings" (App.Br.31-40) devotes 9 pages to their November 29, 2010 opposition/cross-motion – all uncontested by Satterlee.

- A single sentence which, skipping over material procedural events,[4] pertains to Justice Cohalan's September 22, 2011 short-form order [R-3-8], devoid of detail except for misrepresenting that it granted Satterlee's dismissal motion "in its entirety". By contrast, appellants' "Course of the Proceedings" (App.Br.51-54) devotes 3-1/3 pages to the September 22, 2011 short-form order – all uncontested by Satterlee.

- A single sentence pertaining to appellants' December 21, 2011 motion [R-586-758], which does not identify anything about its content, other than the relief sought, as to which it materially omits that the first branch

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[4] These are particularized by 11 pages of appellants' "Course of the Proceedings" (App.Br. 40-51) – all uncontested by Satterlee – *to wit*, (1) Satterlee's December 8, 2010 reply in further support of its dismissal motion [R-515-538]; (2) appellants' December 15, 2010 reply in further support of their cross-motion [R-539-585]; (3) appellants' January 5, 2011 letter to Justice Cohalan [R-724-743]; (4) the June 1, 2011 oral argument before Justice Cohalan [R-609-638].

sought disclosure by Justice Cohalan, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing on his fairness and impartiality, in the event he did not disqualify himself, and concealing the specifics of the requested leave to amend the complaint, *to wit* "so as to make additionally explicit a fourth cause of action for reckless disregard for truth". By contrast, appellants' "Course of the Proceedings" (App.Br.55-60) devotes 5-1/3 pages to their December 21, 2011 motion – all uncontested by Satterlee.

- A single sentence which, skipping over material procedural events,[5] pertains to Justice Cohalan's April 23, 2012 short-form order [R-11], devoid of detail other misrepresenting that it denied appellants' motion "in its entirety". By contrast, appellants' "Course of the Proceedings" (App.Br.62-63) devotes 1-1/2 pages to an analysis of the April 23, 2012 short-form order – all uncontested by Satterlee.

As for Satterlee's preceding 12-page section entitled "Facts" (Opp.Br. 5-17), it also does not contest appellants' 58-page "Course of the Proceedings" in any respect. Indeed, Satterlee's "Facts" section contains only a single citation to appellants' brief, and that in its final sentence (Opp.Br.17), where it cites "Appellant's Br. at 51", but not for purposes of denying or disputing its accuracy. Rather, it is to falsely make it appear that it substantiates Satterlee's assertion that:

> "The primary basis of Appellant's accusation that Ms. Sullivan's oral advocacy constituted a fraud upon the Court was Ms. Sullivan's argument that New York law does not make a distinction between news articles and editorial articles with regard to the availability of the opinion defense, R-596; Appellant's Br. at 51".

This is false. Page 51 of appellants' brief, continuing from the previous page, states:

[5] These are particularized by 2 pages of appellants' "Course of the Proceedings" (App. Br.60-61) – all uncontested by Satterlee – *to wit*, (1) Satterlee's January 11, 2012 opposition to appellants' disqualification/vacatur motion [R-765-809]; (2) appellant Elena Sassower's February 10, 2012 reply affidavit in further support of the motion [R-810-834].

"Attorney Sullivan appeared for Satterlee [at oral argument] and repeated deceits already exposed by plaintiffs' opposition/cross-motion papers, including:

- that it was 'difficult to tell...from...the complaint what exactly in the article the plaintiff's complained about.' [R-631];

- that 'plaintiff's claim fails because the complaint itself, specifically Exhibit 7 to the complaint, is an analysis that...established that the gist or [sting] of the article is substantially true' [R-633];

- that 'the language in the article that plaintiffs claim is defamatory' is: 'heckling', 'slings and arrows", and 'fireworks' [R-632] and that 'all of the statements, complained of by plaintiffs' are 'figurative expression[s]' and 'not factual statements' [R-634];

- that plaintiffs' lawsuit against The New York Times was 'strikingly similar' [R-636].

In response to Justice Cohalan's question, 'Do you think it's proper for a reporter to use figurative statements in a news story, as opposed to an analysis for a news column?' [R-634], attorney Sullivan purported:

> 'New York law simply does not make [a] distinction [between news articles and editorials or columns]' [R-635]; and
>
> 'Miss Sassower, her position is that the distinction between editorial and news articles is, it is a fiction, it is not true, and Miss Sassower should be aware that it's not true.' [R-636].

Justice Cohalan refused to allow plaintiff Elena Sassower to be heard in rebuttal, either orally or by submission, and called for the stenographer to end her transcription with the words 'Off the record. Off the record' [R-637], thereupon hurrying off the bench [R-597]."

The above previously-exposed deceits that Ms. Sullivan regurgitated at the June 1, 2011 oral argument before Justice Cohalan, identified at pages 50-51 of appellants' brief, without contest from Satterlee, are ALL reprised by its opposition brief.

As for Satterlee's handful of other citations to appellants' brief, all are in its "Argument" section (Opp.Br.19-42). These, likewise, all falsify or distort the content or context of the cited pages to make it appear that they support what Satterlee is saying – when they do not. Even still, only two even purport to challenge the accuracy of the cited pages, and Satterlee relegates them to footnotes[6].

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[6] The citations to appellants' brief in Satterlee's "Argument" section are:

- p. 25: citing to App.Br.12 & 19
- p. 32, fn. 10: citing to App.Br.18
- p. 33: citing to App.Br.9 & 24
- p. 36: citing to App.Br.2.

The only two citations that purport to dispute cited pages of appellants' brief, also in the "Argument" section and each in footnotes, are:

- fn. 11 at p. 35, stating:

> "Appellant's Brief suggests Plaintiffs' asserted a fourth cause of action for 'institutional reckless disregard for truth' (Appellant's Br. at 4, 7). Plaintiffs did not in fact plead such a cause of action. See R-33-48."

This is false. Appellants' brief explicitly asserted, at the cited p. 7 ("Course of the Proceedings"):

> "a fourth cause of action, institutional reckless disregard for truth, [was] pleaded in the 'WHEREFORE' clause [of the verified complaint], 'to the extent warranted by the evidence adduced' [R-48]."

Satterlee does not deny or dispute this – or the fact that appellants' November 29, 2010 cross-motion expressly sought summary judgment on their institutional reckless disregard for truth cause of action, unopposed by Satterlee, which did not contend that such had not been pleaded by the complaint. Indeed, Satterlee's brief offers no facts or law to support its falsehood that "Plaintiffs did not in fact plead such a cause of action."

Consequently, appellants' 58-page "Course of the Proceedings", on which every other section of their brief rests, is entirely uncontested, making it frivolous and a fraud on this Court for Satterlee to have interposed opposition, *as a matter of law*.

That appellants' complaint was sufficient, *as a matter of law*, for pleading a cause of action for institutional reckless disregard for truth is particularized, with citation to law, in their December 21, 2011 disqualification/vacatur motion [R-662-663], as part of its analysis of Justice Cohalan's September 22, 2011 short-form order, without contest from either Satterlee or Justice Cohalan.

- fn.12 at p.39, whose challenge is not to any pages within the "Course of the Proceedings", but within the Point I "Argument". It states:

  > "Appellant suggests (at Appellant's Br. 65-68) that Justice Cohalan's use of a 'short-form' order to deny her motion for recusal was somehow improper. However, Appellant does not provide any authority for the proposition that Justice Cohalan was obligated to provide detailed reasoning supporting his decision to deny Appellant's baseless motion..."

This is also false. Appellants' Point I did not "suggest[]" that "use of a 'short-form' order to deny her motion for recusal was "somehow improper". Rather, it explicitly stated, at the cited p. 65:

> "As Justice Cohalan's April 23, 2012 short-form order provides no reasoning for such conclusory and reason-less dispositions as it made, this Court has the obligation, consistent with its appellate/supervisory function, to reinforce that such is not appropriate decision-making and, indeed, that it carries a presumption of illegitimacy, upon appellate review.[fn.3]

Nor was the failure of Justice Cohalan's April 23, 2012 short-form order to provide "detailed reasoning" at issue, but its failure to provide ANY "reasoning for such conclusory and reason-less dispositions as it made" – for which, appellants' Point I furnished legal authority, including by its annotating fn.3 (App.Br.65).

Satterlee Does Not Contest the Accuracy of Appellants' "Argument" Corresponding to their "Questions Presented"

Appellants' two-point "Argument (App.Br.64-72) is also not contested by Satterlee, other than by its footnote 12 which distorts and falsifies the content of pages 65-68 of appellants' brief to which it cites.[7] Indeed, Satterlee's opposition brief does not even identify appellants' Point I or Point II. These two Points, corresponding to and substantiating appellants' two "Questions Presented" (App.Br.viii-x) are, therefore, unopposed, making Satterlee's opposition to appellants' appeals frivolous and a fraud on this Court, *as a matter of law*.

Satterlee Falsifies Appellants' Stated Basis for their Appeals and Conceals the Record Proof Supporting It

Appellants' "Introduction" (App.Br.1-4) summarizes, in four pages, their 58-page "Course of the Proceedings". At issue are two short-form orders of former Supreme Court Justice Cohalan, dated September 22, 2011 and April 23, 2012:

> "which no fair and impartial tribunal could render, as they flagrantly violate ALL cognizable legal standards and adjudicative principles to grant defendants-respondents [] relief to which they are not entitled, *as a matter of law*, and to deny plaintiffs-appellants [] relief to which the law and mandatory rules of judicial conduct absolutely entitle them....[and which] are, in every respect, knowing and deliberate judicial frauds and 'so totally devoid of evidentiary support as to render [them] unconstitutional under the Due Process Clause' of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960)." (App.Br. 1-2, underlining in original).

Appellant's "Introduction" also identifies the record proof:

"[appellants'] December 21, 2011 motion [R-586-758]. Its centerpiece was a 30-page analysis of the September 22, 2011 short-form order [R-639-668], particularizing the factual and legal baselessness of virtually every line of its six pages. This analysis was incorporated by reference into an affidavit [R-589-600] swearing to its truth and setting forth facts warranting disclosure by Justice Cohalan [R-592-595], in the event he did not disqualify himself for demonstrated actual bias and interest – the first relief sought by the December 21, 2011 motion. Justice Cohalan's response was his April 23, 2012 short-form order [R-11]. Its four sentences concealed ALL the facts, law, and legal argument presented by plaintiffs' December 21, 2011 motion, including the analysis. Nor did it deny the motion, but only the materially-truncated and misleading relief it identified, such as disqualification for 'bias'. Among the unidentified relief, disqualification for interest and disclosure, of which it made none." (App.Br.3, capitalization in original).

Satterlee's opposition brief conceals and falsifies all this. Thus, with no mention whatever of appellants' 30-page analysis of Justice Cohalan's September 22, 2011 short-form order, it repetitively purports:

- that the basis of appellants' appeals and claims of bias by Justice Cohalan are his "adverse rulings" and "adverse decision" (Opp.Br.3-5);

- that appellants' motion for his disqualification had not identified "a single relevant fact or issue of law that [they had] a reasonable or objective basis to believe that Justice Cohalan actually 'disregarded' or 'concealed'"; that their "allegations of purported fraud and deceit by Justice Cohalan [stem from] his application of the law to the facts alleged by Plaintiffs", and "failed to identify any objective basis for disqualification" (Opp.Br.16);

- that "Appellant has offered no facts warranting recusal...[and]...in fact, failed to identify for the trial court any objective basis for disqualification, and, on appeal essentially argues that Justice Cohalan's 'bias' is evidenced by his application of the law to the facts alleged, resulting in an Order with which she disagrees." (Opp.Br.36).

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7 *See*, fn.6 (at p.11), *supra*.

These are flagrant falsehoods, evident from the very record citations Satterlee furnishes at pages 15-16 of its opposition brief to advance another flagrant falsehood: that appellants' December 21, 2011 motion made "personal attacks" on Justice Cohalan, as to which it lists:

> "Claiming that Justice Cohalan's order dismissing Plaintiffs' complaint 'brazenly disregards and distorts controlling legal standards' and 'flagrantly falsifies the factual evidentiary record before the Court.' R-590.
>
> Claiming that Justice Cohalan committed 'fraud' in striking out a reference to oral argument in the preamble to his order dismissing Plaintiffs' complaint. R-644-645.
>
> Accusing Justice Cohalan of 'materially misrepresenting and falsifying' the complaint in this action and 'concealing' various allegations. R-648-650
>
> Charging that Justice Cohalan was guilty of a 'falsehood' in stating in his order granting Defendants' motion to dismiss that the Defendants' motion was unopposed by D.L. Sassower and the Center for Judicial Accountability because Mr. DeFelice did not sign the opposition papers. R-650-651.
>
> Accusing Justice Cohalan of being 'altogether deceitful' in his application of CPLR §3211(a)(7). R-651.
>
> Claiming 'deceit' on the part of Justice Cohalan for dismissing Plaintiffs' putative claim for 'journalistic fraud' and/or 'institutional reckless disregard for the truth.' R-660-661."

These are not "personal attacks". They are descriptions of official misconduct by Justice Cohalan, whose particulars are spelled-out by the cited pages of the record, all but the first being pages of appellants' 30-page analysis [R-639-668]. As for the

first citation, "R-590", the excerpt Satterlee quotes is from ¶4 of Elena Sassower's affidavit in support of appellants' disqualification/vacatur motion – and its substantiation is in the balance of ¶4, constituting a synopsis of the analysis so devastating that appellants' brief quotes it, in full (App.Br.56-59).

Satterlee does not deny or dispute the accuracy of either the snippets it mischaracterizes as "personal attacks", or the ¶4 synopsis (App.Br.56-59), or the analysis itself [R-639-668]. Nor does it deny or dispute the accuracy of appellants' analysis of Justice Cohalan's four-sentence April 23, 2012 short-form order, presented by their brief in four separate places, including the "Introduction" (App.Br. ix, 3, 62, 64-68). As such, appellants' showing that Justice Cohalan's two short-form orders are indefensible, factually and legally, is uncontested, making its opposition to these appeals frivolous and a fraud on this Court, *as a matter of law*.

Satterlee Materially Falsifies Justice Cohalan's Appealed-from September 22, 2011 and April 23, 2012 Short-Form Orders

Notwithstanding Satterlee does not contest appellants' showing with respect to Justice Cohalan's two short-form orders, it nonetheless falsifies their content in two material respects.

As to the September 22, 2011 short-form order [R-3-8], Satterlee purports, in its "Summary of Proceedings and Decisions Below" (Opp.Br.18), that it "granted Respondents' Motion in its entirety". This is false. The very first page of the short-form order states:

"***ORDERED*** that the motion by the named defendants for an order pursuant to CPLR §3211(a)(1) and (7) dismissing the complaint is granted to the extent of dismissing the complaint for failure to state a cause of action, and is otherwise denied." [R-3]

In other words – and as identified by appellants' analysis of the September 22, 2011 short-form order:

"the decision grants Satterlee's motion dismissing the Complaint pursuant to CPLR §3211(a)(7), 'failure to state a cause of action', but not pursuant to CPLR §3211(a)(1), a 'defense founded on documentary evidence'" [R-646].

It is to conceal that Justice Cohalan did not grant Satterlee's dismissal motion pursuant to CPLR §3211(a)(1), "defense founded on documentary evidence", that Satterlee's "Summary of Proceedings and Decisions Below" omits both the grounds upon which it moved to dismiss appellants' complaint and the provisions invoked. This enables Satterlee to regurgitate before this Court the presentation of its dismissal motion that had been essentially fashioned on "documentary evidence", rather than reciting the material allegations of the complaint [R-16-48], which it cannot and does not do because, as highlighted by appellants' "Course of the Proceedings" (App.Br.20), they are invulnerable to challenge for failure to state a cause of action. Further, and as pointed out by appellants' Point II (App.Br.71,fn.5), because Satterlee's motion to dismiss for failure to state a cause of action was directed to the whole complaint, the sufficiency of any one of appellants' four causes of action mandated its denial, *as a matter of law*.

As to the April 23, 2012 short-form order [R-11], Satterlee purports, in its "Summary of Proceedings and Decisions Below" (Opp.Br.18), that it "denied Appellant's motion in its entirety". This is false.

The April 23, 2012 short-form order does not deny appellants' motion, but only such relief as it selectively identifies. This is set forth in four separate places in appellants' brief – the most detailed being in their "Course of the Proceedings" (App.Br.62), stating:

> "The April 23, 2012 short-form order also concealed most of the relief the motion sought, *to wit*:
>
> (1) to disqualify Justice Cohalan for interest;
>
> (2) disclosure of facts bearing upon his fairness and impartiality;
>
> (3) vacatur of his September 22, 2011 short-form order pursuant to CPLR §5015(a)(3) for 'fraud, misrepresentation, or other misconduct of an adverse party';
>
> (4) vacatur of his September 22, 2011 short-form order pursuant to CPLR §5015(a)(4) for 'lack of jurisdiction' by reason of his disqualification for interest; and
>
> (5) leave to amend the verified complaint pursuant to CPLR §3025(b) to make even more explicit the institutional reckless disregard for truth cause of action.
>
> Nor was any of this denied by a generic denial of the motion. Rather, the April 23, 2012 short-form order denied only such relief as it identified – and none with any factual findings or reasoning..."

Appellants' Point I (App.Br.67-68) identified the consequences with respect to disqualification for interest and disclosure:

> "That Justice Cohalan's April 23, 2012 short-form order conceals that plaintiffs' motion sought his disqualification for interest – and does not deny that disqualification is warranted on that ground – leaves this Court with no choice but to disqualify him for interest, *as a matter of law*, as it cannot contest what Justice Cohalan himself does not deny or dispute.
>
> Similarly, Justice Cohalan's concealment of the disclosure sought by the motion leaves this Court with no choice but to disqualify him, *as a matter of law*, as plainly, it cannot make disclosure for him of the biases, relationships and interests identified by the motion and not contested by him."

It is apparently to avoid confronting either of these arguments and the consequences of Justice Cohalan's not having denied the CPLR §5015 vacatur and leave to amend relief, as to which the record establishes appellants' entitlement, *as a matter of law*, that Satterlee falsifies the disposition made by the April 23, 2012 short-form order.

Satterlee's Opposition Brief is Fashioned on Deceits Previously Exposed as Such by Appellants, Without Findings of Fact and Conclusions of Law by Justice Cohalan

Unable to confront the "Course of the Proceedings" or "Argument" on which appellants' "Questions Presented" rest, Satterlee constructs its opposition brief from its prior fraudulent advocacy, adorned with new deceits.

Satterlee's "Preliminary Statement" (Opp.Br.1-4)

The overarching deceit of Satterlee's "Preliminary Statement" is that appellants' appeals are not legitimately about the integrity of the judicial process in the court below because their bias claims against Justice Cohalan are based only on his "adverse rulings" and "adverse decision", with their claims against Satterlee for fraud and deceit based only on its having "argued against the Sassowers' positions" and that they are "nothing more than Plaintiffs' disagreement with counsel's legal arguments, arguments which are plainly supported by applicable law".

No reading of appellants' brief or the record on which it is based can remotely support such assertions, and Satterlee's "Preliminary Statement" furnishes no citation to either.

As for Satterlee's pretense that the "rather straightforward issue on appeal" is "can the Article support a libel claim", this is also false. The article is not independent of the complaint. However, Satterlee cannot acknowledge this without then reciting

the complaint's material allegations, thereby exposing the baselessness and fraud of its dismissal motion.

<u>Satterlee's "Counter-Statement of Questions Presented on Appeal" (Opp.Br.5)</u>

Unlike appellants' two "Questions Presented" (App.Br.viii-x), whose accompanying answers are substantiated by record-based explanations, Satterlee's four questions, each beginning with the words "Did the trial court correctly hold...", offer no explanations for their "Yes" answers. Such "Yes" answers are frivolous and frauds on the Court, in the absence of Satterlee's rebuttal to appellants' 30-page analysis of Justice Cohalan's September 22, 2011 short-form order [R-639-668], of which there is none.

<u>Satterlee's "Facts" (Opp.Br.5-17)</u>

Satterlee's 12 pages of supposed "Facts", divided into three subsections, largely replicate, *verbatim*, its advocacy before Justice Cohalan, the fraudulence of which appellants demonstrated in submissions that were fact-specific, law-supported, and record-based, as to which Justice Cohalan made no findings of fact or conclusions of law.

In the interest of judicial economy and because <u>any</u> legitimate adjudication of these appeals <u>requires</u> this Court to make such factual findings and conclusions as

Justice Cohalan did not make[8], appellants rely on and incorporate by reference their rebuttals therein.

A.
"The May 4, 2009 White Plains Common Council Meeting and Subsequent Journal News Article" (Opp.Br. 5-10)

This subsection is divided into two parts, "1. Sassower's Account of the Proceedings" (Opp.Br.6-8) and "2. The *Journal News Article*" (Opp.Br.8-10).

The content of this two-part subsection, as well as Satterlee's two-sentence prefatory paragraph, is taken, largely *verbatim*, from Satterlee's October 20, 2010 dismissal memorandum of law – replicating text appearing beneath title headings: "Plaintiffs' Own Account of the White Plains Common Council Meeting" [R-222-224] and "The Allegedly Defamatory Article" [R-224-225][9]. The fraudulence of this earlier incarnation was demonstrated by appellants' November 29, 2010 opposition/cross-motion memorandum of law [R-471-473], without findings of fact and conclusions of law by Justice Cohalan. This includes its distortion of appellants' complaint and concealment of the video, establishing the material falsity of Satterlee's recitation.

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[8] See, fn.3 of appellants' brief (at p.65): "*Procedure as a Source of Judicial Legitimacy*" in "*Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*", 53 University of Kansas Law Review, 531 (2005) by Amanda Frost.

[9] The most significant material difference is that Satterlee now omits the minimal and materially false information about appellants' post-publication efforts to secure retraction of the article that had appeared in its October 22, 2010 dismissal memorandum of law [R-226], exposed by appellants' November 29, 2010 opposition/cross-motion memorandum of law [R-473-474].

B.
"The Sassowers' Pattern and Practice of Verbal Attacks on the Judiciary and Vexatious Litigation" (Opp.Br.10-15)

This scurrilous subsection, serving no purpose but to prejudice the Court against appellants and divert it from the record controlling these appeals, is taken, largely *verbatim*, from Satterlee's October 22, 2010 dismissal memorandum of law – replicating text appearing beneath the title heading "The Parties" [R-219-221], with additional *verbatim* replication from Satterlee's January 11, 2012 memorandum of law in opposition to appellants' December 21, 2011 disqualification/vacatur for fraud motion [R-786-788]. The fraudulence of these earlier texts was attested-to by Elena Sassower's November 29, 2010 affidavit in support of appellants' opposition/cross-motion [R-251-252][10], and by her February 10, 2012 reply affidavit in further support of appellants' December 21, 2011 motion [R-811], without findings of fact and conclusions of law by Justice Cohalan.

C.
"The Sassowers Target Justice Cohalan and Respondents' Counsel" (Opp.Br.15-17)

This third subsection, purporting that appellants "failed to identify any objective basis for [Justice Cohalan's] disqualification" and that they have "[no] reasonable or objective basis to believe that Justice Cohalan actually 'disregarded' or 'concealed'" "a single relevant fact or issue of law" by his September 22, 2011 short-form order

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[10] Satterlee's false and misleading fn.5 as to CJA (Opp.Br.10) simplistically parallels fn.14 of its October 22, 2010 dismissal memorandum of law [R-237-238], whose fraudulence appellants

replicates deceits of Satterlee's January 11, 2012 memorandum of law in opposition to appellants' December 21, 2011 disqualification/vacatur for fraud motion [R-789, R-797]. The earlier incarnation of these deceits was exposed by Elena Sassower's February 10, 2012 reply affidavit [R-820-821, R-825] and, as hereinabove noted (at pp. 14-15, *supra*), its fraudulence is also established by the very record citations that this subsection furnishes for the proposition that appellants' December 21, 2011 motion made "personal attacks on Justice Cohalan" (Opp.Br.15-16).

Satterlee's "Argument" (Opp.Br.19-42)

All four Points of Satterlee's "Argument" are frivolous and a fraud on this Court, as Satterlee has not contested the accuracy of appellants' 30-page analysis of Justice Cohalan's September 22, 2010 short-form order [R-639-668], demonstrating his actual bias "affect[ing] the result" [R-754], *to wit*, the indefensibility of his "hold[ings]" on the four issues that are the subject of Satterlee's four Points – the overarching and threshold being Justice Cohalan's disqualification, the purported subject of Satterlee's Point III.

Satterlee's Point I:
"The Libel Claims Were Correctly Dismissed" (Opp.Br.19-32)

Although Satterlee's first Question asks "Did the trial court correctly hold that Plaintiffs failed to allege a claim for libel or libel *per se* against Respondents?" – reflecting that Justice Cohalan's dismissal of appellants' libel claims was for failure to

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previously exposed [R-492-493].

state a cause of action – Point I of its "Argument", entitled "The Libel Claims Were Correctly Dismissed", conceals both by its title and content the grounds upon which Justice Cohalan dismissed the libel claims.

Satterlee's Point I, consisting of three parts, largely replicates, *verbatim*, the first three parts of Point I of its October 22, 2010 memorandum of law to dismiss appellants' complaint, "Plaintiffs' Libel Claims Fail as a Matter of Law" [R-227-236], largely predicated on dismissal based on "documentary evidence" pursuant to CPLR §3211(a)(1).

Point IA: "Appellant's Own Submissions Establish the Article is Substantially True" (Opp.Br.19-24), is excerpted, largely *verbatim*, from Point IA of Satterlee's October 22, 2010 dismissal memorandum of law, "Plaintiffs' Own Submissions Establish That the 'Gist or Sting' of the Article is Substantially True" [R-227-231]. As both titles reflect, they are based on "documentary evidence", not facial sufficiency of the complaint. This is also reflected by the additional paragraph pertaining to the video that Satterlee inserts into its instant Point I (Opp.Br.23-24). This paragraph is taken, virtually *verbatim,* from Satterlee's December 8, 2010 reply memorandum of law in further support of its dismissal motion [R-528-529], except that whereas the earlier iteration had employed the purposefully ambiguous description: "Specifically, the video clearly shows Ms. Sassower's reaction" [R-529], Satterlee now changes this to "Specifically, the video clearly shows Ms. Sassower's audible reaction"

(Opp.Br.23-24). This is a brazen fraud. No "audible reaction" is heard, nor is there any reaction by others suggestive of an "audible reaction" having been heard – as this Court can readily confirm from the video that appellants furnished in support of their cross-motion [R-258].

That the instant Point IA is a flagrant fraud on this Court is established by appellants' rebuttals to its original iterations, these being by their November 29, 2010 opposition/cross-motion memorandum of law [R-474-479] and December 15, 2010 reply memorandum of law [R-564-566], to which Justice Cohalan made no findings of fact or conclusions of law.

Point IB: "Certain of the Article's Statements Qualify as Protected Opinion" (Opp.Br.24-29), is excerpted, largely *verbatim*, from Point IB of Satterlee's October 22, 2010 dismissal memorandum of law, bearing the same title [R-231-234], and from its December 8, 2010 reply memorandum of law [R-531-532].

That the instant Point IB is a flagrant fraud on this Court, including by its repetition that *Mann v. Abel*, 10 NY3d 271 (2008), pertains to a "news article" (Opp.Br.29), is established by appellants' rebuttals to its original iteration, these being by their November 29, 2010 opposition/cross-motion memorandum of law [R-479-485] and December 15, 2010 reply memorandum of law [R-569], to which Justice Cohalan made no findings of fact or conclusions of law.

Point IC: "Any Alleged False Statements of Fact Are Not Defamatory" (Opp.Br.29-32), is excerpted, largely *verbatim*, from Point IC of Satterlee's October 22, 2010 dismissal memorandum of law, bearing the same title [R-234-236]. Satterlee's fn.10 (Opp.Br.32) pertaining to online reader comments essentially replicates, largely *verbatim*, Point IE of its same dismissal memorandum of law, "Section 230 of the Communications Decency Act Shields Defendants From any Liability for Comments Posted by Readers" [R-238-239].

That the instant Point IC is a flagrant fraud on this Court is established by appellants' rebuttal to its original iteration, this being by their November 29, 2010 opposition/cross-motion memorandum of law [R-485-486, R-494], to which Justice Cohalan made no findings of fact or conclusions of law.

Satterlee's Point II
"'Journalistic Fraud' Is Not a Cognizable Legal Claim" (Opp.Br.32-35)

Point II, ostensibly corresponding to Satterlee's second Question (Opp.Br. 5), "Did the trial court correctly hold that 'journalistic fraud' is not a recognized cause of action under New York law?", is frivolous and a fraud upon the Court, as it does not confront appellants' particularized demonstration, by their analysis of Justice Cohalan's September 22, 2011 short-form order [R-660-664], that his dismissal of their journalistic fraud cause of action is indefensible, in fact and law, as likewise his bald assertion, relegated to a footnote, that their institutional reckless disregard for truth cause of action was "not before this Court".

Indeed to craft its Point II, Satterlee regurgitates, essentially *verbatim*, Point II of its October 22, 2010 dismissal memorandum of law, "There is No Cause of Action for Journalistic Fraud" [R-239], to which, because it was so skimpy, it regurgitates, essentially *verbatim*, its Point ID, "There Can Be No Liability for Defendants' Alleged Failure to Include Themes and Details Advanced by Plaintiffs" [R-236-237]. Between and additional to these, it purports:

> "to the extent Appellant is asking this Court to recognize her made-up cause of action [for journalistic fraud], she has not identified any justification sufficient to overcome the strong presumption against the creation of a new legal remedy. *See Albala v. City of New York*, 54 N.Y.2d 269, 275-75 (1981) (declining to create a new remedy for injuries suffered by a child during gestation because 'it is this court's duty to consider the consequences of recognizing a novel cause of action and to strike the delicate balance between the competing policy considerations which arise whenever tort liability is sought to be extended beyond traditional bounds'); *Drago v. Buonagurio*, 46 N.Y.2d 778, 779-80 (1978) (reversing order of Appellate Division recognizing new cause of action and urging 'judicial restraint in response to invitations to recognize what is conceded to be perhaps a 'new, novel or nameless' cause of action')...
>
> In essence, the Sassowers evidently believe the Respondents committed 'journalistic fraud' because they would not permit Plaintiffs to dictate the substance of their news coverage or editorial opinions. This grievance is clearly insufficient to justify upsetting the 'delicate balance' of established tort law by creating a new cause of action. *Albala*, 54 N.Y.2d at 75." (Opp.Br.32-34, underlining added).

As for the institutional reckless disregard for truth cause of action, to which Satterlee has fashioned no question and which, because it is so resoundingly established by the pleaded allegations of the complaint, it otherwise conceals from its

brief, Satterlee appends a footnote at the end of its Point II, stating:

> "Appellant's Brief suggests Plaintiffs' asserted a fourth cause of action for 'institutional reckless disregard for truth' (Appellant's Br. at 4, 7). Plaintiffs did not in fact plead such a cause of action. *See* R-33-48. Thus, they cannot seek to reverse dismissal of a cause of action never asserted. Further, even if it had been asserted, as with 'journalistic fraud,' no such cause of action exists and for the reasons set forth herein, <u>there is no rational basis, much less compelling policy reasons, to recognize a heretofore unknown tort claim</u>.' (Opp.Br.35, underlining added).

All this is utterly false and fraudulent. The two separate texts that Satterlee's Point II reprises from its October 22, 2010 dismissal memorandum of law were each exposed as false and deceitful by appellants' November 29, 2010 opposition/cross-motion memorandum of law [R-494-501, R-487-493], to which Justice Cohalan made no findings of fact or conclusions of law.

As for its new text purporting that appellants have "not identified any justification sufficient to overcome the strong presumption against the creation of a new legal remedy" and "there is no rational basis, much less compelling policy reasons, to recognize a heretofore unknown tort claim" – for which it purports *Albala* and *Drago* to be applicable – the fraudulence of this is evident from Satterlee's concealment of the law review articles that proposed the journalistic fraud and institutional reckless disregard for truth causes of action [R-371-398; R-399-441], identified by the complaint, as likewise ALL the complaint's allegations establishing the "essence" of these causes of action, *to wit*, defendant <u>Journal News</u>' "**ACCURACY**"/"Corrections"

policy, its non-existent "READERS' REPRESENTATIVE", defendants' willful failure to respond to appellants' retraction demand, particularizing multitudinous respects in which the subject news article was skewed and false, demonstrably and knowingly so, affecting not only appellants, but issues of legitimate public concern pertaining to governance [R-27-33, 42-45, 91-158, 159-162]. Here, too, Satterlee's concealment of ALL these allegations of the complaint replicates, before this Court, its conduct before Justice Cohalan, with no findings of fact or conclusions of law by him.

The overwhelming showing of fact, law, and legal argument that appellants furnished in support of summary judgment on their journalistic fraud and institutional reckless disregard for truth causes of action – unrebutted, where not uncontested, in the record before this Court (App.Br.71-72) – establishes that appellants have met their burden and that this Court, consistent with *Albala* and *Drago*, would have to give a reasoned decision addressed to the law review articles and other allegations of appellants' complaint for not recognizing those causes of action and appellants' entitlement to recovery thereunder.

Satterlee's Point III
"The Court Correctly Refused Plaintiffs' Recusal Demand" (Opp.Br.35-39)

Point III should properly be Satterlee's Point I, as Justice Cohalan's disqualification is the threshold issue, dispositive of all others. Satterlee thereby repeats what it did by its January 11, 2011 opposition to appellants' December 21,

2011 disqualification/vacatur motion, whose deceit was exposed by Elena Sassower's February 10, 2012 reply affidavit [R-820].

Satterlee's Point III pretends:

> "Appellant has offered no facts warranting recusal..."
>
> "Appellant...failed to identify for the trial court any objective basis for disqualification, and on appeal essentially argues that Justice Cohalan's 'bias' is evidenced by his application of the law to the facts alleged, resulting in an Order with which she disagrees. See Appellant's Br. at 2."

This, too, is adapted, almost *verbatim*, from Satterlee's January 11, 2012 opposition to appellants' disqualification/vacatur motion [R-797-798], the deceit of which was also exposed by Elena Sassower's February 10, 2012 reply affidavit [R-821], without findings of fact or conclusions of law by Justice Cohalan.

The brazen fraud of Satterlee's Point III – transmogrifying the grounds for Justice Cohalan's disqualification particularized by appellants' December 21, 2011 motion and appeal brief so as to purport they do not constitute legal grounds, when they do – is verifiable from appellants' motion and brief. This includes Point I of appellants' brief (App.Br.64-65), to which Satterlee's Point III is non-responsive.

Satterlee's Point IV
"The Court Correctly Denied Plaintiffs' Request for Sanctions"
(Opp.Br.39-42)

Point IV is based on Satterlee's deceit that appellants have neither clearly articulated nor met their evidentiary burden in bringing their sanctions requests:

> "Other than conclusorily asserting that essentially all of Satterlee's and Ms. Sullivan's arguments in support of dismissal were fraudulent and deceitful, it is unclear what precisely is the nature of the fraud or misconduct perpetrated by Satterlee and Ms. Sullivan." (Opp.Br.40, underlining added).

This is brazen fraud. There is nothing either conclusory or unclear about Satterlee's misconduct and that of Ms. Sullivan as appellants particularized it, with near line-by-line precision, in support of their November 29, 2010 cross-motion and December 21, 2011 motion, as to which Justice Cohalan made no findings of fact and conclusions of law. Indeed, these motions resoundingly rebut the further deceits on which this Point rests:

> "Specifically with respect to Ms. Sullivan, it appears Appellant's central objection to her advocacy was her purported statement at oral arguments that New York law does not distinguish between editorials and newspaper articles with regard to the availability of the opinion defense. *See, e.g.*, R-596..." (Opp.Br.40-41)

> "case law wholly supports both Satterlee's briefing in support of Respondents' motion to dismiss and Ms. Sullivan's oral arguments statements."(Opp.Br.41)

> "even assuming, arguendo, that Ms. Sullivan misstated the law (which she did not), her conduct is not frivolous – simply being wrong on the law is not sanctionable conduct." (Opp.Br.42).

Certainly, too, the 58 pages of appellants' "Course of the Proceedings" (App.Br.5-63), uncontested by Satterlee, suffice to also expose the willful and deliberate nature of its misconduct and that of Ms. Sullivan, involving falsification and

distortion of both fact and law, which – with Justice Cohalan's complicity – succeeded in corrupting the judicial process, utterly.

CONCLUSION

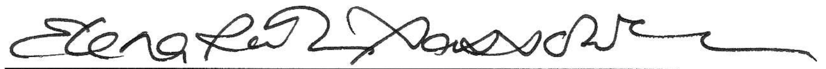
Satterlee's opposition brief is frivolous and a fraud on the Court – triggering this Court's mandatory disciplinary responsibilities under §100.3D of New York's Chief Administrator's Rules of Judicial Conduct and reinforcing what is obvious from the record on appeal: that appellants are entitled, *as a matter of law*, to summary judgment on their four causes of action, removal of the "**ACCURACY**" policy from respondent Journal News' masthead, and all the other relief sought by their November 29, 2010 cross-motion and December 21, 2011 motion.

ELENA RUTH SASSOWER

Dated: October 19, 2012
White Plains, New York

CERTIFICATE OF COMPLIANCE

Pursuant to §670.10.3(f), this is to certify that plaintiffs-appellants' reply brief for appeals #2012-00126 and #2012-05360 was prepared on a computer. The typeface is New Times Roman. The font is 14. The line-spacing is double. The word count is 7,000, excluding the signature line and the eleven words beneath it consisting of my name and date, etc.



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