To be Argued by:
MARK A. FOWLER
(Time Requested: 5 Minutes)

New York Supreme Court

Appellate Division – Second Department

Docket Nos.:
2012-00126
2012-05360

ELENA RUTH SASSOWER and DORIS L. SASSWER, 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,

– 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.

BRIEF FOR DEFENDANTS-RESPONDENTS GANNETT COMPANY, INC., THE JOURNAL NEWS, a business unit of Gannett Satellite Information Network, Inc., HENRY FREEMAN, CYNDEE ROYLE, BOB FREDERICKS, and D. SCOTT FAUBEL

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Defendants-Respondents Gannett Company, Inc., Gannett Satellite Information Network, Inc., Henry Freeman, CynDee Royle, Bob Fredericks, and D. Scott Faubel (collectively, "Respondents")[1], by and through their counsel Satterlee Stephens Burke & Burke LLP, respectfully submit this Brief in Opposition to the Appeal of Appellant Elena Ruth Sassower (hereinafter "Elena Sassower," or "Appellant"), who along with plaintiffs Doris L. Sassower and Center for Judicial Accountability, Inc. ("CJA") (collectively "Plaintiffs"), brought this action against Respondents.[2]

PRELIMINARY STATEMENT

At the heart of this appeal is a newspaper article published by *The Journal News* (the "Article") recounting a judicial confirmation proceeding before the White Plains Common Council at which Plaintiffs Elena and Doris Sassower

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[1] Named defendant *The Journal News* is a business unit of Gannett Satellite Information Network, Inc., and "LoHud.com" is the name of a website maintained by *The Journal News*. Both are improperly identified as parties to this lawsuit. Plaintiffs also brought this action against Keith Eddings, who was never served with the Complaint, and whose employment with *The Journal News* ceased as of August 29, 2009. R-518-519.

[2] Plaintiff Elena Sassower appears to be the only party to have perfected an appeal. First, only Elena Sassower signed the second Notice of Appeal relating to the April 11, 2012 Order. R-9-10. Further, counsel for Plaintiffs' Doris L. Sassower and CJA did not sign the Appellants' Brief and does not appear to be representing these parties on appeal, as he did in some proceedings before the trial court. Notably, Appellants' Brief and the cover page suggest that Elena Ruth Sassower is acting as attorney for Doris L. Sassower and CJA. However, upon information and belief, Elena Sassower is not an attorney and cannot appear on behalf of Doris L. Sassower or CJA. Further, specifically with respect to CJA, pursuant to CPLR 321(c), as a corporation, it is required to appear by counsel. Of course, to the extent the Court treats these consolidated appeals as on behalf of all Plaintiffs, the arguments for affirmance are equally applicable and compelling as to all parties.

vehemently protested the confirmation of Judge Brian Hansbury, including publicly declaring: "a corrupt judge and a corrupt process." Plaintiffs contend the Article, describing the Sassowers as "hecklers," their personal attacks as "fireworks," and their comments generally as "slings and arrows," is defamatory. However, as Plaintiffs' own account of the proceedings concedes, the Article is substantially true, and as the trial court correctly held, the descriptive comments are protected opinion, not actionable factual statements.

Unfortunately, what should be a rather straightforward issue on appeal – can the Article support a libel claim? – is almost lost beneath the myriad allegations and accusations by Plaintiffs Elena and Doris L. Sassower, which include not just invented claims of "journalistic fraud" against Respondents, but also claims of bias by the trial court and "fraud on the court" by Respondents' counsel.

While the Article did not defame Plaintiffs, it did portend what has occurred in this action. After Justice Peter Fox Cohalan granted Respondents motion to dismiss the Complaint, finding that the Article could not support a libel claim and that the law did not recognize a claim for "journalistic fraud," the Sassowers levied the same charges of "corruption" against Justice Cohalan that they made at the confirmation proceedings of Judge Hansbury, another judge who had previously issued adverse rulings against the Sassowers. As they have done in

the litany of litigations in which they have been involved over the years, demanding recusal of the many judges they have encountered, the Sassowers claimed Justice Cohalan's adverse decision clearly indicated his bias against them. Justice Cohalan, mindful of his obligation not to recuse himself without good cause, denied their recusal motion, which Appellant now also appeals.

Appellant also appeals the trial court's denial of their motion (a) to vacate the initial dismissal of the Compliant based on the "fraud on the court" by Respondent's counsel, Satterlee Stephens Burke & Burke, LLP ("Satterlee") and its associate Meghan Sullivan, and (b) impose sanctions on Satterlee and Ms. Sullivan. As with many prior adversaries they have encountered, the Sassowers contend Satterlee's and Ms. Sullivan's advocacy was fraudulent and deceitful, in essence, because they argued against the Sassowers' positions. As the trial court correctly held, Satterlee's and Ms. Sullivan's advocacy, with which the Court agreed (based on its analysis of the relevant law), was entirely appropriate and in no way sanctionable.

Unfortunately, this Appeal is simply the latest episode in a history of well-documented frivolous and abusive litigation spanning more than three decades. Plaintiffs Elena and Doris Sassower have attempted time and time again to air their grievances against an ever-expanding list of targets (many of them judges) in lawsuits that routinely have been dismissed as without merit. Both have been

sanctioned for their "vexatious litigating tactics" and enjoined from further pursuing exhaustively litigated claims. Undeterred, here again, Plaintiffs have filed meritless claims. The trial court properly dismissed the Complaint, and properly denied their re-argument, recusal and sanctions motions.

This Court can and should summarily affirm the trial court's orders. With respect to the libel claims, they were properly dismissed because each of the statements complained of is (a) substantially true based on Plaintiffs' own account of the proceedings, or (b) constitutionally protected opinion, and (c) in no way defamatory. Plaintiffs claim for "journalistic fraud" was correctly dismissed as a made-up cause of action. The recusal motion was properly denied because the only evidence of Justice Cohalan's bias Plaintiffs could identify was his adverse decision dismissing their claims and the only "interest" allegedly informing the court's purported bias was Plaintiffs' prior efforts at recusal and sanctions against other judges, as well as Plaintiffs' allegedly public opposition to judicial pay raises. Of course, if such grounds sufficed for recusal, the Sassowers could dispose of any judge that dared issue an adverse ruling against them. Finally, Plaintiffs' allegations of fraud and deceit against Satterlee and Ms. Sullivan are ultimately based on nothing more than Plaintiffs' disagreement with counsel's legal arguments, arguments which are plainly supported by applicable law, and certainly not fraudulent or sanctionable.

COUNTER-STATEMENT OF QUESTIONS PRESENTED ON APPEAL

1. Did the trial court correctly hold that Plaintiffs failed to allege a claim for libel or libel *per se* against Respondents?

Answer: Yes.

2. Did the trial court correctly hold that "journalistic fraud" is not a recognized cause of action under New York law?

Answer: Yes.

3. Did the trial court correctly hold that recusal was not warranted or appropriate?

Answer: Yes.

4. Did the trial court correctly hold that sanctions against Respondents' counsel were not warranted or appropriate?

Answer: Yes.

FACTS

A. The May 4, 2009 White Plains Common Council Meeting and Subsequent *Journal News* Article

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

1. The Sassowers' Account of the Proceedings

Elana and Doris Sassower (the "Sassowers") were present at the May 2, 2009, White Plains Common Council meeting. Based on their own alleged account of the proceedings,[3] they both "testif[ied]" during a "citizens' half-hour preceding the Common Council meeting." R-99. Elena Sassower prefaced her comments with a "request to testify under oath as to Judge Hansbury's documented corruption as a White Plains City Court judge." *Id.* By her own admission, Elena Sassower proceeded to "state[] . . . that Judge Hansbury had demonstrated his corruption by two fraudulent decisions, each unfounded in fact and law . . . resulting in my being dispossessed from my home of 21 years." R-100. These comments "recapt[] [*sic*] for the Mayor and Common Council Judge Hansbury's misconduct in office." R-101. When Judge Brian Hansbury arrived in the Common Council chambers while Sassower or her mother was speaking, Sassower addressed her comments directly to him, demanding that he "justify his decisions." R-102.

In response to Elena Sassower's invective, Councilwoman Rita Malmud informed Sassower that Common Council rules prohibited personal

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[3] In addition to the allegations in their Complaint, Plaintiffs provide a detailed account of this meeting in a document annexed as Exhibit 7 and incorporated by reference to the Complaint. R-30 (Compl. ¶ 24 (describing the Analysis as "a nine-page paragraph-by-paragraph deconstruction of the news article . . . prefaced by a six-page 'Introduction'"); R-93-107 (Exhibit 7).

attacks during these sessions. R-101 (describing Malmud's "attempt to distort the relevance and seriousness of my remarks as to Judge Hansbury's on-the-bench corruption"). As Sassower's "testimony" continued, City Clerk Anne McPherson instructed her that she had used her allotted three minutes of speaking time. *Id.* (complaining that "neither Councilwoman Malmud's 'protest' nor Clerk McPherson's 'reminder' were appropriate. . . . '[T]hree minutes of speaking time' was plainly inadequate for such serious presentation . . . ."). When Mayor Joseph Delfino requested that Elena Sassower take her seat, Sassower initially refused to comply, and instead continued what Plaintiffs deem a "responsive exchange." R-99. Eventually, Doris Sassower joined her daughter at the lectern and picked up where the younger Sassower left off. R-101.

After the Sassowers had resumed their seats, the Common Council proceeded with its nomination of Judge Hansbury. R-102. In offering an invocation during the meeting, the Reverend Carol Huston remarked that "White Plains is a community that cares for its people." *Id.* Elena Sassower responded by making a "grunt" and giving her mother "an incredulous look." *Id.* (arguing that "my grunt 'Hummph' . . . did not 'interrupt[]' what the reverend was saying," and was nonetheless "not just appropriate, but understated").

Judge Hansbury's nomination was confirmed by a unanimous vote of the Common Council, and he was sworn in by the Mayor of White Plains. R-93.

As Judge Hansbury and his wife shook hands with the Council members and the Mayor, Elena Sassower called out, "a corrupt judge and a corrupt process." R-17. Judge Hansbury and his wife then left the Common Council chambers. R-104. As the Sassowers left the chambers, two police officers stopped them and prevented them from leaving the building until the Hansburys had departed. *Id.*

2. The *Journal News* Article

Two days later, on May 6, 2009, *The Journal News* published an article titled "Hecklers try to derail new city judge" (the "Article"). R-108. The Article was also published online at the website maintained by *The Journal News*, http://www.lohud.com, under the headline "White Plains woman heckles city judge during confirmation." R-109. The Article states in its entirety:

> A city woman once jailed by Congress for interrupting a judicial confirmation took on the Common Council and a city judge this week, when she talked through Mayor Joseph Delfino's requests to take a seat, heckled the judge during his confirmation by the council, then pursued him out of City Hall.
>
> The fireworks began even before Judge Brian Hansbury arrived in the council chambers Monday when Elena Sassower asked the council to reject Hansbury's renomination and instead turn him over to prosecutors for the corruption and conflict of interest she alleges he demonstrated in his 2007 decision to evict her and her mother from their Lake Street apartment of 21 years.
>
> Sassower disregarded Councilman Rita Malmud's protest that council rules do not allow for personal attacks and City Clerk Anne McPherson's reminder that her three minutes of speaking time were up. She then handed the microphone to her mother, who continued with the slings and arrows.

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

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

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

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

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

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

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

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

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

R-108.[4]

B. <u>The Sassowers' Pattern and Practice of Verbal Attacks on the Judiciary and Vexatious Litigation</u>

By their own account, the Sassowers have spent the past two decades on a campaign to expose what their Complaint describes as "the corruption of public officers and of the processes of judicial selection and discipline." R-24. Over the years, their efforts have involved protracted letter-writing campaigns and uninvited appearances before local, state and national governing bodies. R-17-18.

In support of this mission, the Sassowers established the Center for Judicial Accountability, Inc. ("CJA"), a "citizens' group" created in 1993. R-22. According to Plaintiffs, the "patriotic purpose" of the CJA is to "safeguard the public interest in the integrity of the processes of judicial selection" by providing the public the results of its "investigati[ons] . . . in <u>independently-verifiable documentary form</u>." *Id.* (emphasis in original).[5]

The Sassowers' conduct over the years, ostensibly in support of their purported mission against public corruption, has caused problems not just for the unfortunate targets of their crusade, but for themselves as well. On October 18,

[4] The online version of the Article included a feature allowing readers to post their own comments. R-13. Six comments were posted on the website, four of which reflected unfavorable reactions. R-89-90 (compiling comments). Plaintiffs do not and cannot allege that Respondents authored these statements, and pursuant to Section 230 of the Communications Decency Act, they could not, in any event, give rise to a claim against *The Journal News*.

[5] Although the Sassowers purport to join the CJA in their claim for libel, Plaintiffs' own claims establish that the Article makes no mention whatsoever of the CJA. R-36.

1990, following multiple complaints to the Grievance Committee for the Ninth Judicial District against attorney Doris Sassower, and the resulting initiation of disciplinary proceedings against her, the Second Department ordered Sassower to submit to a medical examination to determine whether she was mentally capable of practicing law. R-21; *see also Sassower v. Mangano*, 927 F. Supp. 113, 115-17 (S.D.N.Y. 1996) (reviewing history of Doris Sassower's professional misconduct and noting the issuance of three separate disciplinary petitions against her). When she declined to submit to such an examination, Doris Sassower was suspended from the practice of law. *Id.*

On May 22, 2003, Elena Sassower was arrested and charged with "disruption of Congress" after she appeared, uninvited, at the United States Senate Judiciary Committee's hearing to oppose the confirmation of Judge Richard Wesley to the United States Court of Appeals for the Second Circuit. R-18 (admitting that she "serv[ed] a six-month jail sentence on a trumped-up 'disruption of Congress' charge"); R-99 (insisting that "my . . . request to testify in opposition to Judge Wesley's confirmation based on his documented corruption as a New York Court of Appeals judge . . . interrupted nothing"); R-167-191 (Transcript of sentencing hearing on June 28, 2004 before Judge Brian Holeman of the Superior Court of the District of Columbia, sentencing Sassower to six months incarceration).

In addition, the Sassowers have a long history of relentlessly pursuing frivolous lawsuits that have been dismissed as without merit. They have collectively and individually been sanctioned for their vexatious litigation tactics as well as enjoined from bringing further actions related to repeatedly dismissed claims. *See Sassower v. Comm'n on Judicial Conduct of the State*, 289 A.D.2d 119, 734 N.Y.S.2d 68, 69 (1st Dep't 2001) ("The imposition of a filing injunction against both petitioner [Elena Sassower] and the Center for Judicial Accountability was justified given petitioner's vitriolic *ad hominem* attacks on the participants in this case, her voluminous correspondence, motion papers and recusal motions in this litigation and her frivolous requests for criminal sanctions."); *Wolstencroft v. Sassower*, 234 A.D.2d 540, 540, 651 N.Y.S.2d 609, 609-10 (2d Dep't 1996) (affirming an order sanctioning Doris Sassower in the amount of $10,250 and directing that $100,000 of settlement monies be returned to plaintiff); *Sassower v. Field*, 973 F.2d 75, 77-78 (2d Cir. 1992) (affirming imposition of sanctions against both Elena and Doris Sassower for engaging in an "extraordinary pattern of vexatious litigating tactics" and pursuing the litigation "as if it was a holy war and not a court proceeding"); *see also Sassower v. Signorelli*, 99 A.D.2d 358, 359, 472 N.Y.S.2d 702, 704 (2d Dep't 1984).

What this litany of litigation also reveals is that it is standard procedure for the Sassowers to seek recusal of any judge they encounter. *See, e.g.,* R-203-206

(*Sassower v. The New York Times Co.*, No. 05-19841 (Sup. Ct. West. Co. Sept. 27, 2006) ("*Sassower v. NYT II*") at 2 (denying Appellant's motion for recusal in which she accused Judge Nicolai of "engag[ing] in an on-going retaliatory vendetta against [them] due to their crusade against judicial corruption" and noting that "at least nine of the Supreme Court or Acting Supreme Court Judges in this courthouse had issued standing recusal orders recusing themselves from any action involving the plaintiffs"), *aff'd*, 852 N.Y.S.2d 180 (2d Dep't 2008); *Sassower v. Field*, 973 F.2d 75,78 (2d Cir. 1992) (the Second Circuit quoting the district court's summary of plaintiffs' abusive litigation tactics in a case in which George, Doris, and Elena Sassower were all plaintiffs, noting "[t]hey made several unsupported bias recusal motions based upon this court's unwilling involvement in some of the earlier proceedings initiated by George Sassower"). Notably, in *Sassower v. Comm'n on Judicial Conduct of the State,* slip op. 108551/99 (Sup. Ct. N.Y. Co. Jan. 31, 2000), the Honorable William A. Wetzel was confronted with a situation strikingly similar to the one faced by the trial court in this action. As Justice Wetzel explained:

> The proceeding has been marked by petitioner's deluge of applications seeking recusal of each of the various assigned judges. For the most part, these applications have been based upon the petitioner's categorical allegation that this action somehow implicates the Governor, and therefore all judges who are subject to reappointment by the Governor are ipso facto disqualified. Petitioner further asserts a potpourri of grounds for recusal, and then particularizes its application as to this court in a letter and attachments

> dated December 2, 1999, which contain specific allegations of impropriety.
>
> It is noteworthy that this court finds itself in wide company as a target of allegations by this petitioner. These papers are replete with accusations against virtually the entire judiciary, the Attorney General, the Governor, and the respondent. Petitioner cannot however bootstrap a conflict where none exists merely by making accusations against a court.

R-768-773 (*Sassower v. Comm'n on Judicial Conduct of the State, supra,* at 2-4), *aff'd*, 289 A.D.2d 119, 734 N.Y.S.2d 68 (1st Dep't 2001).

It is not only judges who are targeted by the Sassowers. Too often they have disparaged the professional conduct of their adversaries. *See Sassower v. Field*, 973 F.2d 75, 78 (2d Cir. 1992) ("There were continual personal attacks on the opposing parties and counsel."); *Sassower v. New York Times Co.*, 48 A.D.3d 440, 441 (2d Dep't 2008) (affirming dismissal of Appellant's motion for the disqualification of the trial court judge and for sanctions against the *Times's* counsel); *McFadden v. Sassower*, 900 N.Y.S.2d 585, 589 (App. Term 2010) (affirming dismissal of Appellant's motion for imposition of costs and sanctions against opposing party and his attorney, as well as the disciplinary referral of the attorney); *Sassower v.Comm'n on Judicial Conduct of the State,* 289 A.D.2d at 119 (imposing a filing injunction against Appellant due to her "vitriolic ad hominem attacks on the participants in this case, her voluminous correspondence, motion papers and recusal motions in this litigation and her frivolous requests for criminal

sanctions"); *Sassower v. City of White Plains*, 992 F. Supp. 652, 656 (S.D.N.Y. 1998) (declining to grant plaintiff Doris Sassower's request for Rule 11 sanctions against the defendants); *Ward-Carpenter Engineers, Inc. v. Sassower*, 163 A.D.2d 304, 305 (2d Dep't 1990) (declining to grant defendant Doris Sassower's request for sanctions against the plaintiff).

C. The Sassowers Target Justice Cohalan and Respondents' Counsel

The Sassowers have continued their long-standing practice of targeting judges and their adversaries in this litigation. In response to the trial court's dismissal of Plaintiffs' claims against Respondents, Appellant filed a motion seeking both the recusal of the trial court judge, the Honorable Peter Fox Cohalan, as well as $10,000 in sanctions against Satterlee Stephens Burke & Burke LLP ("Satterlee") and against its associate, Meghan Sullivan, Esq. ("Ms. Sullivan"), personally.

Among the personal attacks on Justice Cohalan leveled by Appellant in support of that motion are the following:

- 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. DeFilice did not sign the opposition papers. R650-651.

- 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.

Of course, conspicuously absent from this litany of personal attacks is a single relevant fact or issue of law that Appellant has a reasonable or objective basis to believe that Justice Cohalan actually "disregarded" or "concealed." Indeed, aside from these allegations of purported fraud and deceit by Judge Cohalan in his application of the law to the facts alleged by Plaintiffs, Appellant failed to identify any objective basis for disqualification. Instead, Appellant argued that Judge Cohalan was biased and interested in this action based on nothing more than (a) Plaintiff's prior efforts at recusal and sanctions against other judges with whom Judge Cohalan may have professional relationships, and (b) the fact that Appellant has generally opposed judicial pay raises. R-592-595.

Appellant has similarly engaged in personal attacks against Satterlee and Ms. Sullivan in seeking sanctions against Satterlee for the filing of Respondents'

motion to dismiss and against Ms. Sullivan personally for her advocacy in support of that motion. In her opposition to Respondents' motion to dismiss, Appellant repeatedly claimed that the Respondents' motion was "frivolous," a "fraud on the court," and "a deceit." R-244-255. Appellant also accused Ms. Sullivan of "ma[king] a false statement of fact or law," "offer[ing] or us[ing] evidence that the lawyer knows to be false," and "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.* After Justice Cohalan granted Respondents' motion in its entirety, noting that Satterlee's submissions on that motion were "well within the bounds of legitimate advocacy," R-8, Appellant again moved for sanctions against Satterlee and Ms. Sullivan, alleging that Ms. Sullivan committed fraud during her oral argument in support of Respondents' motion. 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, an argument that is entirely supported by the case law.

SUMMARY OF PROCEEDINGS AND DECISIONS BELOW

On October 4, 2010, Plaintiffs filed a complaint against Respondents, as well as DOES 1-10 and Keith Eddings, that purports to assert causes of action for libel, libel *per se*, and "journalistic fraud" (the "Complaint"). R-1, R-33-48.

Respondents filed a motion to dismiss the Complaint in its entirety on October 22, 2010 ("Respondents' Motion"). R-163. In response, Appellant both opposed Respondents' Motion and asserted a cross-motion for an order: (i) imposing sanctions against Satterlee pursuant to NYCRR § 130-1.1; (ii) referring Satterlee to disciplinary authorities for its advocacy in support of Respondents' Motion; (iii) granting a default judgment against DOES 1-10 ; (iv) extending Plaintiffs' time to serve defendant Keith Eddings; and (v) giving notice that Justice Cohalan would treat the Respondents' Motion as one for summary judgment. R-241-243. In an order dated September 22, 2011, Justice Cohalan granted Respondents' Motion in its entirety and denied Appellant's cross-motion in its entirety (the "September 22 Order"). R-3-8.

On December 21, 2011, Appellant filed a motion seeking an order: (i) disqualifying Justice Cohalan from this proceeding; (ii) granting reargument and renewal, pursuant to CPLR § 2221, of the September 22 Order; (iii) vacating the September 22 Order, pursuant to CPLR § 5015(a)(3), on the grounds of fraud; (iv) vacating the September 22 Order, pursuant to CPLR § 5015(a)(4), for lack of jurisdiction; (v) sanctioning Satterlee and Ms. Sullivan, pursuant to NYCRR § 130-1.1; and (vi) granting Appellant's leave to amend her dismissed Complaint. R-586-587. In an order dated April 23, 2012 (the "April 23 Order"), Justice Cohalan denied Appellant's motion in its entirety. R-11.

ARGUMENT

POINT I

THE LIBEL CLAIMS WERE CORRECTLY DISMISSED

A. Appellant's Own Submissions Establish the Article is Substantially True

Appellant's claim that the Article defamed her is fatally flawed because the Complaint itself establishes that the factual "gist or sting" of the Article is substantially true. As the Complaint alleges, on June 14, 2009, Plaintiffs sent a "nine page paragraph-by-paragraph deconstruction of the news article" to *The Journal News*, which provides Plaintiffs' own account of their conduct during the May 4, 2009 Common Council meeting. R-14-15 (¶¶ 23-24). This document, attached and incorporated into their Complaint, expressly corroborates the Article's description in all material respects. R-93-107.[6]

Under New York law, it is well-settled that "truth is an absolute, unqualified defense to a civil defamation action." *Commonwealth Motor Parts Ltd. v. Bank of Nova Scotia*, 44 A.D.2d 375, 378, 355 N.Y.S.2d 138, 141 (1st Dep't 1974). It is an equally fundamental concept that "'substantial truth' suffices

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[6] It remains unclear from the Appellant's Brief, much less the hundreds of pages comprising the Complaint and the exhibits thereto, exactly what statements in the Article Appellant contends are actionable. As a result, the Plaintiffs have failed to comply with CPLR 3016(a) requiring that, in defamation actions, "the particular words complained of shall be set forth in the complaint." *See also Hausch v. Clarke*, 298 A.D.2d 429, 748 N.Y.S.2d 264 (2d Dep't 2002) (holding that it was insufficient under CPLR 3016(a) to attach the entirety of the accused article). The September 22 Order should be affirmed for this reason as well.

to defeat a charge of libel." *Id.* (quoting *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 297, 445 N.Y.S.2d 156, 159 (2d Dep't 1981)); *see also Carter v. Visconti,* 233 A.D.2d 473, 474, 650 N.Y.S.2d 32, 33 (2d Dep't 1996) ("Even if a publication is not literally or technically true in all respects, the absolute defense applies as long as the publication is substantially true."), *leave to appeal denied,* 89 N.Y.2d 811, 657 N.Y.S.2d 403, 679 N.E.2d 642 (1997). A statement is substantially true if the statement would not "have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Love v. William Morrow & Co., Inc.*, 193 A.D.2d 586, 588, 597 N.Y.S.2d 424, 426 (2d Dep't 1993) (*quoting Fleckenstein v. Friedman*, 266 N.Y. 19, 23, 193 N.E. 537 (1934); *id.* ("A comparison of the disputed language . . . with the plaintiff's own words . . . demonstrates the 'substantial truth' of [defendant's] words, rather than their falsity.").

Therefore, "it is not necessary to demonstrate complete accuracy to defeat a charge of libel. It is only necessary that the gist or substance of the challenged statements be true." *Printers II, Inc. v. Prof'ls Publ'g, Inc.*, 784 F.2d 141, 146 (2d Cir. 1986) (rejecting libel claim based on publication alleged to be "misleading in substance because they impliedly represent that [plaintiff] was neglecting to pay a debt," when monies had not yet come due); *see also Croton Watch Co. v. Nat'l Jeweler Magazine, Inc.*, 2006 WL 2254818, at *5 (S.D.N.Y.

Aug. 7, 2006); *Korkala v. W.W. Norton & Co.*, 618 F. Supp. 152, 155 (S.D.N.Y. 1985); *Sharon v. Time, Inc.*, 609 F. Supp. 1291, 1294 (S.D.N.Y. 1984).

A side-by-side comparison of the statements about Plaintiffs in the Article with the Plaintiffs' own description of the Common Council meeting definitively demonstrates the substantial truth of the Article:[7]

Allegedly Defamatory Statement	Plaintiffs' Own Descriptions
"Hecklers try to derail new city judge"; "White Plains woman heckles city judge during confirmation"	During the meeting, (i) Elena Sassower "recapt[] [*sic*] for the Mayor and Common Council Judge Hansbury's misconduct in office" (R-101); (ii) a council member stated that Sassower was making improper personal attacks on Judge Hansbury (*id.*); (iii) Sassower directed her comments directly to Judge Hansbury, demanding that he "justify his decisions" (R-102); and (iv) Elena Sassower called out "he is a corrupt judge" as she and her mother left the meeting room (R-32-33 (¶ 34)).
"A city woman [Elena Sassower] once jailed by Congress for interrupting a judicial confirmation . . . ."	Elena Sassower was convicted of "disruption of Congress" in 2004 arising from her conduct at a U.S. Senate hearing on the nomination of Richard Wesley to the U.S. Court of Appeals for the 2nd Circuit. *See* R-98; R-18 (¶ 3(c)); *see also* R-167-191.
". . . [Plaintiff Elena Sassower] talked through Mayor Joseph Delfino's requests to take a seat . . ."	At "Mayor Joseph Delfino's request to take a seat . . . I sat down – and, to the extent such was not instantaneous, my responsive exchange with the Mayor presented issues of legitimate public concern – which should have been reported . . .

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

Allegedly Defamatory Statement	Plaintiffs' Own Descriptions
	." (R-99).
". . . Elena Sassower asked the council to reject Hansbury's renomination and instead turn him over to prosecutors for the corruption and conflict of interest…."	Plaintiffs' submissions to the Common Council repeatedly ask the Mayor and the Councilmembers to "refer [Judge Hansbury] for disciplinary and criminal investigation and prosecution" for his "on-the-bench corruption." (R-113; R-118; R-124; R-127).
"...[Judge Hansbury's] 2007 decision to evict her and her mother from their Lake Street apartment of 21 years."	"[T]wo fraudulent judicial decisions rendered by incumbent White Plains City Court Judge Hansbury in landlord-tenant proceedings, ultimately result[ed] in [Elena Sassower's] wrongful eviction from her White Plains co-op apartment, her home for 21 years." (R-96-97.)
"Sassower disregarded Councilman Rita Malmud's protest that council rules do not allow for personal attacks and City Clerk Anne McPherson's reminder that her three minutes of speaking time were up."	"Rita Malmud is a councilwoman, not a councilman. . . . I was not engaged in 'personal attacks'…I was recapting [*sic*] … Judge Hansbury's misconduct in office…. [N]either Councilwoman Malmud's 'protest' nor Clerk McPherson's 'reminder' were appropriate. . . . '[T]hree minutes of speaking time' was plainly inadequate for such serious presentation . . . ." (R-99.)
"When Hansbury arrived in the council chambers, Elena Sassower greeted him by shouting 'He's a corrupt judge!'…."	"Judge Hansbury arrived in the council chamber . . . when either I or my mother was still at the lectern. My words … were 'There's Judge Hansbury. Let him justify his decisions.'…[U]pon approaching the doorway [to exit, I] spoke the words… 'He's a corrupt judge'. That, however, was not the end of what I said. I continued with the further words 'and the process is corrupt.'" (R-102-103).
"Sassower interrupted Huston's observation that 'White Plains is a city that cares for all its people' with a loud 'Hummph!'"	"[M]y grunt 'Hummph', … did not 'interrupt[]' what the reverend was saying. Indeed…a 'Hummph' would have seemed not just appropriate, but understated." (R-102).

Allegedly Defamatory Statement	Plaintiffs' Own Descriptions
"As the Sassowers stepped up their pursuit, the officers blocked them from descending a staircase to the first floor until the Hansburys were out of the building."	"That 'two cops' followed us and 'blocked' us from leaving until the Hansburys were out of the building – according to Mr. Eddings – does not mean that we were either pursuing them or stepping up our pursuit of them." (R-104).
"The [Sassowers] responded to the eviction by suing McFadden, a suit a federal appeals court dismissed in 1993."	"Judge Friia's July 3, 2008 decision . . . does [not] say we had 'responded to the eviction by suing McFadden'. Nor would it as we had never sued McFadden, who was our co-plaintiff . . . . As for the federal appeals court decision in the case, it was not in 1993, but in 1992 …." (R-105-106).

Plaintiffs' own admissions make clear that the Article offers a substantially true account of the Sassower's conduct during the May 4, 2009 Common Council meeting.

Notably, the "videotape" of the Common Council meeting, repeatedly referenced in Plaintiffs' Complaint and in Appellant's Brief, only provides additional confirmation of the substantial truth of the Article. 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. See R-258 (copy of White Plains Cable television access videotape). Specifically, the video clearly shows Ms. Sassower's audible 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. *Id.*

Indeed, the only purported factual inaccuracies Plaintiffs appear to allege concern the exact timing of Elena Sassower's outburst that Judge Hansbury was "a corrupt judge" and the procedural posture of a convoluted lawsuit that ultimately resulted in the Sassowers' removal from their home. Such minor inaccuracies do not amount to falsity as a matter of law. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) ("Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.") (internal quotations omitted); R-192-202 (*Sassower v. The New York Times Co.*, No. 05-19841 (Sup. Ct. West. Co. Jul. 6, 2006) ("*Sassower v. NYT I*") at 8 ("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.")).

B. <u>Certain of the Article's Statements Qualify as Protected Opinion</u>

Having effectively acknowledged that the sum and substance of the Article is accurate, Appellant appears to take issue with the Article's characterizations of the Sassowers as "hecklers," who "pursued" a city judge, and

whose comments were described as "slings and arrows" and as creating "fireworks." *See, e.g.*, Appellants' Br. at 12, 19. Because none of these figurative statements could even remotely be interpreted as stating facts about the Sassowers, any objections to this language cannot state a claim for libel as a matter of law.

It is well-settled that only statements that can be reasonably interpreted as stating or implying facts about the plaintiff that are objectively proveable as true or false are actionable. *See, e.g.*, *Gross v. New York Times Co.*, 82 N.Y.2d 146, 603 N.Y.S.2d 813, 623 N.E.2d 1163 (1993) (because "falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging facts can properly be the subject of a defamation action'") (quoting *600 West 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 139, 589 N.Y.S.2d 825, 603 N.E.2d 930 (1992)). Accordingly, "[i]t is a settled rule that expressions of opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.'" *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986).[8]

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

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

> (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might 'signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.'

Id.; *see also Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). This analysis must be conducted by "consider[ing] the content of the communication as a whole," *Brian v. Richardson*, 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347 (1995), rather than "isolating challenged speech" and subjecting it to "hypertechnical parsing." *Immuno AG v. Moor-Janowski*, 77 N.Y.2d 235, 255, 256, 566 N.Y.S.2d 906 (1991).

As Justice Cohalan's September 22 Order correctly concludes (R-6-7), the allegedly defamatory phrases Plaintiffs identify simply do not constitute statements of fact under the four factor analysis applied. The Article's characterizations of the Sassowers as "hecklers" who "took on the Common Council" with "slings and arrows" is not language with "a precise meaning which is readily understood," but rather, as Justice Cohalan held, "indefinite and

ambiguous language" (R-6). Indeed, the purportedly objectionable words used in the Article were at most "hyperbole" (R-6), prime examples of the kind of "figurative and hyperbolic language" that is constitutionally protected under both New York and federal law. *See Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 223 (2d Cir. 1985); *see also Greenbelt Cooperative Publ. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (rejecting plaintiff's defamation claim based on newspaper reporting that he had "blackmail[ed]" the city, noting that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable"); *Fleiss v. Wiswell*, 2005 WL 3310014 (2d Cir. Dec. 7, 2005) (statement that book was based on "lies and diatribe" protected opinion); *Lukashok v. Concerned Residents*, 160 A.D.2d 685, 554 N.Y.S.2d 39, 40 (2d Dep't 1990) (statements that plaintiff has "chosen the malicious method of personal lawsuits to intimidate members ... [and] has resorted to ... terrorism by suing every member" constituted a nonactionable statement of opinion); *The Renco Group, Inc. v. Workers World Party, Inc.*, 13 Misc. 3d 1213(A), 824 N.Y.S.2d 758 (Sup. Ct. N.Y. Co. 2006) (dismissing libel claim based on publication of article that accused companies of "robbing" pension funds, noting "statements couched in loose, figurative or hyperbolic language in charged circumstances have been held to be rhetorical hyperbole and therefore

nonactionable opinion"). As at least one court has noted, "to deny to the press the right to use hyperbole . . . would condemn the press to an arid desiccated recital of bare facts." *Time, Inc. v. Johnston*, 488 F.2d 378, 384 (4th Cir. 1971).

Contrary to Plaintiffs' contentions below, the opinion defense is indisputably available in the context of news articles; comments included therein that are inherently opinion or qualify as vigorous epithets are simply not actionable. *See Mann v. Abel*, 10 N.Y.3d 271, 277, 885 N.E.2d 884, 886 (2008) (holding that news article describing plaintiff as "political hatchet Mann" and "one of the biggest powers behind the throne" in the local town government, who "pulls the strings" and might be "leading the Town . . . to destruction" constituted non-actionable expressions of opinion); *Palmieri v. Thomas*, 29 A.D.3d 658, 659, 814 N.Y.S.2d 717, 718 (2d Dep't 2006) (affirming dismissal of defamation complaint against newspaper publisher because "[t]he complained-of statements appearing in the news article were either absolutely privileged . . . or consisted of non-actionable opinion"); *White v. Berkshire-Hathaway, Inc.*, 10 Misc. 3d 254, 255, 802 N.Y.S.2d 910, 912 (Sup. Ct. Erie Co. 2005) (holding that news article headline "Unscrupulous operation gouges nursing home" is not defamatory as a matter of law).

Notably, this is not the first time the Sassowers have tried to mischaracterize constitutionally protected opinions as actionable defamation. In *Sassower v. The*

New York Times Co., Elena Sassower claimed that a November 7, 2004 *New York Times* article reporting her incarceration for disruption of Congress was defamatory based on its references to her as a "gadfly," "something of a handful," with a "relentless" and "exhausting" conversational style of "launch[ing] into polite but fulminating assaults" in debating legal issues, and its description that she "specializes in frontal assaults" against judicial nominees. R-192-202 (*Sassower v. NYT I* at 5-7). The court roundly rejected Sassower's arguments and dismissed the claims in their entirety, noting that "[c]ontrary to plaintiff's contentions, the challenged statements are not reasonably susceptible of a defamatory meaning, and were, in any event merely rhetorical hyperbole constituting pure opinion. They are therefore constitutionally protected." *Id.* at 8. The same rationale applies here.

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

Even assuming *arguendo* that any of the Article's purportedly objectionable descriptions could reasonably be understood as conveying facts rather than opinions, Plaintiffs fall far short of explaining how these statements possibly could be considered defamatory.[9]

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[9] It is certainly hard to discern what statements in the Article could be construed as defamatory on its face, i.e., libel *per se*. *See Ava. v NYP Holdings, Inc.*, 64 A.D.3d 407, 412 (1st Dep't 2009) ("Libel is broken down into two discrete forms—libel *per se*, where the defamatory statement appears on the face of the communication, and libel *per quod*, where no defamatory statement is present on the face of the communication but a defamatory import arises through reference to facts extrinsic to the communication.") The Complaint suggests Appellant is harmed in her business or profession by reason of the Article, and therefore the challenged statements constitute libel *per se*, *see* R-40, but Appellant can offer no cogent explanation as to

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

A statement implying that an individual was rude (*e.g.*, "interrupting" an invocation at a community government meeting with a "Hummph" – a "humph" which the Complaint acknowledges Appellant uttered, or the statements in the Article relating to the Sassowers' past litigation over their acknowledged eviction simply do not qualify as "defamatory" under the standards established by the New

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why an Article that depicts her as outspokenly protesting confirmation of a judge whom she regards as corrupt causes her professional harm (particularly when her "profession" concerns publicizing alleged judicial corruption). Notably, while plaintiffs assert both libel and libel *per se* causes of action, although cases are not uniform in their approach to this distinction, *see Matherson v. Marchello*, 100 A.D.2d 233 (2d Dep't 1984), if a statement is not defamatory on its face, then a plaintiff generally must plead special damages with particularity. *Hahn v. Konstanty*, 257 A.D.2d 799, 684 N.Y.S.2d 38 (3d Dep't 1999); *see also Serratore v. Am Port Servs., Inc.*, 293 A.D.2d 464, 465, 739 N.Y.S.2d 452 (2d Dep't 2002). As the trial court correctly noted, Plaintiffs did not plead any special damages. R-7. Regardless, here, there is simply nothing libelous – be it *per se* or *per quod* – about the Article.

York courts. Indeed, the only comment in the Article that could reasonably be construed as casting Plaintiffs in a negative light is the reference to Elena Sassower's incarceration for disruption of Congress – an observation that is indisputably true. R-18, R-99, R-167-191.

New York courts have consistently declined to extend the scope of defamation beyond its well-established boundaries. *See, e.g., Cutler v. Ensage, Inc.*, 856 N.Y.S.2d 23 (Table), at *8 (Nov. 30, 2007) (statement that plaintiff "was terminated for violating the company's vacation policy" was not defamatory); *Clemente v. Impastato*, 274 A.D.2d 771, 774, 711 N.Y.S.2d 71, 74 (3d Dep't 2000) (statement that engineer harassed landowner and trespassed on her property was not defamatory); *Aponte v. Cosmopolitan Emp't Agency*, 226 A.D.2d 299, 642 N.Y.S.2d 862, 863 (1st Dep't 1996) ("[A]lthough factual in nature rather than opinion," statements that plaintiff verbally harassed the police and interfered with their raid were "not defamatory as a matter of law."); *cf. Wecht v. PG Pub. Co.*, 353 Pa. Super. 493, 498, 510 A.2d 769, 772 (1986) (cartoon characterizing plaintiff as "vocal, abusive, and quarrelsome" was not defamatory); *Gallagher v. Connell*, 123 Cal. App. 4th 1260, 1270, 20 Cal. Rptr. 3d 673, 681 (Cal. Ct. App. 2004) (statement that plaintiff was "extremely rude" was not defamatory because it was protected opinion, not a factual assertion). Here, Appellant does not and cannot explain how any allegedly factual statements in the Article could have

exposed them to hatred, contempt or aversion. Because these statements do not constitute defamation, the claims were properly dismissed.[10]

POINT II

"JOURNALISTIC FRAUD" IS NOT A COGNIZABLE LEGAL CLAIM

Re-treading familiar ground, Appellant attempts to supplement Plaintiffs' legally deficient libel claims with a claim for "journalistic fraud," a non-existent cause of action never recognized in New York or in any other state. As Justice Cohalan noted in correctly dismissing this non-existent cause of action, the court was "unable to find a single jurisdiction that recognizes a cause of action for journalistic fraud." R-7; *see also* R-192-202 (*Sassower v. NYT I* at 9 (rejecting the Sassowers' invitation to create the identical "journalistic fraud" claim and noting that "no jurisdiction has embraced such cause of action."). Furthermore, to the extent Appellant is asking this Court to recognize her made-up cause of action, she has not identified any justification sufficient to overcome the strong presumption

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[10] To the extent the Appellant asserts the reader comments posted online in response to the Article purports to state a basis for Plaintiffs' claims (see App. Br. at 18), this effort is unavailing. Section 230 of the Communications Decency Act provides a statutory protection for providers of interactive computer services, such as the reader comment forum included with the Article, and explicitly provides that no such provider "shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute also provides that "[n]o cause of action may be brought and liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). Because Appellant does not, and cannot, allege that Respondents wrote any of the reader-submitted comments identified in the Complaint, Respondents cannot be held liable for any claim for libel based on these comments. *See, e.g., Gibson v. Craigslist, Inc.*, 2009 WL 1704355, at *4 (S.D.N.Y. Jun. 15, 2009); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004).

against the creation of a new legal remedy. *See Albala v. City of New York*, 54 N.Y.2d 269, 274-75 (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").

Ultimately, it appears Appellant's purported grievance with *The Journal News*, which Plaintiffs attempt to turn actionable through this fictional claim, is with its alleged "covering up the process of judicial selections and discipline ," Appellant's Br. at 9, and its efforts to allegedly "deprive the public of countless opportunities to secure the good-government reforms that plaintiffs' dedicated advocacy consistently put within its grasp," *id.* at 24. Specifically, Plaintiffs' Complaint objects that the Article "purposefully concealed" and "failed to report on the issue of legitimate public concern . . . the corruption of the judicial appointments process to White Plains City Court." R-26; *see also* R-28-29 (alleging that the Article "needed to be retracted, with a story written about the

issues of legitimate public concern it had purposefully concealed: the judicial appointments process...and the case file evidence establishing Judge Hansbury's on-the-bench corruption"); R-94 ("The only thing that readers need to know ... is what I stated at the hearing – (1) that I have direct, first-hand knowledge of Judge Hansbury's corruption on the bench . . . .").

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. Furthermore, of course, the First Amendment plainly protects Respondents editorial and content decisions. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("the choice of material to go into a newspaper, and the decisions made as to limitations on the . . . content of the paper, and treatment of public issues . . . – whether fair or unfair – constitute the exercise of editorial control and judgment."); *Holy Spirit Ass'n v. New York Times Co.*, 49 NY2d 63, 68 (1979) ("[A] newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author."); *Rinaldi v. Holt, Reinhart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 952, *cert. denied*, 434 U.S. 969 (1977) (noting that the omission or inclusion of details is "largely a matter of

editorial judgment in which the courts and juries, have no proper function"). Here, as was the case in the Sassowers' lawsuit against The New York Times Co., "the gravamen of plaintiffs' complaint is, in reality, the failure of the defendants to have included in the article all of the history...which led to Sassower's arrest and conviction. Such coverage decisions are, however, editorial and protected by the First Amendment." R-192-202(*Sassower v. NYT I* at 9).

Thus, regardless of whether Appellant calls it "journalistic fraud" or any other name,[11] notwithstanding Plaintiffs' repeated demands that Respondents publish the arguments and "documentary evidence" of Plaintiffs' choosing, Appellant simply cannot impose liability on Respondents for declining to do so.

POINT III

THE COURT CORRECTLY REFUSED PLAINTIFFS' RECUSAL DEMAND

Appellant also appeals Justice Cohalan's April 11, 2012, Order denying Plaintiffs' motion seeking recusal for bias. Recusal pursuant to Judiciary Law § 14 requires that the court be "interested" in the matter at hand or "related by consanguinity or affinity to any party to the controversy...." 22 NYCRR § 100.3(E) calls for disqualification, where, *inter alia*, the "judge has a personal bias

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[11] 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, there is no rational basis, much less compelling policy reasons, to recognize a heretofore unknown tort claim.

or prejudice concerning a party." In the absence of evidence of a statutory disqualification under Judiciary Law § 14, "a trial judge is the sole arbiter of the need for recusal, and his or her decision is a matter of discretion and personal conscience." *Schreiber-Cross v. State*, 31 A.D.3d 425, 819 N.Y.S.2d 530, 531 (2d Dep't 2006). "A court's decision in this respect may not be overturned unless it was an abuse of discretion." *People v. Moreno*, 70 N.Y.2d 403, 406, 516 N.E.2d 200, 202 (1987). Here, Appellant has offered no facts warranting recusal under either statute, and therefore there is no basis to disturb Justice Cohalan's exercise of discretion in denying Appellant's recusal motion.

Appellant, 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. *See* Appellant's Br. at 2. Of course, disagreement with a court's legal reasoning is not grounds for disqualification. Thus, the law is clear that bias allegedly evidenced by a legal opinion is simply not proper grounds for disqualification, and the denial of a motion to recuse on this basis certainly is not an abuse of discretion. *Petkovsek v. Snyder*, 251 A.D.2d 1086, 674 N.Y.S.2d 208, 209 (4th Dep't 1998) (affirming denial of motion for recusal because "the motion was based solely on the fact that the Trial Judge had not previously ruled in petitioner's favor"); *Hurrell-Harring v. State*, 20 Misc. 3d 1108(A), 866 N.Y.S.2d

92 (Sup. Ct. Albany Co. 2008) ("In order to be disqualifying, alleged bias and prejudice, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what is learned from participation in the case. Neither the formation of an opinion on a question of law nor judicial rulings in a litigation constitute grounds for a claim of bias or prejudice on the part of a judge.").

Further, in arguing for recusal before the trial court, the only purported "relationships and interest" Appellant could identify to support her claim of bias were based on (a) Appellant's prior efforts at recusal and sanctions against other judges with whom Justice Cohalan may have professional relationships, and (b) the fact that Appelant has generally opposed judicial pay raises. R-592-594. Tellingly, the purported "interest" of the trial court completely consists of facts and circumstances known to Appellant at the time she filed the Complaint. Even if these alleged interest were adequate grounds for recusal (they are not), Appellant's inexcusable failure to raise this "interest" prior to the issuance of the September 22 Order reveals the recusal motion to be nothing more than sour grapes. *People v. Simone*, 13 A.D.3d 71, 72, 785 N.Y.S.2d 82, 83 (1st Dep't 2004); *People v. Grasso*, 13 Misc. 3d 1214(A), 824 N.Y.S.2d 757 (Sup. Ct. N.Y. Co. 2006), *aff'd sub nom. People ex rel. Spitzer v. Grasso*, 49 A.D.3d 303, 853 N.Y.S.2d 64 (1st Dep't 2008). In short, because Appellant has not identified any factual basis to

support a finding that the statutory disqualifications set forth in Judiciary Law § 14 are applicable, Justice Cohalan is the "sole arbiter" of his recusal, and his refusal to do so was not an abuse of discretion. *Schreiber-Cross*, 819 N.Y.S.2d at 531.

As Judge Wetzel emphasized in prior litigation by this Plaintiff, the judicial process must not be undermined by baseless recusal motions. R-768-773 (*Sassower v. Comm'n on Judicial Conduct of the State, supra,* at 2-4 ("When a court recuses itself without a proper basis, it undermines respect for the judiciary, encourages forum-shopping, unnecessarily prolongs litigation, and unfairly "passes the buck" to other judges.")). Indeed, a court has an obligation to deny such motions. *See id.* at 3-4 ("Equally important as the obligation to recuse when appropriate is the obligation to decide the case when there is no legal basis for recusal. . . . When a court recuses itself without a proper basis, it undermines respect for the judiciary, encourages forum-shopping, unnecessarily prolongs litigation, and unfairly "passes the buck" to other judges."); *Galasso v. Calder*, 31 Misc. 3d 1220(A), 929 N.Y.S.2d 199 (Sup. Ct. N.Y. Co. 2011) ("A judge is as much obligated not to recuse himself when it is not called for as he is obligated to when it is.") (internal citations omitted); *Hurrell-Harring*, 866 N.Y.S.2d at 92 ("A judge has an obligation not to recuse himself unless he or she is satisfied that he or she is unable to serve with complete impartiality, in fact or appearance") (internal citations omitted). Particularly here, where a finding of grounds for recusal would

arguably apply with equal force to any state court judge daring to dismiss claims brought by Appellant, the trial court was entirely correct in summarily denying Appellant's request for recusal.[12]

POINT IV

THE COURT CORRECTLY DENIED PLAINTIFFS' REQUEST FOR SANCTIONS

Appellant also appeals Justice Cohalan's April 11 Order because the trial court: (a) refused to vacate the September 22 Order pursuant to CPLR § 5015(a)(3), based upon alleged fraud committed by Satterlee and Ms. Sullivan during the oral argument which took place before the Court on June 1, 2011; and (b) denied Appellant's request for sanctions for this conduct pursuant to 22 NYCRR 130-1.1.

In order to vacate an order or judgment of the court pursuant to CPLR § 5015(a)(3), the moving party must establish misconduct or fraud on the part of its adversary or its adversary's attorney sufficient to warrant the vacatur of the ruling. *See Blumes v. Madar*, 21 A.D.3d 518, 519, 800 N.Y.S.2d 580, 581 (2d Dep't

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[12] 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, and a search of New York case law and procedure does not reveal any such requirement. *See, e.g., Washington Mut. Bank v. 334 Marcus Garvey Blvd. Corp.*, 18 Misc. 3d 1145(A), 859 N.Y.S.2d 900 (Sup. Ct. 2008) (noting that "a judge does not have to give a reason or reasons for his or her recusal").

2005); *Arroyo v. Hilton*, 281 A.D.2d 440, 441, 721 N.Y.S.2d 553 (2d Dep't 2001). To warrant vacatur, the fraud must have prevented a party "from fully and fairly litigating the matter." *Shaw v Shaw*, 97 A.D.2d 403, 467 N.Y.S.2d 231 (2d Dep't 1983). Furthmore, the moving party must "affirmatively establish fraud by clear and convincing evidence." *Cofresi v. Cofresi*, 198 A.D.2d 321, 603 N.Y.S.2d 184, 185 (2d Dep't 1993). *See also Aames Capital Corp. v. Davidsohn*, 24 A.D.3d 474, 475, 808 N.Y.S.2d 229, 230 (2d Dep't 2005) (denying motion for vacatur under CPLR § 5015(a)(3) because movant "offered nothing more than broad, unsubstantiated allegations of fraud"); *Miller v. Lanzisera*, 273 A.D.2d 866, 868, 709 N.Y.S.2d 286, 288 (4th Dep't 2000) (same); *H & Y Realty Co. v. Baron*, 193 A.D.2d 429, 430, 597 N.Y.S.2d 343, 345 (1st Dep't 1993) (alleged fraud or misconduct must be "clearly demonstrated").

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. 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. Indeed, as set forth herein, New York law does <u>not</u> make such a distinction. The opinion defense <u>is</u> available in cases involving news articles, just as it is in case involving editorials or letters to the editor. *See* supra Section I.B.

Further, entirely at odds with Plaintiff's allegations of fraud, the Court was made aware of the caselaw supporting the statements Ms. Sullivan made at oral argument, and the Court was free to determine whether those statements were supported by the law. Under such circumstances, Plaintiff was provided the opportunity to "fully and fairly litigat[e] the matter," *Shaw*, *supra*, 97 A.D.2d at 403, and cannot possibly claim fraud warranting vacatur of the Court's Order.

Just as Satterlee's and Ms. Sullivan's arguments were not fraudulent, they are also not "frivolous" arguments warranting sanctions under 22 NYCRR 130-1.1. In order for conduct to be "frivolous" and sanctionable under Rule 130, it must be (1) "completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or (2) "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." 22 NYCRR 130-1(c). Significantly, case law wholly supports both Satterlee's briefing in support of Respondents' motion to dismiss and Ms. Sullivan's oral arguments statements. Further, there is no allegation, nor can there be any allegation, that Ms. Sullivan's statement were

made with any intent to delay or prolong litigation, or harass Plaintiff.[13] Finally, 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. *Golden v. Barker*, 223 A.D.2d 769, 770, 636 N.Y.S.2d 444 (3d Dep't 1996) ("[C]onduct attributable to legal error, standing alone, is not frivolous within the meaning of 22 NYCRR 130-1.1 (c).").[14]

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[13] In contrast, Appellant's baseless and frivolous sanctions motion is itself sanctionable. 24 N.Y. Jur. 2d *Costs in Civil Actions* § 84 ("Frivolous conduct includes making a frivolous motion for costs or sanctions.").

[14] In light of Appellant's history of vexatious litigation, it is respectfully submitted that this Court should follow the lead of prior courts and enjoin Appellant "from instituting any further actions or proceedings relating to the issues decided herein." R-768-773 (*Sassower v. Comm'n on Judicial Conduct of the State*, *supra*, at 5); *Sassower v. Signorelli*, 99 A.D.2d 358, 472 N.Y.S.2d 702 (2d Dep't 1984) (permitting Court to enjoin further litigation by George or Doris L. Sassower, holding that "when, as here, a litigant is abusing the judicial process by hagriding individuals solely out of ill will or spite, equity may enjoin such vexatious litigation."); *see also In the Matter of Pignataro v Davis*, 8 A.D.3d 487, 778 N.Y.S.2d 528 (2d Dep't 2004) (affirming trial court's precluding individual from making further applications to court, noting that while "[p]ublic policy generally mandates free access to the courts . . . a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will."). Provided Appellant is given an opportunity to be heard, this Court is free to impose such sanctions *sua sponte*. *Kamen v. Diaz-Kamen*, 40 A.D.3d 937, 837 N.Y.S.2d 666 (2d Dep't 2007).

CONCLUSION

Defendants-Respondents respectfully submit that, for the reasons set forth herein, the Orders and Judgments of the court below should be affirmed.

Date: September 24, 2012

Respectfully submitted,

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