SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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ELENA RUTH SASSOWER, individually, and as Coordinator of the Center for Judicial Accountability, Inc., CENTER FOR JUDICIAL ACCOUNTABILITY, INC. and The Public as represented by them,

Plaintiffs,

-against-

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

Defendants.
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Index No. 05-19841

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

This Memorandum of Law is respectfully submitted in support of the present motion of The New York Times Company, Arthur Sulzberger, Jr., Bill Keller, Jill Abramson, Allan M. Siegel, Gail Collins and Byron Calame (collectively, "The Times") pursuant to CPLR 3211 (a)(7) to dismiss the Complaint herein.[1] That 67-page, 175-paragraph Complaint filed by Plaintiffs Elena Ruth Sassower and an organization she founded and runs, Center for Judicial Accountability, Inc. (collectively, "Ms. Sassower"), includes a recitation - - and appears to be a culmination - - of Ms. Sassower's decade long campaign against corruption in the judicial selection process and her attempts to enlist The Times on this issue. To the extent it attempts to

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[1] Of the parties named in the caption, Messrs. Okrent and Fuchs are not New York Times Company employees and have not been properly served; *The New York Times* and its Editorial Board are not corporate entities susceptible to suit.

assert a cause of action in the traditional sense, it claims libel and the novel cause of action of "journalistic fraud" arising from a short but wry and sympathetic portrayal of Ms. Sassower in a column in the Westchester Section of The New York Times. For the reasons set forth below, the Complaint should be dismissed with prejudice.

PRELIMINARY STATEMENT

The Complaint sets out in perilous detail Ms. Sassower's quite critical views of the judicial selection process, the corruption she sees therein, the letters she has written and activities she has undertaken in support of her self-appointed monitoring role, as well as her attempts to have The New York Times see the light regarding this issue and her frustrations at The Times's not engaging her and not responding to the over 250 letters she has written it over the past 15 years. The relentless and irrepressible nature of her campaign can be seen not only in the Complaint itself, but also in many of the Exhibits thereto. (See, *e.g.* Exhibit C and E listing her activities and correspondence "documenting the corruption of federal judicial selection/confirmation" and her letters to The Times.) Of course, nothing in this long recitation is in the least bit actionable, let alone against a newspaper making editorial decisions to either cover or, for the most part, not to cover, these matters. (See Point I, *Infra.*)

Finally, at paragraph 140 the Complaint comes to the column which, presumably, is the subject matter of this action - - though by paragraphs 142-3 the Complaint is back arguing that the column

> "so completely covers up the politically-explosive underlying national and New York stories of the corruption of the processes of judicial selection and discipline, involving our highest public officers, as to be explicable only as a manifestation of The Times' profound and multitudinous conflicts of interest."

The column, for its part, reports on Ms. Sassower while she is in the midst of a six-month jail term after she was convicted for disruption of Congress during the Senate Judiciary Committee hearings on the nomination of former New York Court of Appeals, Appellate Division and State Supreme Court Judge Richard Wesley to the U.S. Court of Appeals for the Second Circuit. The column relates not only her actions at the Senate hearing which led to her arrest and conviction, all of which are amply supported in the Congressional Record, but also the subsequent sentencing hearing before Judge Holeman of the District of Columbia Superior Court. As the column relates, he proposed a suspended sentence and probation along with certain other conditions: that she take anger-management classes; stay away form the Capitol complex; sever all contact with members of the Senate Judiciary Committee; and apologize. Again, according to the article as well as the transcript of the court hearing and her Complaint itself (¶63, 89), when Ms. Sassower refused to apologize and alienated the judge, he sentenced her to six months of incarceration.

Ms. Sassower's complaint does not really quarrel with the reporter's factual account of these events - - nor could she, since they are a fair and accurate summary of what appeared in official government documents. Rather, she quibbles with the fairness of the underlying proceedings - - none of which The Times had anything to do with - - and with the not wholly unfavorable, if not enthusiastically supportive, nuanced depiction of her in the column. What she really appears to grieve about are characterizations of her - - such as "relentless", "difficult" and "fulminating", though "harmless" and never even "remotely threatening" - - all of which certainly are constitutionally protected opinion. Moreover, if somehow the Court were not to define them as opinion but facts, an interpretation that would appear legally incorrect and

implausible, they certainly would be considered true facts based on a reading of the Complaint and attached Exhibits themselves. At its core, Ms. Sassower's criticism of the column (as expressed in an 18-page memo at Cmplt., Ex. A), centers on what The Times determined not to publish about her, her arrest and sentence, and her cause - - non-inclusions The Times certainly is free to have decided on. For all these reason, as set forth in Point II, *infra*, the claim of libel, let alone the novel and unprecedented claim of "journalistic fraud", must be dismissed.

Ms. Sassower has had a long and colorful history of litigation in and out of New York. Her litigations generally are marked by voluminous submissions on a myriad of procedural and rather inconsequential issues. (See, *e.g.*, Ex. C-3 of the Complaint, showing the paper trail in her "Disruption of Congress" case, in particular on its third page listing three memos seeking "immediate supervisory oversight of Judge Holman", a motion to disqualify Judge Holman, correspondence about her attempts to subpoena Senators Schumer and Clinton, among others, etc.) In the hope of avoiding such a pattern in this litigation, it is respectfully submitted that for the reasons set forth herein, this Complaint be dismissed with prejudice now.

POINT I

THE VAST BULK OF THE COMPLAINT DOES NOT EVEN APPROACH STATING A CAUSE OF ACTION

A reading of the 175 paragraphs of the Complaint confirms that Ms. Sassower only minimally deals with the November 2004 column which appears to be, at least technically, what she is suing about; rather, it primarily complains of both the judiciary's and The Times's inactive response and lack of engagement to her "patriotic purpose" of "safeguard[ing] the public interest in the integrity of the processes of judicial selection and discipline." (Cmplt. ¶ 4) Thus, the themes of the Complaint are that the judicial selection process is corrupt, that both our public

servants and The Times have done nothing about it and, worse, that The Times especially has not responded to the scores of communications from her regarding her campaign.

Of course, none of this is remotely actionable. Plaintiff does not have standing to attack the New York State judiciary, legislature or executive about the judicial nominating process generally. More to the point, The Times certainly is not a party on whom liability could be pinned even if any of her grievances had merit. Nor is The Times legally responsible to take up the cudgels in support of her cause. As the United States Supreme Court said in *CBS v. Democratic National Committee*, 412 U.S. 94, 124, 93 S.Ct. 2080, 2097 (1973), "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material. That editors - - newspaper or broadcast - - can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided". And likewise, no matter how many letters plaintiff wrote to defendants and other Times employees chastising them for their reporting, informing them as to the evils she sees, and demanding that they read her website and respond to her writings, no company, not even a well-respected newspaper, is legally bound to respond to such entreaties.

Thus, the first paragraph of "Factual Allegations" relates how Ms. Sassower "alerted" The Times about the "then unfolding" story of corruption involving Senators Schumer and Clinton regarding the nomination of Judge Wesley to the U.S. Court of Appeals for the Second Circuit:

> "16. By a memorandum dated June 11, 2003 to THE EDITORIAL BOARD (Exhibit B), plaintiffs alerted it to an important story, then unfolding, about the corruption of federal judicial selection, involving New York Senators Charles Schumer and Hilary Rodham Clinton and the nomination of New York Court of Appeals Judge Richard C. Wesley to the Second Circuit Court of Appeals – 'as

Readily-Verifiable from the 'Paper Trial' of Primary-Source Materials Posted on the Home-page of *www.judgewatch.org*' -- CJA's website (Exchibit (C-1)."

This was followed by a recitation of Ms. Sassower's repeated efforts to speak by phone with "news editors" about this (Cmplt. ¶ 17) and The Times' "pattern and practice of not examining" the story:

> "18. The facts set forth in the June 11, 2003 memorandum-complaint are true and correct—especially as to the evidentiary significance of CJA's posted 'Paper Trail' of primary source materials in documentarily establishing the corruption of federal judicial selection involving Senators Schumer and Clinton, as well as The Times' pattern and practice of not examining federal judicial nominations for New York and the Second Circuit."

Paragraph 19 complains that though Ms. Sassower's "memorandum-complaint was marked **'URGENT ATTENTION REQUIRED'"** the Editorial Board and the Washington Bureau of The Times did not respond:

> "19. Although the June 11, 2003 memorandum-complaint was marked 'URGENT ATTENTION REQUIRED' because Judge Welsey's nomination to the Second Circuit Court of Appeals had been confirmed by the United States Senate on that day, THE EDTIORIAL BOARD did not respond. Nor did it return SASSOWER's June 11, 2003 phone call 'requesting to speak with Gail Collins or those Editorial Board members who write The New York Times' editorials on federal judicial selection". Nor did the Washington Bureau – the memorandum's only indicated recipient – respond. Both also ignored SASSOWER's follow-up phone calls."

Of course, nothing in these first four paragraphs, which typify the first half of the Complaint, is by any stretch of the imagination actionable, let alone actionable against The Times. Nor is an allegation of "journalistic fraud" first set forth in ¶ 22, where it is alleged that what The Times employees did "knowingly and deliberately, was to ignore documentary evidence both proffered and provided, of systematic governmental corruption, such as of judicial selection and discipline - - and the criminal complicity of New York's highest public officers,

including those up for reelection. The result, as they knew, was to deprive the public of information essential to safeguarding democracy, the rule of law and the casting of an intelligent vote." (Cmplt. ¶ 22)[2]

Another recurring theme in the Complaint are allegations that Times employees did not respond to her communications and seemingly did not review her website, as "directed." See ¶ 19, 29 ("SIEGAL did not respond. Nor did THE EDITORIAL BOARD or Washington Bureau respond – each indicated recipients of the June 19, 2003 letter."), 32, 38[3], 43 ("directing" that the Editorial Board and the Managing Editor respond to her letters and questions) 47, 56 (also complaining that Arthur Sulzberger, Chairman of the Board of The New York Times Company and Publisher of the newspaper did not respond), 58, 60, 66, 72, et al.

The Complaint then turns to her public interest lawsuit, *Elena Ruth Sassower, Coordinator of the Center for Judicial Accountability, Inc. acting pro bono publico v. Commission on Judicial Conduct of the State of New York,* alleging primarily that The Times had "willfully suppressed all coverage" about that litigation (Cmplt. ¶ 42-46, 49-50). Likewise, and somewhat ironically in light of the Westchester Section column, plaintiff then discusses her arrest for "disruption of Congress" (Cmplt. ¶ 63), grieving that "Sassower left several messages

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[2] It should be noted that plaintiff's targets were bipartisan. Thus, in ¶ 25, she alleges that the corruption implicated "a panoply of New York's highest public officers" including Republicans and Democrats both, such as Governor Pataki, Attorney General Spitzer, Chief Judge Judith Kaye, and the leadership of the New York Senate as well as the State's two U.S. Senators. (Cmplt. ¶ 25)

[3] ¶¶ 33-38 complain that Managing Editor Jill Abramson did not respond to Ms. Sassower's letter asking her to clarify whether it was her view that "Washington Editors with supervisory responsibilities" "could properly ignore her urgent phone messages for them" complaining of the "then-unfolding, time-sensitive story" of Judge Wesley's confirmation "whose corrupt dimensions…are <u>documented by a 'paper trail' of primary source materials</u> on the homepage of CJA's website,<u>www.judgewatch.org</u>…"

with Washington Bureau [about the 'disruption of Congress' case]...in an unsuccessful effort to secure coverage." (Cmplt. ¶ 65)

Even when the Complaint touches upon the Westchester Section column, it does so by complaining not of any libelous content, but claiming that it "concealed" facts about the underlying "disruption of Congress" case, and "concealed, totally, the underlying national story of the corruption of federal judicial selection/confirmation" and omitted "nearly everything [she] told Mr. Fuchs [the reporter] when [she] spoke to him from a payphone from jail during an interview of at least 20 minutes." (Cmplt. ¶ 105-106) She concluded that the column was "inexplicable except as a manifestation of the 'profound and multitudinous conflicts of interest,'" summarized in a year's worth of Plaintiff's correspondence with The Times. (¶ 106)

Finally, the Factual Allegations end with some fifteen paragraphs about her communications and travails surrounding her filing and service of the instant summons and complaint. (Cmplt. ¶ 125-138).

POINT II

THE LIBEL AND JOURNALSTIC FRAUD CLAIMS ARISING FROM THE WESTCHESTER COLUMN ARE NOT ACTIONABLE

After only a glancing reference in the Factual Allegations to Ms. Sassower's communications with columnist Marek Fuchs in the course of his reporting for the column and her communications with The Times complaining about it (Cmplt. ¶ 96-109), the Complaint at ¶ 140 focuses on the Nov. 7, 2004 Westchester Section column which appears to be the legal basis for the Complaint. Although Ms. Sassower alleges libel and "journalistic fraud" with respect to the column, since "journalistic fraud" has never been recognized as a cause of action in New

York - - or elsewhere insofar as we can ascertain - - our discussion will focus on libel.[4] The Complaint's claims regarding defamation are set forth in ¶ 140-141 which refers to Exhibit A attached to the Complaint, an 18-page paragraph-by-paragraph analysis of the column. Therefore in Section B, *infra,* we answer that analysis by showing that there is no legally cognizable libelous matter whatsoever in the column.

As that analysis shows, and as some additional paragraphs and allegations in the Complaint make clear, Ms. Sassower's quibbles about the article arise generally from three criticisms: first, she believes The Times should have gone below the surface of the events it was reporting on to explain and endorse the positions Ms. Sassower was advocating, such as the corruption in the judicial selection process. (See, *e.g.,* ¶ 143). Second, she complains about what the column does not include, including, again, her positions on these matters (¶ 148) and her communications with The Times (including making available her website to Times reporters) (¶ 150). Finally, she complains of some of the descriptions and characterizations made of her and her organization in the column (¶ 158-61).

However, the fundamental tenets of libel law make clear that no cause of action for libel can lie here. Thus, the facts related about her arrest and sentencing are from official Senate and court transcripts, and, as such, are privileged. While plaintiff may disagree with The Times's editorial decisions regarding what to cover, she simply can make no cognizable claim regarding the column's lack of support of her campaign about judicial corruption and its non-inclusion of her positions, materials from her website, the interviews with her and her mother,

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[4] Beyond the fact that "journalistic fraud" has never been recognized, plaintiff fulfills none of the requirements of a traditional fraud case-- reliance on a misrepresentation that caused her financial loss.

etc.: the law does not allow for defamation for material not published. Finally, the characterizations of Ms. Sassower are not false facts, which are required for a libel claim to be stated, but are colorful descriptions expected in a column and as such, under New York law, are protected as the author's opinion.

A. Basic Libel Principles Dictate Dismissal of the Complaint

(i) Defamatory Meaning and Substantial Truth

A defamatory statement is one which tends to expose a person to hatred, contempt or aversion or to induce an evil or unsavory opinion of her in the minds of a substantial number of people in the community. *Mencher v. Chesley,* 297 N.Y. 94 (1947). A false fact is a necessity in a defamation claim. *600 West 115th Street Corp. v. Von Gutfeld,* 80 N.Y. 2d 130, 139, *rearg. denied*, 81 N.Y. 2d 759 (1992). Thus, it is clear that plaintiff may not state a claim simply because she disagrees with the reporting in the column or, even in the event a statement is false, if that falsity does not significantly bear on her reputation.

Moreover, the report need not be exactly true; it merely must be substantially true. Proof of falsity must go to the "gist" or "sting" of the defamation. As the U.S. Supreme Court stated, the test is whether the alleged libel as published "would have had a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2433 (1991). Libel law "overlooks minor inaccuracies and concentrates upon substantial truth." *Id* at 2432-33. Thus, for example, describing a violation of security law imprecisely as "fraud", *Orr v. Argus-Press Co.*, 586 F 2d 1108 (6th Cir. 1978), *cert denied* 440 U.S. 960 (1979), or saying that a juvenile was arrested for a crime when

in fact he was arrested for "delinquency", *Piracci v. Hearst Corp.*, 263 F. Sup. 511 D.Md. (1966), *aff'd* 371 F. 2d 1016 (4th Cir. 1967), are not actionable since they are minor inaccuracies which courts have determined do not affect the gist of what the reader takes from the article and do not render the statements false.

Additionally, the omission of details is not actionable. It is "largely a matter of editorial judgment in which the courts and juries, have no proper function." *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). Indeed, since New York law requires pleading with particularity of the defamatory words complained of, CPLR § 3016(a), it is clear as a matter of law and logic that a libel action cannot stand on words, ideas or positions which are not written in an article.

More generally it would be unconstitutional to pin liability on material a publisher determined not to print. As the U.S. Supreme Court concluded in *Miami Herald Publishing 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 size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." [5]

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> "Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper. There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material."

Associates & Aldrich Company v. Times Mirror Company, 440 F.2d 133, 135 (9th Cir. 1971)

Whether a statement is defamatory is for the court to decide on just this sort of CPLR 3211(a)(7) motion. The court makes the threshold determination whether a statement is capable of defaming the plaintiff. This decision is made by construing the words in their accepted ordinary meaning and by taking into consideration the article's effect on the average reader. James v. Gannett Co., 40 N.Y. 2d 415, 386 N.Y.S. 2d 871 (1976).

(ii) Report of Official Proceedings

All of the discussion in the column about Ms. Sassower's arrest in Congress and the sentencing hearing before Judge Holeman (where he proposed a suspended sentence, probation, an apology and other limitations, but when she rejected that, sentenced her to six moths in jail) are protected from suit under the privilege for publishing fair and accurate reports of an official proceeding. N.Y. Civil Rights Law § 74. Pursuant to that law, a fair and substantially accurate report of an official, judicial or legislative proceeding cannot be the basis for a defamation action. *Holy Spirit Ass'n v. New York Times Co.*, 49 N.Y. 2d 63, 424 N.Y.S. 2d 165 (1979); *Freeze Right Refrigeration Co. v. New York Times Co.*, 101 A.D. 2d 175, 475 N.Y.S. 2d 383 (1st Dep't 1984).[6] The purpose of this privilege is to allow the press, as surrogates of the public, to freely report on Government activities, and in so doing, fulfill its constitutional obligation to report to the public on what its government is doing. Thus, reporting on the actions of Congress and on the sentencing hearing in the D.C. Superior Court are fully

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[6] The contents of public records are "a proper subject of judicial notice" by the courts of New York. *Affronti v. Crosson*, 95 N.Y.2d 713, 720, 723 N.Y.S.2d 757, 761 (2001), *cert. denied*, 534 U.S. 826 (2001); *Brandes Meat Corp. v. Crommer*, 146 A.D.2d 666, 667, 537 N.Y.S.2d 177, 178 (2d Dep't 1989). "Judicial notice is appropriate on pretrial motions that seek dismissal of a complaint." *Wells v. State*, 130 Misc.2d 113, 121, 495 N.Y.S.2d 591, 597 (Sup. Ct. Steuben Co. 1985) *aff'd*, 134 A.D.2d 874, 521 N.Y.S.2d 604 (4th Dep't 1987).

protected. In any event, in the Complaint itself, Ms. Sassower in no way denies the basic facts of her arrest and sentence (Cmplt ¶ 63, 89).[7]

(iii) Opinion

Finally, since defamation can only arise from false fact, not opinion, the descriptions and colorful characterizations of Ms. Sassower are protected speech. According to longstanding constitutional principles, "it is a settled rule that expressions of an 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 (1986) (*quoting Rinaldi v. Holt, Reinhart & Winston*, *supra,* at 380). This basic constitutional principle was underscored by the Supreme Court's categorical statement: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). As the New York Court of Appeals, citing *Gertz,* held, an expression of pure opinion is not actionable and receives constitutional protection "accorded to the expression of ideas, *no matter how vituperative or unreasonable it may be.*" *Steinhilber,* 68 N.Y. 2d at 289. (emphasis added)

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[7] The transcripts of the Senate hearing and sentencing hearing are attached as Exhibits A and B to the Aff't of George Freeman submitted herewith.

Consistent with these principles, in *Milkovich v. Lorain Journal Co.*, 497 U.S.1, 20 (1990), the Supreme Court held that its line of cases "provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." It reasoned that "this provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich,* 497 U.S. at 20. Indeed, "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). In *Milkovich,* the Court focused mainly on the verifiability of the statement at issue, ruling that only if it could be proven as true or false could it be actionable.

The Court relied on two earlier cases, *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6 (1970), and *Letter Carriers v. Austin,* 418 U.S. 264 (1974). In *Greenbelt,* involving a real estate developer's negotiations with a local city council for a zoning variance, a newspaper published accusations of the developer's negotiating position as "blackmail". Rejecting the contention that liability could be premised on the notion that word "blackmail" implied that the developer committed a crime, the Court held that the "imposition of liability on such a basis was constitutionally impermissible," reasoning 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 [the developer's] negotiating position extremely unreasonable." 398 U.S. at 13-14. Similarly, in *Letter Carriers*, the court held that the use of the word "scab" was not defamatory since it was used in a "loose figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members." 418 U.S. at 286.

Though *Milkovich* focused mainly on the verifiability of the statement in question, the New York Court of Appeals, interpreting the New York Constitution, has protected opinion even more broadly "by looking at the content of the whole communication, its tone and apparent purpose." *Immuo AG v. Moor-Jankowski* ("*Immuno II*"), 77 N.Y.2d 235, 254[8]. As our Court of Appeals reasoned in gently but firmly supplementing *Milkovich*, "statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying *any* facts." *Id.* (emphasis in the original). "Under New York Law, communication is unlikely to be found actionable if its immediate context and its broader social context and 'surrounding circumstances are such as to signal...listeners that what is being...heard is likely to be opinion, not fact.'" *Rappaport v. VV Publishing Corp.*, 163 Misc. 2d 1 (N.Y.Co. Sup. Ct. 1994), *aff'd.*, 223 A.D. 2d 515 (1st Dep't. 1996).

The issue of whether the statements complained of here constitute non-actionable opinion "is a question for the Court in the first instance." *600 West 115th Street Corp., supra,* 80 N.Y.2d at 139 (citations omitted). *See also Immuno II,* 77 N.Y.2d at 254. Here, of course, at issue is a column -- written in a wry, personal and vaguely edgy but not unsympathetic style -- where more opinionated writing is expected, not a straight news article.

Indeed, many of the cases in the opinion area have been dismissed on CPLR 3211(a)(7) motions. Thus, for example, *Steinhilber, supra,* 68 N.Y.2d 283, came to the Court of Appeals on an appeal of a CPLR 3211(a)(7) motion. The reason is self-evident: no amount of

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[8] In the free speech area, the Court of Appeals has consistently held that the protection available to defendants under the New York State Constitution - - and, in particular, Article I, Section 8 - - is broader than that required by the First Amendment. *Immuno II,* 77 N.Y. 2d at 249; *O'Neill v. Oakgrove Construction, Inc.* 71 N.Y. 2d 521, 529 (1988).

discovery or factual submissions can change the plain reading and context of the article, and it is the very words and tone of the article which, alone, need to be examined on a motion to dismiss.

At the outset of this new baseball season, *Parks v. Steinbrenner,* 131 A.D.2d 60, 62-65 (1st Dep't 1987), is particularly apt. This was a case in which an umpire sued George Steinbrenner for libel after the Yankee principal owner issued a press release criticizing plaintiff's abilities. Justice Ellerin, for a unanimous First Department, held that the threshold issue, "which must be determined, as a matter of law, is whether the complained of statements constitute fact or opinion. If they fall within the ambit of 'pure opinion,' then even if false and libelous, *and no matter how pejorative or pernicious they may be*, such statements are safeguarded and may not serve as the basis for an action in defamation." (emphasis added) The court went on to reason that it is the judge's role to determine the significance "to be accorded the purpose of the words, the circumstances surrounding their use and the manner, tone and style with which they are used." On that basis, though defendant had stated that Parks was not a "capable umpire", didn't "measure up" and made "misjudgments", the court reversed the trial court and ordered the complaint dismissed prior to any discovery.[9]

B. The Column Contains No Actionable Content

Under the basic tenets of libel just discussed, it is clear Plaintiff's libel claim is not actionable under any legal basis. Since Ms. Sassower, in Exhibit A to her Complaint,

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[9] In the event that somehow this case is allowed to go on, it would be subject to a summary judgment motion since plaintiff is an archetypal limited purpose (vortex) public figure who would have to show actual malice; there is no evidence whatsoever that columnist Fuchs had any doubts, let alone serious doubts (which would have to be proven by clear and convincing evidence) of probable falsity in his report. Because that point would necessitate evidence beyond the four corners of the Complaint and official records, we do not now make that argument on this motion to dismiss.

analyzed the article on a paragraph-by-paragraph basis, we shall do so as well, albeit in a more abbreviated way, and by reference to the legal rules set forth in Point II. A., *supra.*

Paragraph 1: ELENA SASSOWER, a White Plains Hebrew-school teacher and judicial activist, is -- as even her staunchest defenders note -- something of a handful. Her conversational style can best be described as relentless, and her passions, expressed in long recitations, can exhaust the most earnest listener.

Ms. Sassower's complaint about the descriptions of her as "something of a handful", "relentless" and that "her passions, expressed in long recitations, can exhaust the most earnest listener," are all protected opinion. They are exactly the type of subjective and figurative characterizations on which people can disagree and which cannot be proven true or false.

Moreover, *arguendo,* if one could somehow construe such terms to be facts, they are indisputably true. Columnist Fuchs, the "earnest listener" described, was exhausted by his interview with her where she unceasingly crusaded against judges though he was trying to interview her about her own case. Moreover, the characterization of Ms. Sassower, as "relentless" certainly finds support in a reading of the scores of letters she has written to The Times and others in support of her campaign, many attached as exhibits to the Complaint.

Paragraph 2: But even allowing for that, her defenders can't get past one little fact: that some of those relentless words, not threatening but apparently very annoying to a Washington judge, have landed her behind bars. For speaking out of turn at a Senate hearing in 2003, she is now more than four months into a six-month sentence in a medium-security jail.

All the facts in this paragraph are fair and accurate reports of the Senate hearing and the sentencing hearing in District of Columbia Superior Court (attached to the Freeman Aff't submitted herewith). Most of Ms. Sassower's criticism in her Exhibit A are not really of Mr. Fuchs' reportage, but of the underlying events, i.e., questioning why Mr. Fuchs did not write

about why "a judge would be justified in putting" her in jail and criticizing Mr. Fuchs for "conceal[ing] the bogus, malicious nature of the 'disruption of Congress' charge against me."

> **Paragraph 3: Ms. Sassower and her mother, Doris, run a White Plains group called the Center for Judicial Accountability. It specializes in frontal assaults on the clubby process that often puts judicial nominees on the bench. Their beef is more systemic than ideological: nominations, they say, seem to go not to the most knowledgeable judges but the best connected.**

Here Ms. Sassower complains of statements which are not defamatory, not substantially false, but simply not written in the way Ms. Sassower would prefer. Thus, she complains that the column says that she and her mother "run" the Center for Judicial Accountability, but do not say they co-founded it. Likewise, she complains of the column's description that her organization's specialty is not just "the clubby process that often puts judicial nominees on the bench" but also processes of judicial discipline. None of her disagreements are the least bit actionable.

> **Paragraph 4: Obviously, this stance has not endeared her to the judicial establishment (or the elected officials who approve nominations) -- on top of which, add her reputation for delivering her views with the subtlety of a claw hammer.**

Similar to Paragraph 1, Ms. Sassower complains of the characterization of her reputation "for delivering her views with the subtlety of a claw hammer." Again, this colorful, and maybe even vituperative, description is protected opinion.

> **Paragraph 5: When she began to focus on the nomination of Richard Wesley to the Second Circuit of the United States Court of Appeals, she was warned by police officers at the Capitol in Washington not to disrupt his confirmation hearing.**

Again, Ms. Sassower here suggests that Mr. Fuchs' statement that "she began to focus on the nomination of Richard Wesley" was inaccurate. Rather, she argues, he should have written that she "opposed" the nomination. Certainly the distinction between those two words is well with The Times's editorial discretion, with no substantial difference in meaning and, in any event, is not defamatory.

Paragraph 6: She did not heed the warning. Toward the end of the hearing, she asked to speak, she says, persisting even after the gavel came down.

Ms. Sassower's rendition here is actually worse for her than the statement in the column. She quarrels that right before she was arrested in the Senate Judiciary Committee Hearing when, as Mr. Fuchs nicely put it, "she asked to speak", it was not "toward the end of the hearing", but after the hearing was over and had been adjourned. Again, all of this was supported by the official record, and is substantially true since the gist of the report is the same in either case.

Paragraph 7: Unseemly as officials may have found this behavior, it is rare that even cacophonous outbursts result in charges, let alone jail terms. In May, when protesters disrupted a House Armed Services Committee session by unfurling a banner and shouting at Defense Secretary Donald H. Rumsfeld to resign, they were ushered out -- but not charged or arrested.

If anything, Paragraph 7 is sympathetic to Ms. Sassower, in that Mr. Fuchs notes that in another situation, protesters "were ushered out - - but not charged or arrested."

Paragraph 8: Ms. Sassower, however, was charged with disorderly conduct (and by the way, Mr. Wesley's nomination was confirmed). Court transcripts reveal that her trial, which took place in April, was a production, with Ms. Sassower, who has no law degree, conducting her own defense. She charmed neither jury nor judge, but when she was found guilty, the prosecution recommended only a five-day suspended sentence.

Ms. Sassower claims that she was charged with "disruption of Congress" not "disorderly conduct". But the gist of the report is the same as the truth as admitted by Ms. Sassower in Exhibit A and in the body of the Complaint. Moreover, she argues that the difference "diminish[es] the stature of my offense", suggesting the "disorderly conduct" charge in the column is less grave, and hence would be less, rather than more, defamatory than the actual charge. Again the sentences dealing with the trial and the sentencing hearing are fair and accurate report of the actual hearings, and are substantially true, as can be seen by reading the sentencing hearing transcript. Finally, though she contends that "Judge Holeman made a mockery of my right to a fair trial", that is not an issue related to The Times.

> **Paragraph 9: Judge Brian F. Holeman of Superior Court gave her a three-month sentence, but expressed a willingness to suspend it as long as Ms. Sassower agreed to meet some conditions: to take anger-management classes; stay away from the Capitol complex; sever all contact with members of the Senate Judiciary Committee; and apologize.**

Mr. Fuchs' rendition of the sentencing hearing is fully accurate, as can be seen from the transcript of the sentencing hearing. Again, Ms. Sassower's grievance is not with his report but with the actions of Judge Holeman as "unfounded, inappropriate, or unconstitutional," but that is not a claim that can be brought against The Times.

> **Paragraph 10: The apology, according to court transcripts and an interview with Ms. Sassower from a jail pay phone, was the biggest sticking point. She absolutely refused to apologize.**

As above, this sentence is demonstrably a fair and accurate report of the official transcript of the sentencing hearing.

> **Paragraph 11: So Judge Holman retracted his offer to suspend, then doubled her sentence.**

See Paragraph 10, *supra.*

> **Paragraph 12: Said he: "Ms. Sassower, once again, your pride has gotten in the way of what could have been a beneficial circumstance for you. This incarceration begins forthwith; step her back."**

This is a direct quote from the sentencing hearing transcript.

> **Paragraph 13: Even those who have found Ms. Sassower difficult emphasize that she has never been even remotely threatening. Ralph M. Stein, a Pace University Law professor, remembers her auditing his classes and attending talks he has given. She launched into "polite but fulminating" assaults, said Mr. Stein, but she never crossed the line.**

In this paragraph Ms. Sassower complains about being described as "difficult" and "polite but fulminating," but even as she admits in her analysis, these are "characterization[s]", devoid of any facts": indeed, they are opinionated expressions and subjective descriptions which are fully protected. They are also supported by not only the sources he cites, such as Professor Stein, but also by Ms. Sassower's actions and writings evident from the Complaint.

> **Paragraph 14: New York State Senator John A. DeFrancisco, who has served on the state judiciary committee for 12 years, said that just after he took over as chairman, Ms. Sassower came to testify at a public hearing "wielding a dolly with her and three or four big boxes of materials." She was impossible to keep on message, he said, and he eventually had to tell her that she could not continue. But in the end, she was harmless.**

Ms. Sassower's complaint here appears to be that in his reporting he included a similar example of Ms. Sassower's actions, attributed to State Senate Judiciary Chairman John DeFrancisco. Again, her quarrel is that the episode is mentioned at all, not that it is incorrectly reported. And, again, grievance, is not with The Times, but with Senator Defrancisco's comments and actions at the hearing.

Paragraphs 15 and 16: Nathan Lewin, a well-known Washington lawyer, evidently agrees with that assessment; he is working pro bono to free Ms. Sassower, who is 48.
"Elena makes things more difficult for herself than the ordinary person," Mr. Lewin said, "but judges are not supposed to lose their temper or be vindictive."

The last part of this passage is supportive of Ms. Sassower's position. Again, her lawyer's description of her character that she "makes things more difficult for herself than the ordinary person" is protected opinion.

Paragraph 17: And Ms. Sassower, expressing few illusions about her relatively friendless state, put it this way: "It's not a matter of who is on my side. But why are they not questioning what happened? I shouldn't be in jail. I'm just here because everyone is standing idly by."

Even though she criticizes the column for discussing her "relatively friendless state", at the same time she admits that those on her side are "not questioning what happened" and "standing idly by." Even in her critique, those who she argues are her friends, are people who had signed a petition on her website. And, as other passages in the column state, even her defenders and her attorneys have said that she was difficult to be with. In any event, as the other descriptions and characterizations of her, this too is protected opinion.

CONCLUSION

For all the reasons set forth above, it is respectfully submitted that the instant Complaint should be dismissed with prejudice.

Dated: April 13, 2006

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Index No.: 05-19841

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Plaintiffs,

-against-

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

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

George Freeman, Esq.

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LEGAL DEPARTMENT

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