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,

Index #05-19841

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 for THE EDITORIAL BOARD, DANIEL OKRENT, BYRON CALAME, MAREK FUCHS, and DOES 1-20,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW

IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT & IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SANCTIONS, DISCIPLINARY REFERRALS, DISQUALIFICATION OF MR. FREEMAN & THE NEW YORK TIMES COMPANY LEGAL DEPARTMENT, A DEFAULT JUDGMENT, SUMMARY JUDGMENT & OTHER RELIEF

ELENA RUTH SASSOWER, *Pro Se*
Individually & as Coordinator of the CENTER FOR JUDICIAL ACCOUNTABILITY, INC., & for The Public

ELI VIGLIANO, Esq.
Attorney for CENTER FOR JUDICIAL ACCOUNTABILITY, INC., & for Plaintiff ELENA RUTH SASSOWER as Coordinator, & for The Public

June 1, 2006

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PLAINTIFFS' MEMORANDUM OF LAW

This memorandum of law is submitted in opposition to the April 13, 2006 motion of George Freeman, Esq., Assistant General Counsel of The New York Times Company, on behalf of defendants THE NEW YORK TIMES COMPANY, SULZBERGER, KELLER, ABRAMSON, SIEGEL, COLLINS, and CALAME to dismiss plaintiffs' complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7). It is also submitted in support of plaintiffs' June 1, 2006 cross-motion for sanctions, disciplinary referrals, disqualification, a default judgment, summary judgment, and other relief.

MR. FREEMAN'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION IS A FRAUD UPON THE COURT

Mr. Freeman's 22-page memorandum of law in support of his motion conspicuously omits the legal standard to be applied on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7). That standard is recited in *Silsdorf v. Levine*, 59 N.Y.2d 8, 12 (1983) – a case presenting a cause of action for defamation wherein our New York Court of Appeals stated:

> "The issues raised on this appeal come before the court in the procedural posture of a motion to dismiss the complaint for failure to state a cause of action. Thus, we accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim. If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action (*219 Broadway Corp. v. Alexander's, Inc.*, 46 NY2d 506, 509)." (underlining added)

It is because the complaint's allegations are legally sufficient in establishing its two causes of action for defamation and defamation *per se* (¶¶139-155, ¶¶156-162) arising from defendant FUCHS' column "*When the Judge Sledgehammered The Gadfly*", as well as its third cause of action for journalistic fraud (¶¶163-175), that Mr. Freeman's memorandum flagrantly falsifies,

omits, and distorts the complaint's allegations and cites law that is either inapplicable by reason thereof or falsified and distorted to support his otherwise insupportable dismissal motion. As demonstrated by the first 44 pages of this memorandum, as well as by plaintiff SASSOWER's accompanying affidavit, such motion is a fraud on the court -- from beginning to end and in virtually every sentence.

CPLR §3211(c) allows either party to "submit any evidence that could properly be considered on a motion for summary judgment". Mr. Freeman neither invokes it nor requests that the Court consider his pre-answer dismissal motion as one for summary judgment for defendants. Nor has he furnished the Court with any basis to so-consider his motion[1]. Even were the two transcripts he annexes to his accompanying affidavit[2] "fair and accurate" reports of the Senate Judiciary Committee's May 22, 2003 hearing and of SASSOWER's June 28, 2004 sentencing for "disruption of Congress" – which they are not[3] – they would be insufficient for dismissal of plaintiffs' two defamation causes of action. This, because the defamation causes of action are not confined to the Committee hearing and criminal sentencing. As illustrative, they rest on such other knowingly false and defamatory facts as those FUCHS recites pertaining to SASSOWER's trial for "disruption of Congress" (for which Mr. Freeman annexes no transcript) and pertaining to SASSOWER's unidentified "staunchest defenders", "defenders", and her "most earnest listener" –

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[1] Such requires the Court to give "adequate notice to the parties", CPLR §3211(c).

[2] Mr. Freeman's four-paragraph affidavit would be insufficient for supporting summary judgment pursuant to §3212, as it fails to "recite" ANY, let alone, "all the material facts" and does not "show that...the cause of action...has no merit", as subsection (b) of §3212 expressly requires. The completely deficient, indeed fraudulent, nature of Mr. Freeman's affidavit – which – to avoid penalties of perjury -- fails to reiterate, under oath, the factual assertions improperly made in his memorandum of law -- is set forth in SASSOWER's accompanying affidavit.

[3] See pages 8-9, 26-27, 34-36, 38-40 herein.

anonymous persons alleged by the complaint to be fictions employed by FUCHS to buttress his column's baseless characterizations of SASSOWER.

Mr. Freeman's awareness of the insufficiency of his two annexed transcripts for dismissal pursuant to CPLR §3211(c) might explain why his motion also does not seek dismissal based on "documentary evidence" pursuant to CPLR §3211(a)(1).

MR. FREEMAN'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION MUST BE DENIED, *AS A MATTER OF LAW*

It is well-established that where a motion to dismiss for failure to state a cause of action is directed to the whole complaint -- as is Mr. Freeman's -- it must be denied in its entirety if any one cause is legally sufficient, *Advance Music Corporation v. American Tobacco Company, et al.*, 296 N.Y. 79 (1946); *Birnbaum v. Citibank*, 97 A.D.2d (2nd Dept. 1983); *Canavan v. Chase Manhattan Bank*; 234 A.D.2d 494 (2nd Dept. 1996); *Ross Network, Inc. v. RSM McGladrey, Inc., et al.*, 2006 NY Slip Op 50778U (Nassau S.Ct./May 1, 2006).

Mr. Freeman's notice of motion (at p. 1) seeks dismissal of the complaint "in its entirety", but fails to identify more than that "This is an action claiming defamation". Thus the notice does not encompass the journalistic fraud cause of action[4] and fails to acknowledge that there are two separate causes of action for defamation presented by the complaint: defamation and defamation *per se*. His memorandum of law is similarly deficient. It reiterates the requested relief to dismiss "the instant complaint" (at p. 22), yet also fails to acknowledge that there are two defamation causes of action. As for the journalistic fraud cause of action, Mr. Freeman's memorandum offers two sentences (at pp. 8-9) -- both legally insufficient to support dismissal of that cause, with his

[4] Mr. Freeman also omits the journalistic fraud cause of action from his RJI, identifying only a single "tort at issue", *to wit*, libel.

second sentence (tucked in a footnote) demonstrably fraudulent. Indeed, not a single allegation of the journalistic fraud cause of action – or, for that matter, of the two defamation causes of action are actually addressed by Mr. Freeman's memorandum. Such is demonstrated by pages 20-22 herein, with pages 31-44 demonstrating Mr. Freeman's total inability to confront the very document that is decisive of plaintiffs' defamation claims, *to wit*, SASSOWER's contextual analysis of FUCHS' column – annexed to the complaint as Exhibit A. Indeed, Mr. Freeman has fashioned a motion to dismiss the complaint for failure to state a cause of action without ever confronting the pleaded causes themselves.

MR. FREEMAN'S INTRODUCTORY PREFACE (at pp. 1-2) IS MATERIALLY FALSE AND MISLEADING

The very first sentence of Mr. Freeman's memorandum (at p. 1) begins by misrepresenting the plaintiffs. He fails to identify that plaintiff ELENA SASSOWER is suing in two separate capacities – individually and as Coordinator of the Center for Judicial Accountability, Inc. He also fails to identify that she and the CENTER FOR JUDICIAL ACCOUNTABILITY, INC. (CJA) are appearing not for themselves alone, but for "The Public as represented by them". Instead, he identifies the plaintiffs only as ELENA SASSOWER and CJA (at p. 1), who he improperly combines so as to refer to them not as "plaintiffs herein", but as "collectively, Ms. Sassower". He thereby obscures the grounds upon which these separate plaintiffs each have causes of action for defamation and journalistic fraud – so pleaded by the complaint's causes of action (¶¶139-155, ¶¶156-162, ¶¶163-175) and "WHEREFORE" clause (at p. 60).

Having thus compressed the separate plural plaintiffs into the singular "Ms. Sassower", Mr. Freeman is better enabled to personalize, disparage, and falsify the complaint's content, which he does throughout his memorandum. Likewise, throughout his memorandum, are his utterly false

characterizations of defendant FUCHS' column -- the first being his description of the column (at p. 2) as "a short but wry and sympathetic portrayal of Ms. Sassower" (underlining added).

The first sentence of Mr. Freeman's memorandum also misrepresents defendants and their status by its appended footnote 1. Mr. Freeman wholly omits any reference to defendant DOES 1-20 – thereby concealing that he and The New York Times Company Legal Department are among them. He also baldly purports that defendants "Okrent and Fuchs are not New York Times Company employees and have not been properly served" and that defendants The New York Times and its EDITORIAL BOARD "are not corporate entities susceptible to suit". All this is non-probative, insufficient, false, and misleading – and further set forth at ¶¶ 5-7 of SASSOWER's accompanying affidavit and at pages 59-60 herein for a default judgment against these non-appearing defendants.

MR. FREEMAN'S PRELIMINARY STATEMENT (at pp. 2-4)
IS MATERIALLY FALSE, MISLEADING, & A FRAUD UPON THE COURT

Mr. Freeman's "Preliminary Statement" (at pp. 2-4) is four paragraphs.

His first paragraph (at p. 2) purports to provide an overview of the complaint yet skips – without comment – the quote appearing directly under the complaint's caption (at p. 1) from *Cohen v. Cowles Media Co.*, 501 U.S. 663, 678 (1991):

> "The First Amendment goes beyond the protection of the press..'...'it is the right of the [public], not the right of the [media], which is paramount,'...for 'without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally'".

Mr. Freeman also skips – without comment -- the section of the complaint entitled "The Parties" (at pp. 2-8), wherein plaintiff CJA's identity, mission, and methodology are succinctly set

forth:

> "a national, non-partisan, non-profit citizens' organization...[whose] patriotic purpose is to safeguard the public interest in the integrity of the processes of judicial selection and discipline, which it does by examining, investigating, and interacting with these largely behind-closed-doors processes – and providing the results, in independently-verifiable documentary form, to individuals and institutions charged with protecting the public from corruption. Among such institutions, The New York Times." (¶4, underlining in the original).

This same section had also identified (at ¶5) defendant THE NEW YORK TIMES COMPANY as "a money-making business, publicly traded on the New York Stock Exchange", whose revenues in 2005 were $3.4 billion[5] and whose "flagship", The New York Times, "actively promotes itself as an authoritative, comprehensive news source", including by "extensive advertising" – most prominently by "its front-page masthead slogan, 'All the News That's Fit to Print'" (at ¶6).

Instead – and without identifying any of the allegations of the complaint's three causes of action, especially ¶¶164-175 that the processes of judicial selection and discipline and the conduct of public officers with respect thereto are "matters of legitimate public concern" as to which The Times has First Amendment responsibilities[6] when presented with *readily-verifiable documentary*

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[5] "Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public...they must pay the freight; and injured persons should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand." *Buckley v. New York Post Corp.*, 373 F.2d 175, 182 (2nd Cir. 1967), quoted in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967).

[6] "...comments and opinions on judicial performance are a matter of public interest and concern. The rule of the *Times [v. Sullivan]* case was designed to protect the free flow of information to the people concerning the performance of their public officials. (*Garrison v. Louisiana*, 379 US 64, 77) The public, clearly, has a vital interest in the performance and integrity of its judiciary.", *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 380 (1970) (underlining added);

"'Whatever differences may exist about the interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.'... The operations of the courts and the judicial conduct of judges are matters of utmost public concern", *Landmark v. Virginia*, 435 U.S. 829, 838-9 (1978) (underlining added).

evidence of their corruption and that The Times has, instead, knowingly and systematically misled the public by materially false and deceptive news reports and editorials about these processes and public officers, sabotaging reform and rigging elections, to advance "its own business and other self-interests" -- Mr. Freeman purports that the complaint concerns SASSOWER's "views" of the corruption of the judicial selection process, "her self-appointed monitoring role", 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" – as to which he announces (at p. 2) "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", citing to his "Point I, *Infra*".[7]

Mr. Freeman's second paragraph (at pp. 2-3) then purports, falsely, that it is not until ¶140 that the complaint "comes to the column" -- snidely asserting, as if there is doubt, that the column

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[7] Mr. Freeman presents only a single legal authority in his "Point I, *Infra*" (at p. 5), *CBS v. Democratic National Committee*, 412 U.S. 94, 124 (1973) -- whose inapplicability is clear from his quoted excerpt:

> "[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." (underlining added).

The case at bar has NOTHING to do with the discretion Congress provided broadcast media to make journalistic decisions (subject to FCC oversight of its compliance with such license requirements as the fairness doctrine) – which is what *CBS v. Democratic National Committee* is about -- and Mr. Freeman makes no showing as to its relevance to plaintiffs' causes of action against a newspaper for libel and journalistic fraud.

Mr. Freeman's attempt to mislead the Court by this citation – and by citation to *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) in his Point II (at p. 11) [*see* p. 25 herein] – seems all the more apparent from *Herbert v. Lando, et al.*, 441 U.S. 153, 166-7 (1979) wherein the Supreme Court rejected any notion that these two cases "had announced unequivocal protection for the editorial process" and powerfully affirmed that the editorial process is a proper and essential subject of inquiry by libel plaintiffs.

"presumably, is the subject matter of this action" – and falsely suggesting that after two fleeting paragraphs the complaint reverts to some digressive continuation of allegations manifesting SASSOWER's "relentless and irrepressible...campaign". This is patently false.

The complaint "comes to the column" in its ¶2, with its ¶¶14-15 expressly specifying the column as "the subject of this libel action". The complaint also "comes to the column" in ¶¶96-107 and in such subsequent paragraphs as ¶¶116-117 and ¶¶126-130, then followed by its separate causes of action for defamation (¶¶139-155) and defamation *per se* (¶¶156-162), both based on the column.

Mr. Freeman's second paragraph (at p. 3) then continues by purporting that the column's depiction of SASSOWER's "actions at the Senate hearing which led to her arrest and conviction" are "amply supported in the Congressional Record". This is an outright fraud on the court.

The "Congressional Record" consists of more than the transcript of the May 22, 2003 Senate Judiciary Committee hearing on Judge Wesley's confirmation, which is all that Mr. Freeman subsequently specifies (at p. 13, fn. 7). However, even that transcript does not support the column's description of what took place at the hearing, which is why Mr. Freeman's accompanying affidavit, although purporting to annex the pertinent pages, does not, in fact, do so[8].

As for the "Congressional Record", a copy of which Mr. Freeman does not supply, it includes the bound volume published by the U.S. Government Printing Office containing, in addition to the transcript of the Senate Judiciary Committee's May 22, 2003 hearing, written statements and related correspondence. This should include CJA's March 26, 2003 written

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[8] Instead, he annexes, without a coverpage, a two-page transcript excerpt of the Senate Judiciary Committee's June 25, 1996 hearing to confirm the nomination of Lawrence Kahn to the District Court for the Northern District of New York, falsely purporting it to be "a portion of the transcript of Confirmation Hearings on Federal Appointments before the U.S. Senate Judiciary Committee of May 22, 2003 at which Ms. Sassower was arrested". *See* ¶¶8-11 of SASSOWER's accompanying affidavit.

opposition statement (Exhibit R-2)[9] and subsequent correspondence to the Senate Judiciary Committee based thereon – primary source documents which, as alleged throughout the complaint (¶¶16, 18, 33, 43(a), 63-64, 66, 69, 75-76, 78, 81, 87, 88, 97, 107, 113, 114(c), 164-165), were prominently posted on CJA's website, www.judgewatch.org (Exhibits C-1, C-3), as a *readily-verifiable* "Paper Trail" of the corruption of federal judicial selection involving the American Bar Association, the Association of the Bar of the City of New York, and New York Home-State Senators Schumer and Clinton, in addition to the Senate Judiciary Committee and Senate leadership. As reflected by SASSOWER's analysis of the column – Exhibit A to the complaint -- such documents establish the material falsity of the column's paragraph 5, as well as of the express and implied facts in the column's paragraph 3 (2nd & 3rd sentences) and paragraphs 4, 6-7.

Mr. Freeman's second paragraph (at p. 3) also purports that the "transcript of the court hearing" of SASSOWER's June 28, 2004 sentencing before Judge Holeman – annexed as Exhibit B to his accompanying affidavit – supports the column's depiction of SASSOWER as having "alienated the judge". To the contrary, the transcript, from the very outset, does not reflect a judge comporting himself in a fair and judicious manner – nor, as highlighted by SASSOWER's analysis (Exhibit A), does it provide a basis for FUCHS portraying the judge with the benevolent language of his column's paragraphs 9 and 11.

Also materially false is Mr. Freeman's assertion that "¶63, 89" of the "Complaint itself" reflect that when SASSOWER "refused to apologize and alienated the judge", she was sentenced to six months incarceration. ¶63 has nothing to do with the sentencing. As for ¶89, it states only:

"On June 28, 2004, SASSOWER was sentenced to a maximum six-month jail

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[9] Exhibits A-T are annexed to plaintiffs' verified complaint.

> sentence on the 'disruption of Congress' charge, after declining terms of probation. The Washington Post, Roll Call, the New York Law Journal, as well as The Philadelphia Inquirer ran contemporaneous news articles and items. Nothing appeared in The Times."

Mr. Freeman's third paragraph (at pp. 3-4) then continues his material deceit as to the complaint and column. He purports:

> "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."

Again, Mr. Freeman is committing outright fraud on the court. The complaint's ¶2 describes FUCHS' column as "knowingly false, defamatory" – with the column described by similar language throughout the complaint: "materially false, misleading" (at ¶101); "deliberately defamatory and knowingly false"'(at ¶140); "false and knowingly so" (at ¶142, underlining in the original); "false and reputationally-damaging" (at ¶149); "false and defaming" (at ¶151), as well as an assertion that the unidentified "'staunchest defenders'" utilized by the column to buttress its defamatory characterizations of SASSOWER are "fictions" (at ¶152). This pleaded falsity is detailed by the analysis of the column – whose 18 pages particularize the falsity of virtually each of the column's 17 paragraphs, prefaced by an introductory description of the column as "deliberately defamatory, knowingly false". In so doing, the analysis shows that the column is not "a fair and accurate summary of what appeared in official government documents".

Likewise a fraud on the court is Mr. Freeman's assertion in this same third paragraph (at p. 3) that the complaint only

> "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."

Examination of the complaint shows that its 175 paragraphs do not describe the proceedings

before Judge Holeman or, for that matter, at the Senate Judiciary Committee hearing. Such appear only in the analysis of paragraphs 2, 5-12 of FUCHS' column purporting to describe the proceedings before Judge Holeman and at the Senate Judiciary Committee's hearing. It is there that SASSOWER summarizes what she directly told FUCHS when he interviewed her for the column – none of which can be described as "quibbl[ing]" and all of which were knowingly omitted from the column so as to falsely portray SASSOWER's arrest, conviction, and sentence as the result of her purported uncharming, difficult personality.

As for Mr. Freeman's further claim (at p. 3) that "what [SASSOWER] really appears to grieve about are characterizations of her", such as "relentless" and "difficult" – but that these "certainly are constitutionally protected opinion", he conceals the complaint's pertinent allegations that the column buttressed these and other unflattering characterizations by attributing them to anonymous "staunchest defenders", "defenders" and a "most earnest listener", whose existence the complaint challenges (¶¶130, 151-152). He also conceals that the column exemplifies these characterizations by express and implied facts pertaining to SASSOWER's "focus[ing]" on the Wesley nomination, on the Senate Judiciary Committee hearing, on her trial for "disruption of Congress", and on the sentencing – facts whose falsity the complaint alleges were known to FUCHS and the other defendants (¶¶140-142, 149).

As for Mr. Freeman's fall-back position (at pp. 3-4):

> "if somehow the Court were not to define [these characterizations] 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."

This is another fraud on the court -- again, based on his concealing that the column's characterizations are sourced in fictional persons and fashioned from knowingly false express and

implied facts. As for his attempt to use the complaint and its exhibits to justify the column's deliberately false characterizations of SASSOWER, the most cursory review of the complaint and its exhibits rebut the column's calculated besmirchment of SASSOWER's good name and professionalism.

As for the last sentence in Mr. Freeman's third paragraph (at p. 4) that

> "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.",

this is also a fraud on the court. Aside from being a misrepresentation of SASSOWER's "criticism of the column", exemplified by her analysis particularizing the falsity of a succession of express and implied facts, known to FUCHS because of what SASSOWER told him directly during his interview of her -- the law does not free The Times to "purposefully avoid the truth" and act "irresponsib[ly] and without due consideration for the standards of information gathering and dissemination normally followed by responsible journalists", *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989); *Sweeney v. Prisoners' Legal Services of New York, Inc.*, 84 N.Y.2d 786, 793 (1995); *Kahn v. New York Times Company, Inc. et al.*, 269 A.D.2d 74, 80 (2000). The column's non-inclusions fall within those categories and establish The Times' actual malice, which the complaint alleges (¶¶150-151).

Mr. Freeman's final fourth paragraph (at p. 4) further underscores his improper, where not outrightly fraudulent, defense tactics. Going outside the record in an effort to prejudice the Court against SASSOWER, he purports – falsely – that she has "a long and colorful history of litigation in and out of New York...generally...marked by voluminous submissions on a myriad of procedural and rather inconsequential issues" and that, by his dismissal motion, he hopes to

"avoid[] such a pattern in this litigation." That he uses – as an example

> "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 Holeman', a motion to disqualify Judge Holeman, correspondence about her attempts to subpoena Senators Schumer and Clinton, among others, etc."

– when that "Paper Trail" is accessible from CJA's website (Exhibit AA-2)[10], enabling him to not only verify the impressive, appropriate, and meticulous nature of SASSOWER's advocacy, but Judge Holeman's brazen violation of her due process rights in the "disruption of Congress" case[11], underscores Mr. Freeman's shameless dishonesty and disrespect for litigation standards.

MR. FREEMAN'S POINT I (at pp. 4-8)
IS MATERIALLY FALSE, MISLEADING, & FRAUDULENT
IN PURPORTING THAT "THE VAST BULK OF THE COMPLAINT
DOES NOT EVEN APPROACH STATING A CAUSE OF ACTION"

Mr. Freeman's Point I (at pp. 4-8) serves no purpose but to obscure the complaint's three pleaded causes of action, which he does not address or even identify. These causes of action appear, clearly and distinctly, under separate headings immediately following the last of the complaint's "Factual Allegations"(¶138). The first cause of action, for defamation, is set forth at ¶¶139-155; the second cause of action, for defamation *per se*, is set forth at ¶¶156-162; and the third cause of action, for journalistic fraud, is set forth at ¶¶163-175.

It is because Mr. Freeman cannot confront the legal sufficiency of these 37 paragraphs without conceding that a dismissal motion for failure to state a cause of action cannot properly be made that he instead argues that "The Vast Bulk of the Complaint Does Not Even Approach

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[10] Exhibits U-BB are annexed to SASSOWER's accompanying affidavit.

[11] Such conclusions by Mr. Freeman would have been facilitated by SASSOWER's June 28, 2005 appellant's brief and supplemental fact statement – referred to at footnote 9 of her analysis (at p. 10) as posted on CJA's website.

Stating a Cause of Action". Such assertion as to "The Vast Bulk" is not only irrelevant to the question as to whether the complaint states a cause of action, but is here outrightly fraudulent.

As Mr. Freeman well knows – and as is reflected by his footnote 9 (at p. 16) – a "limited purpose" public figure suing a media defendant for libel is required to prove actual malice – *to wit*, knowledge that the statement is false or made with reckless disregard to whether it is true or false. Nor can private figures – such as ¶¶146-148 of the complaint alleges plaintiffs to be based on the complaint's "Factual Allegations" (¶¶16-138)[12] – recover presumed or punitive damages without proof of actual malice. Additionally, such proof of actual malice is required to be by clear and convincing evidence.

The complaint's 123 "Factual Allegations" establish that plaintiffs can meet their burden. By clear and convincing evidence, they demonstrate defendants' actual malice by showing that the true facts pertaining to the "disruption of Congress" case and the proceedings before Judge Holeman were known to them prior to publication of FUCHS' column. First, because SASSOWER directly discussed them with FUCHS when he interviewed her for the column he was writing (¶¶97 and 106 of the complaint & analysis). Second, because they were embodied in SASSOWER's extensive prior correspondence with Times' editors, reporters, and SULZBERGER, spanning from June 11, 2003 to June 25, 2004 – all posted on CJA's website and *readily-accessible* to FUCHS when he wrote the column (¶¶16-101 & analysis; Exhibits B-P). Additionally, these "Factual Allegations" present clear and convincing evidence of defendants' common law malice. This, by their recitation of plaintiffs' 15-year history of complaints against

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[12] Mr. Freeman's bald assertion (at footnote 9 (p. 16)) that SASSOWER "is an archetypical limited purpose (vortex) public figure" is without addressing -- or even identifying -- ¶148 of the complaint that "defendants are estopped from asserting anything other than that plaintiffs are non-public figures involved in issues that are similarly private". Such estoppel is based on plaintiffs' showing by their "Factual Allegations".

Times' reporters, editors, and SULZBERGER and the myriad of conflicts of interest arising therefrom.

Both this actual malice and common law malice are alleged by the complaint: at ¶144 of the first cause of action for defamation, incorporated in the second cause of action cause of action for defamation *per se* (¶156).

As to the third cause of action for journalistic fraud (¶¶163-175), Mr. Freeman is presumed to know – including from his footnote 4 -- that fraud must be pleaded with specificity (22 NYCRR §3016(b)), which is what the complaint's "Factual Allegations" and recitation of "The Parties" accomplish, in addition to fulfilling "the requirements of a traditional fraud case", as enunciated at page 14 of the law review article, "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*", 14 Fordham Intellectual Property, Media & Entertainment Law Journal 1 (2003) – cited on the complaint's first page.

As for Mr. Freeman's four-page Point I (at pp. 4-8), the following comments are appropriate in further highlighting the dishonesty of his presentation:

Mr. Freeman's first paragraph (at pp. 4-5) is materially false in several respects. He starts out by falsely claiming (at p. 4) that "the 175 paragraphs of the Complaint" only deal with the column "minimally" – notwithstanding these 175 paragraphs include plaintiffs' two particularized causes of action for defamation (¶¶139-155, ¶¶156-162). He then further states (at p. 4), falsely, that the column "appears to be, at least technically, what [SASSOWER] is suing about" – as if there could be doubt that the column is the subject of this libel suit. He thereupon falsely purports that the complaint

> "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." (at pp. 4-5, bold and underlining added).

In fact, the complaint's 175 paragraphs do not complain of the judiciary's "inactive response and lack of engagement", nor that of "our public servants". Rather, the 175 paragraphs focus on defendants' non-response – and not merely to "scores of communications from [SASSOWER] regarding her campaign", but to *readily-verifiable* primary-source documents establishing the corruption of the processes of judicial selection and discipline, which plaintiffs provided and proffered to them so that they could independently draw their own conclusions about these vital governmental processes and the fitness of involved public officers, including those seeking re-election and further public office – and discharge their First Amendment obligations to the public based thereon, consistent with The Times' front-page motto of "All the News That's Fit to Print" and its public declarations about monitoring government and informing voters.

These distortions of the complaint are the predicate for Mr. Freeman's false second paragraph (at p. 5), which baldly declares that "none of this is remotely actionable" – the "this" being his distorted summary. He follows by asserting that "Plaintiff does not have standing to attack the New York State judiciary, legislature or executive about the judicial nominating process generally"-- which is false as plaintiffs are not suing the three governmental branches herein. Also false is his assertion (at p. 5) that "The Times certainly is not a party on whom liability could be pinned even if any of [SASSOWER's] grievances had merit". As hereinabove highlighted, The Times' liability arises from the complaint's demonstration that the prerequisites for defamation, defamation *per se*, and journalistic fraud have been met – which is why Mr. Freeman's

memorandum nowhere addresses the allegations of the complaint's three causes of action.

As for Mr. Freeman's further assertion (at p. 5), "Nor is The Times legally responsible to take up the cudgels in support of [SASSOWER's] cause", the complaint does not seek to enlist The Times in any "cause". Nor does it contend, as Mr. Freeman implies (at p. 5), that The Times was "legally bound to respond" to the "many letters [SASSOWER] wrote to defendants, 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" (at p. 5). Indeed, Mr. Freeman does not quote from the complaint's causes of action to support his claims. Instead, he quotes from the first four paragraphs of the "Factual Allegations" (¶¶16-19) – none inveighing The Times to support a "cause" or asserting that it is "legally bound" to respond. Undaunted, Mr. Freeman immediately follows with a bald assertion that "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" (underlining added). As Mr. Freeman well knows – but does not disclose -- "the first half of the Complaint" does not contain plaintiffs' three causes of action.

As for Mr. Freeman's assertion (at p. 6) that "an allegation of 'journalistic fraud' first set forth in ¶22" is likewise not "actionable against The Times" – as if the complaint offers but a single allegation – such conceals the complaint's ¶¶1, 7(b), 22-23, 40, 109-110 – with ¶¶163-175 constituting the complaint's cause of action for journalistic fraud.

Although Mr. Freeman continues (at p. 7) with what he calls "Another recurring theme in the Complaint" (underlining added), he only repeats "that Times employees did not respond to [SASSOWER's] communications" – to which he adds "and seemingly did not review her website, as 'directed'". Again, this is not the basis upon which plaintiffs' causes of action seek liability against The Times and Mr. Freeman's inference that SASSOWER's communications were

"directing" defendants either to review the website or to respond is false – as examination of his cited paragraphs from the complaint (particularly ¶43) readily reveals.

Likewise, examination of Mr. Freeman's cited ¶¶42-46, 49-50 of the complaint pertaining to the 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* exposes the fraudulence of his assertion (at p. 7) that the complaint is "alleging primarily that The Times has 'willfully suppressed all coverage' about the litigation." (underlining added). To the contrary, the cited paragraphs explicate the basis upon which the complaint alleges (¶¶106, 107, 143, 175) that The Times suffered from "profound and multitudinous conflicts of interest" in reporting on the "disruption of Congress" case and the story it encompassed of Judge Wesley's nomination and confirmation – conflicts manifested by FUCHS' column, both by what it reported and what it did not.

Comparably fraudulent is Mr. Freeman's assertion (at p. 8)

> "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.' (Complt. ¶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) "

Mr. Freeman's implication is that it is the whole of "the Complaint", not just the "Factual Allegations", which only "touch[] upon" the column. As hereinabove shown, this is false, as is his assertion that the complaint does not allege "any libelous content". Similarly, his inference that libel does not encompass concealment and omission. As the complaint alleges (¶149) and the

analysis demonstrates (Exhibit A), the omitted and concealed facts – including the facts SASSOWER directly stated to FUCHS when he interviewed her -- were excluded precisely because such was necessary to creating the intentionally false and defaming *ad hominem* caricature of SASSOWER and CJA, resulting in a column which presented no issues of legitimate public concern. Indeed, such purposeful omission puts the lie to Mr. Freeman's categorical assertion, which he tucks into his footnote 9 (at p. 16), that "there is no evidence whatsoever that columnist Fuchs had any doubts, let alone serious doubts...of probable falsity in his report." [*See*, pp. 35-6, *infra.*, quoting §3:69 of Law of Defamation, Rodney A. Smolla, 2nd edition (2005)].

Although Mr. Freeman quotes the complaint as attributing this otherwise "inexplicable" column to "profound and multitudinous conflicts of interest" and paraphrases these as "summarized by a year's worth of Plaintiffs' correspondence with The Times", he does not reveal that this "year's worth" of correspondence pertaining to such "conflicts of interest" is largely the subject of "The Vast Bulk" of the complaint that he has been denigrating as irrelevant.

Tellingly, it is only in the last paragraph of Mr. Freeman's Point I (at p. 8), that it becomes obvious that his Point I is actually only about the complaint's "Factual Allegations" portion. Yet, even here Mr. Freeman is deceitful in describing its last 15 paragraphs as being "about [SASSOWER's] communications and travails surrounding her filing and service of the instant summons and complaint (Cmplt. ¶125-138)". What he omits is that these 15 paragraphs specifically pertain to his public assertion as to The Times' "strong policy" of correcting factual errors and to his professional misconduct when SASSOWER alerted him to the failure of Times management and editors to address her analysis of FUCHS' column and letters based thereon – misconduct aided, abetted, and condoned by defendant THE NEW YORK TIMES COMPANY's Legal Department, including its Vice President/Chief Legal Officer and Corporate Compliance

Officer/Senior Counsel. Thereby established by these 15 paragraphs is that Mr. Freeman is himself a party to this lawsuit, being among the defendant DOES 1-20 specified by the complaint's ¶15 to include Times "legal personnel" who "wilfully failed to undertake appropriate review and correction necessitating this lawsuit".

MR. FREEMAN'S POINT II (at pp. 8-22)
IS MATERIALLY FALSE, MISLEADING, & FRAUDULENT IN PURPORTING THAT "THE LIBEL AND JOURNALISTIC FRAUD CLAIMS ARISING FROM THE WESTCHESTER COLUMN ARE NOT ACTIONABLE"

Mr. Freeman's opens his Point II (at p. 8) with a prefatory section that begins by remarking that the column "appears to be the legal basis for the Complaint". In other words, he suggests – now for the third time in his memorandum – that there might be doubt on the subject.

Even in then identifying that "Ms. Sassower alleges libel and 'journalistic fraud' with respect to the column", he conceals that she does so by three particularized causes of action for defamation (¶¶139-155), defamation *per se* (¶¶156-162), and journalistic fraud (¶¶163-175).

As to the specific allegations constituting plaintiffs' cause of action for journalistic fraud (¶¶163-175), Mr. Freeman does not address them. His single-sentence excuse:

> "'journalistic fraud' has never been recognized as a cause of action in New York -- or elsewhere insofar as we can ascertain".

This is wholly insufficient. Mr. Freeman does not say that a cause of action for journalistic fraud has been rejected by any court -- or even that such cause of action has ever been tested. Such is all the more significant as the law review article, "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*", cited on the complaint's front page directly underneath the caption, posits the validity of a cause of action for journalistic fraud – without dispute from Mr. Freeman.

Adding to this is Mr. Freeman's extensive background and expertise in media law[13] and his access to unparalleled legal resources, including to the most stellar academicians and practitioners of media law and the First Amendment. Plainly, if legitimate arguments could be advanced for dismissal of such meritorious cause of action – which is essentially a cause of action for fraud, in the context of a constitutional tort – Mr. Freeman has been in a position to provide them to the Court..

As Mr. Freeman well knows, the law evolves, with new causes of action emerging. As stated by the New York Court of Appeals in *Brown v. State of New York*, 89 N.Y.2d 172, 181-2 (1996):

> "...it is well to recognize that the word tort has no established meaning in the law. Broadly speaking, a tort is a civil wrong other than a breach of contract (*see*, Prosser and Keeton, [5th ed.] §1). There are no fixed categories of torts, however, and no restrictive definitions of the term (*see, Advance Music Corp. v. American Tobacco Co.*, 296 NY 79; *see also*, Prosser and Keeton, *op. cit.*). Indeed, there is no necessity that a tort have a name; new torts are constantly being recognized (*see*, the extensive analysis by Justice Breitel, as he then was, in *Morrison v. National Broadcasting Co.*, 24 A.D.2d 284, *revd on other grounds* 19 N.Y.2d 453; *see also*, 16 ALR3d 1175). Tort law is best defined as a set of general principles which, according to Prosser and Keeton, occupies a 'large residuary field' of law remaining after other more clearly defined branches of the law are eliminated (Prosser and Keeton, *op. cit.*, §1, at 2.)."

As for Mr. Freeman's footnote 4 (at p. 9) – constituting his second sentence pertaining to the journalistic fraud cause of action – he states, "plaintiff fulfils none of the requirements of a traditional fraud case – reliance on a misrepresentation that caused her financial loss". This is false. Firstly, there is more than a single "plaintiff" to this action. Secondly, the separate plaintiffs have amply fulfilled the requirements for pleading fraud, including with respect to defendants' misrepresentations causing them damages. Mr. Freeman's failure to confront any of the paragraphs of the third cause of action for journalistic fraud (¶¶163-175) makes this evident.

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[13] Mr. Freeman's credentials appear at Exhibit "U" to SASSOWER's accompanying affidavit.

As for the allegations constituting plaintiffs' two defamation causes of action (¶¶139-155, ¶¶156-162), Freeman also does not confront them and never even mentions defamation *per se*. Indeed, although these allegations collectively span from ¶¶139-162 of the complaint, Mr. Freeman falsely purports "The Complaint's claims regarding defamation are set forth in ¶140-141" – identifying these as referring to the complaint's Exhibit A analysis of the column. To the extent he thereafter cites to other paragraphs within the span of the two defamation causes of action, it is only as "some additional paragraphs and allegations in the Complaint."

It is without confronting, or even identifying, the two defamation causes of action (¶¶139-155, ¶¶156-162), that Mr. Freeman refers to the analysis as "quibbles...aris[ing] generally from three criticisms" (at p. 9). No honest reading of the analysis could support a claim that it "quibbles", nor regard Mr. Freeman's rendition of its supposed "three criticisms" as accurate -- especially as it totally omits what the analysis so repeatedly demonstrates, *to wit*, that the column's defamatory characterizations rest on a succession of false facts, both express and implied. As for Mr. Freeman pretense that these "three criticisms" are "clear" from "some additional paragraphs and allegations in the Complaint", examination of ¶¶143, 148, 150 – cited by him as corroborative of his purported first two criticisms -- shows their material divergence from what he represents.

It is based on such material misrepresentation and omission that Mr. Freeman then proceeds to declare "the fundamental tenets of libel law make clear that no cause of action for libel can lie here" (at p. 9) – thereupon supplementing what he has already misrepresented with additional misrepresentations that will furnish a factual predicate for his false and misleading presentation of law.

Mr. Freeman's Subsection A (at pp. 10-16) is Materially False, Misleading, & Fraudulent in Purporting that "Basic Libel Principles Dictate Dismissal of the Complaint"

Mr. Freeman sets forth three "Basic Libel Principles" which he purports "Dictate Dismissal of the Complaint". However, because he does not assert that these principles are applicable to the complaint's cause of action for journalistic fraud, they do not "Dictate Dismissal of the Complaint". For that matter, they do not "dictate" dismissal of the complaint's two causes of action for defamation and defamation *per se* -- because, as hereinafter shown, these causes of action are fully consistent with "Basic Libel Principles".

Mr. Freeman's first subsection (at pp. 10-12) on "Defamatory Meaning and Substantial Truth" gives law for the proposition that "A false fact is a necessity in a defamation claim" and implies that SASSOWER alleges no false facts with respect to FUCHS' column – and none that "significantly bear on [SASSOWER's] reputation." Such follows up on Mr. Freeman's misrepresentation in his "Preliminary Statement" (at p. 3) that the complaint "does not really quarrel with the reporter's factual account of [the] events" as to what transpired at the Senate Judiciary Committee hearing on Judge Wesley's confirmation and in the trial and sentencing proceedings before Judge Holeman. The fraud that Mr. Freeman thereby commits is established by the analysis, incorporated by reference into the complaint's two defamation causes of action (¶¶140, 156). It resoundingly demonstrates that the column's express and implied facts are not "substantially true", nor the defamatory characterizations based thereon, buttressed by attribution to "staunchest defenders", "defenders", and a "most earnest listener" who are fictions; that this falsity goes to "the 'gist' or 'sting' of the defamation", and that the pleaded truth would have produced "a different effect on the mind of the reader" than the published libel, which "significantly...bear[s] on...the reputation" of both SASSOWER and CJA. These are the

requirements for defamation set forth by the cases Mr. Freeman cites in this subsection[14].

Moreover, as to Mr. Freeman's bald and unattributed assertion (at p. 11) that "the omission of details is not actionable", such is belied by *Rinaldi v. Holt, Reinhart & Winston, Inc.*, 42 N.Y.2d 369, 383 (1977), which Mr. Freeman quotes for the proposition that omission is "largely a matter of editorial judgment in which the courts and juries have no proper function" – without quoting its preceding text "omission of relatively minor details in an otherwise basically accurate account is not actionable." In other words, where the omitted details are not minor and the account is not "basically accurate", omissions are actionable, as at bar. As demonstrated by the analysis (Exhibit A), the column's omissions are not ones "of detail", but of the material facts, either directly stated to FUCHS or readily-accessible to him, establishing the knowing falsity of his written account. Indeed, the complaint expressly alleges (¶¶144, 149-51) that but for these omissions FUCHS and his editor would have been unable to craft their maligning characterizations and inferences about SASSOWER and CJA and that their wholesale exclusion from the column is evidence of defendants' actual malice.

That Mr. Freeman has no caselaw to support his unqualified and emphatic declaration that

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[14] Other aspects of plaintiffs' defamation causes of action are reinforced by Mr. Freeman's cited cases of *Masson v. New Yorker Magazine, Inc.*, 501 US 496, 513 (1991) and *600 West 115th Street Corp. v. Gutfeld*, 80 NY2d 130, 136 (1992) in particular. See, footnotes 18, 19, 21, *infra.*

Indeed, with respect to the fictional "staunchest defenders", "defenders", and "most earnest listener", which FUCHS uses in his column, there are parallels to *Masson* where the issue was falsified quotes. Like quotations, attributions to purported sources – especially to sources aligned with the subject -- "add authority to the statement and credibility to the author's work. [They] allow the reader to form his or her own conclusion and to assess the conclusions of the author, instead of relying entirely upon the author's characterization of [his] subject.". *Masson*, at p. 511.

As for Mr. Freeman's cited case of *Orr v. Argus-Press, Co*, 586 F2d 1108 (6th Cir), it is wholly inapposite since – unlike the case at bar – the facts underlying the objected-to characterizations therein were undisputed. ("Orr concedes that the basic factual statements contained in the story are true..." (at 1111); ("Neither Orr's complaint nor the opinion of the District Court identified any specific, factual errors in the article" (at 1112); ("it is not disputed that the reporter accurately reported the underlying facts" (at 1115). As for *Piracci v. Hearst Corp.*, 263 F.Sup. 511 D.Md (1966), aff'd 371 F.2d 1016 (4th Cir. 1967), it, too, is inapposite as the alleged article was found to be "substantially accurate" (at 514-15).

"omission of details is not actionable" becomes apparent from his argument that "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." As evident from *Rinaldi*, omissions are actionable where, as here, they are knowingly and deliberately excluded for the purpose of placing a subject in a false and defamatory light. The omissions are then "actionable" in the sense that they demonstrate actual malice.

As for Mr. Freeman's assertion (at p. 11) that "More generally it would be unconstitutional to pin liability on material a publisher determined not to print", his two legal citations are inapposite: *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974), involved the constitutionality of a statute requiring newspapers criticizing political candidates to afford them a right of reply and *Associates & Aldrich Company v. Times Mirror Company*, 440 F.2d 133, 135 (9th Cir. 1971), involved whether a newspaper was required to accept advertising in the exact form submitted – neither presenting causes of action for libel or journalistic fraud, as at bar.[15] Moreover, plaintiffs' libel causes of action do not rest liability on what The Times did not print, but, rather, on its publication of materially false and misleading facts – and insupportable

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[15] Not cited by Mr. Freeman is *Gaeta v. New York News, Inc., et al.*, 62 N.Y.2d 340, 349 (1984), a libel action in which the New York Court of Appeals recognized that the courts have a supervisory function to protect against "clear abuses" by the press in its editorial judgments as to news content:

> "Determining what editorial content is of legitimate public interest and concern is a function of editors. While not conclusive, 'a commercial enterprise's allocation of its resources to specific matters and it editorial determination of what is 'newsworthy', may be powerful evidence of the hold those subjects have on the public's attention.' (*Cottom v. Meredith Corp.*, 65 AD2d 165, 170 []) The press, acting responsibly, and not the courts must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable. (*Chapadeau v. Utica Observer-Dispatch*, 38 NY2d 196, 199 [])." (underlining added).

characterizations and opinions based thereon – of which it had direct knowledge when it "determined not to print" such other facts as FUCHS and his editors had squarely before them.

Mr. Freeman's second subsection (at pp. 12-13), "Report of Official Proceedings" recognizes that the purpose of the privilege under New York Civil Rights Law §74 protecting the press from suit for "publishing fair and accurate reports of an official proceeding" is

> "to allow the press, as surrogates for 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".

Such privilege does not apply because, as detailed by the analysis (Exhibit A), FUCHS' column is not a "fair and accurate" account of official proceedings in that it completely covers up the governmental misconduct readily disclosed by the records of the Senate Judiciary Committee's proceedings on Judge Wesley's confirmation and by the records of the judicial proceedings before Judge Holeman.[16] This, in addition to falsely portraying SASSOWER.

Mr. Freeman's reliance on New York Civil Rights Law §74 ignores this. His categorical assertions: "All of the discussion in the column about Ms. Sassower's arrest in Congress and the sentencing hearing before Judge Holeman...are protected from suit under the privilege for publishing fair and accurate reports of an official proceeding." (at p. 12) and "Thus, reporting on the actions of Congress and on the sentencing hearing in the D.C. Superior Court are fully protected" (at pp. 12-13) pick up on his express misrepresentation in his "Preliminary Statement" (at p. 3) that the complaint not only "does not really quarrel with the reporter's factual account of these events", but could not "since they are a fair and accurate summary of what appeared in

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[16] *See* Libel and Privacy, Bruce W. Sanford, 2nd edition (2006) §10.3.2 Fairness – "including in the publication material which is not in the public record may result in loss of the privilege. Nor, in the view of some courts, will an account qualify for the privilege if it is one-sided, or unfairly selective in the excerpts of the public record it reports."

official government documents." Such "official government documents", not there identified, are here specified in a footnote (at p. 13), as "The transcripts of the Senate hearing and sentencing hearing...attached as Exhibits A and B to the Aff't of George Freeman submitted herewith."[17]. This footnote is appended to the last sentence of the subsection which pronounces – falsely – "In any event, in the Complaint itself, Ms. Sassower in no way denies the basic facts of her arrest and sentence (Cmplt 63, 89)."

This is deceit piled on deceit. The complaint, by its incorporated analysis, both denies the "basic facts of her arrest and sentence", as portrayed by FUCHS' column, and that they are a "fair and accurate" account of what is recorded in "official government documents".

Mr. Freeman's third subsection (at pp. 13-16) on "Opinion" rests on obscuring the distinctions between "opinion" and "pure opinion" – distinctions clear from both his first cited case, *Steinhilber v. Alphonese*, 68 N.Y.2d 283, 289-90 (1986), and his last, *Parks v. Steinbrenner, et al.*, 131 A.D.2d 60, 62-3 (1st Dept. 1987) – the latter of which summarizes the law as follows:

> "A nonactionable 'pure opinion' is defined as a statement of opinion which either is accompanied by a recitation of the facts upon which it is based, or, if not so accompanied, does not imply that it is based upon undisclosed facts. Alternatively, when a defamatory statement of opinion implies that it is based upon undisclosed detrimental facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and actionable. (*Steinhilber v. Alphonse*, *supra*, at 289-290.) Similarly actionable as a 'mixed opinion' is a defamatory opinion which is ostensibly accompanied by a recitation of the underlying facts upon which the opinion is based, but those underlying facts are either falsely misrepresented or grossly distorted. (*Silsdorf v. Levine*, 59 NY2d 8, *cert denied* 464 U.S. 831; *Chalpin v. Amordian Press*, 128 AD2d 81.)".

Thus, Mr. Freeman begins his first paragraph (at p. 13) by falsely implying that "the descriptions and colorful characterizations of Ms. Sassower" are "opinion" that do not "arise from

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[17] *See* also, Mr. Freeman's prefatory section to his Point II (at p. 9): "the facts related about her arrest and sentencing are from official Senate and court transcripts, and, as such, are privileged."

false fact" and, therefore, are "protected speech". He then furthers this deceit by quoting from *Steihilber*, "it is a settled rule that expressions of an opinion, 'false or not, libelous or not, are constitutionally protected and may not be subject of private libel actions'", whose quote from *Rinaldi*, *supra*, at 380, omits *Rinaldi*'s material qualification, "provided the facts supporting the opinions are set forth." (underlining added).

Similarly, in quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), "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", Mr. Freeman omits its immediate continuation, "But there is no constitutional value in false statements of fact." (underlining added).

Only in the last sentence of Mr. Freeman's first paragraph (at p. 13) does the constitutionally-protected "opinion" to which he has been unqualifiedly referring now become "pure opinion" – a term he does not define.

Having concealed the distinctions between "opinion" and "pure opinion", Mr. Freeman's unindented second paragraph, formatted onto a different page (at p. 14), states that *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) is "Consistent with these principles". Notably, neither his quote from, nor paraphrase of, *Milkovich* includes the word "opinion" or "pure opinion" – notwithstanding the Supreme Court, in *Milkovich*, was explicit in asserting that its words in *Gertz* were not "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion'" (at p. 18).[18] Yet this exemption of "opinion" is precisely the misimpression which Mr.

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[18] See, also, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) – wherein the Supreme Court reiterated:

Freeman's first paragraph fosters.

In *Milkovich*, the Court reiterated that opinion is actionable where the stated facts on which it is based "are either incorrect or incomplete, or if [the writer's] assessment of them is erroneous", *supra* 19. Only in a backhanded fashion does Mr. Freeman concede, in his second paragraph (at p. 14), that *Milkovich* holds that there is no "protection for statements that [can] 'reasonably [be] interpreted as stating actual facts' about an individual" and that these are "actionable" if they can "be proven as true or false". However, his third paragraph attempts to eliminate its applicability at bar.

Citing two cases on which *Milkovich* "relied": *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6 (1970), and *Letter Carriers v. Austin*, 418 U.S. 264 (1974), Mr. Freeman asserts (at p. 14) that they recognize a category of speech that is "rhetorical hyperbole", "loose[ly] figurative", "lusty and imaginative expression" – and implies that FUCHS' column falls within such category. Such is a deceit as this category of speech arises from "special situations" and "broader context". Thus, *Greenbelt* arose from comments made at – and accurately reported of – a town zoning hearing; *Letter Carriers* arose from a labor dispute, where the plaintiff worker had not, in fact, adhered to the labor position. Each involved social situations in which heated charges, such as of "blackmail" and "scab", are part of the normal exchange of "loose, figurative, hyperbolic language". Thus, if anything, these cases – as well as Mr. Freeman's cited *Time, Inc. v.*

> "in *Milkovich v. Lorain Journal Co.*, we refused 'to create a wholesale defamation exemption for anything that might be labeled 'opinion.'' 497 U.S. at 18 (citation omitted). We recognized that 'expressions of 'opinion' may often imply an assertion of objective fact.' *Ibid.* We allowed the defamation action to go forward in that case, holding that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false factual assertions as to factual matters."

Mr. Freeman's citation to *Masson* (at p. 10) is not for this proposition.

Johnston, 448 F.2d 378, 384 (4th Cir. 1971), arising from a sporting event – actually reinforce the defamatory connotations of the characterizations of SASSOWER and CJA in FUCHS' column since the context of a U.S. Senate Judiciary Committee hearing and a trial and sentencing in D.C. Superior Court is of solemnity and procedure, where words and actions are marked by precision – with a journalist's report thereof expected to be of a similar character – and all the more so when written for a newspaper publicly professing its fidelity to accuracy [19].

Mr. Freeman then goes on to assert, in his fourth paragraph (at p. 15), that the New York Court of Appeals in *Immuno AG v. Moor-Jankowski ('Immuno II')*, 77 N.Y.2d 235 (1991), "protected opinion even more broadly" than the Supreme Court in *Milkovich* by "looking at the content of the whole communication, its tone and apparent purpose". In fact, the Supreme Court had looked at these factors in *Milkovich*[20] – as it had in *Greenbelt* and *Letter Carriers*[21] – the essential difference in *Immuno* being that the New York Court of Appeals viewed the context of the whole communication as the starting point. As quoted by Mr. Freeman, "statements must first

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[19] As recognized in *600 West 115th Street Corp. v. Gutfeld*, 80 N.Y.2d 130, 140-142 (1992) – twice cited by Mr. Freeman (at pp. 10, 15), but not for this proposition:

> "A newspaper column is the product of some deliberation, not of the heat of a moment. Prior to publication, it passes through the hands of professional editors and it thus carries with it the cloak of credibility and authority of the particular newspaper and the profession. Its writers work with the knowledge that the printed would can and will be subjected to close, careful, and repeated reading over time. These undoubtedly are circumstances encouraging the reasonable reader to be less skeptical and more willing to conclude that the report is stating or implying facts garnered by a professional news gatherer and reporter."

At bar, such skepticism is even less because the newspaper at issue is The New York Times. As the Supreme Court recognized in *Masson v. New Yorker Magazine, Inc.*, *supra*, at 513 (1991) – a publication which has "a reputation for scrupulous factual accuracy" encourages readers to believe the truth of what is written.

[20] This was particularly recognized by the D.C. Circuit Court of Appeals in *Moldea v. The New York Times Company*, 22 F.3d 310, 313-15 (1994).

[21] See discussion on this point in *600 West 115th Street Corp. v. Gutfeld*, *supra*, 140-142 (1992).

be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying *any* facts." (*Immuno*, at p. 254, emphasis in the original).

As such, *Immuno* is decisive of plaintiffs' two defamation causes of action because, as demonstrated by SASSOWER's comprehensive, paragraph-by-paragraph analysis, the objected-to characterizations, when "first...viewed in their context", disclose a succession of express and implied facts which are demonstrably and knowingly false. Indeed, immediately preceding Mr. Freeman's quoted words from *Immuno* that "statements must first be viewed in their context" are words not quoted by him:

> "A media defendant surely has no license to misportray facts; false statements are actionable when they would be perceived as factual by the reasonable person." (at p. 254).

Mr. Freeman's Subsection B (at pp. 16-22)
is Materially False, Misleading, & Fraudulent in Purporting
<u>that "The Column Contains No Actionable Content"</u>

Mr. Freeman begins this subsection by announcing (at p. 16) that "Under the basic tenets of libel just discussed, it is clear that Plaintiff's libel claim is not actionable under any legal basis." He then announces his methodology:

> "Since Ms. Sassower, in Exhibit A to her Complaint, 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*." (at pp. 16-17)."

In other words, Mr. Freeman is not going to analyze the analysis, but, rather, will be providing his own "more abbreviated" analysis of the column. This allows him to replicate *verbatim* the column's text, paragraph-by-paragraph – while consigning SASSOWER's contextual analysis of each paragraph to no more than a few brief sentences which materially misrepresent and falsify its presentation so as to excise ALL aspects that would establish the sufficiency of her defamation

claims under the "basic tenets of libel" he has just enunciated.

This is immediately obvious from Mr. Freeman's presentation (at p. 17) of **"Paragraph 1"**, where he purports that SASSOWER is complaining "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' – but that these are "all protected opinions. They are exactly the type of subjective and figurative characterizations on which people can disagree and which cannot be proven true or false."

Examination of SASSOWER's paragraph 1 analysis shows that its focus is not FUCHS' negative characterizations of her, but his buttressing these descriptions by attributing them to anonymous[22] "staunchest defenders", who SASSOWER was unable to locate as they were not among the more than half-dozen CJA members and supporters whose names had been furnished to him[23] by CJA's then Director and SASSOWER's mother, Doris L. Sassower. Likewise, SASSOWER's paragraph 1 analysis was about FUCHS' similar use of an anonymous "most earnest listener", whose existence she also challenged.

The existence of these anonymous persons are objective facts, readily proven true or false. Plainly, too, if these persons do not exist, they cannot be the source of the negative characterizations of SASSOWER ascribed to them by FUCHS – characterizations therefore false for that reason. Such fabrications, in and other themselves, would support a finding of actual

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22 *See*, Law of Defamation, Rodney A. Smolla, 2nd edition (2005), §3:62 Anonymous sources -- "Although reliance on an anonymous source does not itself establish actual malice, such reliance is admissible as evidence of actual malice.".

23 *See*, Law of Defamation, Rodney A. Smolla, 2nd edition (2005), §3.52 Failure to check obvious source as evidence of actual malice in general – "...in certain rare instances the failure to verify a story by checking an obvious and accessible source may be so suspicious as to create an inference that the defendant entertained serious doubts and intentionally avoided verification for fear that it would contradict the story the defendant was about to publish."

malice. *St Amant v. Thompson*, 390 U.S. 727, 731-2 (1968).

It is by concealing the focal issue as to whether these anonymous persons in fact exist[24] that Mr. Freeman purports (at p. 17) – by way of argument – that "if one could somehow construe such [characterizations of SASSOWER] to be facts, they are indisputably true." In support he asserts what the column does not: that FUCHS is the "'earnest listener' described" who "was exhausted by his interview with [SASSOWER] where she unceasingly crusaded against judges though he was trying to interview her about her own case". Such is completely non-probative.[25] FUCHS has submitted no affidavit[26], let alone one claiming to be "the most earnest listener" or that he was "exhausted" by anything SASSOWER said about judges, or that what she said about them was not germane to "her own case".[27] Nor does Mr. Freeman, in his accompanying affidavit, reiterate such significant admission as to FUCHS, let alone provide substantiating detail about it or explain

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[24] This threshold – and dispositive – issue was presented to Mr. Freeman and The New York Times Company Legal Department prior to service of the summons with notice herein, as SASSOWER sought to avert litigation. As reflected by ¶¶130-135 of the verified complaint – and documented by Exhibit T-3 – SASSOWER stated to Mr. Freeman that it would be "most immediately productive" if he provided her with "the names of these 'staunchest defenders'...so as to establish that they are not outright fictions". Mr. Freeman's dilatory, bad-faith response – condoned by supervisory personnel – was a bald claim, not specifically addressed to this request, but encompassing it, that such information was "protected by editorial privileges". (Exhibit T-10).

Clear from *Herbert v. Lando, et al.*, 441 U.S. 153 (1979), is that the names of these "staunchest defenders" would be readily discoverable in this litigation – and that there were no "editorial privileges" to hinder The Times in averting litigation by disclosing their names, as a show of good faith. That Mr. Freeman did not then do so – and that he now conceals the issue as to whether these "staunchest defenders" exist – supports an inference that they are, as alleged at ¶152, "fictions".

[25] *See* Uniform Rules for the New York State Trial Courts: Rule 202.8(c) "...affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law."; *See also*, §246: New York Practice, David D. Siegel, 4th edition).

[26] "Those who make affidavits are held to a strict accountability for the truth and accuracy of their content.", 2 Carmody-Wait 2d §4:12, citing *In re Portnow*, 253 AD 395 (2nd Dept. 1938).

[27] Whether FUCHS actually believed his characterizations of SASSOWER is also a fact susceptible to proof – and "may serve to establish malice where that is required for recovery", *Milkovich*, at p. 20, fn. 7.

why FUCHS has not come forward with his own affidavit. As a consequence, Mr. Freeman's memorandum assertion does not even rise to a level of hearsay. Tellingly, too, Mr. Freeman provides no citation to law or ethics that would give FUCHS license to disguise and reinforce his own opinions by fashioning a fictional "most earnest listener".[28]

Moreover, Mr. Freeman does not confront – or even acknowledge – SASSOWER's showing that the described "most earnest listener" is, in the context of the column, a fabrication – and that FUCHS could not be this "most earnest listener", since, if he was, he would have had "many, many quotes from [her] long recitations to include in his column" – rather than the single quote in his column's final paragraph.

Finally, insofar as Mr. Freeman attempts to justify the characterization of SASSOWER as "relentless" by citing (at p. 17) to her "scores of letters she has written to The Times and others in support of her campaign, many attached as exhibits to the Complaint", such twists FUCHS' use of the word "relentless". As FUCHS had used that word, it was in connection with SASSOWER's purported "conversational style", exhausting to even her "most earnest listener". In any event, SASSOWER's letters provide no support for the disparaging connotations intended by FUCHS, as they evidence the highest standards of professionalism and advocacy.

Mr. Freeman's commentary with respect to **"Paragraph 2"** is similarly deceitful. He baldly proclaims (at p. 17) "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)" – without identifying any of the supposedly fair and accurately-reported "facts" to which he is referring, let alone responding to SASSOWER's

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[28] "A newspaper simply may not shield itself from a libel action by reporting the utterance of a false and defamatory accusation of which it was the source", *Schermerhorn v. Rosenberg, et al*, 73 A.D.2d 276, 288 (1980).

demonstration that such "facts" are false, or even providing corroborating citation references to the pages and lines of the transcripts annexed to his accompanying affidavit. Such proclamation, without any showing, is wholly insufficient – quite apart from it being non-probative because not asserted by his accompanying affidavit.

Mr. Freeman also conceals that as to FUCHS' claim that SASSOWER's "defenders" couldn't "get past one little fact", SASSOWER's paragraph 2 analysis had challenged the existence of such "defenders" by asserting that if they were the same as her "staunchest defenders", they would have had a response to his supposed "one little fact" and to his false characterizations and speculations which FUCHS disguises as "facts". Plainly, if these referred-to "defenders" do not exist, their inability to "get past one little fact" is also verifiably false.

As for Mr. Freeman's assertion (at pp. 17-18) that "Most of Ms. Sassower's criticism in her Exhibit A are not really of Mr. Fuchs' reportage, but of the underlying events", such is belied by his distorted and out-of-context examples. Indeed, examination of SASSOWER's analysis of paragraph 2, as likewise of the column's other paragraphs – reveals they are all focused on FUCHS' "reportage" and demonstrate the very indicia of actual malice recognized by caselaw and the treatises. For instance, §3:69 of Law of Defamation, Rodney A. Smolla, 2nd edition (2005), entitled, "Choice of facts and resolution of inferences or ambiguities may be probative of actual malice", states:

> "Courts have held that the defendant's choice of which facts to report, or the defendant's resolution of inference or ambiguities in a manner adverse to the plaintiff, while not alone constituting actual malice, may be probative of the existence of actual malice.
>
> There is a subtle difference between the principle that a defendant may select from among various interpretations of the 'truth' and conscious manipulation of evidence at hand. At some point on the continuum of journalist judgment 'honest selectivity' gives way to distortion – the evidence is deliberately

> mischaracterized or edited in such a way as to create the possibility that the defendant acted with knowledge of falsity or reckless disregard for the truth. A lack of balance may, therefore, in some cases be probative of actual malice."

Mr. Freeman's deceit continues in his "**Paragraph 3**". He purports (at p. 18) that SASSOWER "complains of statements which are not defamatory, not substantially false, but simply not written in the way Ms. Sassower would prefer." He then pivotally omits SASSOWER's objection to FUCHS' unsourced assertion that CJA "specializes in frontal assaults" – ignoring her analysis with respect thereto, as likewise with respect to the other aspects of FUCHS' paragraph 3 whose significance Mr. Freeman either conceals or distorts.

Likewise deceitful is Mr. Freeman's commentary with respect to "**Paragraph 4**". He purports (at p. 18) that the "colorful, and maybe even vituperative, description" of SASSOWER's "reputation 'for delivering her views with the subtlety of a claw hammer'" is "protected opinion". In so doing, he does not address SASSOWER's analysis of this paragraph – let alone her objection to FUCHS' failure to identify the sources from whom he has garnered [her] supposed 'reputation'". Plainly, if FUCHS only garnered SASSOWER's "reputation" from her detractors, he could not represent it, without qualification, to be her "reputation", which is what he does. Such representation is materially false.

As to "**Paragraph 5**", Mr. Freeman addresses only a single aspect of SASSOWER's paragraph 5 analysis[29] in claiming (at p. 19) that the distinction between FUCHS' describing SASSOWER as "focus[ing] on the nomination of Richard Wesley" rather than "opposing" it is "well with [sic] The Times's editorial discretion, with no substantial difference in meaning". This

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[29] Among the other aspects concealed by Mr. Freeman is FUCHS' falsified time sequencing. Treatise authority recognizes that "The sequencing or juxtaposition of events…in the presentation of a story may be sufficiently misleading to alter the meaning of a story in a manner that is demonstrably false, and, in some instances, may also support a finding of actual malice", Law of Defamation, Rodney A. Smolla, 2nd edition (2005), §3:74 -- Misleading sequencing of events in a story.

is untrue – and Mr. Freeman's bald claim is unsupported by any substantiating elaboration.

That there is "substantial difference in meaning" in the terminology is obvious. "Focus" does not require any obligation on the part of public officers whereas opposition does. SASSOWER's written opposition to the nomination – on behalf of CJA -- by her March 26, 2003 written statement (Exhibit R-2) imposed upon public officers a duty to make findings of fact and conclusions of law with respect thereto. As for Mr. Freeman's claim that "in any event, [FUCHS' terminology] is not "defamatory", such terminology is a component to the defamation of SASSOWER and CJA achieved by the column as a whole, as demonstrated by the analysis.

Mr. Freeman's commentary to **"Paragraph 6"** is outrightly fraudulent. He inexplicably asserts (at p. 19) that "Sassower's rendition here is actually worse for her than the statement in the column" when SASSOWER's "rendition" by her paragraph 6 analysis had identified the falsity of four of FUCHS' express and implied facts. The most important of these are his false factual assertions that SASSOWER "did not heed the warning" of Capitol Police "not to disrupt" – and did "disrupt".

In a grammatically impossible to understand sentence, Mr. Freeman purports that FUCHS "nicely put it" that SASSOWER "asked to speak" -- falsely implying that what she actually said at the Senate Judiciary Committee hearing was worse – when, *as a matter of law*, what she said could never support a 'disruption of Congress' charge – it being a respectful request to testify in opposition to the Wesley confirmation. FUCHS also appears to contest SASSOWER's assertion that the hearing had already been announced adjourned before she spoke. He then caps this with a bald claim that "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." Such proclamation, without any showing, is

insufficient, apart from being a complete deceit. The "official record" corroborates the constitutionally-protected nature of the words she spoke at the already-adjourned hearing -- both of which are material facts establishing that there could be no "disruption of Congress", *as a matter of law*. This is highlighted by SASSOWER's analysis of paragraph 2, sentence 2 – ignored by Mr. Freeman's paragraph 2 recitation in falsely purporting that FUCHS has provided "fair and accurate reports".

Mr. Freeman's commentary to **"Paragraph 7"** is also deceitful. It asserts (at p. 19) that FUCHS' recitation is "If anything [] sympathetic to Ms. Sassower" without addressing -- or even identifying -- any aspect of SASSOWER's paragraph 7 analysis. This had exclusively concerned FUCHS' introductory phrase, "Unseemly as officials may have found this behavior".

Mr. Freeman's commentary to **"Paragraph 8"** is materially deceitful. It is not a "claim", but a verifiable fact, including from the referred-to "Court transcripts", that Sassower was charged with "disruption of Congress" -- not "disorderly conduct", as reported by FUCHS' paragraph 8. Whatever Mr. Freeman's meaning of "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" (at p. 20), these different charges are not equivalent and Mr. Freeman does not support his bald assertion in any way.

As reflected by SASSOWER's paragraph 2 analysis, FUCHS' concealment that SASSOWER was charged with "disruption of Congress" was with knowledge that her actions at the Senate Judiciary Committee's May 22, 2003 hearing could not support such charge, *as a matter of law* – and that posted on CJA's website was a draft memorandum of law challenging the constitutionality of the "disruption of Congress" statute, *as written and as applied.* Such constitutional challenge would have no applicability to the "disorderly conduct" statute – under which she was neither charged nor arrested.

As for Mr. Freeman's attempt to portray SASSOWER as contending that she was less defamed by FUCHS by virtue of his having identified her as charged with "disorderly conduct", this is utterly disingenuous. Any vagrant, on any street corner, can be charged with "disorderly conduct" – and it is one of the most common of criminal charges. By contrast, "disruption of Congress" can only be committed in the seat of this nation's legislative power – and brings with it an immediate connotation of a political offense. These two charges do not remotely have the same stature.

Mr. Freeman does not address – or even identify -- SASSOWER's paragraph 8 analysis pertaining to FUCHS' parenthesized conclusion to the first sentence of the column's paragraph 8, "(and by the way, Mr. Wesley's nomination was confirmed)". Instead, he moves to the second and third sentences of FUCHS' paragraph 8, stating (at p. 20): "Again the sentences [of FUCHS' column] 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". This is a deceit as FUCHS' paragraph 8 only peripherally touches on sentencing. Primarily it concerns the trial – as to which FUCHS had buttressed his disparaging inferences and characterizations of SASSOWER by citing to "Court transcripts". Mr. Freeman conspicuously does not identify the "Court transcripts" referred-to by FUCHS – notwithstanding SASSOWER's paragraph 8 analysis had noted that FUCHS had not identified them and had affirmatively stated such transcripts and the pretrial record resoundingly showed that "Judge Holeman made a mockery of [her] right to a fair trial and that no attorney could have done a more admirable or professional job than [she]". Instead, Mr. Freeman disingenuously states: "though [SASSOWER] contends that 'Judge Holeman made a mockery of [her] right to a fair trial, that is not an issue related to The Times." This is untrue.

Firstly, no account of the trial of the "disruption of Congress" case can qualify as a "fair and accurate" report of the proceedings without identifying what the case record makes obvious, *to wit*, Judge Holeman's violation of SASSOWER's right to a fair trial. Secondly, even apart from what is revealed by the record – including trial transcripts – SASSOWER's paragraph 9 analysis recounts that she told FUCHS of Judge Holeman's misconduct during his interview of her. FUCHS did not have to verify the accuracy of SASSOWER's assertions in order to recite them in his column – which was his minimal obligation if his column was going to be commenting upon the trial and sentencing and disparaging SASSOWER with respect thereto. And certainly, there was no impediment to his challenging SASSOWER's assertions, if there was a basis therefore – from the "Court transcripts" he allegedly reviewed.

Mr. Freeman's **"Paragraph 9"** is also a deceit. FUCHS' "rendition of the sentencing hearing" is not "fully accurate" as Mr. Freeman purports (at p. 20). Rather, as "seen from the transcript of the sentencing hearing", it is one-sided. As for Mr. Freeman's pretense (at p. 20) that SASSOWER's "grievance is not with [FUCHS'] report but with the actions of Judge Holeman as "unfounded, inappropriate, or unconstitutional,'", but that "this is not a claim that can be brought against The Times", such is belied by SASSOWER's paragraph 9 analysis of FUCHS' recitations and depictions -- concealed by Mr. Freeman.

Mr. Freeman's **"Paragraph 10"** is a deceit, concealing the content of SASSOWER's paragraph 10 analysis. As for his single claim that FUCHS' paragraph 10 is a "demonstrably a fair and accurate report of the official transcript of the sentencing hearing", it is rebutted by SASSOWER's paragraph 10 analysis, identifying FUCHS' material omission of what the transcript reflects, namely the reason "she absolutely refused to apologize".

Mr. Freeman's **"Paragraph 11"** is a deceit, concealing the content of SASSOWER's

paragraph 11 analysis. As for his citation to his "Paragraph 10, *supra*", it is irrelevant. SASSOWER's paragraph 11 objections have nothing to do with whether FUCHS' paragraph 11 is a "demonstrably fair and accurate report of the transcript of the sentencing hearing".

Mr. Freeman's **"Paragraph 12"** is a deceit, concealing the content of SASSOWER's paragraph 12 analysis. As for his sole defense of FUCHS' paragraph 11 as "a direct quote from the sentencing hearing transcript", such is irrelevant. SASSOWER's paragraph 12 analysis had not disputed the quote's accuracy.

Mr. Freeman's **"Paragraph 13"** is a deceit, concealing most of the content of SASSOWER's paragraph 13 analysis – beginning with why FUCHS has "solicited comment about [her] from Professor Stein, rather than soliciting comment about the 'disruption of Congress' case from those who know something about it or who can respond to its profound legal and constitutional issues, including as to its sentence.". As for his claim that SASSOWER's paragraph 13 analysis "admits" that the descriptions of her as "difficult" and "polite but fulminating" are "characterization[s]', devoid of any facts" – and, therefore, "opinionated expressions and subjective descriptions which are fully protected", such so-called "admis[sion]" related only to the three words "polite but fulminating", which was the extent of the quote he used from Professor Stein. If FUCHS took these three words out of context, they would not be "supported", nor "fully protected". That Mr. Freeman attempts to buttress this quoted snippet from Professor Stein as being "also" supported by "Ms. Sassower's actions and writings evident from the Complaint" shows how flexibly he views quotes -- quite apart from the fact that Sassower's "actions and writings evident from the Complaint" rebut a description of her as either "polite but fulminating" or "difficult".

Mr. Freeman's **"Paragraph 14"** is a deceit, concealing virtually the entirety of

SASSOWER's paragraph 14 analysis. Indeed, the little he discloses he falsifies to make it appear that SASSOWER is complaining that FUCHS included a description of an "episode" involving New York State Senate Judiciary Committee Chairman DeFrancisco, rather than that FUCHS intentionally selected Chairman DeFrancisco to interview because he knew he would be a source of negative comment. He states,

> "her quarrel is that the episode is mentioned at all, not that it is incorrectly reported. And, again, grievance, [sic] is not with The Times, but with Senator DeFrancisco's comments and actions at the hearing."

It is a deceit for Mr. Freeman to purport that SASSOWER is objecting to FUCHS' truthful "report[]" of a New York State Senate Judiciary Committee hearing – rather than that FUCHS selectively solicited comment from Chairman DeFrancisco so as to obtain a disparaging quote about her which he and Times editors had reason to know was false. Such is emphatically a grievance against FUCHS and The Times – and its presentation, the longest in SASSOWER's analysis, spans two full pages and is documentarily substantiated by six exhibits, annexed to the complaint's Exhibit A analysis with sidetabs marked 1-6, establishing the false and defamatory nature of Chairman DeFrancisco's comments, of which defendants are shown to have had knowledge.

Mr. Freeman's **"Paragraphs 15 and 16"** are a deceit, concealing the entire content of SASSOWER's paragraphs 15-16 analysis. That he purports that the last part of FUCHS' quote from SASSOWER's *pro bono* counsel "is supportive of Ms. Sassower's position" ignores that it rests on – and accepts the truth of -- the first part of the quote, which SASSOWER's analysis asserted FUCHS had taken out-of-context. Such would therefore not be, as Mr. Freeman purports, "protected opinion".

Mr. Freeman's **"Paragraph 17"** is a deceit and both conceals and falsifies the content of SASSOWER's paragraph 17 analysis.[30] His attempt to defend FUCHS' characterization of SASSOWER as "relatively friendless" by purporting, based on FUCHS' quote from her, that "she admits that those on her side are 'not questioning what happened' and 'standing idly by'", disregards the express statement in the analysis that this truncated quote was not referring to her friends – who she had told him were "everyone who cares about [documentary] evidence" -- but "those in positions of leadership and power whose duty it was and is, to respond to that documentary evidence". These she specified as "our public officers in Congress, and the White House, the bar associations, Ralph Nader & a panoply of established/establishment organizations, academia, and the press." That Mr. Freeman further purports that "people who had signed a petition on her website" are not her "friends" – implying that "friends" would like SASSOWER on a personal level, but that these people do not – only reinforces that FUCHS' column is, and was intended to be, not a presentation of any matters of public importance, but an *ad hominem* shot at SASSOWER He then reinforces this by referring to the statements in "other passages in the column" that "even her defenders and her attorneys have said that she was difficult to be with" In so doing, he again ignores SASSOWER's assertions that FUCHS never contacted her so-called "staunchest defenders" to whom his column's opening sentence refers, that they and her supposed "defenders" and "most earnest listener" are fictions, and that her attorney was quoted by FUCHS out-of-context. Under such circumstances, the "descriptions and characterizations" he attributes

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[30] This content includes FUCHS' "startling question" to SASSOWER as to who her friends were – suggestive that he already had his storyline at the time of his interview. *See*, Law of Defamation, Rodney A. Smolla, 2nd edition (2005), §3:71 Preconceived story lines – "Evidence that a defendant conceived a story line in *advance* of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence.".

to them would not be "protected opinion" – nor FUCHS' own characterization of SASSOWER as "relatively friendless".

Finally, **Mr. Freeman skips entirely the introductory preface to the analysis**, which succinctly stated what the analysis demonstrates, *to wit*:

> "...Fuchs' November 7, 2004 column is the very opposite of 'diligent reporting' and 'intelligent reasoning'. It is deliberately defamatory, knowingly false and misleading, and 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" [fn].

As to the footnote – providing citation reference for the "profound and multitudinous conflicts of interest", the existence of which Mr. Freeman's memorandum nowhere disputes – it was:

> "CJA's accompanying July 29, 2005 letter to Times Executive Editor Bill Keller (at pp. 4-7) – and the referred-to underlying correspondence, posted on CJA's website, www.judgewatch.org, most comprehensively *via* the sidebar panel, "*Press Suppression*" – "*The New York Times*".

As the foregoing demonstration establishes, Mr. Freeman conceals virtually the entire content of SASSOWER's analysis – and leaves completely unrebutted its painstaking contextual showing as to the knowingly false and defamatory nature of The Times' column on which plaintiffs' two defamation causes of action rest (¶¶139-155, ¶¶156-162).

PLAINTIFFS' CROSS-MOTION:

THIS COURT'S MANDATORY DISCIPLINARY RESPONSIBILITIES PURSUANT TO §100.3D OF THE CHIEF ADMINISTRATOR'S RULES GOVERNING JUDICIAL CONDUCT

This Court's duty to ensure the integrity of the judicial process is set forth in Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct, as well as in the Code of Judicial Conduct, adopted by the New York State Bar Association. Part 100.3(D) relates to a judge's "Disciplinary Responsibilities". In mandatory language it states:

> "(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."[31] (emphasis added).

Such "appropriate action" includes costs and sanctions pursuant to 22 NYCRR §130-1.1, as well as referrals to appropriate disciplinary authorities.

A. PLAINTIFFS' ENTITLEMENT TO SANCTIONS PURSUANT TO 22 NYCRR §130-1.1 AGAINST MR. FREEMAN, THE NEW YORK TIMES COMPANY LEGAL DEPARTMENT, AND OTHER DEFENDANTS

Under 22 NYCRR §130-1.1-a(a), "Every pleading, written motion, and other paper, served on another party or filed or submitted to the court" is required to be signed. This constitutes certification that

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[31] This reporting duty has been reiterated by the Advisory Committee on Judicial Ethics, *See, inter alia*, Op. 89-54, 89-74, 89-75, 91-114. Its importance is further underscored in the ABA/BNA Lawyers' Manual on Professional Conduct: "It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency. Failure to render such reports is a disservice to the public and the legal profession. Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies." (*See*, "Standards for Imposing Lawyer Discipline, Preface, 01-802) *See also*, *People v. Gelbman*, 568 N.Y.S.2d 867, 868 (Just. Ct. 1991) "A Court cannot countenance actions, on the part of an attorney, which are unethical and in violation of the attorney's Canon on Ethics... . ... A Court cannot stand idly by and allow a violation of law or ethics to take place before it.".

> (b) By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1."
>
> §130-1.1(c) defines conduct as "frivolous" if:
>
> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false."

The subject dismissal motion, signed by Mr. Freeman, meets the test for frivolousness on all three counts. As hereinabove demonstrated, Mr. Freeman's legal presentation, where not itself materially false and misleading, is inapplicable to the verified complaint, whose pleaded allegations he brazenly falsifies to support an otherwise insupportable dismissal motion. Such motion, having no legitimate purpose, can only be seen as "undertaken primarily to delay or prolong the resolution of the litigation or maliciously injure [the plaintiffs herein]".

§130-1.1(c) specifically identifies two factors to be considered in determining whether costs and sanctions should be imposed:

> (1) "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct"; and
>
> (2) "whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party".

As chronicled by ¶¶125-138 of the complaint, Mr. Freeman had ample time to conduct an investigation – beginning approximately 2-1/2 months before service of the summons with notice,

when SASSOWER alerted him to the conduct that would be embodied in the lawsuit's three causes of action. During this period, he had knowledge of SASSOWER's analysis of the column (Exhibit A) – whose serious and substantial nature in establishing causes of action for defamation and defamation *per se* should have been immediately obvious to him. Such analysis obliged him to verify that editors and management had directed it for factual findings and to obtain those findings so that he could make the appropriate legal evaluation. This included with respect to the identities of the "staunchest defenders", whose names SASSOWER requested. Likewise, his obligation was to verify from editors and management the underlying multitudinous conflicts of interest summarized by SASSOWER's July 29, 2005 letter to KELLER (Exhibit Q) to which the analysis referred (at p. 1), as well as to verify the larger issues that letter presented as to The Times' First Amendment responsibilities and its pattern and practice of journalistic fraud, rising to a level of election-rigging. As summarized by the complaint and documented by its annexed correspondence (Exhibits T), Mr. Freeman responded to these obligations with arrogance and dishonesty – aided and abetted by THE NEW YORK TIMES COMPANY's Vice President/Chief Legal Officer Solomon B. Watson, IV, and Corporate Compliance Officer/Senior Counsel Rhonda Brauer, who ignored SASSOWER's requests for their supervisory oversight.

Following service of the summons with notice on February 14, 2006 (Exhibit V-2), Mr. Freeman had another five weeks in which to confront the analysis before the verified complaint was served on March 21, 2006 (Exhibit Y). Following such service, Mr. Freeman made no request for additional time within which to answer or move, which he was certainly free to do. Nor did he take appropriate steps when, upon notice from SASSOWER, by her letter dated May 1, 2006 (Exhibit Z-3), she informed him that she would be cross-moving for sanctions against him because it was based on falsification of the facts and law. By SASSOWER's letter dated May 23, 2006

(Exhibit Z-5), he was on notice to advise his superiors within the Company's Legal Department and defendants that the cross-motion would also be against them by reason of their knowledge of, and consent to, such fraudulent dismissal motion.

Under §130-1.1(a), the court is empowered to impose "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct". "[F]inancial sanctions" of up to $10,000 may additionally be imposed, payable to the Lawyers' Fund for Client Protection (§130-1.1; §130-1.2; §130-1.3). Pursuant to §130-1.1(b), such awards may be against

> "either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation...with which the attorney is associated or that has appeared as attorney of record."

Based on the facts and circumstances hereinabove particularized and further set forth in SASSOWER's accompanying affidavit, maximum costs and additional $10,000 sanctions are warranted against Mr. Freeman and such other attorneys of THE NEW YORK TIMES COMPANY Legal Department as participated with him, as well as such defendants herein who, having knowledge of Mr. Freeman's frivolous dismissal motion, acquiesced in it.

B. PLAINTIFFS' ENTITLEMENT TO DISCIPLINARY REFERRALS OF MR. FREEMAN AND THE NEW YORK TIMES COMPANY LEGAL DEPARTMENT

The Disciplinary Rules of the Code of Professional Responsibility, promulgated as joint rules of the Appellate Divisions of the Supreme Court, have been codified as 22 NYCRR §1200 *et seq*. Particularly relevant is the Code's definition of fraud as involving:

> "scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another"(§1200.1(I)).

Under §1200.3 [DR- 1-102], "Misconduct", a lawyer or law firm is prohibited from, *inter alia*, "Violat[ing] a disciplinary rule", §1200.3(a)(1); "Engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation", §1200.3(a)(4); and "Engag[ing] in conduct that is prejudicial to the administration of justice", §1200.3(a)(5).

Under §1200.33 [DR 7-102], "Representing a Client Within the Bounds of Law", a lawyer shall not, *inter alia*, "...assert a position, conduct a defense...or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another", §1200.33(a)(1); and "knowingly make a false statement of law or fact", §1200.33(a)(5).

Under §1200.4 [DR-1-103], "Disclosure of Information to Authorities", lawyers possessing knowledge of a violation of §1200.3:

> "that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness in other respects as a lawyer *shall* report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." (emphasis added)

These provisions are adapted from the American Bar Association's Model Rules of Professional Conduct. Ten years ago, New York became the first state to extend the Model Rules to law firms[32]. Under §1200.5 [DR 1-104], "Responsibilities of a Partner or Supervisory Lawyer", a law firm is required to "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules" and to "adequately supervise", §1200.5(c). Additionally, "a lawyer with management responsibility...or direct supervisory authority" is required to make "reasonable efforts" to ensure adherence to the disciplinary rules, §1200.5(b), and is responsible for the

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32 *"New Rule Authorizes Discipline of Firms"*, New York Law Journal, 6/4/96, p.1, top, cols. 5-6; *"Taking a Firm Hand in Discipline"*, ABA Journal, Vol. 84, 9/98.

violations of another lawyer if "the lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it"; or

> "knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated", §1200.5(d).

As herein demonstrated, the factual and legal representations in Mr. Freeman's motion are not just false and misleading, they are knowingly and deliberately so. They are, by definition, fraudulent – and a fraud on the court[33] -- warranting appropriate disciplinary referrals[34] of Mr. Freeman and those in The New York Times Company Legal Department who participated with him.

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[33] Black's Law Dictionary (7th ed., 1999) defines "fraud" as:

> "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (especially when the conduct is willful) it may be a crime."

Its definition of "fraud on the court" is

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

[34] Criminal referrals might also be appropriately made, as Judiciary §487 makes it a misdemeanor for any attorney to be guilty of "any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party".

PLAINTIFFS' ENTITLEMENT TO THE DISQUALIFICATION OF MR. FREEMAN AND THE NEW YORK TIMES COMPANY LEGAL DEPARTMENT

In *Greene v. Greene*, 47 N.Y.2d 447, 451 (1979), the New York Court of Appeals stated key principles governing attorney disqualification for conflict of interest:

> "It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law (Code of Professional Responsibility, canon 7). For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests (see, e.g., *Cardinale v Golinello, 43 NY2d 288, 296; Eisemann v Hazard, 218 NY 155, 159;* Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large.
>
> Perhaps the clearest instance of impermissible conflict occurs when a lawyer represents two adverse parties in a legal proceeding. In such a case, the lawyer owes a duty to each client to advocate the client's interests zealously. Yet, to properly represent either one of the parties, he must forsake his obligation to the other. Because dual representation is fraught with the potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and the consent of the clients obtained *(Matter of Kelly, 23 NY2d 368, 376, 378; Eisemann v Hazard, 218 NY 155, 159, supra; Matter of Gilchrist, 208 App Div 497;* see, also, *Matter of Cohn, 46 NJ 202).* Particularly is this so when the public interest is implicated (see, e.g., *Matter of A & B, 44 NJ 331),* or where the conflict extends to the very subject matter of the litigation *(Matter of Kelly, supra, at p 378;* see *Matter of Gilchrist, supra, at pp 497-498).*
>
> By the same token, where it is the lawyer who possesses a personal, business or financial interest at odds with that of his client, these prohibitions apply with equal force (Code of Professional Responsibility, DR 5-101, subd [A]). Viewed from the standpoint of a client, as well as that of society, it would be egregious to permit an attorney to act on behalf of the client in an action where the attorney has a direct interest in the subject matter of the suit. As in the dual representation situation, the conflict is too substantial, and the possibility of adverse impact upon the client and the adversary system too great, to allow the representation. In short, a lawyer who possesses a financial interest in a lawsuit akin to that of a defendant may not, as a general rule, represent the plaintiff in the same action."

Mr. Freeman – and The New York Times Company Legal Department – suffer from both aspects of the attorney disqualification identified by the above-quoted excerpt from *Greene*.

As to the first, representing clients with adverse interests, 22 NYCRR §1200.28 [DR 5-109], entitled "Organization as Client", is relevant. In pertinent part it reads:

> (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents."

Additionally, 22 NYCRR §1200.20 [DR 5-101], "Refusing Employment When the Interests of the Lawyer May Impair Independent Professional Judgment", reads as follows:

> (a) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.
>
> (b) A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on behalf of the client, except that the lawyer may act as an advocate and also testify;
>
> (1) If the testimony will relate solely to an uncontested issue;
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client;
>
> (4) As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.

> (c) Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.[35]

Mr. Freeman is employed in the Legal Department of the corporate defendant NEW YORK TIMES COMPANY. His primary loyalty, as that of the Legal Department itself, is to the corporation. It is for the protection of the corporation – which bears liability for misconduct by its "directors, officers, employees, members... [and] other constituents" – that THE NEW YORK TIMES COMPANY promulgates rules, policies, and procedures governing them.

¶¶125-138 of the complaint summarizes SASSOWER's contact with the Legal Department in the months preceding service of the complaint – occasioned by Mr. Freeman's public assertion that The Times has a "'strong policy' of correcting factual errors and readily does so 'irrespective of whether it increases or decreases the chances of being sued". By letter dated November 30, 2005 (Exhibit T-1), SASSOWER sought to ascertain whether the Company's Legal Department was aware of her analysis (Exhibit A), her July 29, 2005 letter to KELLER which accompanied it (Exhibit Q), and her subsequent September 26, 2005 complaint to CALAME (Exhibit S-1). She stated:

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[35] These rules provide guidance to the courts in determining whether a party's lawyer should be disqualified upon the application of the opposing party, *NYC Medical & Neurodiagnostic, P.C. v. Republic Western Inc. Co.*, 784 N.Y.S.2d 840, 842 (Civil Court/Kings Co. 2004). Such are designed

> "to insure the proper representation of the parties and fairness in the conduct of the litigation (*Solomon v. New York Property Ins. Underwriting*, [118 A.D.2d 695, 500 N.Y.S.2d 41], *Renault Inc. v. Auto Imports*, 19 A.D. 2d 814, 243 N.Y.S.2d 480], and to avoid placing the attorney in the awkward position of testifying on his client's behalf and arguing the credibility of his own testimony at trial (*Skiff-Murray v. Kevin Murray et al.*, 3 A.D.3d 610, 771 N.Y.S.2d 230, 3d dept. 2004)." *Id*, at 843.

"Assuredly, The Times has established protocols and procedures requiring the newspaper's editors to consult with the Legal Department before rejecting – or in this case, ignoring -- requests for correction of published matter shown to be knowingly false and defamatory. Such protocols and procedures are plainly in The Times' interest in reducing the likelihood of its being successfully sued for libel and money damages. The consequence of libel lawsuits – borne by The New York Times Company -- are tens, if not hundreds, of thousands of dollars in legal fees, potentially millions of dollars in damages – and attendant negative publicity that could cause the value of New York Times Company stock to tumble.

As a shareholder in New York Times Company stock, I – as any Times Company shareholder – am concerned that negligent and violative conduct by the newspaper's editors, as well as by its publisher, the Company's chairman, not expose the Company to needless liability. Therefore, please confirm that The Times has protocols and procedures requiring editors and management to secure the advice of the Legal Department before spurning requests for correction of false and defamatory matter and that such were herein complied with." (Exhibit T-1, p. 2).

Mr. Freeman would not answer the question as to the Legal Department's knowledge – except to dishonestly pretend, in conclusory fashion, that nothing SASSOWER had presented rose to a level requiring guidance from the Legal Department. Nor would he confirm that other appropriate procedures were followed, such as referral of the analysis to "an editor who worked on [the FUCHS' column]" and that such editor had made findings with respect to the particulars set forth in its 18 pages (Exhibits T-2, T-3, T-4, T-6, T-10).

Nor could SASSOWER obtain oversight or answers to these and other related questions from Mr. Freeman's superior, Vice President/General Counsel Solomon B. Watson, IV, whose title, during the period of her attempted contact with him changed to Vice President/Chief Legal Officer. He callously ignored and disregarded her entreaties for "appropriate review by The New York Times Company Legal Department" to protect shareholders from the litigation that would otherwise ensue (Exhibits T-5, T-7, T-8, T-16, T-17).

Likewise Corporate Compliance Officer/Senior Counsel Rhonda Brauer callously ignored and disregarded SASSOWER's entreaties (Exhibit T-18) – failing even to confirm that she would, as SASSOWER expressly requested, inform the officers and directors of The New York Times Company of Mr. Watson's misconduct, "which has extinguished any possibility of averting litigation against The New York Times Company".

Evident from the extraordinary misfeasance of Mr. Freeman, Mr. Watson, Ms. Brauer – as well as Senior Counsel David McCraw (Exhibits T-9 – T-15) – documented by the correspondence annexed to the verified complaint and recounted at ¶¶125-138 -- is that these lawyers, employed by defendant THE NEW YORK TIMES COMPANY – were not, in actuality or in appearance, remotely safeguarding the Company's interests, nor enabling the Company to give informed consent to being represented, simultaneous with the individual named defendants, by Mr. Freeman and the Legal Department, themselves co-defendants.

Mr. Freeman's dismissal motion reinforces this, making plain that the Company has no legitimate defense to this lawsuit, either its defamation causes of action or its cause of action for journalistic fraud – and that his duty and that of the Company's other lawyers, months ago, upon examining SASSOWER's analysis and related correspondence, was to have immediately confronted what was therein particularized. However, this would have required Mr. Freeman and the Legal Department to "blow the whistle" on those at the highest echelons of The Times therein shown to be involved in the journalistic fraud and deliberate defamation at issue – individuals with whom they have professional and personal relationships. The highest of these is, of course, SULZBERGER, whose misconduct as

publisher, in concert with The Times' highest editors, has created the Company's profound liability to suit.

It is because Mr. Freeman and his fellow Legal Department lawyers could not meet their foremost duty to act on behalf of the Company and its shareholders – without exposing what SULZBERGER and the other high-ranking named defendants have done in wilfully and deliberately betraying the Company's vaunted commitment to quality journalism and the role of the press in a democratic society – that they have utterly betrayed their professional responsibilities to defendant THE NEW YORK TIMES COMPANY and its unsuspecting shareholders.

SASSOWER's January 24, 2006 letter to Mr. Watson, entitled "Securing & Confirming Your Unconflicted, Appropriate Supervisory Oversight & Arranging for Service of Process" (Exhibit T-16) identified his personal and professional relationships to SULZBERGER as among the factors accounting for his already demonstrated failure to discharge his supervisory and other duties with the care and good faith he owed to Company shareholders, SASSOWER included. But SASSOWER's letter identified other factors as well: his prior involvement in the issues summarized by [her] July 29, 2005 letter (Exhibit Q) – whose consequence made him "one of the unidentified defendant 'DOES'" in the lawsuit. [See ¶¶29-31 of SASSOWER's accompanying affidavit]

Mr. Watson did not deny or dispute that he suffered from such disqualifying conflicts of interest. Nor were these denied by the Company's other Legal Department lawyers, who have some combination of such disqualifying conflicts of interests themselves. Certainly, they are all among the defendant DOES.

Conspicuously, Mr. Freeman omitted the defendant DOES from his March 1, 2006 notice of appearance and demand for complaint (Exhibit W) – notwithstanding The New York Times Company Legal Department accepted service for them on February 14, 2006 (Exhibit V-2). Whether, by omitting the DOES from his notice, Mr. Freeman was seeking to conceal that he and the Legal Department were among them, the fact remains that following plaintiffs' service of the verified complaint on March 21, 2006 (Exhibit Y), Mr. Freeman saw by its identification of the DOES (¶15) and by the last 15 paragraphs of the "Factual Allegations" (¶¶125-138) that he and the Legal Department were clearly DOES. At that point, Mr. Freeman should have recognized that it was improper for him, as a defendant DOE, to act as attorney for the corporation and for individual defendants – and to do so without disclosing that, based on the complaint's allegations, he was actually himself a defendant, as were other lawyers of the Company's Legal Department. Yet, he made his dismissal motion without acknowledging that he was a "DOE" party – and, indeed, by his memorandum's footnote 1, concealed that there were defendant DOES. Such deceit reflects his guilty knowledge of the impropriety of his representation herein.

That Mr. Freeman and The New York Times Company Legal Department are defendant DOES is the second aspect of their disqualification, as they thereby have a direct personal, professional, and financial interest in the litigation – one which is aligned with the named individual defendants, but not the unprotected named corporate defendant THE NEW YORK TIMES COMPANY.

Moreover, as should have been obvious to Mr. Freeman, he and other Legal Department lawyers are properly witnesses at trial.

With respect to plaintiffs' libel causes of action, *New York Times v. Sullivan*, 375 U.S. 254, 286-7 (1964), left open the possibility of circumstances where the failure to retract would be indicative of actual malice. Plaintiffs' complaint specifically alleges (¶145) that defendants' wilful failure and refusal to take any corrective steps in face of SASSOWER's uncontested, document-substantiated analysis of FUCHS' column is "further reflective of their actual and common-law malice"[36]. The testimony of Mr. Freeman and Mr. Watson would be crucial evidence with respect thereto -- and as to The Times' normal and customary protocols and procedures when presented with retraction demands, not followed herein. Moreover, as to Mr. Freeman's public assertion, recounted at ¶125, that The Times has a "strong policy" of correcting factual errors and readily does so 'irrespective of whether it increases or decreases the chances of being sued'", such would be additionally relevant to the journalistic fraud cause of action -- as it misleads the public to believe in The Times' journalistic integrity and commitment to accuracy.

Mr. Freeman's fraudulent dismissal motion – which does not address SASSOWER's analysis – manifests the additional conflict of interest that he and Mr. Watson share: to get rid of this lawsuit, which they needlessly generated, by any means including fraud. Such further mandates their disqualification.

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[36] That common-law malice is "among the more obvious circumstances supporting the inference of actual malice" is recognized in *DiLorenzo v. New York News, Inc.*, 81 A.D.2d 844, 848 (1981), also commenting that: "A retraction in its traditional role is considered some evidence of lack of ill will and can be used to mitigate damages (see Prosser, Torts [4th ed], §116; 1 Seelman, Law of Libel and Slander in State of New York, par 325)."

PLAINTIFFS' ENTITLEMENT TO A DEFAULT JUDGMENT AGAINST THE NON-APPPEARING DEFENDANTS OKRENT, FUCHS, The New York Times, its EDITORIAL BOARD, and DOES 1-20

CPLR §3215, entitled "Default judgment", allows a plaintiff to seek a default judgment against a defendant who has failed to appear or plead. Subsection (e), entitled "Proof", states:

> "On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney..."

Proof of service of the summons with notice, consisting of the affidavit of Richard P. Simmonds, sworn to on February 23, 2006 and filed with the County Clerk's office on March 3, 2006, and the affidavit of Robert Haak, sworn to on February 28, 2006 and filed with the County Clerk's office on March 16, 2006, are annexed to SASSOWER's accompanying affidavit as Exhibits V-2 and V-3, respectively.

Proof of service of the verified complaint, consisting of the affirmation of Eli Vigliano, Esq., affirmed on March 21, 2006 and filed with the County Clerk's office on March 30, 2006, is annexed to SASSOWER's accompanying affidavit as Exhibit Y.

Mr. Freeman's footnote 1 to his April 13, 2006 memorandum of law identifies the defendants who have not appeared: OKRENT and FUCHS, The New York Times, and the EDITORIAL BOARD. It is silent as to DOES 1-20, who have also not appeared.

As demonstrated by plaintiffs' correspondence with Mr. Freeman from March 9, 2006 to March 20, 2006, annexed as Exhibits X-1 – X-5 to SASSOWER's accompanying affidavit, Mr. Freeman would not substantiate that defendants OKRENT and FUCHS have not been properly served or that because they are not Times "employees" defendant NEW YORK TIMES

COMPANY is not responsible for their representation. His footnote 1 demonstrates his continued failure to provide substantiation. This includes legal authority for his claim that because The New York Times and its EDITORIAL BOARD are "not corporate entities", they are not "susceptible to suit".

Plaintiffs are consequently entitled to a default judgment against these non-appearing defaulting defendants.[37]

PLAINTIFFS' ENTITLEMENT TO A COURT ORDER GIVING NOTICE, PURSUANT TO CPLR §3211(c), THAT MR. FREEMAN'S DISMISSAL MOTION IS BEING CONSIDERED FOR SUMMARY JUDGMENT IN PLAINTIFFS' FAVOR AND THAT THE COURT WILL BE DETERMINING WHETHER DEFENDANT THE NEW YORK TIMES COMPANY MUST REMOVE ITS FRONT-PAGE MOTTO "ALL THE NEWS THAT'S FIT TO PRINT" AS A FALSE AND MISLEADING ADVERTISING CLAIM

CPLR §3211(c), entitled "Evidence permitted; immediate trial, motion treated as one for summary judgment", reads as follows:

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

Mr. Freeman's dismissal motion pursuant to CPLR §3211(a)(7) fails to identify that plaintiffs' complaint was verified. Such verification, by SASSOWER, gives the complaint's allegations evidentiary value not only for purposes of a default judgment against the

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[37] If such defendants believe they have a sound objection, based on lack of personal jurisdiction, they can make a motion to vacate the default. New York Practice, by David D. Siegel, 4th ed. (2005), §111: "Making and Preserving a Jurisdictional Objection".

non-appearing defendants (CPLR §3215(e)), but for purposes of summary judgment against the appearing defendants.[38]

In making a pre-answer dismissal motion, Mr. Freeman sought to avoid having to answer the complaint's allegations which, by reason of the complaint's verification, required a verified answer, CPLR §3020. Under subsection (d), such verification would have had to be by "the affidavit of the party...acquainted with the facts", including, since defendant THE NEW YORK TIMES COMPANY is a domestic corporation, by an officer. The purpose of such provision, as stated in the casenotes to CPLR §3020(d)(1) is "to require an individual to answer under oath, subject to the penalties of perjury, the allegations made by the verified complaint", citing *Kopanski v. Hawk Sales Co*, 76 Misc. 2d 348 (S.Ct/Special Term/Herkimer County 1973).

At bar, Mr. Freeman knew that defendants' answer would have to admit the truth of the allegations of the complaint – unless the party/officer signing the verification was willing to perjure himself. Indeed, the truth of the complaint's allegations is self-evident and *readily-verifiable* – not only from the particularity with which they are pleaded, but from the substantiating documentary evidence annexed to the complaint as exhibits or referred to as accessible from CJA's website.

For purposes of plaintiffs' requested conversion of defendants' dismissal motion to one for summary judgment in their favor pursuant to CPLR §3211(c), plaintiffs rest on the allegations of their verified complaint – and the legal authority applicable thereto, as hereinabove cited, to support an award of summary judgment on each of their three causes of action.

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[38] "A 'verified pleading' may be utilized as an affidavit whenever the later is required.", CPLR §105(u); "a sworn complaint may be regarded as an affidavit.", 2 Carmody-Wait 2d §4:12.

As the "WHEREFORE" clause of the verified complaint further seeks "such other and further relief as may be just and proper" (at p. 61), plaintiffs additionally request that the Court, simultaneous with its notice pursuant to CPLR §3211(c), give notice that it will determine whether defendant THE NEW YORK TIMES COMPANY shall be ordered to remove the words "All the News That's Fit to Print" from its front page as a false and misleading advertising claim, in violation of public policy, including General Business Law, Article 22-A, §§349 and 350, *et seq.* and New York City Administrative Code §20-700, *et seq.* Such is eminently appropriate as the "All the News That's Fit to Print" motto exacerbates and reinforces the defamation and journalistic fraud committed by defendants – and the same allegations of the complaint as support these causes of action support this additional relief. Indeed, the same law review article "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*" as underlies the journalistic fraud cause of action identifies (at p. 12) the "well settled U.S. Supreme Court precedent", from which it is clear that there is no First Amendment impediment to judicial determination that "All the News That's Fit to Print" is a false and misleading advertising claim.

General Business Law, Article 22-A, §349, entitled "Deceptive acts and practices unlawful", proscribes "Deceptive acts or practices in the conduct of any business, trade or commence in the furnishing of any service in this state". Its subsection (h) permits "any person who has been injured by reason of any violation...[to] bring an action in his own name to enjoin such unlawful act or practice". Such plaintiff may recover up to $1,000 in damages "if the court finds the defendant willfully or knowingly violated this section" and may be awarded "reasonable attorney's fees". Similarly, General Business Law, Article 22-A, §350, entitled "False advertising, unlawful", proscribes "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state". Likewise, §350-d allows "any person who has been

injured by reason of any violation...[to] bring an action in his own name to enjoin such unlawful act or practice" and to recover up to $1,000 in damages "if the court finds the defendant willfully or knowingly violated this section" and, additionally, "reasonable attorney's fees".[39]

New York City Administrative Code §20-700, entitled "Unfair trade practices prohibited", bars "any deceptive or unconscionable trade practice in the sale...or in the offering for sale...of any consumer goods or services". §20-705 makes explicit that it is inclusive of "any publisher or printer of a newspaper, magazine, or other form of printed advertising, who...is guilty of deception on the sale or offering for sale of its own services" (underlining added).

Defendant THE NEW YORK TIMES COMPANY is a commercial, money-making enterprise (¶5). Its prominent front-page claim of "All the News That's Fit to Print" (¶6) – on a page of The New York Times reserved for news, not editorials – has no other purpose but to induce consumers to believe that The Times is competitively superior to newspapers not making that claim. It is an affirmative representation that purchase of The Times provides all information

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[39] "The genesis of both subdivision 3 of section 350-d and its companion provision, subdivision (h) of section 349 of the General Business Law, was in large measure the inability of the New York State Attorney-General to adequately police false advertising and deceptive trade practices. In a memorandum approving the enactment of both subdivision (h) of section 349 and section 350-d, Governor Carey observed that subdivision (h) of section 349 and subdivision 3 of section 350-d 'by authorizing private actions, providing for a minimum damage recovery and permitting attorney's fees will encourage private enforcement of these consumer protection statutes [General Business Law, §§349, 350], add a strong deterrent against deceptive business practices and supplement the activities of the Attorney General in the prosecution of consumer fraud complaints' (Governor's Approval Memorandum, NY Legis Ann, 1980, p 147; see, also, memorandum of Senator James J. Lack, NY Legis Ann, 1980, p 147; memorandum of Assemblyman Harvey L. Strelzin, NY Legis Ann, 1980, p 146).

The courts have traditionally taken an expansive view of what constitutes 'false advertising' (General Business Law, §350-a; *Geismar v Abraham & Straus, 109 Misc 2d 495;* Note, New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor, *48 Brooklyn L Rev 509, 545-546; Guggenheimer v Ginzburg, 43 NY2d 268).* In *People v Volkswagen of Amer. (47 AD2d 868),* the court in defining 'false advertising' observed: 'The test is not whether the average man would be deceived. Sections 349 and 350 of the General Business Law were enacted to safeguard the 'vast multitude which includes the ignorant, the unthinking and the credulous' (*Floersheim v Weinburger, 346 F Supp 950, 957).*'", Beslity v. Manhattan Honda, 120 Misc. 2d 848, 852 (NY Supreme Court/Appellate Term: 1st Dept: 1983).

meeting objective standards of fitness and, implicitly, that anything rejected by it for publication does not meet those standards. Unquestionably, these front-page words "All the News That's Fit to Print" induce consumers to believe that they can count on The Times to provide them with the information that underlies the very purpose of the First Amendment: to enable them – as citizens in a democracy -- to vote intelligently and maintain the integrity and accountability of government and public institutions.

The Times nowhere sets forth its criteria for determining the fitness of the news it prints. Despite plaintiffs' specific and repeated requests to The Times for elucidation of the "All the News That's Fits to Print" criteria, including requests to publisher SULZBERGER (¶7), defendants have wilfully and deliberately failed and refused to provide same or to discuss with plaintiffs standards of coverage. Simultaneously, it has ignored or rejected, almost always without reasons, plaintiffs' presentation of documented, *readily-verifiable* stories meeting any objective standard of newsworthiness – provided, at great effort and expense, in the good-faith, reasonable belief that The Times adheres to some remotely cognizable "All the News That's Fit to Print" standard.

Defendants' wilful and deliberate disregard, without reasons, of the documented *readily-verifiable* information presented by plaintiffs' June 11, 2003 memorandum-complaint (Exhibit B) and May 11, 2004 letter-proposal (Exhibit L-1) and their publication of the knowingly false and defamatory column, "*When the Judge Sledgehammered The Gadfly*" (Exhibit A) – from which all issues of legitimate public concern had been excised -- suffice to bar The Times from commercially promoting itself as offering "All the News That's Fit to Print", apart from the mountain of additional documentary evidence embodied by plaintiffs' 15-year history of correspondence and complaints to The Times.

CONCLUSION

Defense counsel Freeman's dismissal motion must be denied and plaintiffs' cross-motion granted in accordance with their notice of motion.

ELENA RUTH SASSOWER, *Pro Se*
Individually, and as Coordinator of the CENTER FOR
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