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December 18, 2007

Appellate Division, Second Department  
45 Monroe Place  
Brooklyn, New York 11201

ATT: James Edward Pelzer, Clerk of the Court

RE: December 14, 2007 Oral Argument: Videotape & Correction  
of my Response to Appellate Panel Presiding Justice Santucci  
Sassower, et al. v. The New York Times Company, et al.  
Appellate Division, Second Dept: #2006-8091; #2006-10709; #2007-186

Dear Mr. Pelzer:

Following up our conversation at the Clerk's Office on Friday, December 14, 2007 and our previous phone conversations on December 7<sup>th</sup> and December 10<sup>th</sup> and my intervening December 10<sup>th</sup> letter to you, this is my written request for a copy of the videotape of the December 14<sup>th</sup> oral argument of the above consolidated appeals.

Additionally, I would appreciate if you would transmit this letter to the appellate panel consisting of its Presiding Justice Santucci and Associate Justices Covello, Lifson, and Spolzino, as I have checked the record to verify the accuracy of my response to Presiding Justice Santucci's question to me at oral argument. As I recollect, his question was whether it was true that defendant Marek Fuchs is not a New York Times Company employee.

My initial response was correct: there is NO SWORN STATEMENT in the record as to Mr. Fuchs' employment status.

However, as to my additional remark that I believed there was also no unsworn statement in the record as to Mr. Fuchs' status, I was incorrect. Mr. Freeman did make an unsworn statement. It is in the first footnote on the first page of his April 13, 2006 memorandum of law supporting his motion to dismiss the verified complaint [R-446]. He there purported:

“Of the parties named in the caption, Messrs. Okrent and Fuchs are not New York Times Company employees and have not been properly served....” [R-446].

The record also reveals plaintiffs' objection thereto. It appears at the outset of my June 1, 2007 affidavit in opposition to Mr. Freeman's dismissal motion and in support of plaintiffs' cross-motion [R-472-608]. Noting that Mr. Freeman's bald claim was "completely non-probative" as it was not contained in his affidavit supporting his dismissal motion, ¶5 of my affidavit stated:

"As a seasoned litigator, Mr. Freeman is presumed to know that such factual assertions in his memorandum have no probative value unless presented in a sworn document, such as an affidavit, subject to the penalties of perjury – not a memorandum of law, which is unsworn." [R-475].

¶6 of my affidavit then continued:

"The absence of any substantiating statement in Mr. Freeman's affidavit pertaining to defendants OKRENT and FUCHS is all the more deceitful when seen against the long history of my attempts to obtain the cooperation of The New York Times Company Legal Department in effecting service upon these two defendants." [R-475].

I went on to note that this "long history" was chronicled by my correspondence with the New York Times Company Legal Department, spanning from November 1, 2005 to March 2, 2006, annexed to the verified complaint as Exhibits T-8 – T-22. The bound record on appeal contains this relevant correspondence at R-389-414.

¶7 of my affidavit [R-475-477] then summarized the "history subsequent to my March 2, 2006 letter", describing how Mr. Freeman would not respond to the straightforward question, set forth by my March 9, 2006 and March 17, 2006 letters to him as to whether, by not appearing for Mr. Fuchs by his March 1, 2006 notice and demand for the complaint, he was representing that "229 West 43<sup>rd</sup> Street, New York, New York 10036" was not Mr. Fuchs' "actual place of business" – the relevant inquiry in determining the validity of the substituted service upon Mr. Fuchs of the summons with notice, effected at that address, pursuant to CPLR 308(2) on "a person of suitable age and discretion" on February 14, 2006. Instead, Mr. Freeman would only say that Mr. Fuchs was not a New York Times Company employee – which is non-responsive, as CPLR 308(2) does not require that Mr. Fuchs be an "employee" at his "actual place of business", a fact my March 17, 2006 letter pointed out to Mr. Freeman, without response from him. My affidavit annexed the exchange of correspondence as Exhibits X-1 – X-5 to underscore the deceit of footnote 1 of Mr. Freeman's memorandum. Such is contained in the bound record on appeal at R-505-513. As to whether the record contains even an UNSWORN STATEMENT that Mr. Fuchs' "actual place of business" was not 229 West 43<sup>rd</sup> Street, thereby potentially invalidating the substituted service upon him, the answer is NO.

In replying to Presiding Justice Santucci at oral argument, I stated that Mr. Fuchs was a non-appearing defendant, notwithstanding duly served. The record references as to service are: ¶¶32-33 of my June 1, 2006 affidavit, attesting that all aspects of the substituted service were in my presence and annexing the February 23, 2006 affidavit of plaintiffs' process server, Richard P.

Simmonds, as Exhibit V-2. These appear at **R-488** and **R-496-499** of the record on appeal.<sup>1</sup>

The foregoing factual and legal showing in plaintiffs' opposition/cross-motion was unopposed and uncontested by Mr. Freeman. Such is established by his June 9, 2006 reply affidavit [**R-609-619**] and so-highlighted by my June 13, 2006 reply affidavit, specifically, by my ¶¶3-4 [**R-621-622**].

This was the record before Judge Gerald Loehr when he rendered his July 5, 2006 decision [**R-7-17**]. He made no adjudication as to whether defendant Fuchs was a New York Times Company employee – which, as stated, is irrelevant to whether 229 West 43<sup>rd</sup> Street was Mr. Fuchs' "actual place of business" for purposes of substituted service pursuant to CPLR 308(2). Indeed, Judge Loehr's decision expressly assumed "arguendo" that "Okrent and Fuchs and the unnamed 'Does' have been properly served"[**R-16**], which is what the record before him showed them to be.<sup>2</sup>

Should the panel have any further questions as to the state of the record, I would be pleased to furnish the necessary record references to assist the Court in discharging its appellate duty in this history-making case.

Finally, I take this opportunity to note that plaintiffs-appellants' request for "specific factual findings" on these appeals as to the fraudulence of Judge Loehr's two subject decisions – to which I referred in my oral argument (at p. 4) – is set forth by our brief, not only in the two footnotes to the "Questions Presented" (pp. xi), but, with specificity, by our POINT IV (pp. 52-54).

Thank you.

Very truly yours,



ELENA RUTH SASSOWER  
Plaintiff-Appellant *Pro Se*

cc: Eli Vigliano, Esq.  
George Freeman, Esq.  
(with a copy of the written statement I presented at oral argument)

Enclosure: my December 10, 2007 letter

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<sup>1</sup> See also **R-603-604**, which are the pertinent pages of plaintiffs' June 1, 2006 memorandum of law in support of their cross-motion for default against the non-appearing defendants: Defendant Fuchs, among them.

<sup>2</sup> Mr. Freeman's opposition brief to this Court gave the misimpression that Judge Loehr had ruled that such defendants "had not been served" – a deceit pointed out at page 7 of plaintiffs-appellants' reply brief (fn. 4).

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December 10, 2007

Appellate Division, Second Department  
45 Monroe Place  
Brooklyn, New York 11201

ATT: James Edward Pelzer, Clerk of the Court

RE: Electronic Recording of Oral Argument: Friday, December 14, 2007  
Sassower, et al. v. The New York Times Company, et al.  
Appellate Division, Second Dept: #2006-8091; #2006-10709; #2007-186

Dear Mr. Pelzer:

Following up our phone conversation on Friday, December 7<sup>th</sup>, this is to confirm your statement to me that the Appellate Division, Second Department records oral arguments of appeals – and that the oral argument of my above-entitled consolidated appeals will be recorded.

As discussed, I am requesting a copy of the recording, which I am willing to pay for. You stated that you would confirm with the Presiding Justice that I will be able to obtain same and that you would get back to me by tomorrow. Alternatively, I wish to have a court stenographer take down the oral argument. You told me this would not be a problem, but that I would have to make my own arrangements to secure the stenographer, who should arrive in time to set up his/her equipment in the appropriate location.

Thank you.

Very truly yours,



ELENA RUTH SASSOWER  
Plaintiff-Appellant *Pro Se*