NEW YORK SUPREME COURT
Appellate Division – Second Department

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,

App Div. #2006-8091
#2006-1079
#2007-186

Plaintiffs-Appellants,

-against-

Westchester Co. #19842/05

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

Defendants- Respondents.

BRIEF OF DEFENDANTS – RESPONDENTS

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Counter-Statement of Questions Presented

1. Was the lower court correct in dismissing with prejudice plaintiffs-appellants' defamation claims on the grounds that the passages complained of were either fair and accurate reports of official proceedings or protected opinion?

   Yes

2. Was the lower court correct in dismissing with prejudice plaintiffs-appellants' claims of "journalistic fraud" on the grounds that such claims have never been recognized and because, under the First Amendment, defendant-respondent journalists were not compelled to cover issues propounded by plaintiffs?

   Yes

3. Did Judge Loehr properly have authority to decide the case, and should his decision be, in any event, affirmed in the face of a jurisdictional attack not argued below?

   Yes

4. Should this Court consider plaintiffs' other arguments, urged with no cognizable evidence, that the court below "demonstrated actual bias and interest" and should have been disqualified; that the two decisions and orders of the lower court were "judicial frauds"; and that the

lower court, undersigned counsel, and the entire New York Times Company Legal Department should be referred "for disciplinary and criminal investigation and prosecution"?

No

PRELIMINARY STATEMENT

This is an appeal of the dismissal by the court below of a routine libel case. Defendants-Respondents The New York Times Company and certain New York Times journalists (collectively, "The Times") respectfully submit that, for numerous reasons set forth below, the decisions and orders of Judge Loehr of July 6, 2006 and September 27, 2006, as well as the August 1, 2006 judgment, all be affirmed.

The column in the Westchester Section of The New York Times which plaintiffs sue on was a wry and somewhat sympathetic portrayal of Ms. Sassower; it was published while she was in jail after she was convicted for disruption of Congress, having refused the offer of a suspended sentence and probation along with certain other conditions, such as an apology. The article recounted her protest during the Senate Judiciary Committee hearings on the nomination of former New York Court of Appeals, Appellate Division and State Supreme Court Judge Richard Wesley to the U.S. Court of Appeals for the Second Circuit, which led to her arrest and conviction, her subsequent trial and sentencing hearing, and gave some context to Ms. Sassower's character and longstanding campaign against corruption in the judicial selection process.

The lower court granted defendants' motion to dismiss with prejudice on the grounds that the passages claimed to be libelous were not reasonably susceptible of a defamatory meeting, were protected rhetorical hyperbole and opinion, and were fair and accurate reports of official proceedings. The court also dismissed plaintiffs' novel claim of "journalistic fraud", noting that it has not been recognized in any jurisdiction.

Quite remarkably, on this appeal, plaintiff does not argue any of these substantive libel issues - - undoubtedly because she recognizes that the court's decisions were fully supportable and justified. Rather, consistent with her efforts in attacking the judiciary through the years, her appeal is nothing less than a frontal attack on Judge Loehr's jurisdiction, neutrality and competence, as well as an unsupportable grievance against him (as well as undersigned counsel and The New York Times Legal Department) for fraud and disciplinary violations. This court should not countenance such unfounded allegations. The decisions and orders below must be affirmed.

STATEMENT OF THE CASE

A. The Complaint

The sixty-seven page, 175-paragraph Complaint (R. 30)[1] filed by Plaintiffs-Appellants Elena Ruth Sassower and an organization she founded and runs, Center for Judicial Accountability, Inc. (collectively, "Ms. Sassower"), includes a recitation - - and appears to be a culmination - - of Ms. Sassower's decade long campaign against corruption in the judicial selection process and her attempts to enlist The Times on this issue. It sets out in perilous detail Ms. Sassower's quite critical views of the judicial selection process, the corruption she sees therein, the letters she has written and activities she has undertaken in support of her self-appointed monitoring role, as well as her attempts to have The New York Times see the light regarding this issue and her frustration at The Times' not engaging her and not responding to the over 250 letters she has written it over the past 15 years. The relentless and irrepressible nature of her campaign can be seen not only in the Complaint itself, but also in many of the Exhibits thereto. (See, e.g., Exhibit C (R. 209) and E (R. 225) listing her activities and correspondence "Documenting the Corruption of Federal Judicial Selection/Confirmation" and her letters to The Times.) Of course, nothing

[1] All references "R. ___" are to the Record on Appeal filed by plaintiffs-appellants.

in this long recitation is in the least actionable, let alone against a newspaper making editorial decisions to either cover, or for the most part, not to cover, these matters.

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

> "so completely covers up the politically-explosive underlying national and New York stories of the corruption of the processes of judicial selection and discipline, involving our highest public officers, as to be explicable only as a manifestation of The Times' profound and multitudinous conflicts of interest." (R. 80)

The column, for its part, reports on Ms. Sassower while she is in the midst of a six-month jail term after she was convicted for disruption of Congress during the Senate Judiciary Committee hearings on the nomination of Judge Wesley to the U.S. Court of Appeals for the Second Circuit. (R. 97-98) The column relates not only her actions at the Senate hearing which led to her arrest and conviction, all of which are amply supported in the Congressional Record, but also the subsequent sentencing hearing before Judge Holeman of the District of Columbia Superior Court. As the column relates, he proposed a suspended sentence and probation along with certain other conditions: that she take anger-management classes; stay away from

the Capitol complex; sever all contact with members of the Senate Judiciary Committee; and apologize. Again, according to the article as well as the transcript of the court hearing and her Complaint itself (¶63, 89; R.52,62), when Ms. Sassower refused to apologize and alienated the judge, he sentenced her to six months of incarceration.

Ms. Sassower's complaint does not really quarrel with the reporter's factual account of these events - - nor could she, since they are a fair and accurate summary of what appeared in official government documents. Rather, she quibbles with the fairness of the underlying proceedings - - none of which The Times had anything to do with - - and with the not wholly unfavorable, if not enthusiastically supportive, nuanced depiction of her in the column. What she really appears to grieve about are characterizations of her - - such as "relentless", "difficult" and "fulminating", though "harmless" and never even "remotely threatening" - - all of which certainly are constitutionally protected opinion. At its core, Ms. Sassower's criticism of the column centers on what The Times determined not to publish about her and her cause - - non-inclusions The Times certainly is free to have decided on.

B. Judge Loehr's July 7, 2006 Decision Dismissing the Complaint

Defendants timely moved to dismiss the complaint urging three basic points: (1) that the vast bulk of the complaint - - restating Ms. Sassower's themes 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 - - does not even approach stating a cause of action; (2) that the libel claims arising from the Westchester Section column were not actionable since the challenged passages did not have a defamatory meaning and were substantially true; were privileged as fair and accurate reports of official proceedings under New York Civil Rights Law § 74, such as the narrative about Ms. Sassower's arrest in Congress and the sentencing hearing before Judge Holeman; and were protected opinion; and (3) that her claims for "journalistic fraud" were novel and uncognizable, did not meet the elements of common law fraud, and were easily distinguishable from the fabrication in the Jayson Blair case which gave rise to a law review article heavily relied upon by plaintiffs. (R.446-68)

The court below agreed, and dismissed the complaint in a very cogent eleven-page decision which fully and deftly dealt with all of the material

issues raised. (R.7) After giving some background into Ms. Sassower's campaign against corruption in the judicial appointment process, her complaint against Governor Pataki with the New York State Ethics Commission, her arrest and conviction at the Senate Judiciary Committee hearings, her demands to The Times for press coverage concerning these issues and The Times's unsatisfactory responses, the Court turned to the Westchester Section column "When The Judge Sledgehammered The Gadfly", which it restated in full. Noting that Ms. Sassower based her claim of defamation on its references to her as a "gadfly," "something of a handful," possessed of a "relentless" and "exhausting" conversational style; that she "specializes in frontal assaults" against judicial nominees; that her disruption of the Senate hearings was "unseemly;" that she "launched into polite but fulminating assaults" when debating legal issues, but was "harmless", Judge Loehr held that such depictions were constitutionally protected. "The challenged statements are not reasonably susceptible of a defamatory meaning, and were, in any event merely rhetorical hyperbole constituting pure opinion." (R.14)

Moreover, with respect to the Senate Judiciary Committee proceeding and her sentencing hearing, the Court reasoned that "it is apparent that the article is a fair and substantially accurate description of the official

proceedings it purported to cover (see NY Civil Rights Law §74)." (R.14) After routinely - - and correctly - - dismissing Ms. Sassower's libel claims, Judge Loehr referenced the vast bulk of her complaint by saying that "the gravamen of plaintiffs' complaint is, in reality, the failure of the defendants to have included in the article all of the history – recited in part above – which led to Sassower's arrest and conviction." Citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S.241, 258 (1974), he held, however, that "such coverage decisions are, however, editorial and protected by the First Amendment." (R.14)

Likewise, the Court dismissed plaintiffs' novel claim for "journalistic fraud", stating that "to date, based on the Court's research, no jurisdiction has embraced such cause of action." (R.15) He continued by explaining that "moreover, as opposed to the Blair case in which there was admitted widespread fabrication of news stories and plagiarism, the gravamen of plaintiffs' claim as alleged in the complaint is not defendants' misstatement of fact, but rather defendants' failure to provide such press coverage as plaintiffs believed to be appropriate, and their conclusion that such, ipso factor, must have been based on a conflict of interest." He concluded, "decisions concerning the extent that a newspaper will or will not cover a

story are editorial, necessarily subjective and are protected under the First Amendment." (R.15)

The court below also denied plaintiffs' cross-motion to sanction undersigned counsel on the basis that The Times's motion to dismiss was frivolous, since - - having granted the motion - - the court found it was not frivolous. (R.16) Likewise, plaintiffs' cross-motion to disqualify The Times Legal Department from representing The Times based on some purported conflict of interest was denied; the court found that especially since the journalistic fraud claim was being denied, plaintiffs' seeming argument that all members of The Times Legal Department were also liable for journalistic fraud, thereby somehow creating an adverse situation, was also groundless. (R.15-16) Finally, the court denied a motion for entry of a default judgment against the non-moving journalists who had not been served since, in any event, the complaint failed to state a cause of action. (R. 16)

C. Judge Loehr's September 27, 2006 Decision

Faced with the dismissal of her case, plaintiff then moved for disqualification/disclosure; reargument/renewal; vacatur and other relief. (R. 784) In Decision and Order of September 27, 2006, the Court denied all of plaintiffs' motions. (R.26) Significantly, despite all the motions plaintiffs

made, none raised the jurisdictional issue about the appropriateness of the appointment of Judge Loehr (after a number of Westchester Supreme Court judges had recused themselves from the matter). That is the argument plaintiffs for the first time make now in Point I of their brief to this court. (Plaintiffs-Appellants' Brief at 40.)

Instead, plaintiffs argued bias and an "on-going retaliatory vendetta against the plaintiffs due to their crusade against judicial corruption" on the part of Judge Nicolai, the administrative judge of the district who appointed Judge Loehr, and Judge Loehr alleging that the case was assigned to Judge Loehr so as "to guarantee the outcome he desired." (emphasis in original) (R.27) However, the Court noted that he had "no knowledge of Judge Nicolai's opinion with respect to this matter, assuming he has an opinion at all." (R.27) Judge Loehr also wrote that the case was not assigned to him "to guarantee any particular result but because of the number of judges who had already recused themselves," noting that at least nine Westchester County Supreme Court Judges had issued standing reclusal orders recusing themselves from any action involving the plaintiffs. (R.27) Therefore, the Court denied the motion to recuse and, likewise, denied the motion to reargue or renew since plaintiff had not submitted any new facts or demonstrated any change in the law (CPLR 2221). (R.27) Finally, the

court affirmed the dismissed with prejudice on the grounds that since the decision "was on the merits, the dismissal was necessarily with prejudice" and that the judgment entered "was therefore in accordance with the Decision."[2] (R.27)

This appeal followed.

[2] Inasmuch as the reasons why the claims were dismissed were uncorrectable - - no amount of repleading or additional facts could save them - - entering a judgment with prejudice is entirely appropriate and consistent with the Court's decision.

I.

THE LOWER COURT WAS CORRECT IN DISMISSING PLAINTIFFS' CLAIMS FOR LIBEL AND "JOURNALISTIC FRAUD"

A. The Libel Claims were Correctly Dismissed because the Challenged Passages were Not Defamatory, were Fair and Accurate Reports of Officials Proceedings, or were Protected Opinion

Although Ms. Sassower's brief to this court barely challenges the substantive libel rulings by the lower court, to the extent the Complaint attempts to state a cognizable claim, it is one for libel in the November 7, 2004 Westchester Section column. (R.97) Thus, though her appellate brief seems to deal with everything but the law relating to defamation, we briefly turn to her libel claim and discuss why Judge Loehr's ruling was completely correct and should be affirmed.

The Complaint's claims regarding defamation are set forth, in the main, at ¶ 140-141.[3] Ms. Sassower's quibbles about the article arise generally from three criticisms: First, she complains about what the column does not include, particularly taking The Times to task for not explaining

[3] Those paragraphs refer to exhibit A attached to the complaint, an 18-page paragraph-by-paragraph-analysis of the column. (R.99) Though we do not repeat our rebuttal of that analysis here, we showed in our moving papers why each paragraph of the article does not provide the basis for a defamation claim. See section B of The Times's Memorandum in Support of Motion to Dismiss, R.461-467.

and endorsing the positions Ms. Sassower was advocating on issues such as corruption in the judicial selection process. (See, e.g., ¶ 148, R. 81-82) Second, she takes issue with The Times's reporting on events she partook in, such as the sentencing hearing before Judge Holeman, notwithstanding that The Times's reporting came from official records and that her real complaint is with the Judge's underlying rulings, not The Times's recitation of the events. (¶ 143, R.80) Finally, she complains of some of the descriptions and characterizations made of her and her organization in the column. (¶ 158-61; R. 84-85)

However, as Judge Loehr duly recognized, the fundamental tenets of libel law make clear that no cause of action for libel can lie here. Thus, while plaintiff may disagree with The Times's editorial decisions regarding what to cover, she simply can make no cognizable claim regarding the column's lack of support of her campaign about judicial corruption and its non-inclusion of her positions, materials from her website, the interviews with her and her mother, etc.; the law does not allow for defamation for material not published. Moreover, the facts related about her arrest and sentencing are from official Senate and court transcripts, and, as such, are privileged.

Finally, the characterizations of Ms. Sassower are not false facts, which are required for a libel claim to be stated, but are colorful descriptions expected in a column and as such, under New York law, are protected as the author's opinion. To take the most obvious example, first paragraph of the column describes Ms. Sassower as "something of a handful", whose "conversational style can best be describe as relentless, and her passions, expressed long recitations, can exhaust the most earnest listener." A few paragraphs later, the column continues, "this stance has not endeared her to the judicial establishment (or the elected officials who approve nominations) - - on top of which, add her reputation for delivering her views with the subtlety of a claw hammer." (R.97) As Judge Loehr correctly decided, passages such as these are "rhetorical hyperbole constituting pure opinion" and are "constitutionally protected." (R. 14)

1. <u>The Lower Court was Correct in Finding No Liability for the Non-inclusion of Themes and Issues Propounded by Plaintiffs</u>

The vast bulk of the complaint is a screed against The Times for not taking more seriously, and not writing more voluminously about, the issues plaintiffs hold dear, such as corruption in the judicial selection process. As Judge Loehr aptly wrote, "the gravamen of plaintiffs' complaint is, in reality, the failure of the defendants to have included in the article all of the history - - recited in part above - - which led to Sassower's arrest and conviction." But, as he concluded, "such coverage decisions are, however, editorial and protected by the First Amendment." (R.14)

Thus, it is black letter constitutional law that it is unconstitutional to pin liability on material a publisher determined not to print. As the U.S. Supreme Court concluded in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974):

> "The choice of material to go into a newspaper , and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised

> consistent with First Amendment guarantees of a free press as they have evolved to this time." [4]

Additionally, the omission of details is not actionable. It is "largely a matter of editorial judgment in which the courts and juries, have no proper function." *Rinaldi v. Holt, Reinhart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y.S. 2d 943, 952, *cert denied,* 434 U.S. 969 (1977). Indeed, since New York law requires pleading with particularity of the defamatory words complained of, CPLR § 3016(a), it is clear as a matter of law and logic that a libel action cannot stand on words, ideas or positions which are not written in an article.

Moreover, Judge Loehr correctly pointed out that the only factual inaccuracy plaintiffs identified "is that the article reported that Sassower had been arrested for disorderly conduct when in fact the charge was disruption of Congress." As he correctly concluded, "such a minor discrepancy does not amount to falsity as a matter of law." (R.14) Again, it is black letter libel law that the report need not be exactly true; it merely must be substantially

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

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

true. Proof of falsity must go to the "gist" or "sting" of the defamation. As the U.S. Supreme Court stated, the test is whether the alleged libel as published "would have had a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2433 (1991). Libel law "overlooks minor inaccuracies and concentrates upon substantial truth." *Id* at 2432-33. Thus, for example, describing a violation of security law imprecisely as "fraud", *Orr v. Argus-Press Co.*, 586 F 2d 1108 (6th Cir. 1978), *cert denied* 440 U.S. 960 (1979), or saying that a juvenile was arrested for a crime when in fact he was arrested for "delinquency", *Piracci v. Hearst Corp.,* 263 F. Sup. 511 D.Md. (1966), *aff'd* 371 F. 2d 1016 (4th Cir. 1967), are not actionable since they are minor inaccuracies which courts have determined do not affect the gist of what the reader takes from the article and do not render the statements false.

2. The Lower Court was Correct in Dismissing Claims based on Ms. Sassower's Arrest, Conviction and Sentencing because those Passages were Fair and Accurate Reports of Official Proceedings.

All of the discussion in the column about Ms. Sassower's arrest in Congress and the sentencing hearing before Judge Holeman (where he proposed a suspended sentence, probation, an apology and other limitations, but when she rejected that, sentenced her to six moths in jail) are protected

from suit under the privilege for publishing fair and accurate reports of an official proceeding. N.Y. Civil Rights Law § 74. Pursuant to that law, a fair and substantially accurate report of an official, judicial or legislative proceeding cannot be the basis for a defamation action. *Holy Spirit Ass'n v. New York Times Co.*, 49 N.Y. 2d 63, 424 N.Y.S. 2d 165 (1979); *Freeze Right Refrigeration Co. v. New York Times Co.*, 101 A.D. 2d 175, 475 N.Y.S. 2d 383 (1st Dep't 1984).[5] The purpose of this privilege is to allow the press, as surrogates of the public, to freely report on Government activities, and in so doing, fulfill its constitutional obligation to report to the public on what its government is doing. Thus, reporting on the actions of Congress and on the sentencing hearing in the D.C. Superior Court are fully protected. In any event, in the Complaint itself, Ms. Sassower in no way denies the basic facts of her arrest and sentence (Cmplt ¶ 63, 89; R. 52, 62).

Thus, Judge Loehr was correct in dismissing claims based on the paragraphs detailing Ms. Sassower's arrest and sentencing based on New York Civil Law §74.

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

3. The Lower Court was Correct in Dismissing Claims Based on the Characterizations and Depictions of Ms. Sassower as Protected Opinion.

Judge Loehr also correctly analyzed plaintiffs' defamation claims based on references to Ms. Sassower as "something of a handful"; possessed of a "relentless" and "exhausting" conversational style; that her disruption of the Senate hearings was "unseemly"; and that she "launched into polite but fulminating assaults" when debating legal issues, but was "harmless". (R. 13) Perhaps most typical of this genre was a passage which suggested that she delivered her views "with the subtlety of a claw hammer".(R. 463)

But since defamation can only arise from false fact, not opinion, the descriptions and colorful characterizations of Ms. Sassower are protected speech. According to longstanding constitutional principles, "it is a settled rule that expressions of an opinion, 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions'" *Steinhilber v. Alphonse*, 68 N.Y. 2d 283, 286 (1986) (*quoting Rinaldi v. Holt, Reinhart & Winston*, *supra,* at 380). This basic constitutional principle was underscored by the Supreme Court's categorical statement: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of

other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). As the New York Court of Appeals, citing *Gertz,* held, an expression of pure opinion is not actionable and receives constitutional protection "accorded to the expression of ideas, *no matter how vituperative or unreasonable it may be.*" *Steinhilber,* 68 N.Y. 2d at 289. (emphasis added). Consistent with these principles, in *Milkovich v. Lorain Journal Co.*, 497 U.S.1, 20 (1990), the Supreme Court held that its line of cases "provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." It reasoned that "this provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich,* 497 U.S. at 20. Indeed, "to deny to the press the right to use hyperbole...would condemn the press to an arid desiccated recital of bare facts." *Time, Inc. v. Johnston,* 488 F.2d 378, 384 (4th Cir. 1971).

Though *Milkovich* focused mainly on the verifiability of the statement in question, the New York Court of Appeals, interpreting the New York Constitution, has protected opinion even more broadly "by looking at the content of the whole communication, its tone and apparent purpose." *Immuo*

AG v. Moor-Jankowski ("*Immuno II*"), 77 N.Y.2d 235, 254[6]. As our Court of Appeals reasoned in gently but firmly supplementing *Milkovich*, "statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying *any* facts." *Id.* (emphasis in the original). "Under New York Law, communication is unlikely to be found actionable if its immediate context and its broader social context and 'surrounding circumstances are such as to signal…listeners that what is being…heard is likely to be opinion, not fact.'" *Rappaport v. VV Publishing Corp.*, 163 Misc. 2d 1 (N.Y.Co. Sup. Ct. 1994), *aff'd.*, 223 A.D. 2d 515 (1st Dep't. 1996). Here, of course, at issue is a column -- written in a wry, personal and vaguely edgy but not unsympathetic style --where more opinionated writing is expected, not a straight news article.

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

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

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

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

For all these reasons Judge Loehr was correct in finding that these characterizations were both rhetorical hyperbole and protected opinion which could not be susceptible to a libel suit.

B. The Lower Court Correctly Dismissed Plaintiffs' Novel and Inapplicable Claim for "Journalistic Fraud"

Plaintiffs take the opportunity in this case to unveil a new cause of action, heretofore never recognized in New York or any other state. Based on a law review article discussing the Jayson Blair case, plaintiffs claim damages should be awarded them for "journalistic fraud". This routine litigation about an unspectacular column should hardly be the vehicle to invent a newfound and totally unnecessary cause of action.

First, as the lower court bluntly put it, "to date, based on the Court's research, no jurisdiction has embraced such cause of action." (R.15) Second, as Justice Loehr's July 6 opinion also makes clear, the law review article which discusses such theory does so based on the widespread fabrication and plagiarism of a rogue former Times reporter. That series of events has nothing whatsoever to do with the rather routine reporting involved in the Westchester Section column. Nor does the Blair case have anything to do with plaintiffs' claims which are based on alleged minor inaccuracies, unfavorable characterizations or recitations of official

proceedings she would like to change - - or, as the Court put it, on the Times's "failure to provide such press coverage as plaintiffs believed to be appropriate" which plaintiffs believe must have been due to a conflict of interest. Any and all of such claims have absolutely nothing in common with the Jayson Blair case and the law review article plaintiffs rely on as a basis for this novel claim. Moreover, beyond the fact that "journalistic fraud" has never been recognized in any jurisdiction, plaintiffs fulfill none of the requirements of a traditional fraud case, such as reliance on a misrepresentation that caused her financial loss. For all these reasons, the court below was correct in ruling that "even if such cause of action existed, plaintiffs have failed to allege a claim thereunder". (R. 15)

II.

SASSOWER'S ATTACK ON THE JURISDICTION OF THE COURT BELOW IS ENTIRELY MERITLESS

In Point I of their brief, appellants urge that the appointment of Judge Loehr to this case was improper and that the lower court therefore lacked jurisdiction to determine the matter. The argument is meritless.

Article VI, Section 26 of the New York State Constitution provides:

> A judge of the county court . . . may be temporarily assigned to the supreme court in the judicial department of his or her residence . . ..

. . . .

> While temporarily assigned pursuant to the provisions of this section, any judge or justice shall have the powers, duties and jurisdiction of a judge or justice of the court to which assigned. . . .

N.Y. Const. art. VI, §§ 26(c), (k).

Procedures for the temporary appointment of judges are codified in the Judiciary Law and the Rules of the Chief Administrator of the Courts. Section 212 of the Judiciary Law provides that the Chief Administrator shall "[t]emporarily assign judges and justices of the unified court system, in accordance with the provisions of section twenty-six of article six of the constitution," N.Y. Judiciary Law at § 212(2)(c) (McKinney 2005). The Judiciary Law also makes clear that the Chief Administrator may "[d]elegate to any . . . administrative judge, administrative functions, powers and duties possessed by him." *Id.* § 212(1)(s). The Rules of the Chief Administrator in turn include detailed provisions concerning the temporary assignment of judges, including a provision that permits judges who have served on a lower court for less than two years to be assigned to the Supreme Court for a period of 20 days. 22 N.Y. CODES R. & REGS. § 121.02 (2007). Certain requirements of the rules can be waived by the Chief Administrator, "with the agreement of the Presiding Justice of the appropriate Appellate Division." *Id.* § 121.02(d).

In December 2005, Westchester County Court Judge Loehr was cross assigned to Supreme and Surrogate Courts by an Administrative Order signed by Chief Administrative Judge Jonathan Lipmann and Presiding Justice of the Appellate Division, Second Department, A. Gail Prudenti ("December 2005 Administrative Order"). (R.913-15) Pursuant to § 121.02 of the Rules of the Chief Administrator, the Order designated Judge Loehr for assignment to matters expected to last less than 20 calendar days. (R.915)[6] On May 8, 2006, Administrative Judge Francis Nicolai assigned Judge Loehr to this case. (R.721)

In an argument raised for the first time on this appeal, appellants urge that Judge Loehr's assignment to this case violates section 121 of the Rules of the Chief Administrator and that he was therefore without jurisdiction to dismiss the action. The argument is entirely baseless for at least three reasons. First, Judge Loehr's appointment was entirely consistent with the governing statutes and rules and is therefore unreviewable on this appeal. Second, appellants waived the argument by failing to raise it in the court below. And third, even if there were some impropriety in the manner of Judge Loehr's assignment - - which there was not - - the law is clear that his

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[6] As provided in Section 121.02, the Order also waived certain qualification requirements set forth in the Rule. (R.912)

decision (and his jurisdiction to issue it) cannot be attacked on that basis by appellants.

The assignment of Judge Loehr did not offend the Rules of the Chief Administrator or the December 2005 Administrative Order, and thus, is not reviewable by this Court. As this Court held in *Schwartz* v. *Williams*, 124 A.D. 2d 798, 508 N.Y.S.2d 521 (2d Dept. 1986), where there are no "claims of substance" that the discretionary power of the Chief Administrator "regarding the temporary assignment of Judges and Justices has been put to an illegal or unconstitutional use, the exercise of that power is not subject to judicial review." *Id.*

There are no "claims of substance" here. In accordance with Section 121.02, Judge Loehr was properly designated for temporary assignment to the Supreme Court, Ninth Judicial District by the December 2005 Administrative Order signed by Chief Administrative Judge Lippman and approved by Presiding Justice Prudenti. (R.913-15) As to those judges designated in the Order who had not yet served for more than two years, among them Judge Loehr, the Order properly provided that they were "designated for assignment to the Supreme Court on a temporary, ad hoc basis to matters expected to take twenty (20) calendar days or less to complete." (R.915) In accordance therewith, on May 8, 2006, Francis A.

Nicolai, Administrative Judge for the Ninth Judicial District, assigned Judge Loehr to this case. (R.721).[7] The assignment was entirely proper and is thus not reviewable on this appeal. *See Schwartz* v. *Williams*, *supra*.

Appellants' argument that Judge Loehr's assignment violated Section 121.02 fails in any event because it was not preserved for appellate review. CPLR 5501(a)(3); *Kolmer-Marcus* v. *Winer*, 32 A.D. 2d 763, 764, 300 N.Y.S.2d 952, 953-954 (1st Dept. 1969)(*citing Rentways Inc.* v. *O'Neill Milk & Cream Co.*, 308 N.Y. 342 (1955)("[A]n appellate court should not, and will not, consider . . . new questions, if proof might have been offered to refute or overcome them had they been presented [below] . . . .")); *Lium* v. *Ploski*, 87 A.D. 2d 860, 861, 449 N.Y.S.2d 297, 299 (2d Dept. 1982). Although Ms. Sassower made a host of spurious arguments attacking both Judge Loehr and Judge Nicolai in her omnibus motion filed after the entry of judgment (including claims that other Rules of the Chief Administrator were violated here (R.700-14), nowhere in any of appellants' filings with the lower court did she mention Section 121 of the Rules of the Chief Administrator. Therefore, Appellants' argument that the temporary

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[7] Appellant insists that this was not a case that could properly be expected to take 20 calendar days or less to complete. App. Br. at 44. In fact, Judge Nicolai was prescient in estimating that this matter was capable of a speedy resolution. The motion to dismiss the Complaint in this action was fully submitted to Judge Loehr on June 14, 2006; his decision dismissing the Complaint was issued on July 5, 2006, 21 calendar days later, the day after the fourth of July holiday.

assignment of Judge Loehr violated Section 121 was not preserved for appellate review and should be rejected as a ground for disturbing the judgment below.

Even assuming that there were any irregularity in the appointment of Judge Loehr, which there was not, the law is also clear that appellants cannot attack the trial court's judgment on that basis. The actions of an Acting Supreme Court Justice, even one whose appointment was improper, are valid and binding. As the Court of Appeals has held:

> A de facto judge assumes the exercise of a part of the prerogatives of sovereignty and the legality of that assumption is open to attack by the sovereign power alone. This rule is founded upon the considerations of policy and necessity. It has for its object the protection of the public and individuals whose interest may be affected. Offices are created for the benefit of the public. Private parties are not permitted to inquire into the title of persons clothed with he evidence of such offices and in apparent possession of their powers and functions.
>
> The supremacy of the law could not be maintained or its execution enforced if the acts of a judge having a colorable but not a legal title were to be deemed invalid. It is a well-established principle, recognized in all jurisdictions that, so far as the public and third persons are concerned, the official acts of a de facto judge are just as valid as those of a de jure judge.

Sylvia Lake Co. v. *Northern Ore Co.*, 242 N.Y. 144, 147, 151 N.E. 158, 159 (1926). *See Curtin* v. *Barton*, 139 N.Y. 505, 511, 139 N.E. 1093, 1094 (1893) ("If the court exists under the Constitution and laws and it had jurisdiction of the case, any defect in the election or mode of appointing the

judge is not available to litigants. . . It would be an unseemly proceeding derogatory to the dignity of the court and subversive of all respect for the orderly administration of justice to permit private litigants to enter upon an inquiry as to the title of the judge, before whom the action is pending, to his office.). *See also* *Morgenthau* v. *Cooke*, 56 N.Y.2d 24, 37, 436 N.E. 2d 467, 473, 451 N.Y.S.2d 17, 23 (1982).[8]

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[8] Appellants' other contentions to this Court are so bereft of evidentiary support and of legal basis, and are so inappropriate in attacking a respected jurist (as well as undersigned counsel and The New York Times Legal Department), that they deserve no reply. Thus, appellants make conclusory allegations that Judge Loehr 'threw' the case by a decision which falsified and concealed the record before him to grant defendants relief to which they were not entitled" (Appellant's Brief at 1); that Judge Loehr should have been disqualified for "demonstrated actual bias and interest" because of a "record-based showing that the decision is not merely unsupported by fact and law, but a knowing and deliberate fraud by Judge Loehr" (Id at 46,48-9); that Judge Loehr falsified the record with respect to the recusal of other Westchester Supreme Court justices (although it is unclear how plaintiff would be privy to this information) (Id. at 51); that Judge Loehr's decisions are "judicial frauds" for a number of reasons, including that they "concealed" some of the myraid allegations and exhibits made in plaintiffs' voluminous submissions (Id. at 53); and that Judge Loehr should be subject to mandatory discipline because his decisions "are judicial frauds", along with undersigned counsel and The New York Times Company Legal Department for submitting a dismissal motion, albeit one which was routinely granted, "which was a fraud, from beginning to end and in virtually every sentence." (Id. at 56) Not only are these conclusory, unfounded and offensive allegations not worthy of response, plaintiffs' similar attacks over years of litigation may well be the cause why so many justices have recused themselves from her cases necessitating the very appointment which she now so bitterly contests.

CONCLUSION

For all the reasons set forth herein, it is respectfully submitted that the decisions and orders of July 6, 2006 and September 27, 2006, and the judgment of August 1, 2006, all be affirmed.

Dated: New York, New York
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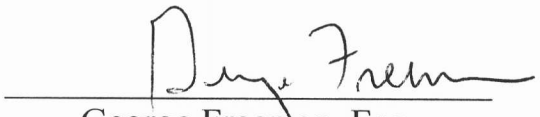
CERTIFICATE OF COMPLIANCE

Pursuant to §670.10.3(f), this is to certify that defendants-respondents' brief for appeals #2006-8091, #2006-10709, and #2077-186 was prepared on a computer. The typeface is Times New Roman. The font is 14 point. The line spacing is double. The word count is 6,457.



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