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 SUPPORT OF THE COURT'S DISQUALIFICATION FOR DEMONSTRATED ACTUAL BIAS AND INTEREST, VACATUR OF ITS JULY 5, 2006 DECISION & ORDER BY REASON THEREOF OR UPON THE GRANTING OF REARGUMENT/RENEWAL, DISCLOSURE & REFERRAL TO ADMINISTRATIVE JUDGE NICOLAI, VACATUR OF THE COUNTY CLERK'S AUGUST 1, 2006 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

August 21, 2006

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APPENDIX:

PLAINTIFFS' MEMORANDUM OF LAW

This memorandum is submitted in support of the relief sought by plaintiffs' accompanying notice of motion: most importantly, disqualification of the Court for demonstrated actual bias and interest and vacatur of its July 5, 2006 decision and order (Exhibit CC)[1] for fraud and lack of jurisdiction, whether directly or by way of the granting of reargument and renewal of the July 5, 2006 decision and order.

As hereinafter shown, no fair and impartial tribunal could render the July 5, 2006 decision and order as it flagrantly violates ALL cognizable legal standards and adjudicative principles to grant defendants relief to which they are not entitled, *as a matter of law*, and to deny plaintiffs relief to which the law – and mandatory rules of judicial conduct – absolutely entitle them. Such decision is, in every respect, a knowing and deliberate fraud by the Court and "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause" of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Should the Court not disqualify itself and vacate its July 5, 2006 decision and order based on plaintiffs' record-based showing herein, it must – consistent with its ethical duty – disclose the facts bearing upon the appearance and actuality of its bias and interest, particularized by plaintiff SASSOWER's accompanying affidavit[2], including as to its

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[1] Exhibit CC – the Court's July 5, 2006 decision and order – is annexed to plaintiff SASSOWER's accompanying August 21, 2006 affidavit. It continues the sequence of exhibits begun with plaintiffs' March 21, 2006 verified complaint (annexing Exhibits A-T) and SASSOWER's June 1, 2006 affidavit (annexing Exhibits U-BB).

[2] Such new and newly-discovered facts as there presented also constitute the grounds upon which

relationships with, and dependencies on, Francis A. Nicolai, Administrative Judge of the Ninth Judicial District, as well as refer back to Administrative Judge Nicolai his May 8, 2006 notice (Exhibit DD) assigning the case to the Court in violation of random assignment rules, so that he may reconsider whether to vacate the assignment for lack of jurisdiction based on his own disqualifying interest or because, based on the record of May 8, 2006, it was improvidently issued in that the first randomly-assigned judge, Supreme Court Justice Mary H. Smith, had not disqualified herself.

Finally, the August 1, 2006 judgment (Exhibit EE), which defense counsel George Freeman, himself a DOE defendant, obtained, *ex parte* and without notice, from the Westchester County Clerk, materially deviates from the July 5, 2006 decision and order, prejudicing plaintiffs' substantial rights and entitling them to its vacatur for "fraud, misrepresentation, or other misconduct of an adverse party", *as a matter of law*.

POINT I

THE FRAUDULENCE OF THE JULY 5, 2006 DECISION & ORDER, AS HEREIN DEMONSTRATED, ESTABLISHES PLAINTIFFS' ENTITLEMENT TO BOTH THE COURT'S DISQUALIFICATION FOR ACTUAL BIAS & TO REARGUMENT – WITH VACATUR OF THE DECISION & ORDER IN EITHER CASE

A. The July 5, 2006 Decision & Order Conceals the Threshold Issue Before the Court as to the Sufficiency of the Motions

Before a court can grant or deny any motion, it must determine whether the motion is legally sufficient, entitling the moving party to the relief sought. Such elementary principle was expressly stated in the concluding paragraph of plaintiff SASSOWER's June 13, 2006 reply affidavit as follows:

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this motion seek renewal, in addition to reargument.

> "the Court is not free to act, independent of the motions before it – and it is the sufficiency of these, Mr. Freeman's dismissal motion and plaintiffs' cross-motion, that are before the Court for adjudication" (at ¶25, underlining in the original).

SASSOWER repeated this basic proposition at the next day's oral argument – emphasizing that plaintiffs' opposition to Mr. Freeman's dismissal motion was so dispositive of the insufficiency and fraudulence of that motion as to entitle plaintiffs to all six branches of relief requested by their cross-motion: (1) maximum costs and $10,000 sanctions against Mr. Freeman, The New York Times Company Legal Department, and the culpable defendants, pursuant to 22 NYCRR §130-1.1, *et seq.*; (2) referring Mr. Freeman and The New York Times Company Legal Department to appropriate disciplinary authorities; (3) disqualification of Mr. Freeman and The New York Times Company Legal Department as defense counsel (4) a default judgment against the non-appearing defendants; (5) conversion of Mr. Freeman's dismissal motion to one for summary judgment in plaintiffs' favor against the appearing defendants; (6) motion costs.

It is without denying, disputing, or even identifying the proposition that the sufficiency of the motions was the issue before it, that the Court purports to grant Mr. Freeman's dismissal motion and deny plaintiffs' cross-motion, making NO determination as to the state of the record presented by these motions. Indeed, so completely does the Court conceal the record that its decision does not identify ANYTHING about Mr. Freeman's presentation of fact, law, and legal argument supporting his dismissal motion – or plaintiffs' response thereto.

The decision's first and only description of defendants' dismissal motion appears at the top of page 2, *to wit*:

> "The defendants [fn] have moved to dismiss the complaint pursuant to CPLR 3211(a)(7) on the grounds that the allegedly libelous article is, on its face, not defamatory; is a fair and accurate summary of what appears in the official records of Congress with respect to Sassower's arrest for disruption of Congress and in the transcript of her sentencing therefor; and that the article's non-record characterizations of Sassower are constitutional protected opinion. With respect to the cause of action for journalistic fraud, defendants moved to dismiss on the basis that no such cause of action exists."[3] (at p. 2).

The decision does not again refer to Mr. Freeman's dismissal motion until the bottom of page 9, when the Court announces "Accordingly, defendants' motion to dismiss the complaint is granted."

No reference to plaintiffs' opposition appears throughout the span of these nearly 9 pages – indeed in the entirety of the 11-page decision. Nor does the Court identify or discuss any of the facts, law, or legal argument which plaintiffs had presented in opposition to the recited grounds of Mr. Freeman's dismissal motion. Rather, only at the bottom of page 9, AFTER the Court has declared its granting of defendants' dismissal motion, does the decision refer to plaintiffs' cross-motion – in order to deny it. Indeed, the already dismissed complaint becomes the basis for the Court's denial, either in whole or in part, of the three branches of the six-branch cross-motion it chooses to identify: disqualification of defense counsel; sanctions pursuant to 22 NYCRR §130-1.1; and a default judgment – in that order.

The Court's knowledge that it had NO basis, in fact or law, to grant Mr. Freeman's dismissal motion is obvious from the most cursory examination of plaintiffs' opposition and the cross-motion to which it was joined. Their exhaustive showing of fact and law,

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[3] As pointed out by plaintiffs' June 1, 2006 memorandum of law (at p. 3), Mr. Freeman's notice of motion to dismiss the complaint did not identify the journalistic fraud cause of action and identified the complaint only as "an action claiming defamation". See, p.17 *infra*.

establishing the dismissal motion to be legally insufficient and "a fraud on the Court – from beginning to end and in virtually every sentence" was embodied by:

> (a) plaintiffs' 64-page June 1, 2006 memorandum of law, whose first 44 pages particularized their opposition to defendants' dismissal motion and whose remaining 20 pages particularized the facts and law pertaining to the six branches of their cross-motion;
>
> (b) SASSOWER's 18-page June 1, 2006 affidavit, whose first section, spanning from ¶¶3-13, presented further facts in support of plaintiffs' opposition to defendants' dismissal motion, with the balance, from ¶¶14-32, particularizing the facts supporting the six branches of their cross-motion;
>
> (c) SASSOWER's 14-page June 13, 2006 affidavit, particularizing the state of the record with respect to both plaintiffs' opposition and their cross-motion and demonstrating that Mr. Freeman's reply affidavit – like his dismissal motion – was "from beginning to end and in virtually every sentence a fraud on this Court".

These three documents, enumerated by the decision's last paragraph as having been "considered" by the Court (at pp. 10-11)[4], also put the Court on notice of its mandatory "Disciplinary Responsibilities" pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct to ensure the integrity of the judicial process by "appropriate action"[5]. This "appropriate action" was specified to include the relief requested by the cross-motion's first and second branches: imposition of maximum costs and sanctions pursuant to 22 NYCRR §130-1.1. *et seq.* and referral of Mr. Freeman and The New York Times Company

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[4] The Court's enumeration fails to identify these documents as forming plaintiffs' opposition. Thus, its listing of plaintiffs' June 1, 2006 notice of cross-motion omits that SASSOWER's accompanying affidavit was explicitly – and by its title – "in Opposition to Defendants' Motion to Dismiss..." and that, likewise, plaintiffs' June 1st memorandum of law was explicitly – and by its title – "IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT".

[5] *See* plaintiffs' June 1, 2006 notice of motion (¶2); plaintiffs' memorandum of law (pp. 45-50); SASSOWER's June 1, 2006 affidavit (¶¶2, 14-19); SASSOWER's June 13, 2006 reply affidavit (¶2).

Legal Department to "appropriate disciplinary authorities". Tellingly, the decision, which identifies (at p. 10) the sanctions branch of plaintiffs' cross-motion – and denies it because the Court, having granted Mr. Freeman's motion to dismiss the complaint, therefore finds it to be not frivolous – conceals the branch for disciplinary referrals, as to which plaintiffs' notice of cross-motion had made the Court's mandatory "Disciplinary Responsibilities" explicit.

B. The July 5, 2006 Decision & Order, While Purporting to Follow the Adjudicative Requirement that the Complaint's Allegations be Deemed True, Instead Falsifies, Distorts, & Omits the Allegations to Dismiss the Complaint

The decision recites (at p. 2) the adjudicative standard for motions to dismiss for failure to state a cause of action – to *wit*, "Deeming the allegations of the complaint as true (*Silsdorf v. Levine*, 59 NY 2d 8, 12 (1983)" — without disclosing that it was plaintiffs' opposition that had put that standard and *Silsdorf* before the Court or plaintiffs' reason for doing so. That reason was to underscore that

> "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)..., as well as its third cause of action for journalistic fraud (¶¶163-175), [Mr. Freeman's dismissal motion] flagrantly falsifies, omits, and distorts the complaint's allegations and cites law that is either inapplicable by reason thereof or falsified and distorted... [S]uch dismissal motion is a fraud on the court – from beginning to end and in virtually every sentence." (plaintiffs' June 1, 2006 memorandum of law, at pp. 1-2)

The Court however neither identifies this objected-to misconduct, summarized at pages 1-2 of plaintiffs' memorandum of law, nor adjudicates the substantiating particulars, set forth by the memorandum's first 44 pages and by plaintiff SASSOWER's accompanying June 1, 2006 affidavit. Rather, in every respect, the Court replicates this misconduct by its decision.

Thus, pages 2-7 of the decision, purporting to recite the "deemed true" allegations of the complaint, which it nowhere identifies as a verified complaint, omits – just as Mr. Freeman had – ALL allegations establishing plaintiffs' three causes of action, including the allegations that are the causes of action themselves. As for the few essentially irrelevant allegations of the complaint that the decision recites, the Court materially expurgates and mischaracterizes them – as Mr. Freeman had. Additionally, and by way of "filler", it introduces (at pp. 2-3) matter nowhere part of the complaint's allegations. That the Court provides no paragraph references to plaintiffs' complaint to support its recitation serves to conceal the flagrantly incomplete, distorted, and false nature of its presentation.

The Court's expungement of the material allegations of plaintiffs' complaint is even more flagrant and absolute than was Mr. Freeman's, detailed at pages 4-22 of plaintiffs' June 1, 2006 memorandum of law. Comparison of the complaint with pages 2-5 of the decision shows that the Court selects approximately nine of the complaint's 175 paragraphs and these it recites in a materially incomplete and distorted fashion. Such is in face of plaintiffs' quoting from *Silsdorf* that "each and every allegation" of the complaint is to be considered "as true" (underlining in their memorandum of law) – and the Court's own citation, albeit for other reasons (at p. 7), to *Gjonlekaj v. Sot*, 308 AD2d 471, 473 (2nd Dept. 2003), articulating the guiding principle:

> "It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and according the plaintiff the benefit of every possible inference". (underlining added).

As demonstrated by the annexed in-depth analysis, the nine paragraphs selectively plucked by the Court conceal, rather than reveal, the complaint. These nine paragraphs appear to be ¶¶3-4 (identifying SASSOWER and CJA), after which the Court inserts nearly three-quarters of a page of matter not among the complaint's allegations, followed by ¶67 (CJA's May 11, 2004 letter-proposal), ¶¶76-77 (CJA's May 24, 2004 memorandum), ¶80 (CJA's June 17, 2004 complaint to Defendant OKRENT), ¶85 (Defendant OKRENT's June 21, 2004 e-mail), ¶89 (the June 28, 2004 sentencing of SASSOWER to six months incarceration), and ¶96 (FUCHS' November 7, 2004 column, "*When the Judge Sledgehammered The Gadfly*", which it reprints in full). The decision then announces (at p. 7) "This complaint followed". The Court thus completely omits, in addition to the complaint's allegations as to the defendants (¶¶5-15), the first 51 "Factual Allegations", spanning from ¶¶16-66, and the last 42 "Factual Allegations", spanning from ¶¶97-138, and the following 24 intermediate "Factual Allegations": ¶¶68-75, 78-79, 81-84, 86-95.

Pages 14-15 of plaintiffs' June 1, 2006 memorandum of law highlighted the significance of the complaint's 123 "Factual Allegations" in establishing plaintiffs' defamation and journalistic fraud causes of action:

> "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 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)... 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." (underlining in the original).

By obliterating virtually the entirety of the "Factual Allegations" of plaintiffs' complaint, the decision transforms "clear and convincing evidence" into no evidence for causes of action whose allegations are themselves obliterated.

As for the allegations constituting the causes of action for defamation, defamation *per se*, and journalistic fraud (¶¶139-155, ¶¶156-162, ¶¶163-175), the decision does not identify them, but instead substitutes false characterizations.

Thus, without reciting or confronting the allegations of plaintiffs' causes of action for defamation and defamation *per se* (¶¶139-155, ¶¶156-162) – or even that there is a defamation *per se* cause of action – the decision, replicating Mr. Freeman's objected-to misconduct[6] – states (at p.7):

> "Sassower asserts that the article is defamatory based 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

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[6] See, plaintiffs' June 1, 2006 memorandum of law (pp.11-12).

> assaults' against judicial nominees; that her disruption of the Senate hearing was 'unseemly;' that she 'launched into polite but fulminating assaults' when debating legal issues; but was 'harmless.'"

This is false. Plaintiffs' two defamation causes of action (¶¶139-155, ¶¶156-162) do not pertain to SASSOWER alone, but to CJA as well, and both causes of action are based explicitly on plaintiffs' paragraph-by-paragraph contextual analysis of FUCHS' column, annexed as Exhibit A to the complaint.

As highlighted by plaintiffs' June 1, 2006 memorandum of law (pp. 4, 12, 22, 31-44)[7], the analysis is "decisive of plaintiffs' defamation claims" because it establishes that the defamatory and reputationally-damaging characterizations of FUCHS' column – both as to SASSOWER and CJA – are fashioned from a succession of express and implied facts that are false and knowingly so.

"Since falsity is a *sine qua non* of a libel claim", *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995), the decision not only completely conceals plaintiffs' analysis – as if it does not exist – but fraudulently purports (at p. 8) that "The only factual inaccuracy plaintiffs have identified is that the article reported that Sassower had been arrested for disorderly conduct when in fact the charge was disruption." – which the Court then rejects (at p. 8) as *de minimis*. This is the foundational deceit by which the Court dismisses the libel causes of action. It thereby replicates what Mr. Freeman's dismissal motion had done in purporting that plaintiffs had not alleged – and could not allege – any falsity in the column – a fraud resoundingly demonstrated by plaintiffs' opposition, based on their complaint and its annexed and incorporated analysis –

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[7] See also SASSOWER's June 1, 2006 affidavit (¶¶25-26) and June 13, 2006 reply affidavit (¶¶14-16).

without adjudication by the Court[8].

With respect to the journalistic fraud cause of action (¶¶163-175), the decision also does not recite or confront its allegations – nor even the summary of them in plaintiffs' memorandum of law (at pp. 6-7):

> "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[fn.6] when presented with *readily-verifiable documentary 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'". (underlining and italics in the original).

Instead, the decision characterizes plaintiffs' journalistic fraud cause of action as based on defendants'

> "refusal to cover, report on and publish what plaintiffs consider to be the more significant underlying facts and reasons which led to Sassower's arrest and conviction (the journalistic fraud cause of action)." (at p. 1);

and that

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[8] See plaintiffs' June 1, 2006 memorandum of law (pp. 10-12, 23, 26-27, 31-44); SASSOWER's June 1, 2006 affidavit (¶¶11-12, 25) and June 13, 2006 reply affidavit (¶¶17-18).

[fn.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).

> "the gravamen of plaintiffs' claims 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 [sic], must have been based on a conflict of interest." (at p. 9).

Both descriptions are false – as comparison with the journalistic fraud cause of action (¶¶163-175) readily reveals. Moreover, as to defendants' conflicts of interest, impacting on Times' coverage and resulting in knowingly false and misleading news reporting and editorials, the complaint's material allegations are all obliterated by the decision. Indeed, here, too, the Court's obliteration is more total than Mr. Freeman's, whose dismissal motion, though concealing the particulars of the complaint's allegations of defendants' "profound and multitudinous conflicts of interest", had at least identified them (at p. 8) as "summarized in a year's worth of Plaintiffs' correspondence with The Times." As pointed out by plaintiffs' June 1, 2006 memorandum of law (at p. 19), this "year's worth" of correspondence is "largely the subject of 'The Vast Bulk' of the complaint". Such extensive correspondence is not recited by the decision, which falsely makes it appear (at pp. 3-4) as if the sum total of plaintiffs' written communications during this year period were on May 11, 2004 and May 24, 2004, followed by a June 17, 2004 complaint to defendant OKRENT.

Thus may be seen that the decision – while purporting to follow *Silsdorf* – is, by concealment and deceit, repudiating it – and does so far more brazenly than Mr. Freeman ever had.

C. The July 5, 2006 Decision & Order Dismisses the Complaint by Falsifying the Law & Applying Law Inapplicable to the Actual Pleaded Allegations of the Complaint

The decision does not reveal that its legal argument for dismissal of plaintiffs' complaint – and much of the law it cites – was put before the Court by Mr. Freeman's motion – and shown by plaintiffs' opposition to be either false or inapplicable to the pleaded allegations of the complaint which Mr. Freeman had falsified, distorted, or omitted.

Thus, just as Mr. Freeman had misrepresented the law to make it appear that "opinion" would not support a defamation claim, so – identically – does the decision in purporting (at pp. 7-8):

> "...it is a settled rule that expressions of opinion, false or not, libelous or not, are constitutionally protected an[d] may not be the subject of a defamation action (*Steinhilber v. Alphonese*, 68 NY2d 283, 286 [1986]; *Rinaldi v. Holt, Rinehart & Winston*, 42 NY2d 369, 380 [1977], *cert denied* 434 US 969)."

This is untrue – and was specifically so-demonstrated by plaintiffs' June 1, 2006 memorandum of law (at p. 27), showing that *Steinhilber* distinguishes between "opinion" and "pure opinion" – the former resting on facts, either express or implied. If these express or implied facts are false, such as demonstrated by plaintiffs' analysis, the opinion founded upon them is actionable.

Pages 27-31 of plaintiffs' memorandum of law decimated defendants' requested dismissal of the complaint based on "Opinion". Pages 23-26 were equally devastating with respect to defendants' requested dismissal based on "Defamatory Meaning" and "Substantial Truth". Pages 26-27 rebutted defendants' requested dismissal based on "Report of Official Proceedings". These three sections – each resting on plaintiffs' analysis to support its showing

as to the inapplicability of defendants' law – presented plaintiffs' "contentions" with respect to the three grounds on which defendants sought dismissal of the defamation causes of action. Yet NO aspect of these "contentions" is revealed, let alone rebutted, by the decision, whose dismissal of the defamation causes of action on these grounds is accomplished by two conclusory paragraphs (at p 8), prefaced by the words "Contrary to plaintiffs' contentions":

> "Contrary to plaintiffs [sic] contentions, the challenged statements are not reasonably susceptible of a defamatory meaning, and were, in any event merely rhetorical hyperbole constituting pure opinion. They are therefore constitutionally protected....
>
> Furthermore, and based solely on the complaint and exhibits annexed thereto, 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)".

The Court's implication that "plaintiffs' contentions" do not refute its conclusory grounds for its dismissal of their defamation causes of action is yet a further fraud by the Court. Indeed, it is because pages 23-31 of plaintiffs' memorandum of law and their cited analysis so resoundingly expose the fraudulence of the purported legal basis for the dismissal, that the decision does not identify or address them in any way.

Of course, "plaintiffs' contentions" are not limited to these eight pages. Thus, with respect to the Court's assertion (at p. 8) that the difference between "disorderly conduct" and "disruption of Congress" is "a minor discrepancy", the decision does not identify or address "plaintiffs' contentions", set forth at pages 38-39 of their memorandum of law. More importantly, by falsely claiming (at p. 8) that this is "[t]he only factual inaccuracy" which plaintiffs have identified in the column, the Court wilfully disregards the very principle it cites (at p. 7) as guiding evaluation of defamatory matter: "The Court must look at the content of

the entire communication, its tone and apparent purpose, to determine whether a reasonable person would consider it as conveying any facts about the plaintiff". Such "entire communication" was meticulously presented by plaintiffs' analysis[9], chronicling a succession of knowingly false express and implied facts, simultaneously defaming plaintiffs and concealing ALL issues of legitimate public concern – including the true charge on which Sassower was arrested, prosecuted, and convicted. This is the "gravamen of plaintiffs' complaint" with respect to the defamation causes of action – evidenced by ¶¶139-155 and ¶¶156-162, the allegations of the defamation and defamation *per se* causes of action, all concealed by the Court.

Nonetheless, the decision purports (at p. 8):

> "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. Such coverage decisions are, however, editorial and protected by the First Amendment (*Miami Herald Publishing Co. v. Tornillo*, 418 US 241, 258 [1974]; *cf. Holy Spirit Ass'n v New York Times Co.*, 49 NY2d 63, 68 [1979] ['a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author.']])."

Such bald assertion – made by the decision immediately before announcing (at p. 8) "Accordingly, the defamation causes of action must be and hereby are dismissed" – not only does not rest on any citation to the defamation causes of action, but was refuted, factually and legally, by pages 25-26 of plaintiffs' June 1, 2006 memorandum of law. As to the facts, plaintiffs could not have been more explicit in pointing out that their

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[9] As to context, see plaintiffs' June 1, 2006 memorandum of law (pp. 30-30) and SASSOWER's

> "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 characterizations and opinions based thereon – of which it had direct knowledge when it 'determined not to print' such other facts a FUCHS and his editors had squarely before them." (underlining in the original).

As to the law, plaintiffs showed that *Miami Herald Publishing Co. v. Tornillo* – cited by Mr. Freeman's dismissal motion to support his claim that "More generally it would be unconstitutional to pin liability on material a publisher determined not to print" – was inapposite as that case did not present a cause of action for either libel or journalistic fraud, as at bar. Plaintiffs provided the Court with an apposite case, *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."

Page 7 of plaintiffs' memorandum of law also asserted that Mr. Freeman's citation to *Miami Herald Publishing Co. v. Tornillo* was an attempt by him to mislead the Court – and pointed out that in *Herbert v. Lano, et al.*, 441 U.S. 153, 166-7 (1979), the U.S. Supreme Court had

> "rejected any notion that...[*Miami Herald Publishing Co. v. Tornillo*] '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."

Moreover, with respect to deliberate omission, plaintiffs demonstrated (at pp. 12, 18-19, 24-25, 35-36) that such is actionable where its purpose is to fashion a knowingly false and defamatory depiction. Among the legal authority quoted, §3:69 of Law of Defamation,

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June 1, 2006 affidavit (¶¶25-26) and June 13, 2006 reply affidavit (¶¶14-18, especially footnote 4).

Rodney A. Smolla, 2nd edition (2005):

> "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."

As with all plaintiffs' arguments – and the facts and law on which they are based – the decision neither identifies nor addresses these.

As for plaintiffs' journalistic fraud cause of action (¶¶163-175), the decision does not, by its language, dismiss it. Rather, the decision's two paragraphs (at pp. 8-9) devoted to the journalistic fraud cause of action end with the declaration, "Accordingly, defendants' motion to dismiss the complaint is granted" (at p. 9). This is telling as defendants' notice of motion to dismiss the complaint identified "[t]his is an action claiming defamation" – omitting any reference to journalistic fraud . Such was highlighted at page 3 of plaintiffs' June 1, 2006 memorandum of law.

Nor does the decision actually reject the viability of a journalistic fraud cause of action, which it acknowledges as posited by Professors Clay Calvert and Robert Richards in their law review article, "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*", 14 Fordham Intellectual Property, Media and Entertainment Law Journal 1 (2003). Instead, the decision states "To date, based on the Court's research, no

jurisdiction has embraced such cause of action." (at p. 9). This is insufficient and non-probative – as the Court well knows from pages 3-4, and 20-21 of plaintiffs' memorandum of law, responding to Mr. Freeman's comparable deceit[10]. Conspicuously, the Court does not purport, based on its claimed "research", that any court has ever rejected a journalistic fraud cause of action – or even that such cause of action has ever been tested. Nor does it challenge plaintiffs' citation of legal authority showing that the law evolves, with new causes of action emerging and being recognized. Likewise, the Court does not deny or dispute any of the law and legal argument furnished by Professors Calvert and Richards to support recognition of a journalistic fraud cause of action, including their showing that there is no First Amendment bar.

Having not rejected the viability of such cause of action – indeed, being unable to reject it based on plaintiffs' legal argument,[11] the decision states "even if such cause of action existed, plaintiffs have failed to allege a claim thereunder" (at p. 9). According to the decision, the deficiency in plaintiffs' claim is that

> "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 [sic], must have been based on a conflict of interest. As indicated above, however, 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." (at p. 9).

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[10] *See* also ¶¶19-23 of SASSOWER's June 13, 2006 reply affidavit.

[11] See pages 20-21 of plaintiffs' June 1, 2006 memorandum of law and ¶¶19-23 of SASSOWER's June 13, 2006 reply affidavit.

As hereinabove demonstrated, the decision not only conceals the "Factual Allegations" of the complaint, which are its "gravamen", with knowledge that these allegations evidentiarily substantiate the complaint's causes of action for both defamation and journalistic fraud, but conceals the very allegations of those causes, with knowledge that they overwhelmingly meet pleading requirements. This includes with respect to knowing falsity and conflicts of interest, alleged and particularized by the complaint.

Finally, the decision's citation to the First Amendment is not only without discussing it, but without addressing ANY of the legal authority and argument presented by plaintiffs[12], all of which it conceals. Indeed, the caveat to the press in *Gaeta* that "editorial judgments as to news content" must be "sustainable" – underscored by plaintiffs' memorandum of law (at p. 25) – would explain why the Court has obliterated from its recitation of the complaint all mention of the *readily-verifiable* documentary evidence of the corruption of the processes of judicial selection, discipline and the judicial process itself which plaintiffs presented to The Times and whose probative significance The Times did not deny or dispute in suppressing coverage[13]. Such unrefuted and irrefutable documentary evidence on matters of recognized

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[12] In addition to plaintiffs' verified complaint (p. 1-introductory preface & ¶¶104, 164); plaintiffs' June 1, 2006 memorandum of law (pp. 5-7) and SASSOWER's June 13, 2006 reply affidavit (¶¶20-22), SASSOWER presented argument based thereon at the June 14, 2006 oral argument, handing up to the Court – for its convenience – copies of the two law review articles, "*Journalistic Malpractice, Suing Jayson Blair and the New York Times for Fraud and Negligence*", 14 Fordham Intellectual Property, Media & Entertainment Law Journal 1 (2003), and "*Access to the Press – A New First Amendment Right*", 80 Harvard Law Review 1641 (1967). Such copies are now in the case file maintained by the County Clerk

[13] "Fraud may be committed by suppression of the truth, that is, by concealment, as well as by positive falsehood or misrepresentation. Where a failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentation is tenuous; both are fraudulent." (underlining added: 60A New York Jurisprudence 2d, §91: "Concealment-Generally");

legitimate public concern, *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 380 (1970), *Landmark v. Virginia*, 435 U.S. 829, 838-9 (1978), is proof positive that The Times' "editorial judgment as to news content" is NOT "sustainable" and that The Times knowingly and deliberately generated false and misleading reporting and editorializing, thwarting reform and skewing elections, as alleged by the complaint – but concealed by the decision..

D. The July 5, 2006 Decision & Order's Denial of the Six Branches of Plaintiffs' Cross-Motion is Factually & Legally Insupportable or Unsupported,

As hereinabove stated (at p. 4, *supra*), the decision does not identify plaintiffs' cross-motion until AFTER it announces "defendants' motion to dismiss the complaint is granted" (at p. 9) – at which point the dismissed complaint becomes the basis for the Court to deny, either in whole or in part, the three branches of the six-branch cross-motion it chooses to identify in the following order. disqualification of defense counsel; sanctions pursuant to 22 NYCRR §130-1.1; and a default judgment.

This is a complete perversion – best exemplified by the Court's disposition of plaintiffs' sanctions request, which is their cross-motion's first branch. Thus, the decision states (at p. 10):

> "The plaintiffs have also cross-moved to sanction Freeman pursuant to 22 NYCRR 130-1.1 on the basis that the motion to dismiss is frivolous. Having granted the motion, the Court finds that it was not frivolous. The motion for sanctions is therefore denied."

In other words, having granted Mr. Freeman's dismissal motion without making any

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"the distinction between concealment and affirmative misrepresentation faded into legal insignificance, both being fraudulent", *Hadden v. Consolidated Edison Company of New York*, 45 N.Y.2d 466, 470 (1978), citing cases.

findings as to plaintiffs' opposition showing that the motion was "a fraud on the Court – from beginning to end, and in virtually every sentence", the Court determines, *ipso facto*, that the dismissal motion is "not frivolous".

The Court's mandatory duty – adjudicative, as well as disciplinary – was for it to have made findings with respect to plaintiffs' overwhelming opposition to Mr. Freeman's dismissal motion and their showing of entitlement to maximum sanctions and costs pursuant to §130-1.1[14]. It did not do this, with full knowledge that doing so would have required its granting of this first branch of plaintiffs' cross-motion and of the five subsequent branches based thereon.

As to the other two branches identified by the decision (at pp. 9-10):

Plaintiffs' request for disqualification of Mr. Freeman and The New York Times Company Legal Department – which is the third branch of their cross-motion – is not based on there being "a conflict of interest" – in the singular – and there is nothing unclear in plaintiffs' showing of entitlement to the requested disqualification relief, as the decision purports when it says (at pp. 9-10) "As best as the Court can decipher plaintiffs' argument". Indeed, the clarity of "plaintiffs' argument" is evident from ¶¶20-31 of SASSOWER's June 1, 2006 affidavit, as it is from pages 51-58 of plaintiffs' June 1, 2006 memorandum of law, and ¶¶11-12 of SASSOWER's June 13, 2006 reply affidavit.

It would appear that the Court's pretense (at pp. 9-10) that it has to "decipher plaintiffs' argument" for this branch of the cross-motion is to cover its misrepresentation of that argument. Such argument is not, as the decision falsely makes it appear, based on Mr. Freeman

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[14] Plaintiffs' legal argument in support of their cross-motion's first branch appears at pages 45-48 of their June 1, 2006 memorandum of law.

and the Legal Department being unnamed DOES because they are participants in "the...alleged journalistic fraud". Rather, it is specifically based on their participation in the events giving rise to the two defamation causes of action by their failure to appropriately address plaintiffs' analysis of the FUCHS' column, consistent with its legal significance and the duty they owed to The New York Times Company . Tellingly, the Court, in referring to plaintiffs' assertion that the interests of Mr. Freeman, the Legal Department, and The Times are "adverse" provides none of the particulars which plaintiffs' cross-motion meticulously detailed. Nor does the Court at all address – or reveal – the further ground for disqualification expressly set forth by plaintiffs' notice of cross-motion – *to wit*, that Mr. Freeman and defense counsel would be necessary witnesses.

The Court's denial of this third-branch – because "Inasmuch as there is no cause of action for journalistic fraud, there is no conflict" and "of course, [it is] also denied as moot" – is again a perversion and fraud by the Court. Aside from the fact that the disqualifying conflicts of interest, chronicled by the cross-motion, begin with the defamation causes of action, plaintiffs' opposition to defendants' dismissal motion resoundingly demonstrated the strength of both the defamation and journalistic fraud causes to such a degree as to have entitled them to summary judgment. This is why the Court has not adjudicated their opposition with findings of fact and conclusions of law, as was its duty to do.

With respect to plaintiffs' request for a default judgment – which is the fourth branch of their cross-motion – such is not sought "against the non-moving defendants", as the decision purports (at p. 10). Rather, it is sought "against the non-appearing defendants" – who

plaintiffs identified and demonstrated to be "OKRENT, FUCHS, DOES 1-20, The New York Times and its EDITORIAL BOARD"[15]. The decision then states (at p. 10):

> "Assuming, arguendo, that Okrent and Fuchs and the unnamed 'Does' have been properly served, CPLR 3215 requires that the plaintiffs state a viable cause of action before a default judgment may be entered against them (*Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [2003]; *Beaton v. Transit Facility Corp.*, 14 AD3d 637 [2nd Dept 2005]). Having decided that the instant complaint does not state a cause of action, the motion for a default judgment is denied and the complaint, on the Court's own motion, is dismissed with respect to the remaining defendants."

As hereinabove set forth, it is because plaintiffs' complaint does state "a cause of action" – indeed, three causes of action – that the Court has not adjudicated their opposition to defendants' dismissal motion with findings of fact and conclusions of law – as was its duty to do.

With respect to the three branches of plaintiffs' cross-motion which the decision only identifies (at p. 10) as "remaining relief" and then denies, without reasons[16], these are:

> The second branch: to refer Mr. Freeman and The New York Times Company Legal Department "to appropriate disciplinary authorities pursuant to this Court's mandatory "Disciplinary Responsibilities" under the Chief Administrator's Rules Governing Judicial Conduct, 22 NYCRR §100.3D(2)"[17];

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[15] Plaintiffs' legal argument in support of their cross-motion's fourth branch appears at pages 59-60 of their June 1, 2006 memorandum of law.

[16] "the inclusion of the court's reasoning is necessary..to ensure [litigants and] the public that judicial decision-making is reasoned rather than arbitrary", *Nadle v L.O. Realty Corp.*, 286 AD2d 130 (1st Dept. 2001), cited by the Appellate Division, Second Department in *Hartford Fire Insurance Company v. Cheever Development Corp.*, 289 A.D.2d 292, 293 (2nd Dept. 2001) in disapproving – and reversing – a Supreme Court decision which had stated no reasons.

[17] Plaintiffs' legal argument in support of their cross-motion's second branch appears at pages 48-50 of their June 1, 2006 memorandum of law.

The fourth branch: "giving notice, pursuant to CPLR §3211(c), that defendants' motion is being considered by the Court as one for summary judgment in plaintiffs' favor on their verified complaint's three causes of action: for defamation (¶¶139-155), for defamation *per se* (¶¶156-162), and for journalistic fraud (¶¶163-175), with additional notice, as part thereof, that the Court will be determining whether defendant THE NEW YORK TIMES COMPANY should be ordered to remove the words 'All the News That's Fit to Print' from The New York Times' 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.*"[18];

The sixth branch: for such other and further relief as may be just and proper, including $100 motion costs pursuant to CPLR §8202.

Examination of the record overwhelmingly establishes plaintiffs' entitlement to these three branches, in addition to the other three branches the decision has denied.

POINT II

THIS MOTION MEETS THE STANDARD FOR JUDICIAL DISQUALIFICATION & FOR VACATUR FOR FRAUD AND LACK OF JURISDICTION – AND IF SUCH ARE DENIED, THE COURT MUST ADDRESS THE FACTS & LAW PRESENTED, MAKE DISCLOSURE, & REFER THE MAY 8, 2006 NOTICE OF ASSIGNMENT BACK TO ADMINISTRATIVE JUDGE NICOLAI FOR RECONSIDERATION

The bedrock principle for a judge is judicial impartiality. Over 150 years ago, the New York Court of Appeals recognized that "the first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality", *Oakley v. Aspinwall*, 3 N.Y. 547 (1850), quoted in *Scott v. Brooklyn Hospital*, 93 A.D.2d 577, 579 (2nd Dept. 1983). This standard of impartiality, both in appearance and actuality, is the hallmark of the Chief

[18] Plaintiffs' legal argument in support of their cross-motion's fifth branch appears at pages 60-64 of their June 1, 2006 memorandum of law.

Administrator's Rules Governing Judicial Conduct (Part 100) – which, pursuant to Article VI, §§20 and 28(c) of the New York State Constitution, has constitutional force.

§100.3E pertains to judicial disqualification and states, in pertinent part:

> "(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a)(i) the judge has a personal bias or prejudice concerning a party... (d) the judge knows that the judge...(iii) has an interest that could be substantially affected by the proceeding."

Judiciary Law §14 governs statutory disqualification for interest. In pertinent part, it states:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding...in which he is interested..."

It is long-settled that a judge disqualified by statute is without jurisdiction to act and the proceedings before him are void, *Oakley v. Aspinwall, supra*, 549, *Wilcox v. Arcanum*, 210 NY 370, 377 (1914), *Casterella v. Casterella*, 65 A.D.2d 614 (2nd Dept. 1978), 1A Carmody-Wait 2nd §3:94.

It is to ensure the impartiality of judicial proceedings that cases are required to be randomly assigned to judges, §202.3(b) of the Uniform Rules of the Supreme Court and the County Court. "[A]ssignment by random selection is mandatory", *Morfesis v. Wilk*, 138 A.D.2d 244, 248 (dissent) (1st Dept 1988). Its purpose is "to prevent judge-shopping by lawyers and judge-steering by administrators", LEXSTAT 1-15 WEINSTEIN, KORN & MILLER CPLR MANUAL §15.02

Although recusal on non-statutory grounds is "within the personal conscience of the

court", a judge's denial of a motion to recuse will be reversed where the alleged "bias or prejudice or unworthy motive" is "shown to affect the result", *People v. Arthur Brown*, 141 A.D. 2d 657 (2nd Dept. 1988), citing *People v. Moreno*, 70 N.Y.2d 403, 405 (1987); *Matter of Rotwein*, 291 N.Y. 116, 123 (1943); 32 New York Jurisprudence §44; *Janousek v. Janousek*, 108 A.D.2d 782, 785 (2nd Dept. 1985): "The only explanation for the imposition of such a drastic remedy...is that...the court became influenced by a personal bias against defendant."

A judge who fails to disqualify himself upon a showing that his "unworthy motive" has "affect[ed] the result" and, based thereon, does not vacate such "result" is subject not only to reversal on appeal, but to removal proceedings:

> "*A single decision or judicial action, correct or not, which is established to have been based on improper motives and not upon a desire to do justice or to properly perform the duties of his office, will justify a removal...*", italics added by Appellate Division, First Department in *Matter of Capshaw*, 258 A.D. 470, 485 (1st Dept 1940), quoting from *Matter of Droege*, 129 A.D. 866 (1st Dept. 1909).

In *Matter of Bolte*, 97 A.D. 551 (1st Dept. 1904), cited in the August 20, 1998 New York Law Journal column "*Judicial Independence is Alive and Well*", authored by the then administrator and counsel of the New York State Commission on Judicial Conduct, Gerald Stern, the Appellate Division, First Department held:

> "A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for *willfully* making a wrong decision or an erroneous ruling, or for a reckless exercise of his judicial functions without regard to the rights of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of another..." (at 568, emphasis in original).
>
> "...Favoritism in the performance of judicial duties constitutes corruption as disastrous in its consequence as if the judicial officer received and was moved by a bribe." (at 574).

§100.3F of the Chief Administrator's Rules Governing Judicial Conduct provides that where a judge's "impartiality might reasonably be questioned" or he has an interest, he may:

> "disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

The Commission on Judicial Conduct's annual reports explicitly instruct:

> "All judges are required by the Rules of Judicial Conduct to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned."

According to the Commission in its brief before the New York Court of Appeals in *Matter of Edward J. Kiley*, (July 10, 1989, at p. 20),

> "It is cause for discipline for a judge to fail to disclose on the record or offer to disqualify under circumstances where his impartiality might reasonable (sic) be questioned".

Treatise authority holds,

> "The judge is ordinarily obliged to disclose to the parties those facts that would be relevant to the parties and their counsel in considering whether to file a disqualification motion", Flamm, Richard E., Judicial Disqualification: Recusal and Disqualification of Judges, p. 578, Little, Brown & Co., 1996.

Where a motion for judicial disqualification is made,

> "The factual basis for the motion ordinarily must be stated with specificity – that is, for the moving party's allegations to warrant the requested relief, such allegations, when taken as true, must contain information that is definite as to time, place, persons, and circumstances. Before acting on a judicial disqualification motion, the challenged judge should carefully examine the allegations to determine whether the

> motion alleges specific, objective facts that, considered as a whole, would lead a reasonable person to believe that the court is biased, that the appearance of the court's impartiality is in doubt, or that a fair and impartial disposition did not occur." Flamm, Judicial Disqualification, pp. 572-3.

Adjudication of a motion for a court's disqualification must be guided by the same legal and evidentiary standards as govern adjudication of other motions. Where, as here, the motion details specific supporting facts, the court, as any adversary, must respond to those facts, as likewise the law presented relative thereto. To fail to do so would subvert the motion's very purpose of resolving the "reasonable questions" warranting disqualification.

The law is clear – and so-recited at ¶7 of SASSOWER's June 13, 2006 reply affidavit – that "failing to respond to a fact attested to in the moving papers...will be deemed to admit it", Siegel, New York Practice, §281 (4th ed. – 2005, p. 464) – citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539 (1975), itself citing Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. "If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it".

Moreover, "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party." Corpus Juris Secundum, Vol. 31A, 166 (1996 ed., p. 339).

This motion resoundingly meets the standard for this Court's disqualification. It documents," specific, objective facts that, considered as a whole, would lead a reasonable person to believe that the court is biased, that the appearance of the court's impartiality is in doubt, [and] that a fair and impartial disposition did not occur." As hereinabove shown, the

Court's July 5, 2006 decision and order (Exhibit CC) is not just factually and legally insupportable, but is, in every respect, a fraud by the Court, requiring vacatur by reason thereof.

Such decision and order is *prima facie* evidence of pervasive actual bias – and so brazen as to suggest that the Court was propelled by interest. The Court's direct, personal, and substantial interests in the dismissal of this lawsuit are recited in SASSOWER's accompanying affidavit and constitute a further ground for vacatur, *to wit*, lack of jurisdiction born of disqualifying interest under Judiciary Law §14. These interests, as likewise the appearance of this Court's bias – which the Court's July 5, 2006 decision and order makes impossible to ignore – furnish grounds for renewal.

Should the Court not disqualify itself based on this motion, it must justify its July 5, 2006 decision and order by confronting and addressing, with specificity, the facts and law which the motion presents. Only by so doing can it demonstrate that there are no grounds on which its impartiality might "reasonably be questioned". In such circumstance, and based on SASSOWER's accompanying affidavit, the Court must make disclosure as to its relationships with, and dependencies on, Administrative Judge Nicolai whose May 8, 2006 notice (Exhibit DD) assigned this case to this Court in violation of random assignment rules. Additionally, it must refer Judge Nicolai's May 8, 2006 notice back to him so that he may reconsider whether to vacate it for lack of jurisdiction by reason of his own disqualifying interest pursuant to Judiciary Law §14 or because, based on the record of May 8, 2006, it was improvidently issued in that the first randomly-assigned judge, Supreme Court Justice Mary H. Smith, had not disqualified herself from this case.

Plainly, the infirmities of Administrative Judge Nicolai's May 8, 2006 assignment affect this Court's jurisdiction to have rendered the July 5, 2006 decision and order in the first instance. This would include, additionally, whether Administrative Judge Nicolai, appointed to that position in 1999 when he was an elected Supreme Court justice, could lawfully retain that office, following his election in 2004 as a County Court judge, and whether as a County Court judge, albeit his purported designation as Administrative Judge, he could then legally appoint another County Court judge to be an "Acting Supreme Court Justice" for purposes of taking jurisdiction of this Supreme Court case – which he did without citation to any specific legal authority.

POINT III

THE COUNTY CLERK'S AUGUST 1, 2006 JUDGMENT MATERIALLY DEVIATES FROM THE JULY 5, 2006 DECISION & ORDER & MUST BE VACATED FOR "FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY" WITH IMPOSITION OF MAXIMUM COSTS & SANCTIONS AGAINST GEORGE FREEMAN & THE NEW YORK TIMES COMPANY LEGAL DEPARTMENT

CPLR §5011 defines a judgment as "the determination of the rights of the parties in an action" and requires that it "refer to, and state the result of, the...decision". It should also include "a clause directing in clear language the relief to which the victorious party is entitled" (Weinstein, Korn & Miller CPLR Manual §24.01 (LEXSTAT WKMCPM SEC 24.01)).

NYCRR §202.48 governs "Submission of orders, judgments and decrees for signature" and identifies two situations in which notice is given: where a decision directs the judgment

"be settled" or where it directs that it be "submitted on notice". In either case, the proposed judgment is presented for signature, with proof of service on all parties[19].

By contrast, if the decision merely directs "submit judgment", the winning side drafts the judgment for the judge's signature, but no notice is required. Nonetheless, "the better practice is to serve copies of the submitted proposed judgment on all parties to the action", Lexis Nexis Answer Guide to New York Civil Litigation (LEXSTAT NYCBHB SEC 11.5).

The New York Court of Appeals addressed the difference between a direction to "settle" and "submit" judgment in *Funk v. Barry*, 89 N.Y.2d 364 (1996) – further addressing the situation where – as at bar – a decision gives neither direction:

> "By its plain terms, section 202.48(a) speaks to the circumstances where the court's decision expressly directs a party to submit or settle an order or judgment. When a decision ends with the directive to 'submit order, the court is generally directing the prevailing party to 'draw[] the order and present[] it to the judge ... who looks it over to make sure it reflects the decision properly, and then signs or initials it' (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2220:4, at 170). This procedure typically calls for no notice to the opponent (*id.*).
>
> A directive to 'settle,' by contrast, 'is reserved for more complicated dispositions, such as orders involving restraints or contemplating a set of follow-up procedures' (*id.*). Because the decision ordinarily entails more complicated relief, the instruction contemplates notice to the opponent so that both parties may either agree on a draft or prepare counter proposals to be settled before the court (*id.; see,* 22 NYCRR 202.48 [c]; *see also* Siegel, NY Prac §250, at 376-377 [2d ed]). The common element in both directives is that further drafting and judicial approval of the judgment or order is contemplated (*see generally,* Siegel, Practice Commentaries, McKinney's Cons Laws of NY,

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[19] As to settlement, the rule specifies that the proposed judgment with notice of settlement, be made returnable at the office of the clerk or before the court if so-directed or if the clerk is unavailable, be served on all parties "(i) by personal service not less than five days before the date of settlement; or (ii) by mail not less than 10 days before the date of settlement." It further requires that the "Proposed counter...judgments shall be made returnable on the same date and at the same place, and shall be served on all parties by personal service, not less than two days, or by mail, not less than seven days, before the date of settlement."

Book 7B, CPLR C2220:3, C2220:4, at 166-171; CPLR 5016, at 642; *see also,* Legislative Studies and Reports, subd [c], McKinney's Cons Laws of NY, Book 7B, CPLR 5016, at 644).

However, where no drafting by the parties is necessary because the matter involves an uncomplicated disposition or simple judgment for a sum of money which speaks for itself, or where 'the court or clerk draws the order,' no direction to submit or settle will be utilized (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2220:4, at 170; *see also,* Siegel, NY Prac §250, at 376 [2d ed]; CPLR 5016 [b]). In such cases, the order or judgment may then simply be 'entered by the clerk without prior submission to the court' pursuant to CPLR 5016 (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5016, at 642)."

In other words – and giving the Court the benefit of the doubt – it considered its July 5, 2006 decision and order (Exhibit CC) so "uncomplicated" as to require no further involvement by it. However – and as the Court could have reasonably anticipated from the record of Mr. Freeman's misconduct before it – Mr. Freeman took advantage of the no-notice opportunity the Court handed him by presenting the Westchester County Clerk, *ex parte*, with a materially false judgment for signature. Thus, the three decretal paragraphs of the judgment (Exhibit EE, p. 2), which he introduced as "upon motion of George Freeman, attorney for The Times" – when, he made no motion and none on notice to plaintiffs – state:

> "ADJUDGED AND DECREED, that The Times' motion to dismiss the complaint is granted; and it is further
>
> ADJUDGED AND DECREED, that plaintiffs' verified complaint and all of the claims made therein, be and hereby are dismissed with prejudice in their entirety; and it is further
>
> ADJUDGED AND DECREED, that plaintiffs' cross-motion, and all of the claims made therein, is denied." (underlining added).

The second of these paragraphs materially deviates from the July 5, 2006 decision and order, which does not state that claims of the verified complaint are "dismissed with prejudice in their entirety". Nor could they be.

The meaning and significance of "dismissal with prejudice" is set forth in Black's Law Dictionary (8th ed. 2004):

> "A dismissal, usu. after an adjudication on the merits, barring the plaintiff from prosecuting any later lawsuit on the same claim. If, after a dismissal with prejudice, the plaintiff files a later suit on the same claim, the defendant in the later suit can assert the defense of res judicata (claim preclusion)".

Such is reflected by the Appellate Division, Second Department's decision in *Aard-Vark Agency, Ltd. v. Barnett Prager, et al.*, 2004 NY Slip Op 5395; 2004 N.Y. App. Div. LEXIS 16563 (2nd Dept. 2004), quoting the New York Court of Appeals in *Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 93 N.Y.2d 375, 380 (1999):

> "[The] principle of res judicata [is] that 'once a claim is brought to *a final conclusion*, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' (*O'Brien v City of Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 445 N.Y.S.2d 687 [emphasis supplied]). A dismissal 'with prejudice' generally signifies that the court intended to dismiss the action 'on the merits,' that is, to bring the action to a final conclusion against the plaintiff. We have used the words 'with prejudice' interchangeably with the phrase 'on the merits' to indicate the same preclusive effect (citations omitted)." (italics in original).

It is settled law that *res judicata* does not apply where the granting of a dismissal motion brought under CPLR §3211(a)(7) is based solely on the facial insufficiency of the pleaded causes of action. In such case, "the plaintiff may sue anew with a complaint that corrects the deficiency. See *Addeo v. Dairymen's League Co-op, Ass'n*, 47 Misc. 2d 426, 262 N.Y.S.2d 771 (1965)." McKinney's Consolidated Laws of New York Annotated, Practice Commentaries by David D. Siegel, C:3211:67 "Impact of Dismissal under CPLR 3211(a)(7)"; David D. Siegel, New York Practice §276: Res Judicata Effect of CPLR 3211 Disposition" (2005 ed.).

> "When a complaint is dismissed for legal insufficiency or another defect in the pleading, the dismissal does not act as a bar to the commencement of a new action for the same relief unless the dismissal is expressly made on the merits...",

9A Carmody-Wait 2nd, §63.566 (2006 ed.); *Asgahar v Tringali Realty, Inc.*, 18 A.D.3d 408 (2nd Dept. 2005).

Such is controlling in this case. Not only was Mr.. Freeman's dismissal motion one for legal insufficiency pursuant to CPLR §3211(a)(7), but the Court did not even rely on the transcripts annexed to Mr. Freeman's motion in holding that plaintiffs' complaint did not facially set forth a cause of action.[20] Thus, in concluding that FUCHS' column is "a fair and substantially accurate description of the official proceedings it purported to cover", the decision explicitly states that such determination is "based solely on the complaint and exhibits annexed thereto" (at p. 8, underlining added). This is consistent with the decision's pretense that plaintiffs had not alleged any falsity in the column, excepting FUCHS' tagging the crime for which SASSOWER was arrested, prosecuted, and incarcerated as "disorderly conduct" rather than "disruption of Congress".

It would appear that it is Mr. Freeman's insertion of the language that the dismissal was "with prejudice" – thereby connoting a "merits" determination – that resulted in the Clerk's Office recording the document which Mr. Freeman had titled as "JUDGMENT" (Exhibit EE) as a "DECLARATORY JUDGMENT"[21] (Exhibit PP). Indeed, a declaratory judgment is

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[20] See also CPLR §5013 "A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise."

[21] "A duly rendered declaratory judgment is entitled to the full benefits of the res judicata and

distinguished from a "judgment" in that "A declaratory judgment is *ex vi termini* a judgment on the merits." *Rockland Light & Power Co.* v. *City of New York*, 289 N. Y. 45, 50 (1942).

Although plaintiffs' verified complaint did not seek declaratory relief – nor could it without compromising their jury demand – decisional law pertaining to declaratory actions would appear controlling. As stated in *City of Buffalo et al. v. State Board of Equalization and Assessment et al.*, 46 Misc. 2d 675; 260 N.Y.S.2d 710 (Sup Ct: Special Term/Albany Co. 1965):

> "'Upon a motion by the defendant to dismiss the complaint on the ground of its insufficiency, made before service of an answer, allegations of fact contained in the complaint are not in issue, and the court can determine only the question of law whether the pleading is sufficient to withstand challenge by demurrer or by its statutory modern substitute, motion to dismiss. If the court denies the motion to dismiss, then declaration of rights must await final judgment. If the court grants the motion to dismiss then it cannot logically grant, at the same time, a judgment on the merits declaring the rights and legal relations of the parties.' (*Rockland Light & Power Co.* v. *City of New York*, 289 N.Y. 45, 51 [1942].) Further supporting this principle, and as stated in Weinstein-Korn-Miller (N.Y. Civ. Prac., par. 3001.13): 'A determination that the complaint is sufficient does not indicate that the plaintiff will be entitled to the relief requested; it indicates only that a justiciable controversy exists and the court's discretion to issue a declaration has been properly invoked. As stated by one court, 'a motion to dismiss a declaratory judgment before answer presents for determination only the question whether a case for a declaratory judgment is made out, not the question of whether plaintiff is entitled to an adjudication in his favor.'"

"When there is an inconsistency between a judgment and the decision upon which it is based, the decision controls", *Green v Morris*, 156 A.D.2d 331 (2nd Dept 1989), citing cases and Siegel, New York Practice §250; 2 Carmody-Wait 2d, §8:91; *Spier v. Horowitz*, 16

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collateral doctrines, which means that it is also entitled to full faith and credit from other American jurisdictions.", David D.Siegel, New York Practice, §440: Judgment in Declaratory Action (4th ed. 2005).

A.D.3d 400, 401 (2nd Dept. 2005); *Curry v. Curry*, 14 A.D.3d 646 (2nd Dept. 2005).

CPLR §5015(a)(3) provides "Relief from judgment", "on motion", for "fraud, misrepresentation, or other misconduct of an adverse party". A judgment may be vacated when procured by fraud on the court but not for fraud between the parties in some remote transaction. To justify a court in setting aside and vacating a judgment on the ground of fraud, the fraud complained of must have been practiced in the very act of obtaining the judgment. Such judgment is a nullity. *Shaw v. Shaw*, 97 A.D.2d 403-4 (2nd Dept. 1983), *Tamimi v. Tamimi*, 38 A.D.2d 197 (2nd Dept. 1972), *Re Holden*, 271 NY 212, 218 (1936), *cf. Clark v. Scovill*, 198 N.Y. 279 (1910).

At bar, plaintiffs are entitled to vacatur of the August 1, 2006 judgment (Exhibit EE), since, as presently worded, it materially prejudices their rights[22] to commence a subsequent lawsuit – as they would be entitled to do within six months under CPLR §205(a):

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff...may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

Mr. Freeman is a seasoned practitioner (Exhibit U). Such deliberate and premeditated misconduct by him in procuring the August 1, 2006 judgment – continuing the pattern of misconduct that has characterized every aspect of his defense herein – not only reinforces, yet

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[22] Such prejudice to plaintiffs' substantial rights makes correction pursuant to CPLR §5019(a) inapplicable, *Shipkoski v Watch Case Factory Associates*, 292 A.D.2d 589, 590 (2nd Dept. 2002), *Kiker v Nassau County*, 85 N.Y.2d 879, 881 (1995).

again, plaintiffs' entitlement to the first, second, and third branches of their June 1st cross-motion, but warrants additional imposition of maximum costs and sanctions against him and The New York Times Company Legal Department pursuant to NYCRR §130-1.1 *et seq.*

CONCLUSION

Plaintiffs' motion for disqualification of the Court must be granted and the July 5, 2006 decision and order vacated, either by reason thereof, or upon the granting of reargument or renewal. Absent same, the Court must address the factual and legal particulars presented by this motion – including disclosure by the Court of its relationships with, and dependencies on, Francis A. Nicolai, Administrative Judge of the Ninth Judicial District, whose assignment of the case to the Court was in violation of random-assignment rules, with referral of the May 8, 2006 notice of assignment back to Administrative Judge Nicolai so that he may reconsider whether he had jurisdiction to render it and whether it was improvidently issued. Additionally, the materially false and prejudicial August 1, 2006 judgment which defense counsel George Freeman obtained, *ex parte* and without notice, from the Westchester County Clerk, must be vacated with imposition of maximum costs and sanctions against Mr. Freeman and The New York Times Legal Department.

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Individually, and as Coordinator of the CENTER FOR JUDICIAL ACCOUNTABILITY, INC., & for The Public

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Dated: White Plains, New York
August 21, 2006