SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Plaintiffs,

-against-

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

Defendants.

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Index #05-19841

Reply Affidavit in Further Support of Plaintiffs' August 21, 2006 Motion

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the plaintiff *pro se* in the above-entitled action for libel and journalistic fraud, fully familiar with all the facts, papers, and proceedings heretofore had.

2. This affidavit is submitted in reply to the utterly deceitful September 19, 2006 opposing affidavit of defense counsel George Freeman, Esq.[1], himself a defendant DOE, and in further support of plaintiffs' August 21, 2006 motion to disqualify the Court for demonstrated actual bias and interest, vacatur of its July 5, 2006 decision and order by reason

[1] It appears that sometime between Mr. Freeman's June 9, 2006 reply affidavit (¶1) and his instant September 19, 2006 opposing affidavit (¶1), his position as Assistant General Counsel to The New York Times Company was enhanced. He is now, additionally, Vice President.

thereof or upon the granting of reargument/renewal, disclosure, and referral to Administrative Judge Nicolai, vacatur of the County Clerk's August 1, 2006 judgment, and other relief.[2]

3. As with Mr. Freeman's prior submissions[3], his instant affidavit is "from beginning to end and in virtually every sentence, a fraud on this Court, warranting additional imposition of costs and financial sanctions, pursuant to 22 NYCRR §130-1.1 *et seq.*, and reinforcing the Court's duty to refer him and culpable colleagues and supervisory personnel in The New York Times Company Legal Department to disciplinary authorities"[4] pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.

4. The legal principles governing answering affidavits – such as Mr. Freeman's opposing affidavit – were set forth by my June 13, 2006 reply affidavit in further support of plaintiffs' June 1, 2006 cross-motion for sanctions, referrals, disqualification (of counsel), default judgment, summary judgment & other relief. They are equally applicable here:

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[2] The motion was originally returnable on September 7, 2006. On August 29th, Mr. Freeman requested plaintiffs' consent to an adjournment to either September 25th or 26th, promising to serve his responsive papers on September 13th (Exhibit QQ-1). Plaintiffs' consented on that basis, notifying him of the September 26th return date which they had confirmed with the Court (Exhibit QQ-2). Mr. Freeman did not serve his opposing affidavit until September 19, 2006, doing so by e-mail and Federal Express overnight delivery (Exhibits QQ-4, QQ-5).

[3] These were Mr. Freeman's April 13, 2006 dismissal motion consisting of his affidavit and memorandum of law and his June 9, 2006 reply affidavit, which was also in opposition to plaintiffs' June 1, 2006 cross-motion.

[4] Such quote, taken from ¶2 of my June 13, 2006 reply affidavit, concluded with a footnote citation to *Matter of Rowe*, 80 N.Y.2d 336, 340 (1992):

> "'the courts are charged with the responsibility of insisting that lawyers exercise the highest standards of ethical conduct...Conduct that tends to reflect adversely on the legal profession as a whole and to undermine public confidence in it warrants disciplinary action (see *Matter of Holtzman*, 78 NY2d 184, 191, cert denied, __US__, 112 S.Ct 648; *Matter of Nixon*, 53 AD2d 178, 181-182; cf., *Matter of Mitchell*, 40 NY2d 153, 156).'"

"'Answering affidavits, in addition to complying with the formal requisites of the affidavits supporting the motion, should meet traversable allegations of the latter. Undenied allegations will be deemed to be admitted', 2 Carmody-Wait 2d §8:56, citing *Whitmore v. J. Jungman, Inc.*, 129 N.Y.S. 776 (Sup 1911). The standard is thus the same as for summary judgment: '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'.

Further, '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).

All this is against the backdrop that 'Those who make affidavits are held to a strict accountability for the truth and accuracy of their contents.', 2 Carmody-Wait 2d §4:12, citing *In re Portnow*, 253 A.D. 395 (2nd Dept. 1938)." (my June 13, 2006 reply affidavit, at ¶7).

5. Mr. Freeman's barely 6-page affidavit does NOT address, let alone identify, ANY of the facts, law, or legal argument presented by plaintiffs' motion, consisting of my 15-page moving affidavit and plaintiffs' 38-page memorandum of law with its 13-page appendix. Rather, it is replete with bald, conclusory claims, which are knowingly false.

6. The sum total of Mr. Freeman's disclosure as to the content of my moving affidavit is his false summarization (at ¶¶3-4) of what he purports to be its "thrust" and "nub".

7. As for the supposed "thrust" of my affidavit, his ¶3 strings together three truncated quotes – NONE of which are from my affidavit. Rather, they are – as his ¶3 itself reveals – from plaintiffs' notice of motion and memorandum of law, *to wit*, that the Court "should have been disqualified for 'demonstrated actual bias' (Notice of Motion at 1)" and that the Court's July 5, 2006 decision and order "was somehow wrong legally as having

'conceal[ed] the threshold issue before the Court' (Plaintiffs' Memo of Law at 2) and 'falsifi[ed] the law and appli[ed] law inapplicable to the actual pleaded allegations.' (Id. at 13)."

8. Conspicuously, Mr. Freeman's ¶3 omits that plaintiffs seek more than the Court's disqualification for "demonstrated actual bias". They ALSO seek the Court's disqualification for "interest" and, if denied,

> "(a) for disclosure by the Court, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, including as to its relationships with, and dependencies on, Francis A. Nicolai, Administrative Judge of the Ninth Judicial District, and the basis upon which Administrative Judge Nicolai assigned this case to the Court by his May 8, 2006 notice;
>
> (b) for referral of the May 8, 2006 notice back to Administrative Judge Nicolai so that he may reconsider whether to vacate it for lack of jurisdiction based on 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".

9. This critical relief, set forth by plaintiffs' notice of motion (at pp. 1-2) and memorandum of law (at pp. 1-2, 25, 27, 29-30) and particularized by ¶¶2, 4-24 of my moving affidavit is NOWHERE mentioned by Mr. Freeman's affidavit as being sought by plaintiffs.

10. Nor does Mr. Freeman disclose ANYTHING about "the threshold issue before the Court", notwithstanding page 2 of plaintiffs' memorandum of law, cited by him, not only specifies this "threshold issue", but does so in the very continuation of the quote that Mr. Freeman has truncated. Indeed, it appears in bold-faced type as the title of the first subsection under the memo's POINT I:

> **"The July 5, 2006 Decision & Order Conceals the Threshold Issue Before the Court <u>as to the Sufficiency of the Motions</u>"** (underlining added).

Pages 2-6 then provide the relevant particulars with respect to this threshold sufficiency issue – NONE identified by Mr. Freeman's affidavit.

11. Likewise, Mr. Freeman does not disclose ANYTHING about the decision's "falsifi[cation]" of law and reliance on law "inapplicable to the actual pleaded allegations", citing the memo's page 13. These quoted words are also taken from the title of a subheading to POINT I:

> **"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 particulars, set forth thereunder at pages 13-20 of the memo, are ALL concealed by Mr. Freeman.

12. As to the supposed "nub" of my affidavit, Mr. Freeman's ¶4 purports that it "attempts to argue that the appointment of Justice Loehr was the result of a 16 year pattern of judicial corruption in Westchester County (Moving Aff't, ¶ 4-24), culminating in the 'brazen fraud' (Id. at ¶ 14) inherent in the Court's decision."

This is a material oversimplification and distortion – evident from examination of the cited ¶¶4-24, appearing in my moving affidavit under the bold and capitalized title heading

> **"THE COURT WAS NOT RANDOMLY-ASSIGNED, BUT HAND-PICKED BY ADMINISTRATIVE JUDGE NICOLAI, WHO KNEW HIMSELF TO BE DISQUALIFIED FOR APPARENT AND ACTUAL BIAS AND INTEREST".**

13. That the Court was NOT randomly-assigned is the first fact particularized by my ¶¶4-24 – at ¶4. Yet this prominently presented, fully-documented fact is NOWHERE identified by Mr. Freeman – NOR a single one of the other facts detailed by my ¶¶4-24 and

documented by annexed exhibits.

14. It is this obliteration of EVERY fact presented by my affidavit – and ALL the specifics of POINT I of plaintiffs' memorandum of law demonstrating the Court's July 5, 2006 decision to be a "brazen fraud" – that enables Mr. Freeman to cavalierly pretend (at ¶5):

> "Your affiant does not believe there was anything the slightest bit inappropriate or improper, let alone fraudulent or corrupt, in the appointment of Justice Loehr to sit on this matter. However, because your affiant has no material information as to how this Court was given this case, and because Ms. Sassower has, at bottom, showed no basis whatsoever for her claims of bias and corruption, it is unnecessary for affiant to discuss this primary contention further." (underlining added).

15. With similar deceit Mr. Freeman disposes (at ¶6) of plaintiffs' memorandum of law – and its "attacks [on] the legal sufficiency of the Court's decision". He purports:

> "While plaintiffs' Memo of Law goes on at great length to repeat many of the same contentions [plaintiffs] argued in [their] original papers on the motion to dismiss as well as at oral argument, in the end, [plaintiffs] fail[] to point to any omissions or misapprehensions by the Court. And indeed, there were none." (underlining added).

Tellingly, Mr. Freeman's ¶6 does NOT identify a single one of these contentions repeated from plaintiffs' original papers and oral argument. NOR does he identify what the memo had explained as to why such repetition was necessary – namely, that the Court, by its decision, replicates the deceits of Mr. Freeman's dismissal motion which plaintiffs "original papers" and oral argument had particularized, without adjudication by the Court.

16. Instead, Mr. Freeman baldly declares:

> "The Court very ably condensed the facts and legal arguments of a 173 paragraph complaint and voluminous motion papers into a cogent eleven-page decision which fully and deftly dealt with all the material issues raised. Ms. Sassower's contention that not all the facts and legal argument in her over 100 pages of submissions were responded to at sufficient length cannot possibly be

availing. Nor is her argument that the Court somehow failed by not repeating all the pleadings and arguments made by both sides in their papers. On the contrary, the Court did a superb job of focusing on the key aspects of both plaintiffs' and defendants' submissions and succinctly, but with solid support, coming to its legal conclusions." (at ¶6).

This is another shameless deceit by Mr. Freeman – only possible because he does not confront ANY aspect of POINT I of plaintiffs' memorandum of law (at pp. 2-24), whose title made explicit its dispositive nature:

> "**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 ANY CASE**" (at p. 2, underlining added).

17. Among the specifics of plaintiffs' POINT I establishing the outright fraud of Mr. Freeman's pretenses in his ¶6:

Subsection A (pp. 2-6) which expressly stated:

> "[the] decision does not identify ANYTHING about Mr. Freeman's presentation of fact, law, and legal argument supporting his dismissal motion – or plaintiffs' response thereto." (at p. 3, emphasis in the original); .

Subsection B (pp. 6-12) which expressly stated:

> "pages 2-7 of the decision, purporting to recite the 'deemed true' allegations of the complaint...omits...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... Additionally, and by way of 'filler', it introduces (at pp. 2-3) matter nowhere part of the complaint's allegations....
>
> 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. ...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." (at pp. 7-8, emphasis in the original).";

Plaintiffs' Subsection C (at pp. 13-20) which expressly stated:

> "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." (at p. 13)

Plaintiffs' Subsection D (at pp. 20-24) which expressly stated:

> "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." (at p. 23).

18. Such exhaustive, unrebutted, and irrebuttable showing of fact and law as presented by POINT I establishes precisely what plaintiffs' memorandum of law announced in its introductory section (at p. 1):

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

19. Mr. Freeman's affidavit, which does not identify that plaintiffs' motion seeks reargument relief, purports (at ¶9) that plaintiffs are not entitled to their requested renewal because they offer "no new fact" or "any change in the law", as required by CPLR §2221(e). He then asserts as "typical", pages 17-20 of plaintiffs' memorandum of law "rearguing [their] claim of journalistic fraud". This is another deceit by Mr. Freeman, who conceals that plaintiffs' memorandum of law (at p. 1 (fn 2) & p. 29) and my moving affidavit (at ¶2) expressly identified the basis for renewal. This had NOTHING to do with journalistic fraud, but, rather, with the "new and newly-discovered facts" pertaining to the appearance and actuality of the Court's bias and interest, particularized by ¶¶4-24 of my affidavit – and as to which plaintiffs' memorandum of law (at pp. 24-30) devotes its POINT II:

> **"THIS MOTION MEETS THE STANDARD FOR JUDICIAL DISQUALIFICATION & FOR VACATUR FOR FRAUD & LACK OF JURISDICTION -- & 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".**

20. Finally, with respect to the August 1, 2006 judgment that Mr. Freeman procured – the subject of plaintiffs' POINT III – plaintiffs do not purport, as Mr. Freeman's ¶8 deceitfully pretends, that his procurement of the judgment, without notice, is one of "two reasons" for vacatur thereof. This is reflected not only by the title of 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" (at pp. 30-37)

– which relates ONLY to the fact that the judgment "materially deviates from the July 5, 2006 decision & order", but pages 30-32 of that Point.

21. As Mr. Freeman concedes at ¶9, the decision and order is "silent as to whether [its dismissal of plaintiffs' complaint] was to be with or without prejudice". That being the case, it was for him to have made a motion to the Court as to whether adding the words "with prejudice in their entirety" to the judgment was consistent with the Court's decision – and available in the context of the Court's granting of a CPLR §3211(a)(7) motion to dismiss. As stated by plaintiffs' POINT III (at p. 33) – but NOT identified or addressed by Mr. Freeman –

> "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.[fn 20]

"fn 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

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

22. Such uncontested presentation of law and fact exposes the deceit of Mr. Freeman's ¶9, including his reliance on alleged "government reports and transcripts" to buttress the liberty he took in adding the words "with prejudice in their entirety" with respect to plaintiffs' libel claims.

23. Moreover, Mr. Freeman's ¶9 assertion that "since no cause of action for journalistic fraud can exist, no amount of repleading can make such a claim cognizable" conceals and completely ignores plaintiffs' argument at pages 17-20 of their memorandum of law – to which his ¶7 refers, but does not identify:

> "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[fn]. Conspicuously, the Court does not purport, based on its claimed 'research', that any court has ever rejected a journalistic fraud cause of action –

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proponent's evidence is a dismissal on the merits unless it specifies otherwise.'"

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,[fn] 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).

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[fn], 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[fn13].

"fn13 '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

> Such unrefuted and irrefutable documentary evidence on matters of recognized 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." (emphases in the original).

24. Mr. Freeman's ¶10 then shifts back to my moving affidavit, which he purports "makes a claim that somehow the oral argument on June 14, 2006 was improper in that the Court allowed [Mr. Freeman] to argue his dismissal motion first". He then baldly declares, without the slightest legal authority, that the Court's doing so was "totally customary and proper". This is a deceit not only because it is legally unsupported, but because ¶24 of my affidavit, to which Mr. Freeman cites, does not "somehow" claim that what the Court at oral argument was "improper". Rather, it gives legal authority, 22 NYCRR §202.8(c), in asserting that the Court's "wanton disregard" thereof, "further bear[s] upon both the appearance and actuality of this Court's disqualifying bias". Such specific assertion is not denied or disputed by Mr. Freeman's ¶10.

25. Finally, as to Mr. Freeman's ¶11, reiterating his despicable request – which he is not ashamed to identify as having been made by him at the June 14, 2006 oral argument – that the Court should require plaintiffs[5] to seek "permission from the Court" before filing "any new

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> 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");
>
> '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."

[5] As with his dismissal motion, Mr. Freeman's opposing affidavit (at ¶2) improperly compresses

motions or claims against these defendants" – "in light of [my] litigation history of repetitive motion practice", for which he now puts forward "the current motions" – there is NO basis, in fact or law for such request, as Mr. Freeman well knows. Indeed, it is to presumably buttress his pretense of "repetitive motion practice" that he purports, both in his ¶11 and in his ¶2, that plaintiffs' have made "current motions" and "various motions", when, they have made a single August 21, 2006 motion. The meritorious nature of such instant motion – and of the only prior motion plaintiffs made herein: their June 1, 2006 cross-motion – is evident from the most cursory examination of these submissions, reinforced by the demonstrated fraud of Mr. Freeman in response thereto.

26. Lastly, in further support of reargument and express recognition of a journalistic fraud cause of action – which is essentially a cause of action for fraud, in the context of a constitutional tort[6] – I wish to bring to the Court's attention the law review article, "*Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*" by Professors Randall P. Bezanson and Gilbert Cranberg, 90 Iowa Law Review 887 (March 2005) (Exhibit RR)[7]. Professors Bezanson and Cranberg detail the changed "media

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the separate plural plaintiffs into the singular "Ms. Sassower". It, thereby, appears that his ¶11 request covers not only myself in both my personal and professional capacities, but the Center for Judicial Accountability, Inc. and the public as represented by it. [*See* plaintiffs' June 1, 2006 memorandum of law, p. 4].

[6] *See* ¶¶20-1 of my June 13, 2006 reply affidavit – reiterated by me at the June 14, 2006 oral argument – "'It is well-settled U.S. Supreme Court precedent that news organizations lack immunity from generally applicable tort liability...*Cohen v. Cowles Media Co*, 501 U.S. 663, 669-70 (1991)...Fraud is a tort – and recognized cause of action.'"

[7] Plaintiffs have previously substantiated their journalistic fraud cause of action with two other 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) – handing

landscape" since *New York Times v. Sullivan*, 376 U.S. 254 (1964), where, in addition to media consolidation, newspapers are publicly-traded, with a focus on "the bottom line", rather than journalism. They state:

> "...when newspaper companies opted to go public, they declared in essence that they wanted to be treated the same as any other enterprise in the marketplace.
>
> Increasingly media companies resemble and behave the same as any other business...". (at 890)

27. The professors describe how media companies, in dealing with market pressures, have cast aside journalistic considerations as the basis for their policy and other decisions – resulting in increased risks of flawed journalism, including defamatory falsehood. They posit a "tort action" "against the corporation" (at 891) which recognizes that there are "decisions and policies at the institutional level that produce, facilitate, or influence the harmful conduct" involved in libel actions, "over which writers and editors may have little or no control" (at 891). Stating that "[t]he conditions under which [journalists] work are often major contributing factors to, if not chiefly responsible for, errant reporting and editing" (at 895), they assert that "when a damaging falsehood is published, and the injured party looks to the courts for redress...the legal system [should] address the issues of institutional responsibility." (at 899):

> "We propose a public defamation action that plaintiffs would bring against the publisher or parent company of a news organization rather than the reporter or editor of the story. The action would be a common law defamation claim that would require a plaintiff to prove the common law elements of defamation and would also require the plaintiff to overcome a First Amendment privilege by showing that the publisher, parent company, or its agents contributed to the defamation by acting in institutional reckless

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up copies at the June 14, 2006 oral argument. Following the Court's July 5, 2006 decision, these copies were in the file maintained by the Clerk's office.

disregard of the truth.[fn]. The institutional reckless disregard question, in turn, is whether at the level of a publisher or in the higher corporate reaches of a parent company, decisions were made for financial and financial market-based reasons unrelated to journalism in the face of known risks of falsity that would result from the decision.

The question, in other words, is not simply whether the editors or news staff disagreed or were substantially hampered by the decisions, but whether the persons making the financial and market-based decisions were aware of the consequences and nonetheless acted without journalistic justification. For purposes of liability, therefore, the question is not exclusively focused on the particular false and defamatory statement that was published, but on whether that statement was causally related to the changed policy or procedure that caused a heightened risk of falsity, and whether the decision to adopt the policy or procedure was made without journalistic justification, but with knowledge of its systematic consequences...

Our proposed defamation action against a parent company for libel based on institutional reckless disregard would be a separate claim from one against the paper via the reporter or editor for defamation based on actual malice. The two claims might be filed together... A given plaintiff might bring one or the other or both. It is possible that a plaintiff might prevail on both, though we think that unlikely since a finding of actual malice by the reporter would ordinarily mean that any bad corporate decisions had no legally material effect on the particular story. This would be the case unless, of course, the corporate decision was that reporters need not worry about the truth..." (at 901-903).

28. Not only does this law review article reflect an evolution of media law and causes of action, but the proposed "public defamation action" is precisely what is embodied by the instant case for libel and journalistic fraud against the corporation and newspaper, its chairman-publisher and highest echelons of the newspaper's editorial and management staff, in addition to MAREK FUCHS, the author of "*When the Judge Sledgehammered The Gadfly*". The verified complaint particularizes that these highest ranks were knowledgeable of, and acquiesced in, a pattern and practice of knowingly false and misleading news reporting and editorializing, covering up systemic governmental corruption and blackballing and besmirching plaintiffs, whose result – consistent therewith – was FUCHS' knowingly false and

defamatory column. The last allegation of the complaint (¶175), culminating the journalistic fraud cause of action, it that:

> "THE NEW YORK TIMES COMPANY has subordinated its First Amendment obligations to its own business and other self-interests. These include its interest in procuring the site for its new corporate headquarters, as well as favorable tax abatements and financial terms worth hundreds of millions of dollars. Upon information and belief, because THE NEW YORK TIMES COMPANY could not obtain same without the backing of Governor Pataki, other powerful government officials -- and the cooperation of the courts -- it has been motivated to "steer clear" of coverage exposing their official misconduct, to the detriment of the public."

29. The excision of this important final allegation from the Court's July 5, 2006 decision, as likewise ALL the complaint's allegations reflecting that "The Times is a for-profit, money-making, corporate entity"[8], and that its highest echelons were knowledgeable of, and involved in, a First-Amendment-violating course of conduct – all elements of the proposed "public defamation action" for "institutional reckless disregard for truth" – is laid out by plaintiffs' 13-page **"IN-DEPTH ANALYSIS OF THE 'DEEMED TRUE' ALLEGATIONS OF THE VERIFIED COMPLAINT RECITED BY THE JULY 5, 2006 DECISION & ORDER"**, annexed to their memorandum of law. Needless to say, Mr. Freeman's opposing affidavit does not contest ANY aspect of this analysis, including its legal argument. Indeed, his affidavit does not even identify that the analysis exists.

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[8] See footnote 5 to plaintiffs' June 1, 2006 memorandum of law:

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

ELENA RUTH SASSOWER

Sworn to before me this
25th day of September 2006

Notary Public

DEBRA BETH ROTHSTEIN
NOTARY PUBLIC, State of New York
No. 02RO6013652
Qualified in Westchester County
Commission Expires September 21, 20 (9)

TABLE OF EXHIBITS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---x

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

Plaintiffs,

Index #05-19841

-against-

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

Defendants.

REPLY AFFIDAVIT IN FURTHER SUPPORT OF PLAINTIFFS' AUGUST 21, 2006 MOTION

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