<u>ANALYSIS of the August 21, 2013 Decision & Order</u>
rendered by the Four-Judge Appellate Division, Second Department Panel
Consisting of Justice Peter B. Skelos, as Justice Presiding, Justice Daniel D. Angiolillo,
Justice Sheri S. Roman, and Justice Sylvia Hinds-Radix

This analysis constitutes a "legal autopsy" of the Appellate Division, Second Department's August 21, 2013 decision & order, consistent with what is proposed in "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*", 73 <u>Albany Law Review</u> 1 (2009), by Gerald Caplan, recognizing that <u>the legitimacy of judicial decisions can only be determined by comparison with the record</u> ("...Performance assessment cannot occur without close examination of the trial record, briefs, oral argument and the like..." (p. 53)).

<u>1st Page – The Caption & Notation of Oral Argument</u>:

The fraudulence of the panel's decision begins with its captioning of this case, which it truncates as "Elena Ruth Sassower, et al., appellants, v. Gannett Company, Inc., et al., respondents." There is no legitimate reason for the panel to do or permit this where, as here, the decision does not elsewhere fully reveal the parties and they are germane to the issues. At bar, they are germane to appellants' causes of action and to their November 29, 2010 cross-motion.

Thus, the decision nowhere reveals that the two individual appellants, plaintiffs Elena Ruth Sassower and Doris L. Sassower, are suing in two capacities, not only individually, but in their professional capacities as the Director and President of the Center for Judicial Accountability, Inc. [R-16] – germane to their libel *per se* cause of action [R-39-41], a cause of action wholly concealed by the decision. For that matter, the decision does not reveal that there is an organizational plaintiff, Center for Judicial Accountability, Inc., or that it and the individual plaintiffs are expressly bringing this lawsuit "*Pro Bono Publico*" – germane to their journalistic fraud cause of action [R-42-45].

As for the defendants, the decision makes it appear that the only defendants are "Gannett Company, Inc., The Journal News, Lohud.com, Henry Freeman, CynDee Royle, Bob Fredericks, and D. Scott Faubel" (at pp. 1-2), when, in fact, there are other defendants: defendant Keith Eddings and defendant DOES 1-10 [R-16] – the subject of three separate branches of appellants' November 29, 2010 cross-motion, these being the fourth, fifth, and sixth branches [R-241-243].

Of these three branches, the panel's decision reveals only the fourth branch, identifying it as "to disqualify defense counsel....[as] a party to the proceeding by virtue of being a defendant" (at p. 3). However, because it removes the specific "defendant" <u>expressly</u> identified by that fourth branch, *to wit*, "defendant DOES" [R-241] – and because the decision nowhere identifies defendants other than "Gannett Company, Inc., The Journal News, Lohud.com, Henry Freeman, CynDee Royle, Bob Fredericks, and D. Scott Faubel" – it is able to baldly assert, without detection, that there is "no support for [the] contention" that defense counsel is a party.

That this is a brazen deceit is readily proven by the record – and appellant Elena Sassower furnished the pertinent facts and record references <u>directly</u> to the panel by her written oral argument, which she read and handed up, which was as follows:

Ex 9

"...compelled by the record, *as a matter of law*, is the disqualification of defense counsel Satterlee, Stephens, Burke & Burke on conflict of interest grounds, because it is a party. Appellant's November 29, 2010 cross-motion [R-241-514] – the subject of their second 'Question Presented' (ix) – sought Satterlee's disqualification in its forth branch, asserting that it was a defendant DOE –

> 'being 'legal personnel' who, *inter alia*, received from The Journal News defendants the plaintiffs' analysis [of the news article] supporting their retraction demand and advised those defendants to ignore it. In other words, Satterlee is a defendant DOE, directly responsible for generating this lawsuit against its clients, who are here its fellow defendants.' [R-509].

Satterlee has never denied this – nor its 'direct interest in the subject matter of this suit' by reason thereof. Rather, both below and here Satterlee has concealed the very existence of this fourth branch – reflective that it cannot confront it, without conceding it.[fn1] Likewise, Justice Cohalan's September 22, 2011 short-form order concealed it.

As stated by appellants' reply brief (at p. 5):

> 'Such uncontested and concealed issue below, as here (*cf.* Opp. Br.1 & fn.1, 18), of Satterlee's disqualification as a party, unable to provide unconflicted representation of its co-defendants, presents this Court with a '*matter of law*' disqualification of Satterlee, as a threshold issue." (Exhibit D-1 of this motion, at pp. 2-3).

The decision's only reference to the oral argument is at the outset of the decision, above and opposite its truncated caption, where appear the words: "Argued – May 6, 2013". The oral argument (Exhibit D) establishes the fraudulence of the August 21, 2013 decision, in every material respect – beginning with its failure to identify the application that appellant Elena Sassower had therein made for the panel's disqualification and for disclosure.

1st and 2nd Pages – Decretal Paragraphs

Of the five decretal paragraphs, two are noteworthy:

The first of these reads:

> "ORDERED that the appeal by the plaintiff Doris L. Sassower from the order dated April 23, 2012, is dismissed, as that plaintiff is not aggrieved by that order" (at p. 2).

Neither here nor elsewhere does the decision explain why appellant Doris Sassower is "not aggrieved". This bald statement is false. The April 23, 2012 order [R-11] keeps intact the

---

"fn1 Appellants' brief: p. 36, 45, 49, 53, 70; Appellants' reply brief: pp. 4-5."

September 22, 2011 order dismissing appellants' complaint and denying their November 29, 2010 cross-motion [R-3-8]. As appellant Doris Sassower is plainly aggrieved by the September 22, 2011 order, whose fraudulence was the subject of appellants' December 21, 2011 motion [R-586-758] – and so-demonstrated by their 30-page analysis of the order [R-639-668], which was the motion's centerpiece, she is aggrieved by the April 23, 2012 order denying that motion.

The second reads:

> "ORDERED that the order dated April 23, 2012, is affirmed insofar as reviewed" (at p. 2).

Neither here nor elsewhere does the decision explain what "insofar as reviewed" means, let alone why appellants have been denied the full review of the April 23, 2012 order [R-11], warranted by their first "Question Presented" (Br. viii-ix). Does it mean, for example, that the panel has not reviewed how the April 23, 2012 order disposed of appellants' December 21, 2011 motion to disqualify Justice Cohalan for interest under Judiciary Law §14 and his obligation to have disclosed facts bearing upon his fairness and impartiality – relief sought by the motion's first branch [R-586]? Does it also mean that the panel has not reviewed how the April 23, 2012 order disposed of the sixth branch of relief sought by appellants' December 21, 2011 motion, *to wit*: "<u>leave to amend the Verified Complaint, pursuant to CPLR §3025(b)</u> so as to make additionally explicit a fourth cause of action for institutional reckless disregard for truth" [R-587]? The panel's decision makes no reference to either of these – and how they were determined by the April 23, 2012 order.

Appellant Elena Sassower's oral argument before the panel had highlighted the significance of what Justice Cohalan's April 23, 2012 order had done with respect to the disqualification for interest and disclosure sought by appellants' December 21, 2011 motion, as follows:

> "As stated at Point I of appellants' brief (at pp. 68-69) – without rebuttal from respondents –
>
> > 'That Justice Cohalan's April 23, 2012 short-form order conceals that plaintiffs' motion sought his disqualification for interest – and does not deny that disqualification is warranted on that ground – leaves this Court with no choice but to disqualify him for interest, as a *matter of law*, as it cannot contest what Justice Cohalan himself does not deny or dispute.
> >
> > Similarly, Justice Cohalan's concealment of the disclosure sought by the motion leaves this Court with no choice but to disqualify him, *as a matter of law*, as it cannot make disclosure for him of the biases, relationships and interests identified by the motion and not contested by him.
> >
> > That Justice Cohalan's April 23, 2012 short-form order does not even purport, in conclusory fashion, that he is a fair and impartial judge only underscores what the record before this Court evidentiarily establishes: his actual bias, 'affect[ing] the result', and so flagrant as to suggest interest. Such requires vacatur of his September 22, 2011

> short-form order on both grounds, as likewise vacatur of his April 23, 2012 short-form order – and plaintiffs' memorandum of law in support of their [December 21, 2011] motion furnishes the controlling legal authority [R-753-754, italics in original]." (Exhibit D-1, at p. 2).

The correctness of these legal propositions – which the panel's decision does not contest – is reinforced by its concealing them and all the facts they recite about Justice Cohalan's April 23, 2012 order. Indeed, like the April 23, 2012 order, the panel's decision makes no mention of either the disqualification for interest or disclosure relief sought by appellants' December 21, 2011 motion and makes no representation as to Justice Cohalan's fairness and impartiality.

As for how Justice Cohalan's April 23, 2012 order disposed of the sixth branch of appellants' December 21, 2011motion for leave to amend their complaint to make additionally explicit their institutional reckless disregard for truth cause of action, the panel's decision not only conceals this branch, but conceals that appellants' complaint had even proffered such cause of action.

These deceits suffice to expose the fraudulence and actual bias of the decision's other decretal paragraphs affirming the judgment and awarding defendants "one bill of costs" (at p. 2).

2nd Page – Introductory Paragraph

The panel here purports that appellants' libel cause of action was "based on identical articles which appeared in The Journal News and on Lohud.com". In fact, the articles are not identical inasmuch as they have different titles [R-27, ¶13]. The decision identifies neither title – nor that appellants' complaint had not only alleged that the titles were "deliberately false and maligning", but had quoted legal authority for the proposition that "the headline alone may provide a basis for a finding of libel..." [R-35, ¶42, fn. 5].

The panel also here improperly designates the parties. It designates "defendants Gannett Company, Inc., The Journal News, Lohud.com, Henry Freeman, CynDee Royle, Bob Fredericks, and D. Scott Faubel" not as "appearing defendants", which is what they are, but as "hereinafter collectively the Gannett defendants" (at p. 2) – concealing that there are other "Gannett defendants" – Keith Eddings and DOES 1-10 – who have not appeared and whose status and identities are material issues. It also improperly designates appellant Elena Ruth Sassower not as "E.R. Sassower", but as "hereinafter Elena".

The glaring facial impropriety of designating appellant Elena Sassower by her first name – repeated in the decision eight times – is all the more striking in view of the scrutiny the decision would have received prior to its release. According to this Court's webpage "How a Case is Decided", under the heading "Decision Department":

> "The decision department consists of a supervisor, a staff of attorney editors, and a number of clerks and typists. ...
>
> The supervisor of the decision department assigns each decision on which the voting is complete to an editor, who then prepares it for publication. Among other

things, the editors check citations, grammar, and technical style. They also examine the draft decision for consistency with prior decisions of the court and with proposed decisions on causes that are pending but not yet released." (Exhibit E).

Upon information and belief, a first-name designation of an adult party is unprecedented, or at least virtually so, for judicial decisions, certainly at the appellate level.

2nd Page – Affirmance of Justice Cohalan's September 22, 2011 Order Granting Defense Counsel's Motion to Dismiss Appellants' Complaint for Failure to State a Cause of Action:

The panel affirms Justice Cohalan's September 22, 2011 order granting defense counsel's motion to dismiss appellants' complaint for failure to state a cause of action by three paragraphs, which conceal essentially every allegation of their three causes of action – libel, libel *per se*, and journalistic fraud [R-33-45] – and of their fourth cause of action, institutional reckless disregard for truth, set forth in the "WHEREFORE" clause [R-48]. Indeed, the panel reveals only two of these four causes of action – libel and journalistic fraud. In so doing, the panel replicates, even more egregiously, what Justice Cohalan's September 22, 2011 order had done in obliterating the allegations of appellants' complaint – and what defense counsel's motion to dismiss appellants' complaint had also done in obliterating the complaint's allegations – the unlawfulness of which was pivotally before the panel on appellants' appeals.

The longest of these three paragraphs is the first: a single sentence reciting the black-letter legal standard for motions to dismiss for failure to state a cause of action. The second paragraph, dismissing appellants' libel cause of action, is three sentences. The third paragraph, dismissing appellants' journalistic fraud cause of action, is two sentences. As for appellants' two other causes of action – libel *per se* and institutional reckless disregard for truth – the panel does not identify them anywhere in its decision, let alone their material allegations and how they had been addressed by defense counsel's dismissal motion and by Justice Cohalan's September 22, 2011 order granting it.

The single-sentence first paragraph, setting forth the applicable legal standard is:

> "On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), ''the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory'' (*Green v. Gross & Levin, LLP*, 101 AD3d 1079, quoting *Breytman v. Olinville Realty, LLC*, 54 AD3d 703, 703-704; *see Leon v Martinez*, 84 NY2d 83, 87."

The panel's purpose in setting this forth is to imply that this is the exacting standard by which it has reviewed Justice Cohalan's dismissal of appellants' complaint. This is a deceit – and replicates the identical deceit of Justice Cohalan's September 22, 2011 order, which, upon reciting the same black-letter standard [R-4], then proceeded to brazenly disregard it [R-5-7]. Such misconduct by Justice Cohalan was particularized by appellants' 30-page analysis of the September 22, 2011 order [R-651-654] and by their appellants' brief (at pp. 51-54, 56-59), demonstrating that it had:

"conceal[ed] virtually every allegation of plaintiffs' Complaint, in violation of black-letter law, which it recites, as to the standard governing dismissal for failure to state a cause of action".

It is without confronting appellants' record-based presentation on the subject – or even identifying it (Br. p. 62) – that the panel instead proclaims, in completely conclusory fashion:

> "Here, the Supreme Court properly concluded that the complaint failed to state a cause of action alleging libel. The plaintiffs explicitly complained about the 'characterization' of certain behavior on Elena's part. Thus, the language alleged to be libelous was nonactionable opinion, rather than fact (*see Sassower v. New York Times Co.*, 48 AD3d 440).
>
> The Supreme Court also properly dismissed the cause of action alleging 'journalistic fraud.' That cause of action, which alleged, in effect, that the articles failed to include and recount certain information as desired by the plaintiffs was not actionable (*see id.* at 441)." (underlining added).

This is multitudinously deceitful:

First, the panel does not purport, except by implication, that Justice Cohalan observed the standards for motions to dismiss for failure to state a cause of action – and the fact that he flagrantly did not is particularized by appellants' 30-page analysis of his September 22, 2011 order [R-651-654] and appellants' brief (at pp. 51-54, 56-59) – quite apart from being immediately evident from the most cursory comparison of appellants' 33-page complaint [R-16-48] and Justice Cohalan's order [R-3-8].

Second, the panel does not purport, except by implication, that its own even more minimal and conclusory descriptions of appellants' libel and journalistic fraud causes of action are consistent with the standards for motions to dismiss – and examination of appellants' complaint [R-16-48], with its four causes of action [R-33-48], shows they are not.

Third, the panel here conceals that Justice Cohalan was acting upon defense counsel's dismissal motion – and that if its motion did not adhere to the standards for motions to dismiss for failure to state a cause of action, it could not be granted. That defense counsel's motion had to be denied, *as a matter of law*, because it concealed most of the allegations of appellants' complaint, including the existence of the institutional reckless disregard for truth cause of action,[1] and materially falsified and distorted the handful it revealed, was the basis for appellants' November 29, 2010 opposition/cross-

---

[1] As pointed out by appellants' brief (at p. 71, fn. 5), defense counsel's concealment of the institutional reckless disregard for truth cause of action was itself sufficient to require denial of its dismissal motion:

> "It is well established that where a motion to dismiss for failure to state a cause of action is directed to the whole complaint, as was Satterlee's, it must be denied in its entirety if any once cause is legally sufficient, *Advance Music Corp. v. American Tobacco Company*, 296 NY 79 (1946); *Birnbaum v. Citibank*, 97 AD2d 392 (2nd Dept. 1983); *Canavan v. Chase Manhattan Bank*, 234 AD2d 494 (2nd Dept. 1996); *Ross Network, Inc. v. RSM McGladrey, Inc., et al.*, 11 Misc.3d 1089A (2006)."

motion [R-241-514].

Fourth, even the panel's simplistic, conclusory and false depictions of appellants' libel and journalistic fraud causes of action are insufficient to dismiss those causes of action – as the panel would not otherwise have had to accompany them by distortions and misrepresentation of law, for which its sole legal authority is this Court's appellate decision in *Sassower v. New York Times Co.*, 48 AD3d 440 (2008) [R-346-7] – a decision whose fraudulence was made known to the panel at the oral argument (Exhibit D-1, at pp. 3-4), with the substantiating proof in the record before it [R-247-249, 268-347, 555-557].

The panel's citation to the appellate decision in *Sassower v. New York Times*, in both paragraphs, is prefaced by an inferential "see"[2] – and without specifying what the panel deemed relevant. The portion of the *Sassower v. New York Times* appellate decision closest to the panel's conclusory assertion that unspecified "'characterization' of certain behavior on Elena's part" is "nonactionable opinion" with respect to her libel claim is the following:

> "the article's characterizations of Sassower fall under the category of opinion, and 'expressions of an opinion 'false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions'' (*Steinhilber v Alphonse*, 68 NY2d 283, 286 [1986], quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d at 380).'" [R-347].

This legal assertion is false – and this Court's appellate decision in *Sassower v. New York Times* does not continue the quote from *Steinhilber v. Alphonse* differentiating "pure opinion" and "mixed opinion", from which this is obvious:

> "A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts...When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading...it, it is a 'mixed opinion' and is actionable...The element of a 'mixed opinion' is not the false opinion itself – it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking..." (at pp. 289-90, underlining added). [R-482].

Indeed, even "pure opinion" is actionable where:

> "'ostensibly accompanied by a recitation of the underlying facts upon which the opinion is based, but those underlying facts are either falsely misrepresented or grossly distorted (*Silsdorf v. Levine*, 59 NY2d 8, cert

---

2 According to The Blue Book: A Uniform System of Citation (Harvard Law Review Association, 17th edition, 2000), "see" before a legal citation means that there is "an inferential step between the authority cited and the proposition it supports". In other words, "the proposition is not directly stated by the cited authority" (at pp. 22-23).

denied 464 U.S. 831, *Chalpin v. Amordian Press*, 128 AD2d 81.)', *Parks v. Steinbrenner, et al.*, 131 A.D.2d 60, 62-3 (1st Dept. 1987)." [R-483].

This, too, is black-letter law – and the panel is presumed to know this, quite apart from appellants presenting these legal principles to Justice Cohalan, both by their opposition/cross motion [R-478-485; 558-559; 568-569] and by their 30-page analysis of his September 22, 2011 order [R-654-659].

Thus, the panel's bald assertion in dismissing appellants' libel cause of action that "characterization" – which it does not even specify – is "nonactionable opinion" is not only false, but knowingly false.

As for the panel's assertion that Justice Cohalan "also properly dismissed the cause of action alleging 'journalistic fraud' because it "alleged, in effect, that the articles failed to include and recount certain information", which is "not actionable (*see id.* at 441)", this, too, is false and knowingly so.

Justice Cohalan's September 22, 2011 order could not be clearer as to its basis for dismissing appellants' journalistic fraud cause of action, stating:

> "The Court is unable to find a single jurisdiction that recognizes a cause of action for journalistic fraud. The sole case on the issue is an unreported case, submitted by the defendants, which involves E.R. Sassower herself. In an action by E.R. Sassower against The New York Times, the Court found that 'based on the Court's research, no jurisdiction has embraced such cause of action' (*Sassower v. The New York Times Co.*, Sup Ct, Westchester County, July 6, 2006, Loehr, J., Index No. 19841/05)." [R-7].

Such reason is insufficient, *as a matter of law*, as pointed out by appellants, both before and after Justice Cohalan's dismissal of their journalistic fraud cause of action on that ground [R-663-664, 817]. And the panel's decision concedes as much by concealing that this is the reason Justice Cohalan gave for dismissing the journalistic fraud cause of action.

Moreover, for the panel to rely on this Court's appellate decision in *Sassower v New York Times* [R-346-7] as authority for dismissing the journalistic fraud cause of action is a further fraud as it, unlike Judge Loehr's lower court decision, nowhere even refers to journalistic fraud. This is evident from the appellate decision itself – quite aside from appellants having pointed it out to Justice Cohalan in the record that was before the panel [R-248-249]. And it may be presumed that the reason the appellate decision in *Sassower v. New York Times* concealed the journalistic fraud cause of action is because this Court had no defense to Judge Loehr's stated reason for dismissing it -- whose insufficiency, *as a matter of law*, was argued by the appellants' therein on their appeals [R-294-295, 303, 334].

As for the portion of the *Sassower v. New York Times* appellate decision relevant to the panel's proposition that omission of information is "not actionable", it is the following:

> "While the plaintiffs claim that the subject article failed to include and recount certain information as desired by the plaintiff Elena Ruth Sassower, editorial decisions on '[t]he choice of material to go into a newspaper' (*Miami Herald*

Publishing Co. v. Tornillo, 418 US 241, 258, 94 S Ct 2831, 41 L Ed 2d 730 [1974]), and the decision to omit certain details (see generally *Rinaldi v. Holt, Rinehart & Winston*, 42 NY2d 369, 383, 366 NE2d 1299, 397 NYS2d 943 [1977], cert denied 434 US 969, 98 S Ct 514, 54 L Ed 2d 456 [1977]) are not actionable." [R-347].

Here, too, the legal propositions of this Court's appellate decision in *Sassower v. New York Times* are false. As pointed out in the record [R489-491], *Miami Herald Publishing Co. v. Tornillo* is not about libel or journalistic fraud, but the constitutionality of a statute requiring newspapers criticizing political candidates to afford them a right of reply – and any notion that it 'had announced unequivocal protection for the editorial process' was rejected by the U.S. Supreme Court in *Herbert v. Lando, et al.*, 441 US 153, 166-7 (1979), reaffirming that such is a proper and essential subject of inquiry by libel plaintiffs. As for omissions of detail, the New York Court of Appeals held, in *Rinaldi*, that such is actionable where the omissions are not "minor" and the account is not accurate, as at bar. Indeed, unlike the *Sassower v. New York Times* appellate decision, which purported that "the article fairly and accurately reported what occurred at certain hearings" [R-347], the panel makes no assertion as to the accuracy of the subject article – which is a news article – unlike the column that was the subject of *Sassower v. New York Times*.

Finally, this Court has itself recognized that a libel claim includes not only what is printed, but what is left out – and its decision in *Matovcik v. Times Beacon Record Newspapers*, 46 AD3d 636 (2007), reflecting this, was cited by appellants in the record below [R-563, 628-629] and also cited in their brief (at p. 50). Such proposition and caselaw is clearly relevant to causes of action for journalistic fraud and institutional reckless disregard for truth, as at bar.

2nd – 3rd Pages – Affirmance of Justice Cohalan's September 22, 2011 Decision Denying Appellants' November 29, 2010 Cross-Motion:

The panel affirms Justice Cohalan's denial of appellants' cross-motion in a single four-sentence paragraph. It rests, entirely, on bald assertions, which are false, and concealment of four of the cross-motion's eight branches, most importantly, appellants' seventh branch for summary judgment [R-241-242].

The panel states:

> "The Supreme Court properly denied Elena's cross-motion for various relief. Since the record does not support a finding that the defendants' conduct was frivolous, the court prudently exercised its discretion in denying that branch of the cross motion which was to impose sanctions against defense counsel (see 22 NYCRR 130-1.1). Similarly, as the record does not support a finding that defense counsel committed a substantial violation of the Rules of Professional Conduct or a finding that defense counsel was guilty of any deceit or collusion, the court properly denied those branches of Elena's cross motion which were to refer defense counsel to appropriate disciplinary authorities and to assess damages against defense counsel for deceit and collusion (see Judiciary Law 487[1]). Moreover, the court properly denied that branch of Elena's cross-motion which was to disqualify defense counsel for violation of rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200.07), because there

was no support for her contention that defense counsel was a party to the proceeding by virtue of being a defendant (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7)." (underlining added).

The referred-to branches are the first four branches of appellants' eight-branch cross-motion [R-241-242]. Except for its description of the fourth branch, "to disqualify defense counsel for violation of rule 1.7 of the Rules of Professional Conduct because...defense counsel was a party to the proceeding by virtue of being a defendant...", the panel furnishes not the slightest information as the nature of the complained-of misconduct by defense counsel that was the subject of the first three branches. This, where the misconduct was defense counsel's unabashed violation of the very standard for motions to dismiss for failure a cause of action that the panel has recited only a couple of paragraphs before.

That the panel baldly asserts that the cross-motion was "properly denied" – followed by the additional bald assertion that "the record does not support a finding" of frivolous conduct under 22 NYCRR §130-1.1; or of substantial violation of the Rules of Professional Conduct; or deceit and collusion under Judiciary Law §487(1), or of violation of rule 1.7 of the Rules of Professional Conduct (22 NYCRR §1200.07) – are judicial frauds. This is proven by the most cursory comparison of Justice Cohalan's September 22, 2011 order [R-3-8] and the record of appellants' November 29, 2010 cross-motion [R-241-585], which could not have been easier for the panel to make, as it was furnished by appellants' brief. Thus, their second "Question Presented" asked:

> "Did the record of plaintiffs-appellants' November 29, 2010 cross-motion [R-241-514] establish their entitlement to the relief it sought, as a matter of law?",

with appellants' answer, furnishing a thumbnail analysis of Justice Cohalan's September 22, 2011 order, as follows:

> "Yes. *The record of plaintiffs-appellants' November 29, 2010 cross-motion established that all such relief was legally compelled – which is why Justice Cohalan's September 22, 2011 short-form order* [A-3-8], *denying the cross-motion, does not identify any of the facts, law, or legal argument it presented, misrepresents such branches as it identifies so as to deny them, and conceals entirely the threshold issue presented by the cross-motion's fourth branch: disqualification of defense counsel Satterlee, Stephens, Burke & Burke, LLP for conflict of interest as a defendant DOE.*"

The truth of this answer was then demonstrated by appellants' record-referenced summary of the "Course of the Proceedings" before Justice Cohalan, containing 24 pages devoted to their cross-motion and his September 22, 2011 order (at pp. 31-34) and culminating in a Point II Argument entitled, "The Record of Plaintiffs' November 29, 2010 Cross-Motion Entitled Them to its Requested Relief, *as a Matter of Law*, including Summary Judgment" (pp. 69-72). Such is dispositive of the fraud committed by the panel with respect to appellants' cross-motion.

3rd Page – Affirmance of Justice Cohalan's April 23, 2012 Decision "Denying" Appellants' December 21, 2011 Motion

The panel affirms Justice Cohalan's April 23, 2012 short-form order [R-11] in a single four-sentence paragraph, whose brazen falsification of the record is established by appellant Elena Sassower's oral argument.

The panel states:

> "The Supreme Court properly denied Elena's motion, *inter alia*, for recusal and to vacate the order dated September 22, 2011. Absent a legal disqualification under Judiciary Law §14, 'the determination concerning a motion seeking recusal based on alleged impropriety, bias, or prejudice is within the discretion and the personal conscience of the court'' (*Daniels v City of New York*, 96 AD3d 895, 895, quoting *People v. Moreno*, 70 NY2d 403, 405; *see Schreiber-Cross v State of New York*, 31 AD3d 425). Here, Elena failed to set forth any proof of bias or prejudice on the part of the court which would have warranted recusal (*see Daniels v City of New York*, 96 AD3d at 895; *Schreiber-Cross v State of New York*, 31 AD3d at 425). Additionally, Elena failed to establish any grounds for vacating the order dated September 22, 2011 (see CPLR 2221; 5015[a][3], [4])." (underlining added).

In baldly asserting "The Supreme Court properly denied Elena's motion", the panel conceals all particulars as to how the motion was purportedly "denied" – including those presented by appellant Elena Sassower's oral argument, as follows:

> "Justice Cohalan's response to the December 21, 2011 motion – of which disqualification/disclosure was the first of seven branches of relief [R-586-587] – was his four-sentence April 23, 2012 short-form order [R-11], concealing all the facts, law, and legal argument presented by the motion, including the existence of the 30-page analysis [of Justice Cohalan's September 22, 2011 order], whose line-by-line showing was completely undenied and undisputed by him. Indeed, the April 23, 2012 short-form order did not specify the disqualification motion as other than for 'bias' – not identifying 'actual bias', not identifying 'interest', and not identifying that it sought disclosure – of which it made none. [Br. 62-63]."

In other words, the panel is purporting that all of this is "proper", which it flagrantly is not – and which the panel knows it is not by concealing it from its decision.

The panel then moves on to concealing and distorting the relief sought by appellants' December 21, 2011 motion [R-586-587], identifying it as "inter alia, for recusal and to vacate the order dated September 22, 2011". In fact, "recusal" is not the word used by appellants' motion. The word used was "disqualification" – and the panel may be presumed to know why:

> "'disqualification' – in its strictest sense – has typically been reserved for situations involving statutorily or constitutionally mandated removal of a judge, upon the

request of a moving party".[3]

This is the situation at bar. Yet, the panel more than conceals that appellants moved for Justice Cohalan's statutory disqualification under Judiciary Law §14 for interest by its disingenuous assertion, "Absent a legal disqualification under Judiciary Law §14", implying that no such legal disqualification was at issue – when it not only was, but the *matter of law* consequence of what Justice Cohalan did in his April 23, 2012 order with respect to the requested disqualification for interest was directly presented to the panel by appellant Elena Sassower's oral argument, as was the *matter of law* consequence of what Justice Cohalan's April 23, 2012 order did with respect to appellants' request for disclosure. She stated, as follows:

> "As stated at Point I of appellants' brief (at pp. 68-69) – without rebuttal from respondents –
>
> > 'That Justice Cohalan's April 23, 2012 short-form order conceals that plaintiffs' motion sought his disqualification for interest – and does not deny that disqualification is warranted on that ground – leaves this Court with no choice but to disqualify him for interest, as a *matter of law*, as it cannot contest what Justice Cohalan himself does not deny or dispute.
> >
> > Similarly, Justice Cohalan's concealment of the disclosure sought by the motion leaves this Court with no choice but to disqualify him, *as a matter of law*, as it cannot make disclosure for him of the biases, relationships and interests identified by the motion and not contested by him.
> >
> > That Justice Cohalan's April 23, 2012 short-form order does not even purport, in conclusory fashion, that he is a fair and impartial judge only underscores what the record before this Court evidentiarily establishes: his actual bias, 'affect[ing] the result', and so flagrant as to suggest interest. Such requires vacatur of his September 22, 2011 short-form order on both grounds, as likewise vacatur of his April 23, 2012 short-form order – and plaintiffs' memorandum of law in support of their [December 21, 2011] motion furnishes the controlling legal authority [R-753-754, italics in original]." (Exhibit D-1, at p. 2).

The panel, likewise, replicates Justice Cohalan's concealment that the motion sought his disqualification for "demonstrated actual bias". It then not only disingenuously quotes law obscuring the governing standard pertaining to disqualification for bias, which appellant Elena Sassower had correctly quoted at oral argument as follows:

> "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

---

3 §1.1 "Definitions" (at pp. 4-5), Judicial Disqualification: Recusal and Disqualification of Judges, Richard E. Flamm, Little, Brown & Company, 1996.

or prejudice or unworthy motive' is 'shown to affect the result'' [R-751-758]" (Exhibit D-1, at p. 1),

but utterly falsifies the record by baldly asserting: "Elena failed to set forth any proof of bias or prejudice on the part of the court which would have warranted recusal" and "Elena failed to establish any grounds for vacating the order dated September 22, 2011" – without the slightest mention of the proof of Justice Cohalan's result-affecting bias, presented by appellants' December 21, 2011 motion motion – and so-stated by appellant Elena Sassower at oral argument, *to wit*:

> "a 30-page analysis of his September 22, 2011 short-form order [R-639-668] detailing the factual and legal baselessness of virtually every line of its six pages [R-3-8]." (Exhibit D-1, at p. 1).

Appellants' 30-page analysis of Justice Cohalan's September 22, 2011 order is dispositive, *prima facie*, proof of their entitlement to his disqualification for "demonstrated actual bias" and vacatur of both his September 22, 2011 order and April 23, 2012 order by reason thereof – as the panel well knows by concealing its very existence.

3rd Page – Final Paragraph as to Appellants' "remaining contentions"

The panel ends its decision with a one-sentence paragraph:

> "The plaintiffs' remaining contentions are without merit".

This final paragraph, like the decision's preceding paragraphs, is completely conclusory because it is false and knowingly so. None of the supposedly "without merit" "remaining contentions" are identified by the decision – and examination of appellants' briefs establishes that each and every one of their "contentions" were compelled, *as a matter of law* – and so identified as compelled, *as a matter of law*. This includes the contention in appellants' reply brief – substantiated by its content – and summed up by its conclusion:

> "[Defense counsel] Satterlee's opposition brief is frivolous and a fraud on the Court – triggering this Court's mandatory disciplinary responsibilities under §100.3D of New York's Chief Administrator's Rules of Judicial Conduct and reinforcing what is obvious from the record on appeal: that appellants are entitled, *as a matter of law*, to summary judgment on their four causes of action, removal of the "**ACCURACY**" policy from respondent Journal News' masthead, and all the other relief sought by their November 29, 2010 cross-motion and December 21, 2011 motion." (Reply Brief, at p. 32).