SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

GERARD MATOVCIK, Plaintiff, -against- TIMES BEACON RECORD NEWSPAPERS a/k/a THE VILLAGE TIMES HERALD, a/k/a THE PORT TIMES RECORD, a/k/a THE VILLAGE BEACON RECORD, a/k/a THE TIMES OF SMITHTOWN, THE TIMES OF ST. JAMES, THE TIMES OF NESCONSET, VILLAGE TIMES, INC. and PETER C. MASTROSIMONE, Defendants.	Index No.12282/04

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS THE AMENDED COMPLAINT

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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-against-	
TIMES BEACON RECORD NEWSPAPERS a/k/a THE VILLAGE TIMES HERALD, a/k/a THE PORT TIMES RECORD, a/k/a THE VILLAGE BEACON RECORD, a/k/a THE TIMES OF SMITHTOWN, THE TIMES OF ST. JAMES, THE TIMES OF NESCONSET, VILLAGE TIMES, INC. and PETER C. MASTROSIMONE, Defendants.	

This Memorandum of Law is submitted in support of Defendants' Motion to Dismiss the Amended Complaint. Two grounds are asserted for dismissal. First, the Amended Complaint should be dismissed in its entirety as to all Defendants, under CPLR 3211(a)(1) and 3211(a)(7), based on documentary evidence and for failure to state a cause of action for defamation as a matter of law. Alternatively, if the Amended Complaint is not dismissed in its entirety, certain of the Defendants should be dropped from the action and the claims against them dismissed, under CPLR 1003, because they have been misnamed and/or misjoined.

PRELIMINARY STATEMENT

In this action Plaintiff, who was a high school English teacher, seeks to hold Defendants liable in defamation for reporting in their newspaper that Plaintiff had been involved in, and that he was under investigation for, the collection of fees from students for workbooks that had already been paid for by the school district and the diversion of those funds to other purposes. The fact of the matter is that he had and he was.

In other circumstances a potential dispute over the truth or falsity of factual reporting of this kind regarding the Plaintiff's involvement in such activities might preclude consideration of a motion to dismiss addressed solely to the pleadings. However, in the unique circumstances of this case, the Amended Complaint is subject to dismissal as a matter of law, under CPLR 3211(a)(1) and 3211(a)(7), because documentary evidence, in the form of Plaintiff's own sworn pleadings and other uncontested evidence filed in a separate Article 78 proceeding that Plaintiff commenced, based on the same facts and circumstances reported in Defendants' newspaper, definitively establishes the truth or substantial truth of all of the facts reported by Defendants.

Also of great significance is that the Amended Complaint to which this motion is addressed was not filed until after Plaintiff's Article 78 proceeding was resolved by a formal settlement in which Plaintiff voluntarily accepted a strong reprimand and significant sanctions arising out of his acknowledged role in the collection and diversion of student workbook fees. The Amended Complaint completely and insupportably ignores this change of circumstances between the time Plaintiff filed his original Complaint in this action (which was prior to his commencement of the Article 78 proceeding) and the time of his recent filing of the Amended Complaint.

Those ensuing events demonstrate that Plaintiff cannot now credibly dispute the truth or substantial truth of the core facts established by his own sworn pleadings and documentary evidence in the Article 78 proceeding. And any claim that Defendants' publications are actionable because they disclosed Plaintiff's actions in a public or embarrassing fashion is also without merit and subject to dismissal as a matter of law. Defendants have a constitutionally protected right to publish their newsworthy opinions, especially when they are based on true facts. That right is not negated simply because Defendants questioned or criticized Plaintiff's admitted actions.

SUMMARY OF ARGUMENT

The documentary evidence submitted on this motion may be considered, pursuant to CPLR 3211(a)(1), for the purpose of determining whether that evidence resolves all factual issues regarding Defendants' affirmative defense of truth, as a matter of law. (Point I.A.) A point-by-point review of the documentary evidence definitively establishes the truth or substantial truth of all statements of fact reported about Plaintiff in Defendants' newspaper. (Point I.B.)

For purposes of assessing the issue of truth, only publications that are not "substantially true" are actionable in defamation. Thus, the documentary evidence need not establish the precise or literal accuracy of each and every factual statement in Defendants' publications. Because all of the factual statements in Defendants publications are demonstrably or substantially true, based on the documentary evidence, the motion to dismiss must be granted. (Point II)

Plaintiff's remaining claims of defamation also fail, and must therefore be dismissed under CPLR 3211(a)(7), because they are addressed to statements of opinion. Opinion and editorial commentary are constitutionally-

protected; they cannot form the basis for a defamation claim. Because all of the statements in Defendants' article and editorial that the documentary evidence does not definitively establish to be true or substantially true are statements of opinion, Plaintiff's claims based on those statements are also ripe for dismissal as a matter of law. (Point III)

Potentially dispositive motions addressed to defamation claims against media defendants, involving publications on matters of undoubted public interest and concern, should be given the most serious consideration. The Court of Appeals has instructed that such motions should be granted, where appropriate, in order to safeguard Defendants' constitutionally guaranteed rights and in order to avoid the costs and chilling effects that may be caused by unduly extended litigation of meritless defamation claims. (Point IV.A.)

For the same reasons, should this Court grant Defendants' motion to dismiss the Amended Complaint based on the documentary evidence, the Court should also entertain a motion by Defendants for sanctions against Plaintiff and/or his attorney. On such a motion Defendants expect to demonstrate that the facts available to Plaintiff and his counsel at the time this action was commenced, or

at the very least the facts available at the time of the filing of the Amended Complaint, did not support the commencement or the continuation of this action so that, therefore, the pursuit and perpetuation of this action was frivolous and should be sanctioned. (Point IV.B.)

Finally, under CPLR 1003 the court has the power to drop a misnamed or misjoined party on the motion of any party or on the court's own initiative. Should the Court not grant Defendants' motion to dismiss the action in its entirety, it should at the very least drop all five of those defendants from the case and the Amended Complaint should be dismissed as against them. (Point V)

ARGUMENT

POINT I

THE AMENDED COMPLAINT SHOULD BE DISMISSED UNDER CPLR 3211(A)(1) BECAUSE "DOCUMENTARY EVIDENCE" CONCLUSIVELY ESTABLISHES THE TRUTH OR SUBSTANTIAL TRUTH OF ALL STATEMENTS OF FACT IN DEFENDANTS' PUBLICATIONS

A.

CPLR Rule 3211(a)(1) and Cases Applying It Recognize That Undisputed Material Outside the Pleadings, Such as the Matters of Public Record Contained in Plaintiff's Article 78 Proceeding, May Be Considered in Support of a Motion to Dismiss.

Under CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action based upon

documentary evidence. The term "documentary evidence" has broad application and includes, inter alia, "letters, demands, receipts, releases, contracts, leases as well as public records such as court judgments." Weinstein Korn & Miller, § 3211.06, at 32-40-41.

The undisputed documentary evidence on which Defendants rely consists of pleadings and related documents filed or generated in connection with the separate proceeding Plaintiff initiated, entitled "In the Matter of Gerard Matovcik, Petitioner v. The Board of Education of the Miller Place Union Free School District, Respondent," in the Supreme Court of the State of New York, County of Suffolk, Index No. 04-17879 (hereafter the "Article 78 proceeding"). The Article 78 proceeding arose out of the very same facts and circumstances as this pending defamation action.

Dismissal pursuant to CPLR 3211(a)(1) is warranted when the "documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim." Berardino v. Ochlan, 2 A.D.3d 556, 557, 770 N.Y.S.2d 75, 76 (2d Dept. 2003). See also Reno v. Westchester, 289 A.D.2d 216, 734 N.Y.S.2d 464 (2d Dept. 2001); Chrien v. Horn, 278 A.D.2d 178, 718 N.Y.S.2d 334 (1st Dept. 2000), appeal denied, 96 N.Y.2d 778, 725

N.Y.S.2d 633 (2001).

While pleaded facts must ordinarily be taken as true and afforded all favorable inferences, "factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." Maas v. Cornell Univ., 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716, 718 (1999)

In Berardino, the plaintiff brought claims for fraud, negligent misrepresentation and violation of various statutes following his exchange of an existing life insurance policy for one with a lower cash value. The defendant's motion to dismiss all claims was granted on the basis of documentary evidence consisting of a policy comparison form and various policy illustrations that, when analyzed in relation to Plaintiff's factual claims, conclusively established that the reduction in the cash value of the policy had been disclosed to the plaintiff. Id., 2 A.D.3d at 557, 770 N.Y.S.2d at 76.

The plaintiff in Chrien brought suit against his former wife regarding certain marital assets. The trial court granted the defendant's motion to dismiss on the basis of documentary evidence consisting of the stipulation entered into in the parties' divorce action and certain letters signed by the plaintiff. The stipulation had provided, inter alia, for the transfer of certain assets to

the defendant and the letters established that the plaintiff had had access to his client files at all pertinent times. The appellate court affirmed the dismissal and awarded the defendant $5,000 as her reasonable attorneys' fees incurred in responding to the appeal. Id., 278 A.D.2d at 178, 718 N.Y.S.2d at 334.

In Reno, the Second Department affirmed the dismissal of plaintiffs' complaint for intentional infliction of emotional distress and intentional tort on the ground that plaintiffs' claim failed to state a cause of action. In affirming the dismissal of plaintiffs' claim for negligence the court relied on a transcript of testimony given by one of the plaintiffs, in a separate notice of claim proceeding pursuant to General Municipal Law § 50-h, that established he had already received Workers' Compensation benefits for his injuries. Id., 289 A.D.2d at 217, 734 N.Y.S.2d at 464.

B.

The Undisputed Documentary Evidence Filed in the Article 78 Proceeding, Annexed to the Moving Papers, Establishes a Complete Defense Founded upon The Truth or Substantial Truth of Defendants' Publications.

It is black letter law that no cause of action can be stated for defamation without proof of factual falsity. Yet the undisputed documentary evidence from Plaintiff's own pleadings, which are matters of public record in the

related Article 78 proceeding, and which address the very same facts and circumstances as presented in this action, definitively establishes that the facts presented in Defendants' publications are true or substantially true. Indeed, in sworn filings in the Article 78 proceeding Plaintiff admitted to all of the core operative facts he now purports to dispute, and he settled the Article 78 and related §3020-a disciplinary proceedings, accepting a severe reprimand and substantial sanctions based on those same facts.

The following point-by-point comparison of the factual statements contained in the article and editorial here at issue, with the documentary evidence from Plaintiff's Article 78 proceeding, establishes that the Amended Complaint fails to state a cause of action against these Defendants and their publications.

1. Analysis of the News Article in Relation to the Documentary Evidence Establishes the Truth or Substantial Truth of That Publication

The central gist and the allegedly defamatory sting of the facts reported in the news article here at issue were that Plaintiff was involved in a questionable practice of taking monies from students who believed they were paying for workbooks, although the workbooks had already been paid

for out of budgeted funds; that Plaintiff had been diverting such student monies, purportedly collected to pay for the students' workbooks, to other Departmental purposes; and that school officials had placed Plaintiff on extended leave or suspension as a result of concerns over such a diversion of student funds.

The documentary evidence submitted by Plaintiff in the Article 78 proceeding definitively establishes that each of these core factual allegations was true.

(i) Plaintiff definitively admitted, in the Article 78 proceeding, his central involvement in collecting and holding the workbook money from students.

In the Article 78 proceeding, Plaintiff admitted in his sworn submissions, and in documents he had previously prepared and submitted during the school's investigation of his activities, that in fact he was in charge of collecting – and did collect – the workbook money from students.

- In a sworn affidavit submitted in the Article 78 proceeding, plaintiff admitted his role in collecting and diverting workbook monies: "students paid a small fee for these books" and that he used the funds "to buy more books and/or supplies . . ." Affidavit of Gerard Matovcik in Support of Order to Show Cause, July 27, 2004 (hereafter "Matovcik July 27 Affidavit"), ¶ 4, annexed as Exhibit B to Kaufman Affidavit.

- In a letter written to the School Superintendent while Plaintiff was under investigation, Plaintiff admitted that he personally received the student

monies and never deposited any of the funds collected. Plaintiff described his method of accounting for and safeguarding the student funds as follows: ". . . the English teachers brought me the money for the vocabulary books at various times in the fall as they collected it, and I would write down how much they gave me on an envelope and put the money in the envelope. I kept the envelope with the money in my briefcase. I did not deposit any money into a bank account or other financial institution." See Letter of Gerard Matovcik to Donald Carlisle, February 27, 2004 (hereafter "Matovcik February 27 letter"), p. 2, point 3), Exhibit H to Affirmation of Richard J. Guercio in Opposition, August 2, 2004 (hereafter "Guercio Affirmation") and annexed as Exhibit E to Kaufman Affidavit.

(ii) In the Article 78 proceeding Plaintiff also definitively admitted that the workbooks had already been paid for – and that Defendant was well aware they had been paid for – out of budgeted funds.

Plaintiff has admitted collecting money from students for the workbooks notwithstanding the fact that the books had already been budgeted and paid for by the school district:

- In another sworn affidavit submitted in the Article 78 proceeding, Plaintiff attempted to rationalize his collection of workbook payments from students by arguing that the school principal had been "informed for well over a year, for two successive school years in fact, of the purchase of the workbooks with budgeted funds . . ." Affidavit of Gerard Matovcik in Reply to Respondent Attorney's Opposition and in Support of Cross-Motion for Sanctions, etc., dated August 17, 2004 (hereafter Matovcik Affidavit of August 17), ¶ 13.

(iii) In the Article 78 proceeding Plaintiff submitted detailed evidence documenting his admitted use the student's monies, not for workbooks, but for other Departmental purposes.

During the official investigation of his activities Plaintiff attempted to account for, in elaborate detail, the amounts of student funds he received and the other Departmental purposes for which they were used instead of payment for the workbooks. Apparently because he had never previously deposited or otherwise accounted for the monies, and because his admitted purchases were made in cash, Plaintiff's own documentary evidence acknowledged that he could not fully account for, nor could he produce receipts for, nearly two thousand dollars of the proceeds of, and the purchases made with, the questionable student fee collections.

- In his letter to the school superintendent, Plaintiff admitted that all of the supplies he purchased with the students' workbook funds for the English department were purchased with cash: "If I needed supplies, I went to Staples or Office Max and paid with cash. Since I never had a purchase order to Staples or Office Max, any English department supplies purchased from them were paid for with cash . . ." Matovcik February 27 letter), p. 3, point 6.

- In a follow-up letter, written in an attempt to clarify discrepancies in his initial accounting, Plaintiff admitted to having collected a total of $5406.00 from students during the period between the 1997-98 and 2002-03 school years, but he also acknowledged that, of the total expenditures made using these funds, no receipts at all were available for $1845.60 worth of his purchases from the student

workbook monies fund he maintained. See Letter of Gerard Matovcik to Donald Carlisle, March 15, 2004 (hereafter "Matovcik March 15 letter"), p. 1, Exhibit H to Guercio Affirmation and annexed as Exhibit E to Kaufman Affidavit.

(iv) In the Article 78 proceeding Plaintiff acknowledged that school officials had placed him on leave, that he was later suspended while school officials conducted an investigation of his actions, and then that formal disciplinary charges were lodged against him in connection with Plaintiff's collection and diversion of the student workbook funds.

Plaintiff certainly cannot deny the absolute truth of Defendants' revelation that Plaintiff had been placed on leave during an investigation into his activities by the school district. In fact, Plaintiff admitted this, and much more, in the Article 78 proceeding. The documentary evidence establishes that at the time of their publication in May 2004, Defendants were actually unaware of, and therefore did not report, the full scope and seriousness of the school district's investigation of possible wrongdoing by Plaintiff.

For example, although Defendants had learned that Plaintiff's actions were under scrutiny, Defendants did not know, and thus did not report, that the school had actually hired a special counsel to investigate Plaintiff's collection and diversion of school funds and that this secret investigation had had been underway since the

previous December, 2003.

- In his sworn affidavit, Plaintiff admitted that: "In December 2003, I agreed to further paid leave of absence. I remained on paid leave until on or about June 9, 2004. During that time, the District hired an investigator named Thomas Cote, Esq. to look into this practice described above." Matovcik July 27 Affidavit, ¶ 8.

- In his sworn affidavit, Plaintiff also admitted that he was subsequently formally suspended as a result of §3020-a disciplinary charges that were filed against him as the result of his admitted role in the collection and diversion of the student workbook funds. Compare id., ¶¶7 and 16.

- In his sworn affidavit Plaintiff acknowledged and appended the 410 disciplinary charges that were preferred against him by the school district, alleging misapplication, misappropriation and violations of the New York Penal Law in connection with his collection and diversion of the student workbook funds. Id., ¶10 and Exhibit A.

- Finally, as the result of the Article 78 proceeding Plaintiff entered into a formal settlement resolving the student workbook funds dispute in which he accepted and paid a $2000 fine, consented to a severe reprimand placed in his employment file, relinquished his tenure rights, agreed to retire after two years, and accepted reassignment from the High School where he had been Chairman of the English Department, to a junior high school. See Settlement Agreement, Exhibit G to the Kaufman affidavit.[1]

(v) Documentary evidence in the Article 78 proceeding supports a finding that other subsidiary factual details contained in Defendants' publications were also either true or substantially true.

[1] Plaintiff cannot, simply by not litigating the issues to judgment in the Article 78 proceeding, or by purporting to make no admissions in the settlement agreement, preclude these Defendant or this Court from drawing all appropriate factual conclusions from the undisputed documentary evidence and from Plaintiff's own actions in settling the related proceedings.

- Defendant reported that – despite the fact that Plaintiff was under investigation for his diversion of student funds – lawyers for the school district were "working out a deal." Plaintiff's submission in the Article 78 proceeding clearly establishes the truth of this statement: "Then from January until April [2004], my attorney and Respondent's attorney negotiated as to a settlement." Matovcik July 27 Affidavit, ¶ 10.

- Defendant reported that Matovcik's actions were discovered when he was on medical leave. Plaintiff admits that he was on medical leave in October 2003. See Matovcik July 27 Affidavit, ¶ 7 ("I had been out of the high since October 2003 for medical leave for a knee operation.")

- Defendant reported that students tried to give the workbook money to principal Seth Lipshie while Plaintiff was on medical leave. According to Plaintiff, it was a teacher rather than a student that tried to give principal Lipshie "a pile of money collected for the workbooks." Matovcik August 17 Affidavit, ¶ 12.[2]

- Because the funds were admittedly kept in Plaintiff's briefcase, never deposited in a bank or given to school authorities and no contemporaneous records were maintained by Plaintiff, it is impossible to know precisely how much money was collected or spent. Nonetheless, Plaintiff ultimately admitted, in documents he filed in the Article 78 proceeding, to having collected $5406.00 from students during a period of several years between the 1997-98 and 2002-03 school years. See Matovcik March 15 letter, p. 1.[3]

- Defendant admitted that the diverted money was used

[2] The difference between a student and a teacher trying to give the principal money for the workbooks is undoubtedly an immaterial divergence from the precise facts under the "substantial truth" doctrine. See Point II, infra.

[3] Under the circumstances, the difference between the "approximately $6000" figure Defendants reported and $5406.00 is, again, a classic example of a substantially true publication.

by him to buy items for use by the English Department instead of workbooks. Plaintiff's own list of non-workbook purchases included the following items for which Plaintiff retained receipts: two storage cabinets costing $645.56, a cabinet and table costing $335.66, and a speaker for a film projector costing 155.00. In addition, Plaintiff identified a number of other non-workbook purchases for which receipts were lacking, totaling $1845.60, including: another storage cabinet costing $375.00, presentation folders costing $300.00, color photocopies amounting to $275.00, ink cartridges costing $200.00 and a space heater costing $100.00. See Guercio Affirmation, Exhibit H, annexed as Exhibit D to Kaufman Affidavit.

- In their news article Defendants reported that Plaintiff's purchases for the English Department also included an air conditioner and faculty lunches. Among the items included in Exhibit H to the school district's submission in the Article 78 proceeding is a list of "Department Expenses." See id. Included on that list is an air conditioner as well as a space heater. A second list, titled "Ongoing Expenses," includes "Refreshments for some department meetings/grading regents and ELA." Id. Plaintiff has argued that the Department Expenses list is not evidence of "criminal activity" but he does not appear to dispute the accuracy of the information included on this exhibit. See Matovcik August 11 Affidavit, ¶ 15.[4]

(vi) The remainder of the allegedly defamatory statements in Defendants' news article constitute constitutionally protected opinion commenting on and supported by the documentary evidence.

[4] Even assuming, arguendo, that it was a space heater that Plaintiff purchased with the diverted funds, rather than an air conditioner, this would be another example of where the substantial truth doctrine would bar a claim based on such an inconsequential variation from the actual facts whose gist and sting are essentially equivalent. Plaintiff admits in the documentary evidence to having purchased a space heater and many other items with funds that were supposedly earmarked for workbooks. See Matovcik August 11 Affidavit, ¶ 3 ("I myself readily disclosed to Mr. Cote, Esq. (the school's investigator) that I used the funds for a space heater . . .")

- Defendant's article is headlined "Scandal in the English Dept." In this context the term "scandal" is clearly a statement of opinion that is based on the admitted facts contained in the documentary evidence of Plaintiff's involvement in questionable activities, that were in fact questioned and ultimately punished by school authorities, that resulted in Plaintiff's placement on extended leave and then his suspension, and that led to formal disciplinary action ultimately resolved voluntarily by severe reprimand and other serious sanctions. If this is not the definition of a "scandal," it is hard to know what is. In any event, the law of defamation does not in any fashion prevent Defendants from publishing such an opinionated label on it, based on the true facts of the situation.

- Defendant's article characterizes Plaintiff's actions as involving the "misappropriation" of funds collected from students. Once again, the documentary evidence establishes beyond dispute that Plaintiff was involved in the diversion of student monies from workbooks to other purposes, nor can it be denied that such a diversion of funds is a form of misappropriation. To the extent that the term "misappropriation" suggests something more than a factual description of this diversion and misapplication, Defendant's use surely constitutes constitutionally protected opinion based on the foregoing facts – see Point III, infra.[5]

- Defendant's article quotes a school official as stating that Plaintiff had turned the diverted funds into a "slush fund for the English Department." Plaintiff admits that he collected the funds in cash, there is no evidence to suggest that he kept any official record of those receipts, and it is uncontroverted that he used the funds for purposes other than those for which they were collected, including the purchase of various items for the English department having nothing to do with

[5] Indeed, the documentary evidence establishes that Defendants' editorial opinion was shared by the school district, as evidenced by its decision to investigate Plaintiff and to prefer formal disciplinary charges against him which specifically alleged that he had "misapplied" and "misappropriated" the students' funds (see, e.g., §3020-a Specifications 81 and 82, attached to Matovcik July 27 Affidavit.

> workbooks. To the extent the "slush fund" label is not properly understood as the source's protected opinion, it is nonetheless based on facts fully supported by the documentary evidence. This was a "slush fund," in the sense that Plaintiff developed the fund based on false pretenses, he maintained the fund at his own personal discretion, and he used it over an extended period of time to make purchases other than those originally intended.

2. Analysis of Defendants' Editorial in Relation to the Documentary Evidence Establishes the Truth or Substantial Truth of That Publication

The central thrust of Defendants' editorial, insofar as it related to Plaintiff, was to raise a question as to whether Plaintiff's documented actions might be found to fit within the legal definition of a "second-degree scheme to defraud" and to suggest, even if Plaintiff's actions did not amount to criminal activity, that they nonetheless figuratively involved a "theft" of the students' trust. To speculate about such questions in this fashion must surely be understood as stating protected opinions. See Point III, infra.

But even if the opinions stated, and the hypothetical questions raised in this publication clearly labeled as an "editorial," were construed in any way as statements of fact, Plaintiff's defamation claim would still be without merit because the situation discussed in the editorial was based on the true facts of Plaintiff's actions in

connection with the student workbook funds. The documentary evidence establishes that Plaintiff did in fact receive money based on the false pretense that it was being collected for workbooks when it was not.

In fact, the question as to possible criminality raised in Defendant's editorial was also raised officially by both the school district and its counsel when, as established in the documentary evidence, the district preferred disciplinary charges against Plaintiff. Those charges alleged, inter alia, that Plaintiff's actions had violated the New York State Penal Code. Indeed Plaintiff himself also confirmed the serious nature of the questions that had been raised by Defendants in their editorial as well as by the school district in its formal charges when, according to his own sworn submission in the Article 78 proceeding, he himself went to the district attorney to obtain a determination as to criminality vel non, which is precisely what Defendants' editorial had called for.[6]

Beyond questions raised regarding possible criminality and breach of trust, the other major focus of Defendant's

[6] The fact that the district attorney ultimately exercised his prosecutorial discretion not to prefer criminal charges hardly means that it was either "false" or illegitimate for Defendants to raise the issue. Based on their own independent investigation, which predated Defendants' publications, the school district in fact reached the conclusion that there was a basis to allege that Plaintiff had violated the N.Y. Penal Law. See also Point III, infra.

editorial was its criticism of school officials for attempting to sweep the situation under the rug due to political considerations. These opinions focused largely on others than Plaintiff and do not add any potentially actionable statements to those already discussed.

In addition to characterization of the central thrust of Defendants' editorial as either an absolutely privileged statement of opinion, or as editorial commentary based on true or substantially true facts, the documentary evidence establishes the following core facts relevant to the statements in Defendants' editorial:

(i) Defendant's editorial correctly sets forth the legal definition of "second degree scheme to defraud."

- This passage accurately quotes the definition of "scheme to defraud in the second degree" set forth in the New York Penal Code. See N.Y. Penal Law § 190.60.

(ii) Plaintiff admits that the money collected from students, ostensibly for workbooks, was used to purchase non-workbook items.

- Consistent with the definition of a scheme to defraud, the documentary evidence establishes that Plaintiff has admitted (i) that the funds were obtained by means of the false representation or premise that they were to pay for workbooks, see Matovcik July 27 Affidavit, ¶4; (ii) that, instead, they were not used to pay for workbooks that had already been paid for with budgeted funds, see Matovcik August 17 Affidavit, ¶ 13, and (iii) that Plaintiff used the workbook funds for those other purposes – inter alia, storage cabinets, a table,

ink cartridges, presentation folders, a speaker for a film projector, a space heater, etc. See Guercio Affirmation, Exhibit H.

(iii) The documentary evidence establishes that the school district concurred with the question Defendants raised about a possible criminal violation based on Plaintiff's admitted acts, and Plaintiff also sought a determination from the district attorney on that issue.

- It is undeniable that the school district filed 410 disciplinary charges against Plaintiff. See Matovcik July 27 Affidavit, ¶10. The disciplinary charges asserted, inter alia, that Plaintiff had "misappropriated" funds, see id., Exhibit A, Specifications 82, 164, 246, 328 and 410, and that he had violated sections of the New York Penal Law. See id., Specifications 76, 158, 240, 322 and 404.

- Plaintiff admits in his sworn testimony that after the disciplinary charges were filed, he himself submitted the facts to the District Attorney. See Matovcik August 11 Affidavit, ¶ 13.

(iv) Plaintiff has definitively admitted in the documentary evidence that a settlement was being negotiated in secrecy in an attempt to keep his actions – and the investigation – from the public eye.

- Plaintiff admits that he and the school district were in settlement negotiations during the four months between the commencement of the investigation and the publication of Defendant's article. See Matovcik July 27 Affidavit, ¶ 10. In fact, Plaintiff claims that an agreement was reached but then was broken by the district once the negotiations were no longer taking place in secrecy. See Matovcik August 17 Affidavit, ¶¶ 16-17. These documented admissions substantiate the very point that Defendants were making in their editorial.

POINT II

SUBSTANTIALLY TRUE STATEMENTS OF FACT ARE NOT ACTIONABLE IN DEFAMATION; PLAINTIFF'S CLAIMS ADDRESSED TO SUCH STATEMENTS SHOULD BE DISMISSED AS A MATTER OF LAW UNDER CPLR 3211(A)(7)

In addition to the bare necessity of proving falsity, under both common law tradition and modern constitutional practice the issue in a defamation action as to truth or falsity is not whether the publication at issue was precisely accurate in every minor particular, but as the Supreme Court has noted:

> "The common law of libel takes but one approach to the question of falsity …. It overlooks minor inaccuracies and concentrates upon substantial truth." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991)(emphasis added)

Under the doctrine of "substantial truth" plaintiff's burden is thus more than simply to prove the literal falsity of a publication, the falsity must go to what has been labeled the "gist" or "sting" of the defamation. The test is whether the alleged defamation as published "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Masson v. New Yorker Magazine, Inc., supra, 501 U.S. at 517. See Fleckenstein v. Freedman, 266 N.Y. 19, 23 (1934)("When the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of

their ordinary usage to sustain a charge of libel, no legal harm has been done. (Cafferty v. Southern Tier Pub. Co., 226 N. Y. 87, 93.)").

Moreover, "[f]alsehoods that do not harm the plaintiff's reputation more than a full recital of the true facts about him would do are … not actionable …. [The law protects error in publishing] details that, while not trivial, would not if corrected have altered the picture that the true facts paint." Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228 (7th Cir. 1993).

And omission of immaterial details, not significant enough to substantially alter the conclusions to be reasonably "drawn from the episodes reported," is not actionable as this is "largely a matter of editorial judgment in which the courts and juries have no proper function." Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 383 (1977).

Applying these standards here, as has been demonstrated, it is established by the documentary evidence that Plaintiff has not and cannot plead a substantially false statement of fact in Defendants' news article and editorial. See generally, Point I.B., supra.

POINT III

STATEMENTS OF OPINION ARE NOT ACTIONABLE IN DEFAMATION; PLAINTIFF'S CLAIMS ADDRESSED TO SUCH STATEMENTS SHOULD ALSO BE DISMISSED AS A MATTER OF LAW UNDER CPLR 3211(A)(7)

Under Article I, Section 8 of the New York State Constitution, as well as under the First Amendment, statements of opinion (as opposed to statements of fact) are absolutely protected from a claim of defamation. In Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), the U.S. Supreme Court held that "a statement of opinion … which does not contain a provably false factual connotation will receive full constitutional protection" from claims of defamation.

In Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 256, 566 N.Y.S.2d 918, cert. denied, 500 U.S. 954 (1991), the Court of Appeals held that – under the New York State Constitution even more so than under the First Amendment – statements of "opinion" are constitutionally protected. Immuno teaches that statements of opinion based on facts set forth in the communication are absolutely privileged under Article I, §8 of the New York State Constitution. Only assertions of fact that are capable of being proven false can be actionable. Brian v. Richardson, 87 N.Y.2d 46, 637 N.Y.S.2d 347 (1995). And whether a potentially

actionable statement is one of fact or opinion is a question of law to be decided by the Court. Rinaldi v. Holt, Rinehart & Winston, supra, 42 N.Y.2d at 381 (1977).

In his Amended Complaint Plaintiff alleges that both the news article and the editorial are actionable as "per se" defamations because Defendants publications have "indicated that [he] was a criminal, was immoral, unethical and a thief." Amended Cplt. ¶¶10, 13. But the Court of Appeals has made clear that even allegations of serious criminality – assuming arguendo that is what is portrayed in Defendants' publications – are not necessarily to be considered actionable as statements of fact per se. Indeed, the Court of Appeals has emphasized that "there is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as opinion or fact."

> "In all cases, whether the challenged remark concerns criminality or some other defamatory category, the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts, to determine whether the reasonable listener or reader is likely to understand the remark as an assertion of provable fact (600 W. 115th St. Corp. v Von Gutfeld, supra; see, Immuno AG. v Moor-Jankowski, 77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.E.2d 1270, supra)."

Gross v. New York Times Company, 82 N.Y.2d 146, 603 N.Y.S.2d 813 (1993)

The Court of Appeals has also instructed that all published statements, whether seemingly ones of fact or seemingly statements of opinion, must be sensitively evaluated, in context, in order to determine their proper meaning. In particular, the Court of Appeals has long recognized that that the placement, labeling and tone of materials in newspapers or other media publications will have a significant bearing on the question of whether their statements are to be viewed as ones of fact or ones of opinion.

In particular, columns labeled as "editorials" and similar materials have long been recognized as contexts for statements of opinion.

> "Like the 'letters to the editor' section in which the Immuno publication appeared, the Op Ed page is a forum traditionally reserved for the airing of ideas on matters of public concern. Indeed, the common expectation is that the columns and articles published on a newspaper's Op Ed sections will represent the viewpoints of their authors and, as such, contain considerable hyperbole, speculation, diversified forms of expression and opinion. Thus, the 'broader context' in which 'A High-Tech Watergate' was published provided some signals to the reader that its contents were expressions of opinion.

Brian v. Richardson, supra, 87 N.Y.2d at 53. See also Millius v. Newsday, Inc., 89 N.Y.2d 840, 842, 652 N.Y.S.2d 726, 728 (1996), cert. denied, 520 U.S. 1144 (1997) (appearance of an allegedly defamatory statement on the

editorial page, and the tenor of the editorial, served to "alert… the reader that the piece contained expressions of opinion").

Here, the Amended Complaint alleges that Defendants have "indicated that Plaintiff was a … thief." Plaintiff's claim apparently refers to a statement in Defendants' editorial complaining hyperbolically that "The greatest fraud here was the theft of children's trust." But clearly, in context, this can only be reasonably understood as a statement of opinion, not one of fact. As the Court of Appeals note on this precise point:

> "To illustrate *** the assertion that 'John is a thief' could well be treated as an expression of opinion or rhetorical hyperbole where it is accompanied by other statements, such as 'John stole my heart,' that, taken in context, convey to the reasonable reader that something other than an objective fact is being asserted. Indeed, it has already been held that assertions that a person is guilty of 'blackmail,' 'fraud,' 'bribery' and 'corruption' could, in certain contexts, be understood as mere, nonactionable 'rhetorical hyperbole' or 'vigorous epithet[s]' (see, e.g., Greenbelt Publ. Assn. v Bresler, supra, at 14; 600 W. 115th St. Corp. v Von Gutfeld, supra, at 143-145)."

Gross v. New York Times Company, supra, 82 N.Y.2d 146, 155.

Similarly, it is clear that the question raised in Defendants' editorial, as to whether Plaintiff's actions amounted to a criminal offense, and the suggestion that Plaintiff's actions should be investigated by the District

Attorney in that regard, do not amount to a factual allegation that a crime has been committed and are thus also non-actionable as a matter of law. See Brian v. Richardson, supra, 87 N.Y.2d 46, 53, 637 N.Y.S.2d 347, 352 (letter to the editor "advocat[ing] an independent governmental investigation" would be understood by a reasonable reader, in that context, "as mere allegations to be investigated rather than as facts"); accord, Vengroff v. Coyle, 231 A.D. 2d 624, 647 N.Y.S.2d 530 (2d Dept. 1996)(letter to the editor raising numerous questions about whether the Plaintiff had engaged in arson for profit and urging an investigation was expression of opinion as to which motion to dismiss should have been granted).

POINT IV

A.

IN DEFAMATION ACTIONS A DISPOSITIVE MOTION SHOULD BE GRANTED, WHERE APPROPRIATE, AT THE EARLIEST STAGE IN ORDER TO AVOID CHILLING THE EXERCISE OF CONSTITUTIONAL RIGHTS

New York courts have recognized the particular importance of the early resolution of defamation cases in order to protect constitutional rights. Citing the threats posed by unduly extended defamation litigation on the exercise of First Amendment rights, the First Department has eloquently reasoned that:

> "To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights."

Immuno AG v. Moor-Jankowski, 145 A.D.2d 114, 537 N.Y.S.2d 129, 137 (1st Dept. 1989)(citation omitted)

The Court of Appeals has also strongly supported early disposition of defamation actions because of "[t]he chilling effect of protracted litigation." Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 256, 566 N.Y.S.2d 918, cert. denied, 500 U.S. 954 (1991), and its recognition that "[t]he threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 545, 435 N.Y.S.2d 556, 563 (1980) (citation omitted). See also Rinaldi v Holt, Rinehart & Winston, 42 N.Y.2d 369, 384-85 (1977) "[in] areas of doubt and conflicting considerations, it is thought better to err on the side of free speech."

In many of these cases, early disposition of constitutionally-sensitive defamation actions has come at the summary judgment stage. But many of those same considerations are applicable on a CPLR Rule 3211 motion to dismiss, particularly one based not merely on the pleadings but on undisputed documentary evidence under 3211(a)(1).

The leading commentators on the federal rules have noted, for example, that "[w]hen the claim alleged is a traditionally disfavored cause of action, such as … libel, or slander, the courts tend to construe by a somewhat stricter standard and are more inclined to grant a Rule 12(b)(6) motion to dismiss." 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure 2d §1357. See also Ramsey v. Fox News Network, L.L.C., 351 F.2d 1145, 1153 (D. Colo. 2005) (granting motion to dismiss in reliance, inter alia, on underlying state law recognition "that the threat of protracted litigation in defamation cases could have a chilling effect upon constitutionally protected rights of free speech."

Most recently, Judge Wilkinson, of the Fourth Circuit U.S. Court of Appeals addressed head on the First Amendment importance of early disposition of a libel action, even at the motion to dismiss stage:

> "It makes little sense to acknowledge the special sensitivity of speech to defamation actions and then to say that speech interests matter little or not at all because of the procedural posture of the action. While a heightened pleading standard in defamation cases may be inappropriate ***, there is no reason why an action of this kind cannot frequently be resolved on a motion to dismiss. The critical part of the record – the speech itself – is available prior to any discovery. Whether the statements are defamatory as a matter of law will therefore be ripe for decision

Hatfill v. The New York Times Company, ___ F.3d ___ (4th

Cir., 10/18/05)(citation omitted; emphasis supplied) dissenting to the denial of rehearing en banc).

In any event, whether or not such special considerations are always appropriate at the motion to dismiss stage, under the unique circumstances presented here, where the documentary evidence definitively resolves a dispositive defense and demonstrates the futility of further proceedings or discovery, it requires no special treatment, and is thus most appropriate, for the Court to evaluate this motion with the avoidable dangers of protracted litigation in mind.

B.

SHOULD THE COURT GRANT DEFENDANTS' MOTION TO DISMISS UNDER 3211(A)(1), IT SHOULD ALSO ENTERTAIN A MOTION FOR SANCTIONS AGAINST PLAINTIFF AND/OR HIS ATTORNEY FOR THEIR FRIVOLOUS COMMENCEMENT OR CONTINUATION OF THIS ACTION

For the same reasons that the Court should grant Defendants' motion to dismiss the Amended Complaint based on the documentary evidence, this Court should also entertain a motion by Defendants for sanctions against Plaintiff and/or his attorney. On such motion, Defendants would demonstrate that the facts available to Plaintiff and his counsel at the time this action was commenced, or at the very least the facts available and circumstances

understood at the time of the filing of the Amended Complaint, did not support either the non-frivolous commencement or at least the non-frivolous continuation of this action.

Under those circumstances, Defendants would show that the pursuit and perpetuation of the action, in the face of the undisputed facts contained in the documentary evidence, was frivolous and without basis in law nor supported by any reasonable argument for an extension, modification or reversal of existing law.

The Court should therefore open for consideration whether the actions of Plaintiff and Plaintiff's counsel to initiate and/or to perpetuate this action should therefore be sanctioned, pursuant to CPLR § 8303-a and 22 NYCRR §130-1.1(c)(1), inter alia because they have imposed unwarranted costs on the Defendants and have thereby threatened to chill Defendants exercise of their constitutional rights.

POINT V

ALTERNATIVELY, THE COURT SHOULD DROP OR DISMISS THE ACTION AS TO FIVE OF THE DEFENDANTS NAMED IN THE AMENDED COMPLAINT ON GROUNDS OF MISNAMING AND/OR MISJOINDER

If this Court does not grant Defendants' motion to dismiss the action in its entirety, it should at the very least drop these five misnamed and/or misjoined Defendants

from the case and the Amended Complaint should be dismissed as against them.

Under CPLR 1003 this Court has the power to drop a misjoined party on the motion of any party or on the court's own initiative. As is set forth more fully in the Affidavit of Leah S. Dunaief, Publisher of Times Beacon Record Newspapers, both at the time of the events alleged in the Amended Complaint, and currently, Defendants "The Port Times Record," "The Village Times Herald," and "The Times of Smithtown" had nothing to do with publication of the article and editorial published in The Village Beacon Record. See Scoma v. Doe, 2 A.D.3d 432, 767 N.Y.S.2d 840 (2d Dept. 2003)(dismissed defendants were not involved with accident at issue and had no relationship with other defendants that would give rise to vicarious liability).

Moreover, under CPLR 3211(a)(7), an action cannot be maintained against a defendant that does not exist as a legal entity at all. As is also set forth in the Dunaief Affidavit, both at the time of the events alleged in the Amended Complaint, and currently, "The Times of St. James" "The Times of Nesconset" did not and do not exist. See, e.g., Sottile v. Islandia Home for Adults, 278 A.D.2d 482, 718 N.Y.S.2d 394 (2d Dept. 2000) (evidence also demonstrated that defendants were not legal entities

amenable to service); Ober v. Rye Town Hilton, 159 A.D.2d 16, 18, 557 N.Y.S.2d 937, 938-939 (2d Dept. 1990) (nonexistent defendant lacks capacity to be sued). Accordingly, the action should also be dismissed as to these misnamed Defendants.

CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Dismiss should be granted and all claims against them should be dismissed. If the motion is granted based on the documentary evidence, Defendants should also be granted leave to move for sanctions against Plaintiff and/or his counsel. Alternatively, if the motion to dismiss is not granted in its entirety, five of the Defendants should be dropped, and Plaintiff's claims dismissed as against them.

Dated: New York, New York
November 7, 2005

Respectfully Submitted,

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CASES

STATUTES

OTHER AUTHORITIES