

THIS BRIEF WAS RESEARCHED, DRAFTED & STRATEGIZED BY
SUSAN CHANA LASK, AND REVISED WITH NELSON PEREL, LOCAL COUNSEL
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Steven J. Baum & Steven J. Baum P.C.

Plaintiffs,

v.

Case No.: 11-CV-0197A

Susan Chana Lask, Law Offices of
Susan Lask,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

THIS BRIEF WAS RESEARCHED, DRAFTED AND STRATEGIZED BY
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PRELIMINARY STATEMENT

Defendant Susan Chana Lask (“Lask”) incorrectly sued as Susan Chana Lask, Esq. and Law Offices of Susan Chana Lask¹ respectfully submits this brief in support of her motion for an Order pursuant to Federal Rules of Civil Procedure 12(b)(6) dismissing the Complaint in its entirety. Lask also requests an award of attorneys’ fees pursuant to 28 U.S.C. §1927 and this Court’s inherent powers.

Plaintiffs Steven J. Baum, Esq. and Steven J. Baum, P.C. (collectively “Baum”) filed a New York State court defamation action against Lask on or about November 18, 2010. On February 23, 2011, Baum served the Complaint by substitute service. On March 8, 2011, Lask timely filed a notice of removal to this Court. Lask’s notice of removal, certification of Susan Chana Lask dated March 7, 2011 and all exhibits thereto are hereby incorporated by reference. As shown by these papers, Baum’s claim that Lask was a resident of New York is false. Lask is a resident of New Jersey.

Equally meritless are Baum’s defamation claims. All of Baum’s claims involve alleged statements made by Lask concerning a legal proceeding filed on behalf of her clients in the Eastern District of New York against Baum and other defendants regarding a matter of public concern. Based on settled law, these statements cannot be the basis for a defamation action pursuant to New York State Civil Rights Law §74. On this ground alone, Baum’s Complaint should be dismissed. Moreover, Baum’s Complaint is legally deficient on several additional grounds. Baum’s frivolous lawsuit is nothing more than an invalid effort to harass and intimidate Lask

¹ The alleged entity “Law Offices of Susan Chana Lask” does not exist. (Certification of Susan Chana Lask dated Mar.7, 2011 at ¶1)

from pursuing her earlier filed federal court action. This is a case where sanctions pursuant to 28 U.S.C. §1927 are warranted.

STATEMENT OF FACTS

Resolution of this motion based primarily on Civil Rights Law §74 involves a “comparison of the allegations attributed to [Lask] in the [three publications asserted in Baum’s complaint] with the allegations set forth in [the complaint filed by Lask in the Eastern District of New York.]” *Silver v. Kuehbeck*, 2007 WL 559960 at *3-4 (2nd Cir. 2007), quoting, *Ford v. Levinson*, 90 A.D.2d 464, 454 N.Y.S.2d 846, 847 (1st Dept 1982).

On August 17, 2010, Lask filed her complaint in the Eastern District of New York (the “EDNY Action”). A copy of Lask’s complaint is attached to the Declaration of Nelson Perel, dated March 16, 2011 (“Perel Dec.”, at Ex. “B”) The complaint is styled as a class action by persons who lost their homes based on violations of Federal and State statutes and, in addition, common law torts, including fraud, in connection with foreclosure actions prosecuted by Baum.

There are three publications made subsequent to the EDNY action that Baum claims are defamatory. On August 19, 2010, Lask wrote an article entitled “*Class Action RICO Suit Alleges Tens of Thousands of New York Foreclosure Frauds Orchestrated by ‘Foreclosure Mill’ Attorney & Banks*” on her website. On September 20, 2010, Lask uploaded an informational video at <http://www.youtube.com/watch?v=E6JEgYs8A-Q>. On October 16, 2010 the Buffalo News printed an article. The two printed publications are attached to Baum’s Complaint at Exhibits “A” and “C”.

On November 9, 2010, Baum filed a proposed confidentiality agreement in the EDNY Action that included provisions barring publicity concerning the action. Lask

objected as it was actually an injunction disguised as a confidentiality agreement and, after a hearing, the court denied Baum's request for a confidentiality order. (Perel Dec., Exhs. "C" – "E")

After failing to persuade the court in the EDNY Action to accept his proposed confidentiality agreement, Baum then filed the instant action. Like his meritless request for a confidentiality agreement, this defamation action is a transparent effort designed solely to prevent Lask from commenting fairly and accurately concerning the allegations and events occurring in the class action lawsuit.

ARGUMENT

BAUM'S DEFAMATION COMPLAINT SHOULD BE DISMISSED BASED ON NEW YORK CIVIL RIGHTS LAW §74 AND OTHER GROUNDS

A. Motion to Dismiss Legal Standard

A complaint may be dismissed "for failure of the pleading to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. The court must "accept as true all factual statements alleged...and draw all reasonable inferences in favor of the non-moving party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995), cert. denied, 519 U.S. 808 (1996).

Under *Rule 12(b)(6)*, the court must determine whether the "[f]actual allegations . . . raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court need not accept as true mere "conclusions of law or unwarranted deductions of fact." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d

763, 771 (2d Cir. 1994) (quoting 2A MOORE, JAMES WILLIAM & JO DESHA LUCAS, Moore's Federal Practice P 12.08, at 2266-69 (2d ed. 1984)), *cert. denied*, 513 U.S. 1079 (1995); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009)("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.")

Although, in the *Rule 12(b)(6)* context, the court is "normally required to look only to the allegations on the face of the complaint," it may also "consider documents . . . that are attached to the complaint or incorporated in it by reference" *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007).

B. The Alleged Defamations Are Privileged Under *Civil Rights Law §74*

To state a claim for defamation, Baum must allege: (1) a false and defamatory statement of fact, (2) concerning the plaintiff, (3) **published without privilege or authorization to a third party by the defendant**, (4) constituting fault as judged by, at a minimum, a negligence standard, and (5) causing special harm or constituting defamation *per se*. *Fordham v. Islip Union Free School Dist.*, 662 F. Supp. 2d 261 (E.D.N.Y. 2009). (Emphasis added.)

Civil Rights Law §74 provides that:

[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

The statute affords an absolute privilege "and is not defeated by the presence of malice or bad faith." *Glendora v Gannett Suburban Newspapers*, 201 A.D.2d 620, 608 N.Y.S.2d 239 (2nd Dept), *leave to appeal denied*, 83 N.Y.2d 757, 615 N.Y.S.2d 875 (1994);

Cholowsky v Civiletti, 69 A.D.3d 110, 114, 887 N.Y.S.2d 592 (2nd Dept 2009); *Pelayo v Celle*, 270 A.D.2d 469, 469-470, 705 N.Y.S.2d 282 (2nd Dept. 2000).

The absolute privilege applies where the publication is a comment on a judicial, legislative, or other official proceeding (*Cholowsky v Civiletti*, 69 A.D.3d at 114-115; *Cuthbert v National Org. for Women*, 207 A.D.2d 624, 626, 615 N.Y.S.2d 534(3rd Dept 1994); *Ramos v El Diario Publ. Co.*, 16 A.D.2d 915, 229 N.Y.S.2d 652(1st Dept 1962)), and is a "fair and true" report of that proceeding. *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 N.Y.2d 63, 67, 424 N.Y.S.2d 165 (1979); *Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 N.Y. 106, 118, 183 N.E. 193 (1932).

"For a report to be characterized as fair and true' within the meaning of [*Civil Rights Law* § 74], thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 N.Y.2d at 67). Moreover, "a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated" (*Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 N.Y. at 118; see *Holy Spirit Assn.*, 49 N.Y.2d at 67).

"It is well established that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation. . . . In this seminal case, the Court made clear that the rule rests on the policy that counsel should be able to 'speak with that free and open mind which the administration of justice demands' without the constant fear of libel suits." *Lacher v. Engel*, 33 A.D.3d 10, 13, 817 N.Y.S.2d 37, 40 (1st Dept 2006), quoting *Youmans v. Smith*, 153 N.Y. 214, 219 (1897).

This long-standing principle of New York State law has wisely prevented the type of attorney defamation actions that Baum brought in this case. Both Federal and State courts have repeatedly dismissed such actions on motions to dismiss recognizing that such a litigation tactic is barred under the Civil Rights Law, except in the rarest of circumstances not applicable in this case, and serve only to degrade and detract from the merits of the main action. See, e.g., *Silver v. Kuehbeck*, 2007 WL 559960 (2nd Cir. 2007); *Proctor & Gamble Co. v. Quality King Distributors, Inc.*, 974 F. Supp. 190 (E.D.N.Y. 1994); *Lacher v. Engel*, 33 A.D.3d 10, 817 N.Y.S.2d 37 (1st Dept 2006); *Ford v. Levinson*, 90 A.D.2d 464, 454 N.Y.S.2d 846 (1st Dept. 1982).

Baum's Complaint omits mention of the EDNY Action! As such, it pretends that the three alleged defamatory publications exist on a clean slate. This is dishonest and deficient as a matter of law. Baum fails to plead any allegations concerning the required element of **published without privilege or authorization to a third party by the defendant.** A comparison of the complaint in the EDNY Action and the three subsequent publications that are the basis for Baum's defamation action plainly establish that each of the alleged defamatory statements are pertinent to the EDNY Action and therefore privileged as a matter of law. This frivolous action should be dismissed.

This case presents an even stronger case for dismissal. Prior to filing this action, Baum asked the court in the EDNY Action to approve a confidentiality order barring Lask from making any public communications concerning the action. That court denied him based on the similar arguments made here. Baum's attempt to shut-up Lask in this case is no better than his invalid request in the EDNY Action.

C. Other Grounds For Dismissal

Defamation law provides several doctrines, each of which is sufficient by itself to justify dismissal of this baseless action. Each is discussed in turn.

1. Baum Is Libel Proof

The libel-proof doctrine holds that “a plaintiff’s reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject.” *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir.1986), *cert denied*, 479 U.S. 1091 (1987); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Savino*, 2007 WL 895767 (S.D.N.Y. Mar. 23, 2007) (“The libel-proof doctrine ... states that a plaintiff who has established such a bad reputation that he cannot show injury to his reputation is libel-proof and thus cannot maintain an action for defamation.”).

It is a question of law for the court to decide if a plaintiff is libel proof. *Guccione*, 800 F.2d at 303 (holding that plaintiff is libel proof as matter of law); *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639(2nd Cir. 1975); *Cerasani*, 991 F. Supp. 343, 354 (S.D.N.Y. 1998).

In this case, the undisputed record concerning infamous “foreclosure mills” and Baum’s role in that is a matter of public record and concern. On October 13, 2010, all 50 Attorneys General launched an investigation of the foreclosure process, robo-signing and foreclosure mills as the false filings became evident. On October 20, 2010, the New York State Court of Appeals’ Chief Judge, with the consent of the Presiding Justices of all four Judicial Departments, mandated foreclosure attorneys to file an affirmation certifying that counsel took reasonable steps, including inquiry to banks and lenders and reviewed the papers filed in the case, to verify the accuracy of documents filed in support of residential

foreclosures. In its press release, the Office of Court Administration quoted Chief Judge Lippman as follows:

We cannot allow the courts in New York State to stand by idly and be party to what we now know is a deeply flawed process, especially when that process involves basic human needs, such as a family home, during this period of economic crisis. This new filing requirement will play a vital role in ensuring that the documents judges rely on will be thoroughly examined, accurate, and error-free before any judge is asked to take the drastic step of foreclosure.

(Perel Dec., Ex. "F")

Baum's participation in the foreclosure mill crisis has been the subject of repeated newspaper articles (Perel Dec, Ex. "H") and numerous internet articles (Perel Dec., Ex. "I"). A google search produces numerous articles and blogs referencing Baum's participation in the crisis. (Perel Dec., Ex. "J") The record on this motion also includes a six-page chart containing summaries of published State and Federal case holdings against Baum's improper foreclosure practices before, during and after any comments Lask made about her EDNY Action. (Perel Dec. at Ex. "K")

For years, Baum has been publicly sanctioned, reprimanded and found to engage in unethical misconduct by State and Federal courts. Published State and Federal court decisions sanction, reprimand and dismiss Baum's filings as "an abuse of process", "operating in a parallel mortgage universe, unrelated to the real universe", "engaged in frivolous conduct" under 22 NYCRR 130-1.1(c) by commencing a lawsuit without merit, violating court orders, acting with impunity, engaging in conflict of interests by simultaneously representing multiple parties and concealing conflicts, acting "dishonest" and misleading courts. A sampling of decisions is contained in the chart at Perel Dec. Ex. "K".

Simply put, by the time of Lask's EDNY Action and the three publications at issue in this case, Baum's reputation was completely tarnished based on his own conduct in the foreclosure crisis as described in judicial decisions and numerous newspaper, internet articles and blogs. Baum's reputation was in tatters as a result of his own conduct long before the EDNY Action and the alleged defamations in this case. As such, the libel-proof doctrine applies and this action should be dismissed.

2. Baum Fails To Plead Actual Malice

"[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures." *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944). Baum was and is a public figure who must by clear and convincing proof establish that Lask's statements were made with actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); accord *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 621 (2d Cir.1988) ("Liability requires clear and convincing evidence of a knowing falsehood or 'subjective awareness of probable falsity.'"), *cert. denied*, 488 U.S. 856 (1988).

As revealed by the number of newspaper, internet and google articles about him, Baum plainly is a public figure concerning the subject matter of this lawsuit. His Complaint fails to plead, nor could he, any facts remotely suggesting that Lask's filing of the EDNY Action or her subsequent comments were made with actual malice. His conclusory pleading that such comments were made in reckless disregard of the truth is no longer sufficient in light of current federal law pleading requirements. Baum's Complaint also fails to allege that Lask's comments included any statement that was not already in the public record such that any actual malice might be inferred. Baum's failure to plead actual malice is a separate ground requiring dismissal of this action.

3. The Incremental Harm Doctrine Bars This Action

The incremental harm doctrine “measures the difference between the harm caused by non-actionable statements when compared with the harm caused by purportedly actionable statements and dismisses the latter when the difference is incremental.” *Jewel v. NYP Holdings, Inc.*, 23 F.Supp.2d 348, 387 (S.D.N.Y. 1998). Under this doctrine, the Court should dismiss a claim, even one based on a false statement, where the Court determines that the plaintiff’s “reputational interest in avoiding further adverse comment ... is minimal when compared with the First Amendment interests at stake.” *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F.Supp. 742, 751 (S.D.N.Y.1981).

Lask plainly has a First Amendment right to speak publicly on behalf of her clients concerning Baum’s role in the foreclosure crisis. She did not start this drum beat. Baum’s role had already been described numerous times by Federal and State court judges and repeated numerous times by the media. Baum’s purported concern that Lask’s comments is harming his reputation is minimal compared to the First Amendment need to speak publicly concerning this matter of utmost public concern. For this reason, the incremental harm doctrine requires dismissal of this action.

4. Truth

As a matter of New York law, “it is ‘fundamental that truth is an absolute, unqualified defense to a civil defamation action,’ and ‘substantial truth suffices to defeat a charge of libel.’” *Weber v. Multimedia Entm’t, Inc.*, 2000 WL 724003 (S.D.N.Y. May 2, 2000) (quoting *Guccione*, 800 F.2d at 301). The Supreme Court holds that where the “the substance, the gist, [or] the sting” of a statement is true, it cannot be libelous. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991). As reflected in the chart attached at Perel Dec.

Ex. "K", numerous Federal and State court judges have described Baum's practices no differently than those simply reported by Lask in the allegedly defamatory public statements. These judicial determinations establish the truthfulness of Lask's statements concerning Baum's role in foreclosure cases. Lask was not reporting tabloid or gossip; she was reporting word for word actual statements by judges from Federal and State courts. The defense of truth requires dismissal of this action.

5. Lask's Statements Are Non-Actionable Opinions

Lask's August 19, 2010 article entitled "*Class Action RICO Suit Alleges Tens of Thousands of New York Foreclosure Frauds Orchestrated by "Foreclosure Mill" Attorney & Banks*" directly related to the EDNY Action. Baum complains about two statements:

-“Mr. Baum is an attorney who knows better, yet his foreclosure filings for parties who have no standing to sue confuse the courts and homeowners while he and his banking clients profit tremendously by throwing people on the streets after their bad loans sold by the very same banks become unaffordable to innocent people.”

-"Courts have rules and laws are made to be followed. Corporate America needs to follow the rules and be accountable just like the rest of us, else we're all victims to one big Bernie Madoff scam."

(Perel Dec. Ex. "A" at ¶ 16)

Both statements are non-actionable opinion and may not support claims for defamation. Whether a statement is one of opinion or fact is a question of law. In determining if a statement is an opinion, and thus not actionable as defamation, a court must consider: 1) whether the statement has a precise meaning or is ambiguous; 2) whether the statement is capable of being proven true or false; and 3) whether the statement, when taken in the "full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal

. . . readers or listeners that what is being read or heard is likely to be opinion, not fact." *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 817 (1993) (internal quotations omitted). The dispositive inquiry is "whether a reasonable [reader] could have concluded that [the articles were] conveying facts about the plaintiff." 82 N.Y.2d at 153, 603 N.Y.S.2d at 817.

The two statements above meet the test for non-actionable opinion. The stated language is simply the type of opinion-based comment found in the editorial sections of newspapers. Its gist is simply that Baum "knows better" and also includes the general statement made to all persons that rules have to be followed.

6. Baum's Distortions of the September 20, 2010 YouTubeVideo

In paragraph 19, Baum complains about a statement made by Lask on her September 20, 2010 YouTubeVideo. As the quoted statement indicates and the video makes clear, Lask was literally reading from a published decision by Florida State Court Judge Johnson. (Perel Dec, Ex. L) The statement referred to the foreclosure mill firm of David J. Stern then under investigation by the Attorney General for false filings (which its foreclosure practice is now defunct). Baum does not claim, nor could he, that Lask misquoted Judge Johnson's published decision. Nor can he take it so far out of context as he does to claim it referred only to him when the video was reporting on the national foreclosure crisis and comparing many entities involved, including banks, foreclsoure mills and investors involved in the securitization of the loans at issue.

Baum next complains at paragraphs 22-25 that in a segment called "Foreclosure Mill Math", Lask states that Baum "foreclose[s] on 70,000 homes per year"..."leading to an estimated revenue of \$206.3 million annually." Baum alleges that these statements are

defamatory because they suggest an incentive to file foreclosure actions. Notably, Baum does not dispute the fact that he forecloses on tens of thousands of homes per year as reported in the media and can be discovered from an E-Courts search, nor can he dispute that such foreclosures generate substantial revenues. Thus, whether the estimates complained of are exactly accurate is immaterial to the premise that Baum has an economic incentive to file foreclosure actions. His claim that the exact number in the estimates supports the alleged defamation of incentive whereas a smaller number would not makes no sense. Moreover, he fails to disclose that earlier in the video Lask states that on September 4, 2010, the New York Times reported those numbers attributed to a foreclosure mill and later used it as an estimate, as clearly stated therein. Lask's estimate is protected according to law as hereinabove explained that estimates do not give rise to a defamation claim.

7. The Buffalo News Article Does Not Support A Claim Against Lask

Baum's claims based on the October 17, 2010 Buffalo News article raise additional grounds for dismissal. First, Baum's claim in paragraph 52 that Lask published the article is false. Not only was that article unsolicited by Lask, but she is not the reporter or publisher of that article. In fact, the article is copyrighted and owned by the Buffalo News, and published at the Buffalo News domain of <http://www.buffalonews.com/business/local-business/article222365.ece>.

Moreover, "In order to be liable for the publication of a defamatory statement, a defamation defendant (or person authorized to act on behalf of the defendant) must make the statement or authorize its republication or recommunication." 43A N.Y. Jur. 2d

Defamation and Privacy § 91 (2009). In this case, the unsolicited Buffalo News article presented comments from both sides and appeared months after the EDNY Action was commenced. The Buffalo News article attributes statements to Lask, which are inaccurate, and are published by that publication, not Lask. Nonetheless, the alleged statements complained above are:

- “ This is the biggest fraud in history, and it’s being done by the attorneys. The banks wouldn’t be able to do it without the attorneys,”
- “These attorneys are not acting like attorneys.”
- “They’re making up their own rules, and that’s what frauds do,” ...“They’re just making stuff up.”

First, to fairly evaluate the allegedly defamatory statements, the entire paragraph of each must be examined in full. See, e.g., *Gristede’s Foods, Inc v. Poospatuck (Unkechaug) Nation, et al.*, 2009 WL 4547792 (E.D.N.Y. December 10, 2009) Notably, neither statement specifies Baum because they are general expressions of opinion directed at the nationwide foreclosure crisis involving banks, foreclosure mills and other parties, including MERS, as alleged in the EDNY Action. Nothing is directed to Baum in those statements.

Simply put, the statements in the Buffalo News article are not actionable for the additional reason that they are not statements approved for publication by Lask and do not even purport to state facts concerning Baum.

D, Attorneys’ Fees Should Be Awarded In This Case

This is a case where sanctions should be imposed pursuant to 28 U.S.C. §1927 and this Court’s inherent power to manage its own affairs. Section 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

In *D.A. Elia Constr. Corp. v. Damon & Morey, LLP*, 389 B.R. 314, 320-22 (W.D.N.Y. 2008), this Court explained the standards governing awards of attorneys' fees pursuant to 28 U.S.C. §1927 and its inherent powers:

The statute authorizes the imposition of sanctions only 'when there is a finding of conduct constituting or akin to bad faith.' . . . The Second Circuit has held that an award of sanctions under §1927 is permissible only 'when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay.' . . . This Court also has the inherent power to sanction parties and their attorneys, which is derived from the Court's authority to manage its own affairs to achieve the orderly and expeditious disposition of cases. . . . The Second Circuit has cautioned that a decision to impose sanctions under either §1927 or the Court's inherent power should be made 'with restraint' and may not imposed unless the Court finds clear evidence that: '(1) the offending party's claims were entirely meritless; and (2) the party acted for improper purposes.'"

D.A. Elia, 389 B.R. at 321. (Citations omitted.)

Application of these standards supports the award of sanctions against Baum. As a threshold matter pursuant to 28 U.S.C. § 1927, upon information and belief Baum is an attorney admitted to conduct cases in the United States. Moreover, he is a party to this action.

This defamation action is entirely meritless. First, Baum claimed that Lask was a resident of New York State and named as a party the fictional entity "Law Offices of Susan Lask." Baum could have easily determined that Lask is a resident of New Jersey as her Notice of Removal makes clear. Moreover, Baum's motion for Substituted Service relied on an expired 1995 New York license. That alone shows his deliberate purpose to abuse

Lask and the courts with false information. But the simple search even on lexis shows Lask's domicile in New Jersey for years. These false allegations were plainly designed to support a non-diverse action in New York State court. They have no basis in fact or law and caused Lask to provide detailed information in support of her notice of removal.

Second, Baum's defamation claims are all barred by New York Civil Rights Law §74 and other grounds. Baum is an attorney himself. He knew or should have known that Federal and State courts applying New York law routinely reject defamation claims brought by attorneys against their litigation adversaries. Moreover, the repeated news stories and court decisions consist of numerous statements concerning Baum's role in the foreclosure mill crisis. Lask's comments on top of this already existing public record added nothing new to cause any unique or additional harm to Baum's reputation.

Third, the record on this motion provides ample evidence establishing that Baum filed this defamation action for improper purposes.

For years, every media outlet, including the New York Times, Bloombergs, the New York Post, websites, blogs, Federal and State court judges have published articles and decision stating that Baum, as a foreclosure mill, files fraudulent court documents, has been sanctioned and violates ethical obligations. Yet, Baum never filed a single defamation action against any of the several hundreds of public web posters, website owners, news publishers and judges who have published such statements. Instead, he has singled out Ms. Lask.

The chronological record establishes that Baum's defamation action is a direct response to the EDNY Action and interposed solely to impede, harass and intimidate Lask from pursuing her case. Indeed, Baum's defamation action was filed a mere eight days

after the court in the EDNY Action refused his request for a confidentiality agreement designed to prevent Lask from commenting concerning the substance of her case. Indeed, if Baum believed his defamation action had merit, then he could have easily asserted such claims as a counterclaim in the EDNY Action. Instead, his decision to file an original action in New York State court is further evidence that his main goal is to target Lask for her audacity to bring him to justice on behalf of her aggrieved clients.

CONCLUSION

For the foregoing reasons, Lask respectfully requests this Court to file an Order dismissing the Complaint in its entirety and imposing sanctions including an award of reasonable attorneys' fees.

Dated: March 16, 2011

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THIS BRIEF WAS RESEARCHED, DRAFTED & STRATEGIZED BY
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