SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

---------- x

MICHAEL MANTELL,

Petitioner-Appellant,

- against –

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent-Respondent.

S.Ct./NY Co. 99-108655

Cal. #2000-3833

---------- x

MEMORANDUM OF LAW OF ELENA RUTH SASSOWER

IN REPLY TO THE OPPOSING AFFIRMATION OF ASSISTANT ATTORNEY GENERAL CONSTANTINE SPERES AND IN SUPPORT OF HER SEPTEMBER 21, 2000 MOTION

Elena Ruth Sassower, Movant
Box 69, Gedney Station
White Plains, New York 10605-0069
914-421-1200

TABLE OF CONTENTS

Argument

Argument

POINT I

AS A MATTER OF LAW, MR. SPERES' LEGALLY INSUFFICIENT AND DECEITFUL AFFIRMATION IN OPPOSITION TO THE INSTANT MOTION CONCEDES THE FRAUDULENT NATURE OF HIS RESPONDENT'S BRIEF

Mr. Speres, a litigator employed by the Attorney General's office for the past five years, is charged with knowledge of the rudimentary evidentiary standards governing motions. Likewise, supervisory staff at the Attorney General's office are charged with that knowledge, as are counsel and members of the Commission. All had the benefit of those standards laid out for them in the September 24, 1999 Reply Memorandum of Law of Elena Ruth Sassower [hereinafter "Movant"] in her Article 78 proceeding before the lower court[1].

In pertinent part, this September 24, 1999 Reply Memorandum of Law, stated:

> "A wealth of treatise and case law instructs as to what is required in bringing and opposing motions: proof based on evidentiarily established facts.
>
> 'Proof is the perfection of evidence', 'there is no proof without evidence', Corpus Juris Secundum, Vol. 31A, § 5 (1996, p. 72).
>
> The affidavit is 'the foremost source of proof on motions', Siegel, New York Practice , §205 (1999 ed., p. 324)....
>
> 'An affidavit must state the truth, and those who make affidavits are held to a strict accountability for the truth and accuracy of their contents', Corpus Juris Secundum, Vol. 2A, § 47 (1972 ed., p. 487). 'False swearing in either an affidavit or CPLR 2106 affirmation constitutes perjury under Chapter 210 of the Penal Law', Siegel, New York Practice, §205 (1999 ed., p. 325)[2].

---

[1] Movant's Affidavit supporting her instant motion references the September 24, 1999 Reply Memorandum at fn. 8, ¶52, fn. 28.

[2] *See also* McKinney's Consolidated Laws of New York Annotated, Practice Commentary

While the focus of the discussion in Movant's September 24, 1999 Reply Memorandum of Law was on standards applicable to a summary judgment motion, similar standards, albeit less rigorous, apply to all motions.

> ... 'A party opposing a motion... cannot rely on mere denials, either general or specific... it is not enough for the opponent to deny the movant's presentation. He must state his version and he must do so in evidentiary form.' [Vol 6B Carmody-Wait 2d] §39:56 (pp. 163-4).... '[M]ere general allegations will not suffice', Vol. 6B Carmody-Wait 2d §39:52 (1996 ed., p. 157)...
>
> 'Failing to respond to a fact attested in the moving papers... will be deemed to admit it', Siegel, New York Practice, §281 (1999 ed., p. 442) -- citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 599 (1975), itself citing *Laye v. Shepard*, 265 N.Y.S.2d 142 (1965), aff'd 267 N.Y.S.2d 477 (1st Dept. 1966) and Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. 'If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it' *id.* (1992 ed., p. 324). '[I]f answering affidavits are not produced, the facts alleged in the movant's affidavits will usually be taken as true', 2 Carmody-Wait §8:52 (1994 ed., p. 353). Where answering affidavits are produced, they 'should meet traversable allegations' of the moving affidavit. 'Undenied allegations will be deemed to be admitted', *id*, citing *Whitmore v. J. Jungman, Inc.*, 129 NYS 776, 777 (S.Ct., NY Co. 1911).
>
> Moreover, 'when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party.'" Corpus Juris Secundum Vol. 31A, 166 (1996 ed., p. 339)[3].

---

by Vincent C. Alexander for CPLR 2106: "Although the persons currently eligible to submit affirmations in lieu of affidavits all have personal obligations of honesty, the real deterrent to falsehood is possible prosecution for the crime of perjury." (p. 816). Also, under "Legislative Studies and Reports: "While attorneys always have a professional duty to state the truth in papers, the affirmation under this rule gives attorneys adequate warning of the possibility of prosecution for perjury for a false statement." (at p. 817).

[3] *Cf. People v. Conroy*, 90 NY 62, 80 (1884): "The resort to falsehood and evasion by one accused of a crime affords of itself a presumption of evil intentions, and has always been

Movant's motion attests to her allegations in a fact-specific, sworn Affidavit, detailing (at ¶¶10-13, 16(a), (b)) the pivotal respects in which Respondent's Brief is fraudulent. Chief among these, the Brief's assertion that 22 NYCRR §7000.3 has been lawfully promulgated "pursuant to the Commission's powers and duties as set forth in Article VI, §22(c) of the New York State Constitution and Judiciary Law §42(5)" and that its language "follow[s]" Judiciary Law §44.1. This the Brief buttresses by citation to the unreported decision of Justice Cahn in *Doris L. Sassower v. Commission*, incorporating Justice Cahn's related argument that the term "initial review and inquiry" of 22 NYCRR §7000.3 is subsumed within the term "investigation" "as used in the constitution and statute". Movant's Affidavit asserts (at ¶¶14-16(a)) that the Attorney General and Commission have long had knowledge that these claims are false, as they were exposed in an analysis of Justice Cahn's decision, which she provided them. Additionally, the Affidavit asserts (at ¶16(b)) that the Brief's replication of arguments from Justice Lehner's decision is also known to be false by the Attorney General and Commission, as their falsity was exposed in an analysis of Justice Lehner's decision, which she also provided them. Among these replicated arguments: (1) the pretense that the whole issue before the court is the availability of a writ of mandamus to compel (§7803(1)), omitting the further review provided by Article 78, *to wit*, "affected by an error of law", "arbitrary and capricious", and "an abuse of discretion" (§7803(3)); (2) the pretense that the Commission is analogous to a public prosecutor and, therefore,

---

considered proper evidence to present to a jury upon the question of the guilt or innocence of the person accused." citing cases.

not subject to judicial review; and (3) the pretense that challenges to attorney disciplinary committees are "comparable" and demonstrate that the Commission "is not vulnerable to a writ of mandamus" and is "exempt from judicial review".

Substantiating Movant's Affidavit is documentary proof: exhibits annexing copies of the aforesaid analyses of the decisions of Justice Cahn and Lehner (Exhibits "D", "E") – as well as of repeated written notices to the Commission and Attorney General about them (Exhibits "H", "I", "J", "K", "N", "O", "P", "Q", "R", "S", "T", "U", "V") and, additionally, about Justice Wetzel's fraudulent unreported decision in *Elena Ruth Sassower v. Commission*. That decision had also been the subject of an analysis, provided to the Commission and Attorney General. It, too, is an exhibit to the Affidavit (Exhibit "G", pp. 15-29), demonstrating the further deceit in Respondent's Brief by its approving citation to Justice Wetzel's decision.

Such fact-specific, evidentiary-supported presentation required Mr. Speres to come forward with his own sworn, fact-specific, evidentiary presentation refuting the three analyses. In particular, he needed to refute the specific respects in which Movant's Affidavit claimed (at ¶¶10-13, 16(a)(b)(c)) that the analyses established the falsity of his Respondent's Brief. He also needed to respond to the specific question raised by Movant's Affidavit (at ¶33) as to whether he knew of the analyses *before* filing the Brief.

Mr. Speres provides no such sworn statement. His Opposing Affirmation does *not* even mention his Brief, does *not* even mention the three analyses, and does *not* disclose when he became aware of these analyses. Consequently, *as a matter of law*,

Mr. Speres' opposition is legally insufficient and the material facts set forth in Movant's Affidavit must be deemed conceded.

Moreover, *as a matter of law*, the flagrant deceit that infuses every paragraph of Mr. Speres' Opposing Affirmation reinforces the inference that he has no legitimate defense. This includes his deceit (at ¶10) that Movant's "allegations of fraud" are "unsubstantiated" and that they stem from her "belief that decisions that go against her are 'fraudulent' rather than precedent" – essentially the sum total of what he has to say on the subject.

Examination of Movant's Affidavit shows there is absolutely nothing "unsubstantiated" about her allegations. Nor is there any basis for pretending that she has some benighted view of the meaning of "fraudulent". According to Black's Law Dictionary (7th ed., 1999), the adjective "fraudulent", comes from the noun "fraud", whose first definition is:

> "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime."

Such definition fully accords with what the three analyses annexed to Movant's Affidavit demonstrate about the decisions of Justices Cahn, Wetzel, and Lehner. Likewise, it accords with what Movant's Affidavit demonstrates about Mr. Speres' Respondent's Brief. Additionally, it fits with what her accompanying Reply Affidavit and this Memorandum of Law demonstrate about Mr. Speres' Opposing Affirmation.

Conspicuously, the Commission, which was served with its own copy of the

instant motion, has not come forward with an affidavit from its Administrator or Chairman to refute the three analyses and to defend the Brief. Presumably, however, it advised Mr. Speres about his Opposing Affirmation and approved its content before it was filed.

There is also no affidavit from Attorney General Spitzer or his high echelon staff, refuting the three analyses and defending the Brief. As the third branch of Movant's motion potentially subjects Attorney General Spitzer himself and his highest echelon staff to sanctions, as well as disciplinary and criminal referral, it seems likely that Mr. Speres would have availed himself of the advice and assistance of others at the Attorney General's office in fashioning his Opposing Affirmation. Moreover, based on the history of Movant's advocacy to the upper echelons at the Attorney General's office – as evidenced by the Affidavit -- it is reasonable to assume that Mr. Mantell's appeal is being more closely supervised than most – and all the more so because Movant's appeal is right behind it.

Consequently, this Court may properly conclude that the Commission, as well as Mr. Speres' colleagues and superiors at the Attorney General's office, were active participants with Mr. Speres in the preparation of his fraudulent Opposing Affirmation – and especially as they have taken no steps to withdraw it – or his Respondent's Brief -- upon notice of their obligation to do so under ethical rules of professional responsibility. This suggests that if they did not previously know of it, they have subsequently approved of it.

Mr. Speres, the Commission, and legal and supervisory personnel at the

Attorney General's office are all charged with knowledge of these ethical rules of professional responsibility – as well as with statutory provisions and sanction rules, proscribing false and misleading advocacy. Movant's Affidavit (at ¶57) additionally highlighted for them a selection of those germane to the fraud committed by Mr. Speres' Brief, *to wit*:

> "this Court's Disciplinary Rules of the Code of Professional Responsibility, 22 NYCRR §§1200 *et seq.*, among them, 22 NYCRR §1200.3(a)(4) proscribing "conduct involving dishonesty, fraud, deceit, or misrepresentation"; §1200.3(5) "conduct that is prejudicial to the administration of justice"; 1200.33(a)(1) "knowingly mak[ing] a false statement of law or fact"; §1200.33(a)(5) "[k]nowingly mak[ing] a false statement of law or fact; Judiciary Law §487, "Misconduct by attorneys"; and 22 NYCRR §130-1.1 [Part 130-1.1 of the Chief Administrator's Rules]."

Plainly, these provisions are also germane to the fraud committed by Mr. Speres' Opposing Affirmation. However, also relevant are Penal Law §210.10 for Mr. Spires' perjury and Penal Law §105.05, "Conspiracy in the Fifth Degree", for his accomplices therein at the Commission and at the Attorney General's office. Movant's Affidavit annexed, as Exhibit "AA", eight pages of "Applicable Ethical and Legal Provisions", with more detailed discussion.

POINT II

THIS COURT HAS THE INHERENT POWER TO PROTECT ITSELF FROM FRAUD BY CONSIDERING MOVANT'S UNCONTROVERTED AFFIDAVIT ON MR. MANTELL'S APPEAL

This Court has the inherent power to protect itself from fraud. That power, referred to in Movant's Affidavit (at fn. 25), is not denied or disputed by Mr. Speres' Opposing Affirmation.

Movant's Affidavit quotes from *Matter of Hogan v. N.Y. Supreme Court*, 295 NY 92 (1946), that inherent power is "an old, old principle", referencing and quoting from *Baldwin v Mayor &tc of New York*, 42 Barb. 549, 550, affd. 45 Barb. 359 -- an 1864 case. The *Baldwin* quote, appearing in *Hogan*, seems itself to be taken, *verbatim*, from the opening paragraph of a 1857 case, *Lowber a. The Mayor &c., of New York*, 5 Abbotts 484. As the fuller paragraph in *Lowber* is particularly relevant, it is herein set forth:

> "I presume that it will not be disputed...that it belongs to the essential, inherent powers of this court, to exercise such an efficient control over every proceeding in an action pending in it, as effectually to protect every person actually interested in the result from injustice and fraud, and that it will not allow itself to be made the instrument of wrong, no less on account of its detestation of every thing conducive to wrong, than on account of that regard which it is proper it should entertain for its own character and dignity. And it will not only rectify proceedings of this nature, when brought to its notice by the intervention of any person having an interest in the result, whether formally a party to the action or not, but it is the solemn duty of every judge upon the bench to employ a vigilant eye without waiting for the suggestion of others, for the purpose of avoiding and detecting the perpetration of wrong which may be attempted by the instrumentality of legal forms. And this vigilance should be exercised through every stage of the action, from the issuing of the summons to the levying of the execution." (at p. 487)

The express purpose of the first branch of Movant's motion, was "to protect the Court against the fraud being perpetrated on it and the *pro se* Petitioner, Michael Mantell, by the Attorney General of the State of New York, representing the Commission" – and to do this by having the Court consider her Affidavit on Mr. Mantell's appeal. As shown by controlling legal principles and caselaw, hereinabove cited, the fraudulence of Respondent's Brief, as particularized by Movant's Affidavit (at ¶¶10-13, 16(a)(b)(c)), is established by the legal insufficiency and flagrant deceit of Mr. Speres' Opposing Affirmation. Consequently, this Court has the inherent power to consider Movant's Affidavit on Mr. Mantell's appeal – quite apart from the "statutory warrant"[4] it has, pursuant to statutes pertaining to intervention, which the first branch of Sassower's motion expressly invoked, or the practice of *amicus curiae*, on which the first branch of Movant's motion also expressly relies.

POINT III

MOVANT IS ENTITLED TO PERMISSIVE INTERVENTION PURSUANT TO CPLR §7802(d), GOVERNING ARTICLE 78 PROCEEDINGS – A FACT MR. SPERES' OPPOSING AFFIRMATION EFFECTIVELY CONCEDES BY CONCEALING THAT MOVANT SOUGHT INTERVENTION THEREUNDER

Intervention in an Article 78 proceeding is governed by CPLR §7802(d), preempting the more general provision of CPLR §1012(a), Siegel, New York Practice, §178 (1999 ed., p. 295), citing CPLR §103(b). This is also reflected in *Elinor Homes Co. v. St. Lawrence*, 494 NYS2d 889 (AD 2d Dept 1985). That case describes CPLR

---

[4] *See* quotation from *Matter of Hogan v. N.Y. Supreme Court*, appearing at fn. 25 of Movant's Affidavit.

§7802(d) as

> "grant[ing] the court broader power to allow intervention in an Article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013 in an action (*see,* Second Preliminary Report of the Advisory Committee on Practice and Procedure [N.Y.Legis.wrc., 1958, No. 13, p. 398]; *Matter of Helms v. Diamond*, 76 Misc.2d 253, 255, 349 N.Y.S.2d 917; *Matter of Muccioli v. Board of Stds. & Appeals of City of N.Y.*, 42 Misc. 2d 1088, 1089, 249 N.Y.S.2d 530). The Court has discretion to allow intervention in a CPLR article 78 proceeding at any time, provided the movant is an interested person (*see* Siegel, NY Prac, §564 [1978])."

The only requirement for permissive intervention under CPLR §7802(d) is that the person be "interested".

At bar, there is no question that Movant is "interested" in Mr. Mantell's appeal from Justice Lehner's decision dismissing his Article 78 proceeding against the Commission. Justice Wetzel's decision dismissing her own Article 78 proceeding against the Commission relied on Justice Lehner's decision (at p. 5). Describing Justice Lehner's decision as "a carefully reasoned and sound analysis of the very issue raised in the within petition", it expressly "adopt[ed] Justice Lehner's finding that mandamus is unavailable to require the respondent to investigate a particular complaint". Movant thus has a clear interest in this Court's reversing Justice Lehner's decision, on which the decision of Justice Wetzel rests. This, in addition to the fact that Movant expressly seeks to also vindicate the "unrepresented public interest", "adversely affected by Justice Lehner's decision, subverting the rights of every person whose *facially*-meritorious judicial misconduct complaint the Commission dismisses, without investigation, in violation of Judiciary Law §44.1 (Affidavit, ¶¶6, 7)

As highlighted in the accompanying Reply Affidavit (¶¶25-26), Mr. Speres' Opposing Affirmation conceals that Movant moved for intervention under CPLR §7802(d). This, to avoid confronting the undeniable fact of her direct and immediate "interest" in the outcome of Mr. Mantell's appeal. Even still, Mr. Speres concedes (at ¶2) this "interest" by his statement that "the issues presented in both appeals are similar and a decision in the Mantell appeal may impact the arguments presented in and the outcome of Sassower's appeal".

POINT IV

MOVANT IS ALSO ENTITLED TO PERMISSIVE INTERVENTION UNDER THE MORE STRINGENT STANDARDS OF CPLR §1013 – A FACT OBSCURED BY THE DECEITFUL PRESENTATION IN MR. SPERES' OPPOSING AFFIRMATION

In view of the pre-emption of CPLR §1013, Movant need not establish her entitlement for intervention under the more stringent standards thereof. However, because she meets even these more stringent standards, this will be briefly described.

Under CPLR §1013, Sassower's motion must be "timely" and involve claims that "have a common question of law or fact" with the main action. In exercising its discretion, the Court is to consider "whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

The timeliness question is *sui generis*, Siegel, NY Practice §183, p. 300[5]. According to McKinney's Consolidated Laws of New York Annotated, Book 7B,

[5] This Department has even permitted an intervenor to move against default judgment taken against original defendant, *Gonzalez v. Industrial Bank*, 13 AD2d 770, 215 NYS2d 632 (1st Dept. 1961).

(1997)[6], citing cases, timeliness under CPLR §1013, as likewise under CPLR §1012(a)(2), is guided by the "principal guideposts" of whether the disposition of the action will be unduly delayed and whether the original parties will be prejudiced. To this is added an additional factor "the extent of the time lag between the motion and the intervenor's acquisition of knowledge of the circumstances that made intervention appropriate."

Applying those standards, the motion is timely. There will be no undue delay by the granting of intervention, seeking only to place before this Court on Mr. Mantell's appeal the Affidavit annexed to the instant motion, setting forth essential facts as to the fraud perpetrated by Respondent's Brief. Mr. Speres already has had an opportunity to respond thereto, as likewise Mr. Mantell. Consequently, no further response from them is required that would delay its consideration by the Court in conjunction with Mr. Mantell's appeal.

As to prejudice, there is none to Mr. Mantell, who serves to benefit, mightily, from being protected from the fraud visited on him and the Court by Respondent's Brief. As to the Commission, there is only the appropriate prejudice that results from being exposed as committing fraud.

Finally, as to "the time lag between the motion and the intervenor's acquisition of knowledge of the circumstances that made intervention appropriate", the circumstances making intervention appropriate was Mr. Speres' September 6th Respondent's Brief, with its pivotally false claims buttressed by the unreported

---

[6] Practice Commentaries by Vincent C. Alexander and Peter Preiser

fraudulent decisions of Justice Cahn and Wetzel – unaddressed by Mr. Mantell's September 15th Reply Brief. The instant motion followed a mere *six days later*, being served on September 21st on Mr. Mantell, Mr. Speres, and the Commission. This is further particularized at ¶¶27-33 of the accompanying Reply Affidavit.

As to "a common question of law or fact", Mr. Speres concedes (at ¶2) that "the issues presented in both appeals are similar". Those issues include the two questions of law presented by Mr. Mantell's appeal: (1) whether Judiciary Law §44.1 requires the Commission to investigate facially-meritorious complaints; and (2) whether the Commission's dismissal, without investigation, of facially-meritorious complaints is judicially reviewable by way of Article 78 -- questions that Movant herself formulated[7]. The law as to these common questions – as well as to the additional common question of "standing" -- is already set forth in the exhibits to the Affidavit, which Movant seeks to have the Court consider upon the granting of intervention. The two appeals also involve the common factual questions as to whether, as these petitioners' contend, the judicial misconduct complaints which are the subject of their proceedings, are facially-meritorious and, therefore, as a matter of law, wrongly dismissed by the Commission without investigation.

Movant also meets a fourth factor that may form part of the Court's consideration: the extent to which the proposed intervenor has a "'real and substantial interest in the outcome of the action'", McKinney's Consolidated Laws of New York Annotated (7B; 1997 ed.). As hereinabove particularized, Movant has an "interest" in

Mr. Mantell's appeal, over and beyond the "interest" of the public, adversely-affected by Justice Lehner's decision. This, because Justice Wetzel's decision dismissing her Article 78 proceeding, which is the subject of her appeal, rests on Justice Lehner's decision, the subject of Mr. Mantell's appeal. Consequently, Movant's "interest" in the disposition of this appeal is "real and substantial"[8].

According to McKinney's Consolidated Laws of New York Annotated (7B; 1997 ed.), courts have sometimes also considered "the adequacy of alternative remedies for the would-be intervenor", to which a related consideration is "the extent to which judicial economy would be served by intervention". At bar, the "alternative remedies" that would safeguard Movant's "interest" in the appeal by alerting the Court to the fraud perpetrated on it by Respondent's Brief would be this Court's permission for her to file her Affidavit of facts as *amicus curiae*. This "alternative" is expressly requested by Movant's motion. A further "alternative" – although not framed in the "alternative" in her motion -- is postponing oral argument of Mr. Mantell's appeal so that it could be heard together with Movant's appeal and/or consolidated with it. Such joint oral argument and/or consolidation would inform the Court of the very facts, presented by Petitioner's Affidavit, as to the fraud that Respondent's Brief has perpetrated on it and Mr. Mantell.

---

[7] *See* ¶31-32 of the accompanying Reply Affidavit and Exhibit "E-1" thereto.

[8] The commentary to §1013 in McKinney's Consolidated Laws of New York Annotated (7B; 1997 ed., p. 184) approvingly cites the Third Department's decision in *Pier v. Board of Assessment Review of the Town of Niskayuna*, 1994, 209 AD2d 788, 789, 617 NYS 2d 1004, 1005-06, for the proposition that where the proposed intervenor has a "direct and substantial interest in the outcome of the proceeding" it is more likely to outweigh "considerations, which are grounded in general concepts of judicial efficiency and fairness to the original litigants".

POINT V

MR. SPERES' OPPOSING AFFIRMATION PROVIDES NO INTERPETATION OF THE SECOND PRONG OF CPLR §1012(a)(2) FOR INTERVENTION OF RIGHT AND FACTUALLY MISREPRESENTS THAT MOVANT DOES NOT MEET THE FIRST PRONG, WHEN SHE HAS

As detailed in Movant's accompanying Reply Affidavit, Mr. Speres' disposes of Movant's right to intervention pursuant to CPLR §1012(a)(2) in a single – and deceitful sentence. The statute may be invoked "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment". According to New York Practice, Siegel, §180, (1999 ed, p. 296),

> "The showing required under CPLR §1012(a)(2) is that the representation 'may be' inadequate and that the proposed intervenor 'may be' bound by the judgment. It is the possibility rather than the certainty that governs. Well-reasoned caselaw holds that the movant should be given the benefit of the doubt."

Plainly, Movant satisfies the first condition. Indubitably, her "interest" in the outcome of the appeal is not being adequately represented by the parties: Mr. Speres has perpetrated a fraud by his Respondent' Brief and Mr. Mantell has failed to recognize such by his Reply Brief. However, as to the second condition, that the proposed intervenor "may be bound by the judgment", if this "binding" is by principles of *res judicata* – rather than *stare decises* – she would not be bound. According to McKinney's Consolidated Laws of New York Annotated, 7B, (1979), this judicial interpretation of being bound:

"severely limits the utility of CPLR 1012(a)(2) as a basis for intervention. The circumstances in which the principles of res judicata can bind a person who is not a party to an action are few in number". (C:1012:3, at p. 155)

Consequently, it advises that:

"nonparties who seek to intervene pursuant to CPLR 1012(a)(2) would be well advised to couple the motion with a request for permissive intervention under CPLR 1013. Where satisfaction of the res judicata standard is problematic, a showing that the judgment could nonetheless prejudice the nonparty's interest in a practical way might serve to tip the balance in favor of permissive intervention."[9] (C:1012:3 at p. 158).

This is what Movant has done since, as a practical matter, an adverse adjudication by this Court in Mr. Mantell's appeal could significantly prejudice her legal position in her upcoming appeal.

POINT VI

MR. SPERES' OPPOSING AFFIRMATION MISREPRESENTS, WITHOUT LEGAL AUTHORITY, WHAT AN *AMICUS CURIAE* IS AND DOES NOT DENY OR DISPUTE MOVANT'S CONTENTION THAT MR. MANTELL IS NOT "ADEQUATELY PROTECT[ING] HIS INTEREST, LET ALONE THE LARGER PUBLIC INTEREST AT STAKE IN THIS APPEAL"

An *amicus curiae* literally means "friend of the court". Its definition, from cases addressing the subject in the 1999 Cumulative Annual Pocket Part to the Permanent Edition of Words and Phrases, Book 3 (1953), includes

"a person, *whether attorney or layman*, who, as a standerby, when a judge is doubtful or mistaken, may, on leave granted in a case then before him, inform [the] *court as to facts or situations* that may have escaped consideration or remind [the] court of legal matter[s] which has escaped its notice and regarding which it appears in danger of going

---

[9] *Cf.* Siegel, New York Practice, §182 (1999 ed., p. 299) "One appropriate grant of a discretionary application of CPLR 1013 would be where there's a question in the case about whether intervention exists as of right under CPLR 1012, and the question is a close one."

wrong" (emphases added),

citing *State ex rel. Bennett v. Bonner*, 214 P.2d 747, 123 Mont. 414 (1950); *see* also *Village of North Atlanta v. Cook*, 133 S.E.2d 585, 219 Ga. 316.

Thus, an *amicus curiae* does not have to be an attorney – as Mr. Speres' Opposing Affirmation implies (at ¶8), *without* citation to legal authority. Nor is an amicus required to file a proposed "brief", as Mr. Speres suggests (at ¶7), likewise *without* citation to legal authority.

This Court's appellate rules contain no instructions to guide those seeking to be granted *amicus curiae* status. However, this Court's decision in *Matter of Foster Care of George Joey S.*, 598 N.Y.S.2d 229 (AD 1st Dept. 1993), shows that *amicus* can be laypeople and that they can fulfill important evidentiary functions. At bar, Movant's *amicus* request is founded on her public service desire to serve an evidentiary function through her Affidavit of "essential facts, based on direct, personal knowledge", for the Court's consideration in Mr. Mantell's appeal. Facts belong in a sworn affidavit, not an unsworn brief (*cf.* 22 NYCRR §202.8). For such reason, Movant has not requested to file a brief, but, simply, her factual Affidavit as to the fraud being perpetrated on the Court and Mr. Mantell by Respondent's Brief.

As reflected by Siegel, New York Practice, §525 (1999 ed., p. 857), whether the court exercises its discretion to grant *amicus curiae* "usually depends on how much additional education the court believes it can draw from the *amici*." There can be no doubt that Movant's Affidavit provides this Court with unequalled "education" not only as to the fraud committed by Respondent's Brief, but as to the TRUE law relating to

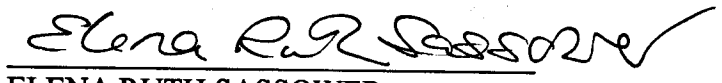
the legal issues on this appeal, which that fraud has wilfully perverted and obscured. The two cases cited by Mr. Speres' Opposing Affirmation, *Matter of Mayer*, 110 Misc.2d 346, 351 (Sup. Ct., NY Co. 1981), aff'd 92 AD 2d 756 (1983) and *Rourke v. NYS Dept of Corr. Services*, 159 Misc.2d 324 (Sup. Ct., Albany Co. 1993) manifest the standard to be applied: whether there are additional "points of view" and "contentions", not otherwise presented. At bar, neither the facts presented by Movant's Affidavit – nor the law, legislative history, and rules of statutory interpretation that are part of the appended analyses and exhibits – are otherwise presented.

As Mr. Mantell would be the beneficiary of the facts and law presented by Movant's Affidavit, which his submissions nowhere reflect, it is obvious that, as alleged by that Affidavit (at ¶6), 'Mantell is not 'adequately protect[ing] his own interest, let alone the larger public interest at stake in this appeal". This allegation, snidely mischaracterized by Mr. Speres' Opposing Affirmation as a "unilateral claim" (at ¶8)– much as he mischaracterizes Movant's allegations of fraud as "unsubstantiated" (at ¶10) -- is not denied or disputed by him under the false pretense that the non-lawyer Movant, as *amicus curiae*, cannot advance the public interest or aid the overburdened Mr. Mantell.

CONCLUSION

The motion should be granted in accordance with the Notice of Motion. Additionally, by reason of the legally insufficient and fraudulent Opposing Affirmation of Assistant Attorney General Constantine Speres, additional costs and sanctions should be imposed pursuant to §130-1.1 of the Chief Administrator's Rules, with further disciplinary and criminal referrals made pursuant to §603 of the Rules of the Appellate Division, First Department and §100.3D(1) of the Chief Administrator's Rules Governing Judicial Conduct, as well as this Court's inherent power to protect itself from fraud and safeguard the integrity of the appellate process.

Respectfully submitted,



ELENA RUTH SASSOWER
Movant

October 5, 2000
White Plains, New York