SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ELENA RUTH SASSOWER, Coordinator
of the Center for Judicial Accountability, Inc.,
acting *pro bono publico*,

Petitioner,

Index # 99-108551

-against-

COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF NEW YORK,

Respondent.

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PETITIONER'S REPLY MEMORANDUM OF LAW

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Prefatory Statement

This Memorandum is submitted in response to the Attorney General's "Reply Memorandum in Further Support of a Motion to Dismiss and in Opposition to Petitioner's Motion for 'Omnibus Relief'". Such Memorandum, *unaccompanied by any affidavit or documentary proof*, manifests the same flagrant and unrestrained misconduct for which Petitioner's Notice of Motion *expressly* requested sanctions and disciplinary and criminal referral against the Attorney General, Respondent, and their culpable staff -- contrary to the Attorney General's claim therein that Petitioner did *not* notice her sanctions request[1].

By letter dated August 17, 1999[2], the return date of the Attorney General's dismissal motion and Petitioner's Motion for Omnibus Relief [hereinafter "omnibus motion], Petitioner apprised the Court (at p. 3) that by reason of the Attorney General's continuing failure to respect fundamental rules of professional responsibility and statutory law regulating lawyer conduct and legal submissions, her response to his Memorandum [hereinafter "Reply-Opposition"] would be more extensive than otherwise necessary. She stated (at p. 3) that just as her omnibus motion had meticulously demonstrated that the Attorney General's dismissal motion was, from beginning to end, based on falsification, distortion, and concealment of the evidence-supported material allegations of her Verified

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1 *See* pp. 21-22, 44-5 *infra*.

2 Petitioner's August 17, 1999 letter is annexed as Exhibit "D" to Petitioner's accompanying Reply Affidavit.

Petition, so her Reply would meticulously demonstrate that the Attorney General had followed an *identical* pattern of defense misconduct in his Reply-Opposition – this time falsifying, distorting, and concealing the evidence-supported material allegations of her omnibus motion.

The scores of record references in Petitioner's moving Memorandum of Law prove, incontrovertibly, that virtually each and every line of the Attorney General's dismissal motion is founded on flagrant deceit, including its four asserted defenses. So, too, this Memorandum of Law, similarly record-referenced, proves that virtually every line of his Reply-Opposition is, likewise, a brazen deceit upon the Court within the meaning of Judiciary Law §487. This misconduct is committed because the Attorney General knows he has NO legitimate defense – whether to the document-supported allegations of the Verified Petition or to the document-supported allegations of the omnibus motion.

The Assistant Attorneys General who signed the dismissal motion and identified themselves therein as appearing "of counsel", Carolyn Cairns Olson and Michael Kennedy, are likewise "of counsel" on the Reply-Opposition, which Ms. Olson has signed, knowing it to be replete with legally-insufficient factual allegations and spurious legal arguments, as herein demonstrated. As before, the defense misconduct of these two lawyers is with the knowledge and approval of those in the highest echelons of supervision within the Attorney General's office. Indeed, it is with the knowledge and approval of Attorney General Spitzer himself.

¶102 of Petitioner's Affidavit supporting her omnibus motion recites that

on July 26, 1999 – two days before the omnibus motion seeking sanctions against Mr. Spitzer personally was due to be served -- Petitioner had a telephone conversation with Mr. Spitzer's counsel, David Nocenti, which she requested be deemed notice to Mr. Spitzer personally. In that conversation, she discussed the Attorney General's conflict of interest and litigation misconduct in this proceeding, the refusal of supervisory personnel, who she named, to supervise the Assistant Attorneys General, who she also named, and Mr. Spitzer's own supervisory responsibilities under New York's Disciplinary Rules of the Code of Professional Responsibility. She stated that she would send Mr. Nocenti a copy of the omnibus motion, in which the foregoing was chronicled, and that, in the meantime, he should access her voluminous correspondence with Mr. Spitzer, in the possession of Executive staff, and, particularly, CJA's March 26, 1999 ethics complaint against Mr. Spitzer personally, filed with the New York State Ethics Commission[3].

As recounted in Petitioner's August 17th letter to the Court (at p. 4), Petitioner hand-delivered a copy of her omnibus motion – both its moving Affidavit and Memorandum of Law – to Mr. Nocenti's office on August 6th. Accompanying the transmittal was an August 6, 1999 coverletter[4], whose opening paragraph requested that the motion be "immediately inspected" not only by Mr. Nocenti, but by Mr. Spitzer personally, since sanctions were being sought against Mr. Spitzer personally, including

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[3] The March 26, 1999 ethics complaint is annexed as Exhibit "E" to Petitioner's moving Affidavit.

[4] Petitioner's August 6, 1999 letter to Mr. Nocenti is annexed as Exhibit "A" to Petitioner's accompanying Reply Affidavit.

disciplinary and criminal referral.

The letter (at p. 1) reiterated Petitioner's July 26th conversation with Mr. Nocenti, recited at ¶102, that the Attorney General's litigation fraud and misconduct in this proceeding "continues the *identical* modus operandi of Mr. Spitzer's predecessors... as recounted in [the Center for Judicial Accountability's $3,000 public interest ad] "*Restraining 'Liars in the Courtroom' and on the Public Payroll*" (New York Law Journal, 8/27/97, pp. 3-4)" – a copy of which was appended to the letter. It also referenced ¶¶40-53 of Petitioner's Affidavit relating to Mr. Spitzer's failure to follow through on his public promise to Petitioner that his office would examine "anything... submitted" relative to the allegations of that ad "because he is compromised by personal and professional relationships with those involved in his predecessors' corrupt litigation practices or benefiting from those practices." Among these relationships, Petitioner's letter (at p. 2) referred to his relationship with Respondent's Chairman, Henry T. Berger, who helped establish Mr. Spitzer's narrow election victory -- cited in the March 26th ethics complaint against Mr. Spitzer (at p. 6, fn. 4). Petitioner also pointed out that the March 26th complaint detailed Mr. Spitzer's failure "to make good on yet another public promise": establishing a "public integrity unit". This, because such a unit "could not credibly 'clean up' corruption elsewhere in state government, without first 'cleaning up' the corruption in the Attorney General's office".

Petitioner requested that her transmitted Affidavit and Memorandum of Law, particularizing the multiple conflicts of interest of Mr. Spitzer and his staff in this

proceeding and the Law Department's unrestrained litigation misconduct, be deemed an ethics complaint for review by the Attorney General's own "Employee Conduct Committee". Additionally, she requested (at p. 3) that at the scheduled August 17th oral argument of Petitioner's omnibus motion "Mr. Spitzer should plan to *personally* attend and account for his misconduct – and that of his staff—in this proceeding" and, if unable to appear, that Mr. Spitzer "furnish the Court with a sworn statement to be presented by [Mr. Nocenti], as his counsel."

Petitioner's July 26th phone conversation and August 6th letter imposed upon Mr. Nocenti – and through him upon Mr. Spitzer – a duty under applicable codes of professional responsibility, whose pertinent provisions Petitioner's supporting Memorandum of Law quoted (at pp. 5-8). That duty was to ensure that corrective steps were immediately taken unless the Law Department was able to refute the fact-specific, document-supported showing of Petitioner's July 28th omnibus motion as to the litigation fraud perpetrated: (a) by Assistant Attorneys General Olson and Kennedy in the May 24, 1999 dismissal motion and; (b) by Ms. Olson's May 17, 1999 Affirmation in support of a post-default extension request; and (c) by Ms. Olson's May 25, 1999 letter to the Court -- all with the knowledge and approval of supervisory personnel. This required: (a) withdrawing the dismissal motion; (b) removing Ms. Olson and Mr. Kennedy from the case; and, (c) discharging them, for cause, from the Attorney General's employ, along with all supervisory personnel involved in their misconduct. Moreover, unless the Law Department could refute the fact-specific, document-supported allegations of multiple

conflicts of interest preventing independent evaluation of "the interests of the state" pursuant to Executive Law §63.1, the Attorney General was duty-bound to seek such evaluation by independent special counsel and to so notify the Court (*See*, Executive Law §67). Additionally, in view of Petitioner's serious allegations that the Attorney General has a pattern and practice of disregarding his duty under Executive Law §63.1[5] and follows a *modus operandi* of litigation misconduct, as reflected in "*Restraining 'Liars'*", his duty, after verifying the factual recitation of what occurred in the three cases featured in the ad – to which Petitioner attested (at ¶12) as "true and correct" of [her] personal knowledge, and... based on the files of the three litigations" – was to undertake a full-scale investigation of other cases in which the Law Department defended public agencies and officers. In light of the ad's particularized allegations that the Attorney General was corrupting the judicial process in both state and federal courts, such investigation was imperative to ensure the integrity of the office.

Mr. Spitzer did not have to be the Harvard Law School graduate he is to know, as a matter of elementary law, that the fact-specific allegations of litigation misconduct and conflict of interest in Petitioner's moving Affidavit would be deemed

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[5] *See* ¶10 of the Verified Petition:

> "Upon information and belief, the Attorney General's office routinely violates Executive Law §63.1 by *automatically* defending state agencies sued in litigation -- without any evaluation of 'the interests of the state'. To that end, even if liability is clear and it has NO legitimate defense to evidence-supported allegations of governmental corruption, it will still defend state agencies, engaging in litigation fraud and other misconduct in order to defeat the claim. This is particularly so where it can count on the court's complicity because the subject of litigation involves state judicial corruption or Respondent's cover-

true, unless he made specific denials in "admissible form", *to wit*, by answering affidavits from persons having personal knowledge, himself included, and that, without such affidavits, any opposition to Petitioner's omnibus motion would be frivolous.

Nevertheless, Mr. Spitzer permitted Ms. Olson, whose direct conflict of interest and litigation misconduct had been detailed in Petitioner's omnibus motion, to interpose the 13-page Reply-Opposition, unsupported by any affidavits or evidentiary proof, and which, by gross falsification and distortion of the content of the omnibus motion, urged the Court to deny it and to grant the dismissal motion. This, without denying or disputing a single one of the record and legal citations in Petitioner's 99-page Memorandum of Law or any of the fact-specific allegations of Petitioner's 55-page Affidavit, including those relating to Ms. Olson's own disqualifying conflict of interest and litigation misconduct. Thereafter, when Petitioner notified Mr. Spitzer, *via* Mr. Nocenti, that the August 13, 1999 Reply-Opposition continued "unabated, the Attorney General's fraudulent and deceitful advocacy" and that, as a result, she needed more time to respond to it[6], Ms. Olson was permitted, yet again, to engage in litigation misconduct by a false and misleading August 16, 1999 letter to the Court[7], in which she disingenuously purported to "see no need" for Petitioner's extension request and which, to further mislead the Court, she falsely characterized as being a "sur-reply" – which it

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up thereof."

[6] *See* Petitioner's August 16, 1999 letter to Mr. Nocenti and Assistant Attorneys General Olson and Kennedy annexed as Exhibit "B" to Petitioner's accompanying Reply Affidavit.

[7] Ms. Olson's August 16, 1999 letter to the Court is annexed as Exhibit "C" to Petitioner's

was not.

Petitioner's August 17th letter to the Court, identifying (at pp. 2-5) this further litigation misconduct by the Attorney General, was also sent to Mr. Nocenti. Additionally, it was sent to Respondent, which has its own copy of Petitioner's omnibus motion – both the Affidavit and Memorandum of Law – which Petitioner provided it on August 6, 1999, the same date as she hand-delivered a copy to Mr. Nocenti. Notwithstanding they have not denied or disputed the accuracy of the recitation contained in Petitioner's August 17th letter, neither have taken any corrective steps, such as withdrawing the Reply-Opposition – thus needlessly burdening the Court and Petitioner with this Reply Memorandum.

Such failure to withdraw the Reply-Opposition, like their failure to withdraw the dismissal motion, thereby necessitating Petitioner to seek sanctions relief in her omnibus motion, is in the face of their knowledge of the Court's mandatory duty under Part 100.3(D) of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct to "take appropriate action" against "a lawyer [who] has committed a substantial violation of the Code of Professional Responsibility", quoted by Petitioner at page 6 of her Memorandum of Law in support of her omnibus motion – and reiterated in her August 17th letter (at p. 4), with the following assertion:

> "In the circumstances at bar, where what is before the Court in Ms. Olson's August 13th Memorandum, as in her May 24th dismissal motion, are 'fraud and deceit upon the Court and Petitioner, as well as the crimes of, *inter alia*,...filing of false instruments, conspiracy, obstruction of justice

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accompanying Reply Affidavit.

> and official misconduct', 'appropriate action' would be, as *expressly* requested by [Petitioner's] Notice of [Motion], 'immediate trial of...the sanctionable misconduct of Respondent and the Attorney General' (¶4), 'sanctions and...costs, pursuant to Part 130-1.1 of the Chief Administrator's Rules against Respondent, its members and culpable staff, and against Attorney General Spitzer personally and his culpable Assistant Attorneys General for their litigation misconduct' (¶5), and referral of 'Respondent's members and culpable staff and Attorney General Spitzer personally and his culpable Assistant Attorneys General for disciplinary and criminal action based on their litigation misconduct' (¶6)."

The fact that the Court's mandatory duty under its own ethical rules of professional responsibility has not deterred the Attorney General or Respondent from their flagrant defense fraud suggests that they are confident that the Court will not meet that duty. This may be confidence borne of experience, such as reflected by the three lawsuits described in "*Restraining 'Liars'*", where state and federal courts ignored the Attorney General's fully-documented defense misconduct in fraudulent judicial decisions dismissing those cases. It may also be because, as they well know, the Court's enforcement of fundamental ethical and legal standards in this proceeding would run counter to its very real self-interest herein, as particularized in Petitioner's oral application for its recusal[8]. Indeed, for the Court to expose that there is NO legitimate defense to this proceeding – the inevitable result of exposing the litigation fraud committed by the

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[8] *See* pp. 9-17 of the transcript of the June 14, 1999 court conference, for Petitioner's oral recusal application, annexed as Exhibit "O" to Petitioner's moving Affidavit. Petitioner has invited both the Attorney General and Respondent to respond to the recusal issue (*see*, pp. 2-3 of Petitioner's August 16th letter to Mr. Nocenti and the Assistant Attorneys General and pp. 5-6 of her August 17th letter to the Court, annexed to her accompanying Reply Affidavit as Exhibits "B" and "D" respectively). However, the Attorney General's position is not to respond until the Court determines whether it wants a written recusal motion or deems Petitioner's August 16th letter as a written motion, at which point he wishes to do so (*see*, Ms. Olson's August 16th letter to the Court, annexed as Exhibit "C" to Petitioner's accompanying Reply Affidavit).

Attorney General on behalf of his knowingly complicitous client – would be to expose systemic governmental corruption, including Governor Pataki's long-time official misconduct in covering up Respondent's corruption, as well as his more recent criminal fraud and that of the Senate Judiciary Committee's Chairman in connection with Albert Rosenblatt's nomination and confirmation to the State Court of Appeals. This would end any chance of this Court's being reappointed to the bench by the Governor and confirmed by the State Senate when its term expires in just two years – unless, of course, the Governor and those involved in the Senate are removed from office as a result of the public scandal brought to light by this case.

The Attorney General's confidence that the Court will shirk its duty would explain Mr. Nocenti's September 1, 1999 letter to Petitioner[9], his *sole* response to her August 6th letter to him. By that letter, Mr. Nocenti stated that the Attorney General's office would not undertake "a separate internal review" of the conflict of interest and defense misconduct in this litigation, proffering as excuse that the "allegations are now the subject of a pending motion in the State Supreme Court", with "related allegations" submitted to the State Ethics Commission.

Not only is Mr. Nocenti's September 1st letter contrary to the Disciplinary Rules of the Code of Professional Responsibility, which provide no escape to those charged with supervisory responsibilities, it is in face of Petitioner's showing in her

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[9] Mr. Nocenti's September 1, 1999 letter to Petitioner is annexed as Exhibit "E" to Petitioner's accompanying Reply Affidavit.

omnibus motion that the Attorney General has, for years, been protected by the Ethics Commission and the courts.

The Ethics Commission's protectionism of the Attorney General by covering up his litigation misconduct and conflict of interest is chronicled at pages 8-14 of the March 26th ethics complaint, as well as at ¶¶25-35 of Petitioner's moving Affidavit. Each detail the unethical and unlawful conduct that occurred during the period in which Mr. Spitzer's Deputy Attorney General for State Counsel, Richard Rifkin, formerly in the upper echelons of Attorney General Abrams' office, was the Ethics Commission's Executive Director. This protectionism has continued to date, with the Ethics Commission's new Executive Director, Donald Berens, Jr., formerly Mr. Vacco's Deputy Attorney General for State Counsel. Mr. Berens' on-going protectionism is detailed in CJA's September 15, 1999 letter to the Ethics Commissioners[10]. The letter, additionally, constitutes a supplement to the March 26th ethics complaint, based on the Attorney General's conflicts of interest in this proceeding and litigation misconduct, and requests that the Ethics Commission advise the Court of its intentions with respect thereto, since the supplement involves "the *very* issues as are before the Court on [Petitioner's] motion" (at p. 11). That way, the Court will know:

> "whether the transcending issue of the corruption of the judicial process by our state's highest law enforcement officer and the state agency designed

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[10] CJA's September 15, 1999 letter to the Ethics Commissioners is annexed as Exhibit "G" to Petitioner's accompanying Reply Affidavit. CJA's September 7, 1999 letter to Andrew Weissmann, Deputy Chief of the Criminal Division, U.S. Attorney, Eastern District of New York – a copy of which the September 15th letter to the Ethics Commissioners enclosed – is annexed as Exhibit "H" to Petitioner's Reply Affidavit.

to enforce judicial standards rests with it alone." (at p. 11)

As for the Court's protectionism of the Attorney General, the public interest ad, "*Restraining 'Liars'*", annexed to Petitioner's August 6th letter to Mr. Nocenti, highlights the failure of judges, both state and federal, to address uncontroverted, fully-documented sanctions applications against the Attorney General based on his defense misconduct and conflict of interest in three separate cases involving the public interest[11]. Indeed, the Attorney General's confidence that this Court will not address the sanctions issues in this public interest case is reflected by ¶101 of Petitioner's moving Affidavit[12], describing that on July 7th, when Petitioner turned to Joe Palozzola, Assistant to Mr. Spitzer's Chief of Staff, for the Attorney General's supervisory oversight, his response was to tell her to make her sanctions motion to the Court. Undenied are Petitioner's allegations therein that Mr. Palozzola was "perfectly contented by the possibility that, as in the three litigations detailed in "*Restraining 'Liars'*", the Court might cover-up the Attorney General's misconduct by ignoring it – a possibility [Petitioner] raised with him" and that "[h]e rejected the notion that the Attorney General, as this State's chief law enforcement officer, has any duty to ensure the integrity of the judicial process".

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[11] That the Attorney General's office has its own original litigation files of those cases and has never denied or disputed the fact-specific allegations of that ad is reflected at ¶13 of Petitioner's moving Affidavit.

[12] This paragraph is referenced at page 6 of Petitioner's moving Memorandum of Law, referring to the fact that Executive level personnel rebuffed the Attorney General's supervisory role, telling Petitioner to go to Court for adjudication of the sanctions issues.

Applicable Ethical And Legal Standards

Neither New York's highest law enforcement officer, the State Attorney General, nor Respondent, the State Commission on Judicial Conduct, charged with safeguarding the integrity of the judiciary, deny or dispute this Court's mandatory disciplinary responsibilities under Part 100.3(D) of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct. Nor do they deny or dispute any of the scores of record references that fill Petitioner's omnibus motion establishing an endless repetition of fraud and deceit by Ms. Olson and Mr. Kennedy, constituting "substantial violation[s] of the Code of Professional Responsibility", activating the Court's mandatory duty to take "appropriate action". That duty is plainly reinforced where, as here, the record shows the wilful failure and refusal of *all* supervisory personnel at the Attorney General's office to effect supervision, as likewise Respondent's wilful failure and refusal to disavow the flagrant litigation misconduct and conflict of interest of which it is the beneficiary.

As hereinafter demonstrated, the only denials throughout the Reply-Opposition, as likewise the only assertions therein, are bald conclusory claims, which aside from having no probative value, are belied by the record.

Both the Attorney General and Respondent are charged with knowledge of the rudimentary evidentiary standards that govern motions, including Petitioner's motion, where, among the relief expressly requested, is conversion of Respondent's

dismissal motion under CPLR §3211(a) to a motion for summary judgment in Petitioner's favor pursuant to CPLR §3211(c).

The Reply-Opposition does not even identify these basic standards. Nor does it anywhere disclose that Petitioner's omnibus motion seeks summary judgment in her favor. This is not surprising since doing so would have immediately exposed how thoroughly deficient and frivolous the Reply-Opposition is.

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). In dismissal motions, it is "the primary source of proof", Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, C3211:43 (1992 ed., p. 60), as it is on summary judgment motions, Siegel, New York Practice, §281 (1999 ed., p. 442).

"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).

"Affidavits on any motion should be made only by those with knowledge

of the facts, and nowhere is this rule more faithfully applied than on the motion for summary judgment." *Id*, §281 (p. 442)[13].

In *Zuckerman v. City of N.Y*, 49 NY2d 557 (1980), our highest state court clearly articulated the "strict requirement" of "evidentiary proof in admissible form":

> "To obtain summary judgment it is necessary that the movant establish his cause of action... 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b]). Normally, if the opponent is to succeed in defeating a summary judgment motion, he must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate an acceptable excuse for his failure to meet the strict requirement of tender in admissible form [citing cases and CPLR 3212, subd [f]]... We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form... or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions... or unsubstantiated allegations or assertions are insufficient" (*Alvord v. Swift & Muller Constr. Co.*, 46 NY2d 276, 281-282; *Fried v. Bower & Gardner*, 46 NY2d 765, 767; *Platzman v. American Totalisator Co.*, 45 NY2d 910, 912; *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290)." at 562

"[T]he basic rule followed by the courts is that general conclusory allegations, whether of fact or law, cannot defeat a motion for summary judgment where the movant's papers make out a prima facie basis for the grant of the motion", Vol. 6B, Carmody-Wait 2d,

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[13] *See also*, 6B Carmody-Wait 2d, §39:69: "An affidavit opposing a motion for summary judgment must indicate that it is being made by one having personal knowledge of the facts. An affidavit not based on personal knowledge constitutes hearsay and may not be utilized to defeat a motion for summary judgment..." (1996 ed., pp. 225-6).

§39:66 (1996 ed., p. 219). "A party opposing a motion for summary judgment 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." *Id.* §39:56 (pp. 163-4). The party seeking to defeat summary judgment "must avoid mere conclusory allegations and come forward to lay bare his proof...", Siegel, New York Practice §281 (1999 ed., p. 442). "[M]ere general allegations will not suffice", Vol. 6B Carmody-Wait 2d §39:52 (1996 ed., p. 157). "[T]he burden is on the opposing party to rebut the evidentiary facts and to present evidence showing that there exists a triable issue of fact. Such party must assemble, lay bare, and reveal his proofs... some evidentiary proofs are required to be put forward", *Id.*, §39:53 (pp.159-60); *See also, State v. Metz*, 671 N.Y.S.2d 79, 82 (1st Dept. 1998), where the successful party was the State, represented by the Attorney General, ("the well-established burden of a party opposing a motion for summary judgment to assemble and lay bare affirmative proof", citing *Stainless, Inc. v. Employers Fire Ins. Co.*, 418 NYS2d 76, *affd.* 49 NY2d 924, as well as Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16).

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).

In *Noce v. Kaufman*, 2 NY2d, 347 (1957), cited in Corpus Juris Secundum (1996), Vol. 31A, §167 (at p. 343), the New York Court of Appeals reiterated "the rule":

> "that where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, *the strongest inferences may be drawn against him which the opposing evidence in the record permits* (*Perlman v. Shanek*, 192 App. Div. 179; *Milo v. Railway Motor Trucking Co.*, 257 App. Div. 640; *Borgman v. Henry Phipps Estates*, 260 App. Div. 657)." (emphasis added).

The First Department approvingly quoted the foregoing in *Jarrett v. Madifari*, 415 N.Y.S.2d, 644 (1st Dept. 1979) – also cited in Corpus Juris Secundum, Vol. 31A, §167 (1996 ed., p. 343).

Additionally, relevant is the First Department's decision in *Ellen v. Lauer*, 620 N.Y.S.2d 34 (A.D. 1st Dept., 1994) – cited in 6B Carmody-Wait 2d (1996) §39:54 (at p. 161):

> "A court reviewing a motion for summary judgment will tend to construe the facts 'in a light most favorable to the one moved against, but this normal rule of summary judgment will not be applied if the opposition is evasive, indirect, or coy.'", citing *Siegel*, New York Practice §281 and *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 170 A.D.2d 108, 573 N.Y.S.2d 981 (1st Dept. 1991), *aff'd* 80 N.Y.2d 377,

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590 N.Y.S. 831.

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)[14].

Aside from Petitioner's 25-page Verified Petition, which, because it is sworn, has the equivalent probative weight of an affidavit, and whose fact-specific allegations are substantiated by annexed documentary exhibits, Petitioner's omnibus motion is supported by two affidavits, her own 55-page affidavit and that of Doris L. Sassower, Director of the Center for Judicial Accountability, Inc. (CJA). Both attest to facts from first-hand, direct personal knowledge. The omnibus motion is also supported by voluminous substantiating documents, which, where not already part of the record before the Court, were either annexed as exhibits to Petitioner's moving Affidavit or, by reason on their volume, transmitted in support of the omnibus motion in free-standing file folders, marked "I-III".

The massive evidentiary presentation in Petitioner's omnibus motion was in response to the Attorney General's dismissal motion, unsupported by ANY probative evidence, including probative affidavits. This was highlighted by Petitioner's

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[14] *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 considered proper evidence to present to a jury upon the question of the guilt or innocence of the person accused." Citing cases.

Memorandum of Law in support of her omnibus motion, whose "Argument" section (at pp. 13-23) began with an extensive discussion of Assistant Attorney General Kennedy's "completely non-probative" moving Affirmation. Such, *inter alia*, was not affirmed "to be true", was not stated to be on personal knowledge, and failed to even state that it was based "on information and belief" and, if so, its source. As shown, its only evidentiary value is for the two-fold purpose of showing that Respondent has no legitimate defense and for assessing sanctions against Mr. Kennedy, since the Affirmation demonstrably falsifies and distorts the document-supported allegations of Petitioner's Verified Petition. Moreover, as to the Affirmation's two exhibits -- the Verified Petition in the prior Article 78 proceeding against Respondent and Justice Cahn's dismissal decision – Petitioner's moving Memorandum of Law showed (at pp. 38-45, 65-67) how the content of both these documents – the only documentary evidence accompanying the dismissal motion – was flagrantly falsified and distorted by Mr. Kennedy and Ms. Olson in their moving Memorandum (at pp. 4-6, 15-18) to support Respondent's bogus *res judicata*/collateral estoppel defense.

Also detailed in the "Argument" section of Petitioner's moving Memorandum of Law (at pp. 22, 30-32) was the irrelevant ¾ page Affidavit of Respondent's Clerk, Albert Lawrence, whose only evidentiary value was shown to be in its failure to confront material issues presented by the fact-specific, document-supported allegations of the Verified Petition, as to which Mr. Lawrence has first-hand knowledge. Indeed, Petitioner's Memorandum identified (at pp. 23-30) the large number of persons

with testimonial competence available to the Attorney General to furnish affidavits probative of the issues presented by the Verified Petition, as well as the abundant resources at his disposal from which to obtain pertinent legal authority, legislative history, and advisory opinions to support his bald claims in the dismissal motion. All such claims Petitioner demonstrated to be based on wilful falsification, misrepresentation, and concealment of the document-supported allegations of the Verified Petition.

It is in face of Petitioner's showing of the legal insufficiency of the Attorney General's dismissal motion – quite apart from her showing of his multiple conflicts of interest and litigation fraud – that the Attorney General has totally failed to meet his burden to come with *any* affidavit or documentary proof, either to support his dismissal motion or to oppose Petitioner's omnibus motion. Nor does he offer the slightest excuse or explanation for this failure. Instead, the Reply-Opposition rests on bald and conclusory denials and, over and again, falsifies, distorts, and omits the grounds particularized by Petitioner for the relief sought by her omnibus motion, where it does not entirely omit mention of the relief sought, such as her summary judgment and default judgment requests.

This unrestrained litigation misconduct to which Mr. Spitzer and Respondent, by their wilful and deliberate inaction, have given their imprimatur, not only underscores Petitioner's entitlement to all relief requested by her Notice of Motion, but warrants imposition of additional sanctions and costs against them, as well as further disciplinary and criminal referral of them, which this Reply Memorandum requests.

The Argument

The Attorney General's 13-page Reply-Opposition begins with a "Preliminary Statement" (at pp. 1-2), following which is a three-point "Argument" (at pp. 2-13), and "Conclusion". These will be addressed *seriatim* and with the same line-by-line detail with which the Attorney General's dismissal motion was dissected by Petitioner's Memorandum of Law in support of her omnibus motion. This, to demonstrate her entitlement to further sanctions against the Attorney General and Respondent based on the wilful falsification and distortion woven into virtually each and every line of his instant submission.

The Attorney General's "Preliminary Statement" Shows That Those Branches Of Petitioner's Omnibus Motion Seeking A Default Judgment And Summary Judgment Are Unopposed By Implication

The Attorney General's "Preliminary Statement" does not identify his Memorandum as opposing Petitioner's omnibus motion in its entirety, unless he considers the only two branches he identifies (at p. 1), with global record references, as the entire motion. These two identified branches are: (a) to disqualify the Attorney General; and (b) to vacate what the Attorney General falsely terms the "order" of Justice Lebedeff granting Respondent's application for an extension to respond to the petition. Additionally, the Memorandum identifies (at p. 2) that it is submitted in opposition to Petitioner's "application... seeking sanctions against the Attorney General and his assistants for appearing and asserting the defenses that have been raised on behalf of the Commission in this lawsuit". Citing CPLR §2215 relating to cross-motions, which

Petitioner's motion is not, the Attorney General falsely claims that Petitioner's sanctions "application" is "not noticed in her notice of motion."

In fact, two separate paragraphs of Petitioner's Notice of Motion relate explicitly to the sanctions relief requested, ¶¶4 and 5, with a third paragraph, ¶6 relating thereto by implication:

> ¶ 4 converting Respondent's dismissal motion under CPLR §3211(a) to a motion for summary judgment in favor of Petitioner pursuant to CPLR §3211(c), and, if deemed appropriate by the Court, immediate trial of the issues raised on the motion, particularly with regard to the sanctionable misconduct of Respondent and the Attorney General;
>
> ¶ 5 imposing sanctions and awarding costs, pursuant to Part 130-1.1 of the Chief Administrator's Rules, against Respondent, its members and culpable staff, and against Attorney General Spitzer personally and his culpable Assistant Attorneys General for their litigation misconduct;
>
> ¶6 referring Respondent's members and culpable staff and Attorney General Spitzer personally and his culpable Assistant Attorneys General for disciplinary and criminal action based on their litigation misconduct, including fraud and deceit upon the Court and Petitioner, as well as the crimes of, *inter alia*, perjury, filing of false instruments, conspiracy, obstruction of the administration of justice, and official misconduct;

Since ¶4 seeks, first and foremost, conversion of the dismissal motion pursuant to §3211(a) to summary judgment pursuant to §3211(c), to which neither the "Preliminary Statement" nor the balance of the Reply-Opposition refer, he is not opposing this relief.

Similarly his "Preliminary Statement" does not refer to ¶3 seeking an order:

> ¶3 granting a default judgment against Respondent in favor of Petitioner by reason of its failure to file its answer or dismissal

> motion in accordance with the mandatory time requirements of CPLR §7804(c)(e), [and], if such is denied, directing that an answer be filed, together with a certified transcript of the record of the proceedings, both as specified by CPLR §7804(e).

Indeed, nowhere in the Reply-Memorandum is there any reference to either CPLR §§7804(c) or (e) and no response to Petitioner's arguments with respect thereto. Consequently, the Attorney General is not opposing that relief either.

The Reply-Opposition's only suggestion that Petitioner's motion seeks relief apart from the two categories it identifies, is in its final sentence immediately preceding the "Conclusion" (at p. 13). This sentence, which is part of the Memorandum's "Point C" argument opposing imposition of sanctions, asserts, without *any* specificity,

> "Further, any and all other relief that is being sought in petitioner's 'omnibus motion' should be denied" (Reply-Opposition, at p. 13).

By no cognizable standard, can such bald statement be considered opposition to the otherwise unaddressed branches of Petitioner's omnibus motion

The Attorney General's "Point A" Opposition To Petitioner's Omnibus Motion Seeking His Disqualification Is Non-Probative, Fraudulent, And Sanctionable

The Attorney General's two-page response (pp. 2-4) to that portion of Petitioner's omnibus motion addressed to his disqualification is even more knowingly false and frivolous than footnote 1 of his Memorandum supporting the dismissal motion -- previously the *only* place he purported to address Petitioner's challenge to his representation of Respondent.

That footnote was meticulously dissected at pages 33-37 of Petitioner's moving Memorandum of Law. The Reply-Opposition does not deny or dispute Petitioner's demonstration therein that the Attorney General's footnote 1 perpetrates several deceits upon the Court. Instead, it unabashedly repeats them. Indeed, it employs the *identical* knowingly false and deceptive presentation for its claim that:

> "respondent here is entitled to representation and the Attorney General is statutorily authorized to defend this proceeding" (at p. 4),

as in footnote 1, which claimed, virtually *verbatim*:

> "The Commission is entitled to such representation and the Attorney General is statutorily authorized to defend this proceeding" (fn. 1, p. 1).

As in footnote 1, the Attorney General again cites (at p. 4) Executive Law §63.1, but *without* discussion or analysis, and again cites (at p. 4) *Sassower v. Signorelli*, but again *without* discussion or analysis. As noted by Petitioner's moving Memorandum of Law

(at p. 35), and not denied or disputed by the Reply-Opposition, the one-sentence discussion of Executive Law §63.1 appearing in *Sassower v. Signorelli* demonstrably misrepresents the statute.

This now twice-repeated deceit upon the Court as to what Executive Law §63.1 *actually* says is to obscure that the statute, by its *express* language, does ***not*** automatically entitle Respondent to the Attorney General's advocacy. Nor does it authorize the Attorney General to defend Respondent unless doing so is in "the interests of the state". Concealing this is essential to the Attorney General's bogus claim that "petitioner lacks standing to challenge the Attorney General's decision to represent the Commission" (at p. 3), since, by its language, Executive Law §63.1 gives a litigant suing a state agency as much right to the Attorney General's advocacy as the agency, so long as his suit is in "the interests of the state."

Only a single sentence of the Reply-Opposition (at p. 3) is devoted to the deceit that "petitioner lacks standing to challenge the Attorney General's decision to represent the Commission". The Reply-Opposition purports that this is "more fully argued in footnote 1" of the Attorney General's Memorandum in support of the dismissal motion. Yet, footnote 1 presents no such argument other than its bald misrepresentation of Executive Law §63.1, hereinabove quoted. Following such, as highlighted by Petitioner's moving Memorandum (at p. 37), the footnote conceals the nature of Petitioner's constitutional challenges to obscure the basis upon which, pursuant to CPLR §1012 and Executive Law §71, the Attorney General could, as requested, intervene to

assist Petitioner.

As for *Zaccaro v. Parker*, 169 Misc.2d 266, 268-9 (Sup. Ct., Onadaga Co., 1996), cited by the Reply-Opposition (at p. 3) for purposes of comparison, it is not analogous. This is evident from the Attorney General's own parenthesed description of the case, showing that it involves Public Officers Law §17 – not Executive Law §63.1. The Reply-Opposition does not contend, let alone show, that Public Officers Law §17 and Executive Law §63.1 are comparable, and they plainly are not. Public Officer Law §17 creates an automatic right for a public officer to be defended by the Attorney General, thereby potentially depriving a litigant of standing to assert a challenge thereto. It has nothing to do with Executive Law §63.1, which restricts the Attorney General's representation of an agency to "the interests of the state". As hereinabove stated, this statutory language confers upon a litigant suing a state agency as much right to the Attorney General's representation as the agency.

Having falsely asserted (at p. 3) that Petitioner lacks "standing" to assert "that there has been no articulated 'finding' that it would be in the interest of the State to defend this proceeding" (at p. 3), the Reply-Opposition, notably, does not contend that the Attorney General ever made an "articulated 'finding'". Indeed, its bald unsworn pronouncement, "this office has made its determination that the Commission is entitled to representation in the CPLR Article 78 proceeding" (at p. 4), which has no evidentiary value in that it is not contained in an affidavit -- is conspicuously not joined with any explicit statement that such allegedly determined representation is in "the interests of the

State", as Executive Law §63.1 requires. This omission is not only pivotal, but glaring. As pointed out by Petitioner's omnibus motion[15], the Attorney General nowhere previously stated, including in footnote 1 of his dismissal motion, that his representation of Respondent was in "the interests of the state".

Nor does the Reply-Opposition identify who made the supposed "determination that the Commission is entitled to representation", which, as noted, is not even stated to be pursuant to Executive Law §63.1. As Petitioner's omnibus motion highlighted, any determination pursuant to Executive Law §63.1 would require an independent evaluator, one uncompromised by the conflicts of interest permeating all levels of the Attorney General's office[16]. Obviously, the person making the "determination", whoever he or she is, is the one to have provided an affidavit.

In the same sentence of the Reply-Opposition as refers to the Attorney General's purported "determination" that "the Commission is entitled to representation" is the inference that a further determination has been made, *to wit*, that "it is proper for the assigned Assistant Attorneys General in the Litigation Bureau" to be involved in that representation. This second determination, if made, likewise, has no probative value, which would require an affidavit from the person responsible therefor. Such person, like the person making the purported "determination" of Respondent's entitlement, is also conspicuously unidentified by the Reply-Opposition.

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15 *See* ¶3 of Petitioner's moving Affidavit and p. 35 of her Memorandum of Law.

16 *See* pp. 34-35 of Petitioner's moving Memorandum of Law and ¶23, 24, 39, 40, 52, 53 of her moving Affidavit.

Conspicuously, too, the Reply-Opposition does not deny, contradict, or even identify *any* of the facts recited at ¶¶20-23 of Petitioner's moving Affidavit as establishing the impropriety of Ms. Olson's assignment to this case. Those facts, deemed admitted as a matter of law, show Ms. Olson's direct interest in this litigation by reason of her participation in the events ultimately giving rise to it, at issue herein. Indeed, since Ms. Olson is the signator of the Reply-Opposition, her failure to come forth with an affidavit to address those facts, combined with her failure in the Reply-Opposition to even identify them, explodes the bald assertion of the propriety of her representation herein, impliedly determined by the Attorney General's office.

Additionally, the Reply-Opposition does not identify *any* of the facts particularized throughout Petitioner's omnibus motion as manifesting Ms. Olson's disqualifying conflict of interest, namely, her pervasive litigation misconduct herein and that of her co-counsel, Mr. Kennedy[17]. The plethora of record citations supporting Petitioner's motion not only establish that misconduct, *prima facie*, but show that the bald denials of misconduct in the portion of the Reply-Opposition addressed to Petitioner's sanctions application – none of which even reference those record citations -- are brazen deceits upon the Court – quite apart from being insufficient as a matter of law. [*See* pp. 8-9 of the Reply-Opposition]

It is in the absence of *any* evidence supporting Respondent's entitlement to the Attorney General's representation or as to the propriety of its being represented by

these Assistant Attorneys General – and the absence of *any* evidence that the Attorney General's officer ever made determinations as to either, let alone by whom -- that the Reply-Opposition refers to Petitioner's acknowledgment of being advised "on numerous occasions" that "we were representing the Commission" and by "executive staff that the Office is comfortable with that decision" -- as if these *ipse dixit* assertions take on probative value when repeated, or if made by those in the upper ranks of the Attorney General's office. That they do not may be seen from the very paragraphs of Petitioner's moving Affidavit cited in the Reply-Opposition, ¶¶81 and 101, showing Petitioner's vehement objections to these unsubstantiated assertions made by Ms. Olson herself and Joe Palozzola, Assistant to Mr. Spitzer's Chief of Staff, as completely non-responsive to the fact-specific issues she was raising as to the lawfulness of the Attorney General's representation of Respondent, pursuant to Executive Law §63.1, and the conflicts of interest attendant on that representation. These fact-specific, legally-supported issues relating to the Attorney General's disqualification are, as a matter of law, deemed conceded – the Reply-Opposition being similarly non-responsive to them.

As to Petitioner's objection to the Attorney General's representation based on his multiple conflicts of interest, concerning which his footnote 1 is completely silent, the Opposition-Reply materially distorts what it does not wholly conceal of Petitioner's 55-page moving Affidavit. These pages, detailing both the appearance of the conflict-of-interest objection (pp. 7-26) and its actualization by the litigation misconduct (pp. 27-55),

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[17] *See* ¶¶68, 71, 76-79, 81, 84-86, 88, 90-92, 93-97, 99, 104-116 of Petitioner's moving Affidavit

are reduced to a mere two-sentences in the Reply-Opposition, *to wit:*

(1) "[Petitioner] and/or CJA has filed ethics complaints against the Attorney General and various Assistant Attorneys General who have rejected her requests for investigations"; and

(2) "Petitioner also complains about the manner in which Assistant Attorneys General have responded to her mother's cases in state and federal courts against the judges of the Appellate Division, Second Department, who suspended her."

This two-sentence condensation, from which *all* material facts have been purposefully excised, is then the basis for the Reply-Opposition's three-sentence conclusion (at pp. 2-3), constituting the Attorney General's *entire* argument on Petitioner's conflict of interest objections. These three sentences are:

(1) that Petitioner has not established "any conflict between this petitioner and the Attorney General's office which would require the Attorney General's disqualification" – for which it cites (at p. 3), for comparison and *without* discussion, the irrelevant case of *Solow v. W.R. Grace & Co.*, 83 NY2d 303 (1994);

(2) that "none of the complaints that petitioner has allegedly filed against the Attorney General and his Assistants are pending before the respondent Commission"; and

(3) that "petitioner was not a party to her mother's lawsuit and, thus, has no standing to asserts (sic) any claims about the manner in which it was defended."

Each of these conclusory sentences, as well as the prior two sentences, are knowing deceits upon the Court, as established by the Reply-Opposition's obliteration of the fact-specific, document-supported allegations of Petitioner's omnibus motion These show the disqualifying conflict between Petitioner and the Attorney General, which she

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and pages 1-99 of her Memorandum of Law.

has full "standing" to assert, and which have nothing to do with ethics complaints pending before Respondent, an agency without disciplinary jurisdiction over the Attorney General, but, rather, with complaints pending before the New York State Ethics Commission – which has.

Tellingly, the Reply-Opposition does not address or even disclose the particulars of the ethics complaints, each in the Attorney General's possession – other than that Petitioner's "requests for investigations" were rejected. It also omits any reference to the basis for the requested investigations, namely, the defense misconduct of the Law Department in the three cases, featured in "*Restraining 'Liars'*", and the fact that, under ethical rules of professional responsibility, the Attorney General, as head of the Law Department, is not free to ignore notice of that misconduct, nor free to ignore the fraudulent judicial decisions in those cases, also made the subject of notice to him.

The Reply-Opposition not only falsely makes it appear that these cases are *unrelated* to the ethics complaints, but that they are *unconnected* with this Article 78 proceeding. This is yet another flagrant deceit, evident from ¶¶10-53 of Petitioner's moving Affidavit, detailing the inextricable relationship between the cases and this proceeding. As set forth therein, this proceeding necessarily exposes the Law Department's defense fraud in the cases and the official misconduct of Mr. Spitzer in failing to take corrective steps (¶¶14, 40-53). Likewise, it necessarily exposes the official misconduct of his Executive staff appointees, Richard Rifkin and Michele Hirshman, who, in former high-ranking positions charged with safeguarding governmental integrity,

failed to take corrective steps (¶¶24-39). As a consequence, Mr. Spitzer and these upper echelon appointees on his staff and, in particular, Mr. Rifkin, who, as his Deputy Attorney General for State Counsel, oversees the Litigation Bureau handling this proceeding (¶24), are self-interested in ensuring that there is no independent evaluation of "the interests of the state" herein pursuant to Executive Law §63.1. Any such evaluation would reveal their nonfeasance and misfeasance in the prior cases, the subject of Petitioner's September 14, 1995, December 16, 1997, and March 26, 1999 ethics complaints (¶¶29-30; ¶35, 49-50)[18]. This self-interest is additionally shared by Ms. Olson (¶23) by reason of her direct participation in the Law Department's defense fraud in the earliest of the three cases (¶21) and her personal and professional relationships with those responsible for the defense fraud in the subsequent two cases (¶22). Likewise, it afflicts other subordinate staff at the Attorney General's office, dependent on Mr. Spitzer and his complicitous high-ranking appointees for job security and promotions. These fact-specific, document-supported allegations of Petitioner's Affidavit (¶¶10-53), as well as the further fact-specific allegation that a disqualifying personal and professional relationship exists between Mr. Spitzer and Respondent's Chairman, Henry Berger (¶51), for which Petitioner also offered documentary support[19], are entirely suppressed by the Reply-Opposition, as if such allegations are non-existent.

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[18] Copies of the September 14, 1995 and December 16, 1997 ethics complaints are contained in "File Folder I: Rifkin Docs" (*See* Docs. #1 and #9). A copy of the March 26, 1999 ethics complaint is annexed as Exhibit "E" to Petitioner's moving Affidavit.

[19] *See* Exhibit "C" to the March 26, 1999 ethics complaint [Exhibit "E" to Petitioner's moving Affidavit].

Likewise suppressed are ¶¶54-120 of Petitioner's Affidavit, substantiated by Petitioner's Memorandum of Law, detailing "the actuality, and not just the appearance" of the Attorney General's disqualifying conflict of interest (¶56), *to wit*, his wilful failure and refusal to perform his duty under Executive Law §63.1 to evaluate "the interests of the state" in this proceeding and the Law Department's litigation misconduct, replicating the *modus operandi* chronicled and complained of in "*Restraining 'Liars'*".

This wholesale obliteration of the content of Petitioner's 55-page Affidavit is to conceal that its material allegations are not only undenied, but that, as a matter of law, any opposition to Petitioner's showing of the Attorney General's conflict of interest disqualification would be legally insufficient without answering affidavits from those persons whose disqualifying conflicts of interest and misconduct were particularized therein. Indeed, answering affidavits were absolutely required from Mr. Spitzer, Mr. Rifkin, Ms. Hirshman, and Ms. Olson, as well as the supervisory personnel dependent on Mr. Spitzer and Executive personnel for their jobs, among them: James Henley, who heads the Litigation Bureau, June Duffy, his Deputy, and Charles Sanders, who heads "Section "D" handling this case. The Reply-Opposition presents no excuse for the failure of these persons to have provided affidavits and, plainly, they were all within Mr. Spitzer's control and readily available to him. Likewise available was Respondent's Chairman, Mr. Berger, who was in a position to attest to the nature of his relationship with Mr. Spitzer, in addition to attesting to the large range of factual and legal issues delineated at pages 23-32 of Petitioner's Memorandum supporting her dismissal motion.

Furthermore, the Reply-Opposition not only obliterates from its five-sentence presentation ALL the material allegations of Petitioner's 55-page Affidavit, but affirmatively misrepresents the cases presented by Petitioner on the disqualification issue as "cases in state and federal courts against the judges of the Appellate Division, Second Department who suspended" the law license of Petitioner's mother (at p. 2). Such description does *not* encompass the prior Article 78 proceeding against Respondent, brought by Petitioner's mother, which is the *first* case Petitioner's omnibus motion presented (at ¶¶12(a), 15) – much as it was the FIRST of the three cases chronicled in "*Restraining 'Liars'*"[20].

The Reply-Opposition's knowing failure to identify the prior Article 78 proceeding against Respondent as being among Petitioner's proffered cases, whose number the Reply-Opposition nowhere even identifies, is essential to its spurious argument that "petitioner was not a party to her mother's lawsuit and, thus, has "no standing to asserts (sic) any claims about the manner in which it was defended." (at p. 3). This sentence transforms the three cases brought by Petitioner's mother into an unidentified single "lawsuit". Further, the Attorney General cannot claim that Petitioner lacks "standing" as to the prior Article 78 proceeding against Respondent, where he is simultaneously trying to establish "privity" between Petitioner herein and her mother, the Petitioner in the prior Article 78 proceeding, as he does for purposes of his bogus *res*

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[20] As highlighted in Petitioner's moving Affidavit (¶15), the Attorney General's defense fraud in that prior proceeding and failure to take corrective steps, upon notice, directly resulted in Respondent's continued corruption leading to this proceeding – and are embraced by ¶¶ELEVENTH through FIFTEENTH of the Verified Petition.

judicata/collateral estoppel defense in Point II of his dismissal motion – reasserted by his Reply-Opposition (at pp. 11-12).

This "standing" objection is another deceit upon the Court by the Attorney General, shown from his failure to cite *any* legal authority showing its applicability. Had his Reply-Opposition identified that the three cases presented by Petitioner are not for purpose of obtaining any adjudication therein – which is the only context in which "standing" would have relevance – the laughable inapplicability of such objection would be clear. Petitioner's motion makes obvious that the cases presented are for purpose of establishing evidentiarily the Attorney General's disqualifying self-interest in this proceeding, resulting from his involvement in those cases, integrally part of Petitioner's subject October 6, 1998 and February 3, 1999 judicial misconduct complaints.

In sum, the Reply-Opposition presents *no* evidence – nor even a claim – of the Attorney General's compliance with "the interests of the state" requirement of Executive Law §63.1 – the sole legal authority he proffers for his representation of Respondent. Likewise, it presents *no* evidence – nor even denies or disputes -- Petitioner's fact-specific, fully-documented showing of multiple conflicts of interest by the Attorney General and his staff and its actualization in the Law Department's flagrant litigation misconduct herein, including its wilful and deliberate failure to evaluate "the interests of the state". Consequently, *as a matter of law*, the Attorney General's disqualification is mandated based on his non-compliance with Executive Law §63.1, and disqualifying conflicts of interest.

The Attorney General's "Point B" Opposition To Petitioner's Omnibus Motion Seeking Vacatur Relief Is Non-Probative, Fraudulent, And Sanctionable

The Attorney General's three-page response (at pp. 4-7) to that branch of Petitioner's omnibus motion as seeks vacatur of Justice Lebedeff's post-default extension of time to Respondent does not deny or dispute *any* of the facts or legal authority set forth in Petitioner's moving Affidavit (at ¶¶104-113) and Memorandum of Law (at pp. 96-99) showing that such extension was granted by Justice Lebedeff *after* she had recused herself and *without* adhering to the provisions of CPLR §7804(e) or the specific requirements of CPLR §3012(d), which Respondent did *not* satisfy. These are, therefore, deemed conceded, as there is no issue raised as to such undisputed facts.

Indeed, the Reply-Opposition nowhere presents any legal authority for what Justice Lebedeff did, never even mentioning CPLR §7804(e), the statutory provision Petitioner invoked, or even CPLR §3012(d), the statutory provision under which Respondent obtained the extension from Justice Lebedeff. Nor does the Reply-Opposition provide any authority that would permit a recused judge to have done anything with Respondent's extension application but refer it to the judge to be assigned.

On the recusal issue, the Attorney General's failure to provide legal authority is especially egregious, since Petitioner challenged the Attorney General, as well as Respondent, to produce legal authority for the legally unsupported contention – significantly not repeated in the Reply-Opposition – that "Justice Lebedeff had the authority to grant [the] Commission's request for an extension in the same proceeding in

which she determined to recuse herself", which is what Ms. Olson stated in her May 25th letter to the Court[21]. As first pointed out in Petitioner's responding May 28th letter[22], Respondent is "charged with upholding standards of judicial ethics and, presumably, could have provided it... – were such authority to actually exist." Plainly, Respondent has special expertise in dealing with recusal questions, as reflected by its own decisions on the subject. Indeed, one such decisions seems particularly relevant, *Matter of James H. Reedy*, where Respondent held that a judge, having recused himself, "should have had no contact with the case" (1985 Annual Report, p. 215). *See also*, 46 Am Jur. 2d §86

> "Once a judge concludes there are grounds for recusal, he must completely disassociate himself from participating in the case."

Absent legal authority for Justice Lebedeff's actions, the Reply-Opposition contends (at pp. 4-6) that at issue is an "order" by her, which cannot be vacated by a judge of coordinate jurisdiction, but only by appeal. Such argument is frivolous.

Firstly, Justice Lebedeff made no "order". Pursuant to CPLR §2219(a), an order is required to be "in writing", Siegel, New York Practice, (1999, p. 404) §250. For that reason, Petitioner's Notice of Motion does not seek annulment and vacatur of any "order". Nor is any "order" referred to elsewhere in Petitioner's omnibus motion.

Secondly, pursuant to CPLR §2221, referred to in *Powell v. All City Insurance Company*, 74 A.D.2d 942 (3rd Dept. 1980), cited in the Reply-Opposition (at p. 5), a motion to vacate or modify an order "shall be made, on notice, to the judge who

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21 Ms. Olson's May 25, 1999 letter is Exhibit "M" to Petitioner's moving Affidavit (*see* p. 2).

22 Petitioner's May 28, 1999 letter is Exhibit "N" to her moving Affidavit (*see* p. 2).

signed the order, *unless he is for any reason unable to hear it*" (CPLR §2221(a), emphasis added). Since the Reply-Opposition nowhere claims that the recused Justice Lebedeff is able "to hear" the motion to declare a nullity and vacate the post-default extension of time she granted to Respondent, it is properly made to this Court.[23] Clearly, bringing the motion to Justice Lebedeff would be inconsistent with *Matter of Reedy, supra.*

According to the commentary to CPLR §2221, it is the movant who makes the initial determination as to whether the original judge is able to hear the motion (Siegel, McKinney's Consolidated Laws of New York, Book 7B (1992 ed., p. 179). Directly in point is *Friends of Keuka Lake, Inc. v. DeMay*, 615 NYS2d 203 (A.D. 4th Dept. 1994), where the movant brought a motion to vacate before a justice other than the one who signed the order, because such justice had recused himself subsequent to signing the order. The Appellate Court upheld the motion as "properly brought before a different justice" and affirmed vacatur as within the new justice's discretion, "It is well established that a court maintains inherent power to vacate a judgment in the interest of justice [citation omitted] *Ruben v. American & Foreign Ins. Co.*, 185 A.D.2d 63, 67, 592 N.Y.S.2d 167." at 204.

Moreover, according to the commentary, the purpose of §2221(b), which was added after the IAS system went into effect, was to give to the IAS judge, "whenever assigned, [the authority] to stand in the shoes of the original judge for most if not all of

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[23] Pursuant to CPLR §2221(b), "a motion made to other than a proper judge under this rule shall be transferred to the proper judge".

the purposes that CPLR 2221(a) has in mind." (Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, (1992 ed. p. 179), *citing Dalrymple v. Martin Luther King Community Health Center*, 127 A.D. 2d 69, 514 N.Y.S.2d 385 (2d Dept. 1987); *see also, Ministry of Christ Church v. Mallia*, 129 A.D.2d 922, 514 N.Y.S.2d 563 (3d Dept. 1987)). Since this Court is the IAS judge assigned after Justice Lebedeff recused herself, the motion is properly before it for this reason as well. *See also, 12-16 Arden Associates v. Vasquez*, 638 N.Y.S.2d 535 (N.Y.City Civ. Ct. 1995).

The Reply-Opposition argues in the alternative that "even if Justice Lebedeff's order was reviewable in this Court, her constitutional, statutory, and inherent jurisdiction as a Supreme Court justice authorized her to grant the adjournment that respondent requested in the same proceeding that she recused herself." (at p. 6) No specific constitutional or statutory provisions are cited for such proposition. Likewise, no case law is provided for Justice Lebedeff's purported "inherent jurisdiction". Such legal authority would obviously and justifiably confer upon this Court "inherent power" to vacate the non-existent extension "order" granted by an already recused Justice. Inherent power, exercised "in the interest of justice", *Ruben v. American & Foreign Ins. Co.*, *supra*, is over and beyond the Court's statutory power under CPLR §2221(a) and (b).

The Reply-Opposition also seeks to buttress Justice Lebedeff's extension by the unsupported assertion (at p. 5) that "...Justice Lebedeff determined that respondent demonstrated sufficient grounds to support its application for an extension...". This is a

deceit upon the Court. There is *no* evidence that Justice Lebedeff ever determined that Respondent met the standards for its CPLR §3012 application, requiring "a showing of reasonable excuse for delay or default". This is highlighted on the very first page of Petitioner's Memorandum of Law and by her moving Affidavit, whose uncontroverted allegations must be taken as true. Indeed, the transcript of the May 17th appearance before Justice Lebedeff[24] shows she made no inquiry of Ms. Olson as to any "reasonable excuse" for Respondent's default -- a fact highlighted at ¶107(b) of Petitioner's moving Affidavit. Moreover, as recited at ¶¶108-113, to the extent that Justice Lebedeff may have relied on Ms. Olson's Affirmation in support of Respondent's CPLR §3012 application, which Ms. Olson handed to her at the outset of the aforesaid court appearance, she was misled by its false and deceitful claims. That would have been obvious had she afforded Petitioner an opportunity to respond thereto, which she did not do. As further recited in those affidavit paragraphs, had Justice Lebedeff given Petitioner an opportunity to be heard, she would have learned of the extraordinary misconduct of the Attorney General's office, including by those in supervisory positions, making no terms of the extension "just", as CPLR §3012 expressly requires.

As a further basis for sustaining Justice Lebedeff's improperly-granted extension, the Reply-Opposition also argues that "petitioner does not mention, much less demonstrate that she was at all prejudiced by the short extension that Justice Lebedeff

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[24] The May 17th transcript is annexed as Exhibit "K" to Petitioner's moving Affidavit.

granted"[25] (at p. 6) – as if an extension application which had not met the standard for being granted in the first instance could, nonetheless, be confirmed. The Reply-Opposition then falsely describes (at pp. 6-7) two cases so as to make it appear that lack of prejudice has determinative weight. In fact, in *Antonious v. Muhammed*, 188 A.D. 2d 399 (First Dept. 1992), the court found reasonable excuse for the short delay, occasioned by confusion, and, further that "meritorious defenses" had been raised. Similarly, in *Matter of Russo v. Jorling*, 214 A.D.2d 863 (3rd Dept. 1995), the court found reasonable excuse for the modest delay, also occasioned "not from deliberately dilatory behavior, but essentially from a confusing telephone conversation", where, additionally, the late filing was still "more than five days prior to the return date of the CPLR article 78 petition, as required by CPLR 7804(c)". Thus, these cases have no applicability to the case at bar, where, as particularized by Petitioner's uncontroverted moving Affidavit (¶¶104-113), the Attorney General did not set forth any "meritorious defenses" or "reasonable excuse" for his default.

Finally, the Reply-Opposition cites *Crawford v. Perales*, 205 A.D.2d 307 (1st Dept.), for the proposition that "a trial court should not grant relief against a State

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[25] The Reply-Opposition seeks to contrast the "short extension" given to the Attorney General, with the "one month extension that this Court granted petitioner in which to reply" (at p. 6). The Court did not grant Petitioner any extension for purposes of responding to the dismissal motion. The Attorney General's May 24th dismissal motion had no return date – and no response was due until one was inserted, which was not until the June 14th conference. As reflected by the transcript of the June 14th court conference (at pp. 21-26), annexed as Exhibit "O" to Petitioner's moving Affidavit, the month given Petitioner was for filing her threshold motion addressed to the Attorney General's disqualification. It was when the Court decided to direct Petitioner to also respond to the Attorney General's as yet unfiled dismissal motion that it gave her two weeks more for that purpose. As may be seen from Petitioner's extensive and meticulously-documented omnibus motion, the time afforded her by the Court was not excessive.

agency before it has filed an answer, unless the failure to answer is intentional and the administrative body had 'no intention to have the controversy determined on the merits" – purposefully omitting that in that case the court *first* found that "the State Respondent...met its burden of demonstrating *both* an excusable default...and a meritorious defense" (emphasis added). This contrasts with the case at bar, where the State Respondent did not, has not, and cannot, meet that two-fold burden and where, additionally, it wilfully did not answer and, by its litigation fraud and misconduct, has demonstrated "no intention to have the controversy determined on the merits".

Examination of the transcript of the May 17th appearance before Justice Lebedeff shows that she erroneously believed that the extension being requested by the Attorney General was "to answer" -- which Ms. Olson did nothing to correct [p. 13, lns. 10-14] – and that the extension Justice Lebedeff, thereafter, granted was for Respondent "to answer" [p. 15, lns. 24-25].

Nonetheless, Respondent did not "answer", which, pursuant to CPLR §7804(d), would have required a "verified answer", *See also,* CPLR §3020(a). Instead, through its counsel, the Attorney General, it filed a dismissal motion, which it and the Attorney General knew to be based on falsification, distortion, and concealment of *all* the material allegations of the Verified Petition. Such defense fraud demonstrates that the last thing Respondent wanted was for "the controversy [to be] determined on the merits". This, because it and the Attorney General knew it had NO legitimate defense "on the

merits", whether raised by dismissal motion or answer. Indeed, the record is wholly devoid of any evidence that Respondent or the Attorney General have intended this case to be "determined on the merits". Were that their intention, they would not be engaging, even now, in their continuing pattern of defense fraud and misconduct.

The Attorney General's "Point C" Opposition To Petitioner's Omnibus Motion Seeking Sanctions Is Non-Probative, Fraudulent, And Sanctionable

The Attorney General's response to that branch of Petitioner's omnibus motion as seeks sanctions against him, Respondent, and their culpable staff, as well as disciplinary and criminal referral against them, is – like the balance of the Reply-Opposition -- further evidence of their fraudulent and deceitful conduct for which such sanctions and referral were sought. Although this opposition is ostensibly 5-1/4 pages in length (pp. 7-12), the last three pages are less directed to the sanctions issue than to modifying Points I-III of the dismissal motion relative to "capacity to sue", "standing", and *res judicata*/collateral estoppel.

The Attorney General begins his opposition to sanctions with a procedural objection. The Reply-Opposition disingenuously purports that "petitioner has failed to designate her sanctions application in the Notice of Motion", thereby repeating the assertion in its "Preliminary Statement" (at p. 2) that the sanctions application is "not noticed in her notice of motion".

The untruth of this bizarre twice-repeated claim is exposed by the most cursory examination of Petitioner's Notice of Motion, three of whose seven branches of relief relate to the sanctions issue: branches 4, 5, and 6 [*see* pp. 21-22 *supra*].

Thus, the assertion in the Reply-Opposition that Petitioner's sanctions application is not noticed in her Notice of Motion is a knowing deceit upon the Court, as is the irrelevant citation to CPLR §2215 in its "Preliminary Statement" and to *Matter of*

Barquet v. Rojas-Castillo in its argument (at p. 8). CPLR §2215 relates to a cross-motion, which Petitioner's motion was not, and *Matter of Barquet* relates to the necessity that the notice of cross-motion identify the requested relief. Thus, Respondent's technical objection is completely baseless, the sanctions relief having been properly noticed[26].

On the merits of Petitioner's sanctions application, the Reply-Opposition again deceives the Court flagrantly. Without denying or disputing *any* of the scores of record references presented by Petitioner's motion establishing a pervasive and unrestrained pattern of deceitful and frivolous advocacy by the Attorney General – all of which are, therefore, deemed conceded -- the Reply-Opposition nonetheless baldly proclaims:

> "[the Attorney General has] not engaged in any frivolous conduct as defined by 22 NYCRR 130-1.1(a) that would warrant sanctions under 22 NYCRR Part 130-1 or any other sanctions that petitioner seeks". (at p. 8)

This is followed by further blanket assertions:

> "AAG Olson's application for an extension to respond to the petition on behalf of respondent and her May 28 [sic], 1999 letter to this Court requesting a scheduling conference or order is not sanctionable conduct under the aforementioned or any standards" (at p. 9)

and

> "all of the arguments raised in AAG Kennedy's affirmation and in respondent's memorandum in support of its motion to dismiss are meritorious and fully supported by the referenced caselaw." (at p. 9)

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[26] Under 22 NYCRR 130-1.1(d), the Court may impose sanctions "upon the court's own initiative". *See Bruckner v. Jaitor Apts. Co.*, 147 Misc. 2d 796, 797, citing cases.

These bald assertions are the sum total of the Attorney General's opposition to Petitioner's fact-specific, record-referenced sanctions motion. Examination of such motion papers exposes these assertions as brazen deceit.

With no defense to Petitioner's entitlement to sanctions, the Reply-Opposition tries to deflect the Attorney General's unethical advocacy in connection with his dismissal motion's Point I based on a technical objection as to her lack of "capacity to sue". It accuses Petitioner of creating "confusion" as to her status in bringing this proceeding and of wrongfully seeking sanctions against the Attorney General for "allegedly, misinterpret[ing] her status and arguments". In so doing, the Reply-Opposition admits to nothing and, indeed, fails to identify, let alone confront, the indicia of the Attorney General's deliberate deceit as to Petitioner's status. This indicia is set forth in Petitioner's omnibus motion[27]: (1) the Attorney General did not support his false claim that Petitioner was suing on CJA's behalf, and not individually, with any citation to the caption or the allegations of the Verified Petition, except for ¶2, which the dismissal motion's "Statement of the Case" affirmatively misrepresented (at p. 7)[28]; and (2) even where, as in the prior Article 78 proceeding against Respondent, the caption contained no reference whatever to CJA, the Attorney General nonetheless falsely claimed that the petitioner therein was not suing individually, but on CJA's behalf.

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[27] *See* pp. 59-60 of Petitioner's moving Memorandum of Law, opposing the Attorney General's Point I "capacity to sue" defense and pp. 65-66, opposing his Point II *res judicata*/collateral estoppel defense (at pp. 65-66). *See also*, ¶119 of Petitioner's moving Affidavit.

[28] *See* pp. 46-47 of Petitioner's moving Memorandum of Law relative to this affirmative

The Reply-Opposition then pretends that Petitioner's assertions as to her individual status are newly-advanced:

> "petitioner *now* asserts that she is not suing the Commission 'as coordinator of CJS" [sic] or on behalf of the corporation." (at p. 9, emphasis added).

This is yet another flagrant deceit upon the Court, designed to provide the Attorney General with an excuse to modify his Points I and II, which, SOLELY because of his dishonesty and lack of candor, contained no alternate defenses based on Petitioner's individual status.

In fact, Petitioner's status was plainly stated to Ms. Olson a week *before* the May 24th dismissal motion. This is established by ¶85 of Petitioner's moving Affidavit – whose accuracy the Reply-Opposition does not deny or dispute. It recounts Petitioner's response on May 17th upon reading Ms. Olson's Affirmation in support of Respondent's CPLR §3012 extension application:

> "Immediately upon reading the Affirmation, while waiting for the case to be called, I told Ms. Olson it was sanctionable, crossing the courtroom to speak to her for such purpose. I specifically challenged as patently false her Affirmation's claim that I was suing 'on behalf of CJA' and 'on behalf of a corporation', as to which she was contending I lacked capacity to sue, and her reliance on Justice Cahn's fraudulent decision in the prior Article 78 proceeding for a *res judicata*/collateral estoppel defense."

It was in face of such notice that Ms. Olson nonetheless repeated in the Memorandum she signed in support of the Attorney General's dismissal motion, that

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misrepresentation.

Petitioner was suing "on behalf of CJA" and not individually – an *unequivocal* statement, completely disregarding Petitioner's explicit contrary notice, to which she made no reference.

Thereafter, and as set forth at ¶115 of Petitioner's moving Affidavit, Petitioner gave Ms. Olson additional notice of her status. This, at the June 14th court conference at which Petitioner responded to Ms. Olson's reference to her Point I by asserting "this case... is being brought by me in an individual capacity. I am not suing *as* coordinator." This additional notice of Petitioner's status is also concealed by the Reply-Opposition.

It was in face of this clearly-stated, twice repeated notice that Ms. Olson made no attempt to verify the facts from Petitioner as to her status – although Petitioner had already demonstrated to her and other Law Department personnel her eagerness to discuss the case, including by offering to withdraw the proceeding *IF* a legitimate defense were presented to her (¶¶68-99). In the very week following Petitioner's May 17th notice, when Ms. Olson was presumably working on the dismissal motion, Petitioner initiated two telephone calls to her (¶¶88, 90). Petitioner's accompanying Affidavit (¶¶5, 16-17) attests to the fact that Ms. Olson made no request seeking clarification of Petitioner's May 17th statement that she was not suing on CJA's behalf. Nor did Ms. Olson's superiors, to whom Petitioner placed calls three times that week, alerting them to Ms. Olson's misconduct in connection with her May 17th Affirmation and court appearance, ever see fit to return Petitioner's calls so as to learn the details of misconduct that included Ms.

Olson's misrepresentation of Petitioner's status in her Affirmation.

Likewise, after the June 14th court conference, neither Ms. Olson nor anyone else at the Attorney General's office attempted to obtain from Petitioner clarifying information as to her status – although Petitioner's eagerness to discuss the case was reiterated in her several phone messages requesting to speak with Peter Pope, the supposed head of Mr. Spitzer's "public integrity unit", including on the day after the conference, as well as her further phone calls to Mr. Palozzola and, ultimately, with Mr. Nocenti (¶¶100-103).

Consequently, Ms. Olson has only herself – and supervisory personnel at the Attorney General's office – to blame for not sooner acquiring information as to Petitioner's status that she claims (at pp. 9-10) to be learning "now" and "for the first time" [29]. Based on the record herein, it is obvious that the reason neither Ms. Olson nor anyone else at the Attorney General's office ever bothered to inquire of Petitioner as to her status in bringing this proceeding is that they were no more interested in the true facts about it than they were in any other material fact herein. All, as shown, were deliberately falsified, distorted, and concealed in the dismissal motion in a calculated attempt to deceive, delay, and defeat Petitioner's rights. Indeed, there is no evidence that the Attorney General's deceit in connection with his Point I lack of "capacity to sue" argument is attributable to any "confusion" fostered by Petitioner. No affidavit has been submitted attesting to the alleged "confusion". Moreover, the dismissal motion's flagrant misrepresentation of the status of the petitioner in the prior proceeding against Respondent – as to whom there could be no

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[29] *Cf.* In pleading ignorance, a showing is required "that the ignorance is unavoidable and that with diligent effort the fact could not be ascertained." Siegel, §281 New York Practice (1999 ed., p. 442). *See* also, C3212:16, Civil Practice Law and Rules (1999 ed., p. 324).

"confusion" – demonstrates the Attorney General's readiness to falsify and obfuscate even the clearest facts as part of his litigation strategy of winning "at all costs".

As stated by Petitioner's moving Affidavit (¶¶117-118) and the Affidavit of CJA's Director, Doris L. Sassower, annexed thereto, the reference to Petitioner's title "Coordinator of the Center for Judicial Accountability, Inc." in the caption of this proceeding was descriptive only, it being understood that a corporation has to appear by an attorney, which Petitioner was not.

Conspicuously, the Reply-Opposition nowhere refers to Doris Sassower's Affidavit, but, instead references ¶117 of Petitioner's moving Affidavit for an out-of-context quote that "CJA's Director, Doris Sassower, told petitioner that she would 'not authorize this lawsuit' and she 'will not be involved in it". It does this in order to falsely pretend that Petitioner has disregarded Doris Sassower's "directive" by filing suit with CJA's name in its caption[30] -- a knowing deceit, as shown by Doris Sassower's Affidavit, which unambiguously refers to Doris Sassower's approval of this lawsuit:

> "Prior to the filing of this suit, both I and an attorney Board member read the proposed pleading and were satisfied that the proceeding was being filed in an individual capacity, with the words 'Coordinator of the Center for Judicial Accountability, Inc.' being purely descriptive." (at ¶5)

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[30] The Reply-Opposition appears to claim that this disregard is also manifested by Petitioner's use of CJA's address on the Verified Petition and CJA's letterhead for correspondence, without showing how this alters the capacity in which she is suing, as established by the Verified Petition's caption and allegations. It may be noted Petitioner's use of CJA's letterhead in her correspondence with the Court in connection with this litigation is signed "Petitioner *Pro Se*" and not "Coordinator of the Center for Judicial Accountability, Inc." [*See, inter alia*, Petitioner's May 28, 1999 letter and August 17, 1999 letter (Exhibit "N" to Petitioner's moving Affidavit and Exhibit "D" to Petitioner's Reply Affidavit, respectively)].

This approval was precisely because the lawsuit comported with her "directive" -- issued 2-1/2 weeks before this proceeding was commenced – that the proposed lawsuit not be brought by CJA or by Petitioner on CJA's behalf, which it was not.

Since the Reply-Opposition does not deny or dispute the facts set forth by Petitioner's moving Affidavit, corroborated by Doris Sassower's Affidavit, as to Petitioner's individual status in commencing this proceeding and, additionally, does not deny or dispute the legal authority presented by Petitioner's Memorandum of Law (at pp. 60-61) that, in the absence of prejudice to a substantial right of a party – "not even alleged, let alone proven" *Great Eastern Mall v. Condon*, 36 NY2d 544, 549 (1975)-- the descriptive title can be disregarded (CPLR §2001[31]; *Gianunzio v. Kelly*, 90 App. Div. 2d 623 (1982, 3rd Dept.) or, if objectionable, stricken as surplusage (*In re Kandler*, 18 Misc. 2d 109, 187 N.Y.S.2d 702 (Sup. Ct. Queens Co. 1959), it is sanctionable for the Reply-Opposition to persist in maintaining that the proceeding be dismissed "because it was commenced by a non-attorney pro se petitioner on behalf of a corporation in violation of CPLR §321" (at p. 10).

In raising the technical objection of Petitioner's capacity to sue as an

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[31] CPLR §2001: "At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded."

See also, CPLR §3026: "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."

individual, "the People's lawyer" shamelessly asserts Petitioner "cannot maintain this lawsuit *pro bono publico*". This contrasts with his Point I argument, citing Judiciary Law §478 for the proposition that "because [Petitioner] is not a lawyer, she can not maintain this proceeding pro bono publico *on behalf of anyone other than herself*". Petitioner's Memorandum of Law had expressly noted (at p. 60) that "The Attorney General does not contend that Petitioner cannot maintain this proceeding *pro bono publico*." The Attorney General now advances that very contention – but without any legal authority, including Judiciary Law §478, which, by its express language, is inapplicable. Absent legal authority, the Reply-Opposition's newly-advanced argument is not only mildly sanctionable, but requires the sharpest rebuke. As the record herein shows, Petitioner's civic-minded prosecution of this case, at great effort and expense to her personally, is because the State Attorney General is so totally compromised by personal and professional self-interest that he has jettisoned his duty as "the People's Lawyer" to himself bring the case or intervene on Petitioner's behalf (*See* ¶¶55, 120 of Petitioner's moving Affidavit).

Likewise, it is sanctionable for the Reply-Opposition to contend that Petitioner lacks standing to sue as an individual for judicial misconduct complaints she filed as CJA's coordinator. In the prior Article 78 proceeding against Respondent – which the Attorney General relies on for his *res judicata*/collateral estoppel defense -- no such objection was raised to Doris Sassower's standing to sue individually, notwithstanding six of the nine complaints challenged were not signed by her individually, but as Director of the Center for Judicial Accountability, Inc. or as Director of its

predecessor, the Ninth Judicial Committee[32]. The Attorney General must, therefore, be estopped from inconsistently asserting this technical objection, while simultaneously, seeking to take advantage of the prior Article 78 proceeding for purposes of his *res judicata*/collateral estoppel defense.

As attested to at ¶4 of Doris Sassower's Affidavit, Petitioner relied on the prior Article 78 proceeding as a guide in bringing this proceeding individually. Bringing this proceeding individually on CJA's complaints also accorded with Respondent's policy – known to Petitioner -- of recognizing only the individual signator of a complaint and not the organization filing it. Thus – and as reflected in the exchange of correspondence appended to the Verified Petition as part of Exhibit "G"[33] – when Petitioner, as CJA's coordinator, sent a December 15, 1994 letter to Respondent's Clerk, Albert Lawrence, seeking information about Respondent's purported dismissal of CJA's September 19, 1994 and October 26, 1994 judicial misconduct complaints, which had been signed by Doris Sassower as CJA's Director, Mr. Lawrence responded with a January 13, 1995 letter, addressed to Petitioner individually, declining to provide it on the ground that Petitioner was not the signator of the complaints.

Respondent's policy was, likewise, borne out in its handling of the October 6, 1998 judicial misconduct complaint (Exhibit "C" to the Verified Petition).

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[32] *See* Exhibit "D" (10/24/91 complaint); Exhibit "E" (1/2/92 complaint); Exhibit "G" (9/19/94 complaint); Exhibit "H" (10/5/94 complaint); Exhibit "I" (10/26/94 complaint); Exhibit "J" (12/5/94 complaint).

[33] *See* footnote 1 of Exhibit "G" to the Verified Petition and attachments referred to therein.

Notwithstanding the complaint was on CJA's letterhead and signed by Petitioner as CJA's coordinator, Mr. Lawrence's December 23, 1998 letter advising of Respondent's purported dismissal of the complaint was addressed to her individually (Exhibit "F-3" to the Verified Petition). Even after Petitioner's December 29, 1998 letter pointed out that she had filed the complaint in her capacity as CJA's coordinator (Exhibit "F-4" to the Verified Petition), Mr. Lawrence persisted in addressing her personally in his responding January 25, 1999 letter (Exhibit "F-5")[34].

It must be emphasized that other than the prior Article 78 proceeding against Respondent and Petitioner's first-hand experience of Respondent's policy, reflected by both her past and recent correspondence with Respondent's clerk, Petitioner had no other guide for bringing this proceeding. This, because Respondent wrongfully refused to provide Petitioner with information as to "any and all procedures for review", hiding behind its spurious invocation of the confidentiality of Judiciary Law §45. The record shows Petitioner's repeated requests for such information – including *after* this proceeding was commenced[35]. In such oppressive fashion, Respondent has purposefully deprived Petitioner of essential guidance as to the manner of review, let alone its technicalities. Consequently, for the Court to entertain the Attorney General's defense based on such technicalities would be to reward Respondent for the very abusive, unconstitutional, and unlawful conduct, intended to thwart the legitimate review sought

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[34] As pointed out by Petitioner's Memorandum of Law (at p. 31), it is Mr. Lawrence, Respondent's Clerk, and not Mr. Stern, its Administrator, who attends Respondent's meetings and, therefore, signs its letters purporting to dismiss complaints, etc.

by this proceeding. It is a fundamental equitable principle that one should not be permitted to profit from his own wrong.

However, as to this newly-asserted defense that Petitioner, suing individually, lacks standing to sue on CJA's complaints – refuted by Respondent's document-established past policy regarding its handling of complaints and demonstrated by Mr. Lawrence's aforesaid two letters concerning the October 6, 1998 complaint – such defense is founded on the false assertion in the Reply-Opposition that "CJA's Director does not authorize this lawsuit based upon CJA's complaints to the Commission" (at p. 11). The Attorney General's guilty knowledge that this assertion is false may be seen from his failure to refer to Doris Sassower's Affidavit in his Reply-Opposition, including its ¶5, hereinabove quoted.

A second Affidavit from Doris Sassower accompanies this Reply to reinforce what is obvious in her first Affidavit, *to wit*, that although CJA was unwilling to itself commence this lawsuit or authorize Petitioner to bring it on CJA's behalf, it conferred upon Petitioner rights relative to the October 6, 1998 and February 3, 1999 judicial misconduct complaints, each of which Petitioner had written and signed. *Cf.* Siegel, §115, New York Practice, (1999 ed., p. 197), "[T]he assignee of a corporation may sue in person, citing, *Kamp v. In Sportswear Inc.*, 39 A.D.2d 869, 332 N.Y.S.2d 983 (1st Dept 1972), rev'g on dissenting opinion below, 70 Misc2d 898, 335 N.Y.S.2d 306 (App. Term 1972).

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[35] *See*, Petitioner's May 17, 1999 letter, annexed as Exhibit "L" to her moving Affidavit.

This second Doris Sassower Affidavit also states an alternative should the Court entertain the Attorney General's newly-raised technical objection of Petitioner's standing, notwithstanding: (1) it completely disregards Doris Sassower's originally-submitted Affidavit that CJA was knowledgeable of and made no objection to this individually-filed lawsuit; (2) it is inconsistent with the Attorney General's own reliance on the prior Article 78 proceeding for purposes of *res judicata*/collateral estoppel, as well as with Respondent's own practice of recognizing the complaint as belonging to its signator, and not his organizational affiliation, and; (3) it rewards Respondent for its refusal to provide reasonably-requested information concerning review procedures. In such circumstances, on notice of such intention by the Court, CJA would be willing to join as a party to this proceeding so as to preserve its rights relating to the October 6, 1998 and February 3, 1999 complaints that it sought to confer on Petitioner. However, Petitioner and the public interest she represents have a right to expect this Court to declare that *basic* information relative to review procedures MUST be provided by Respondent, just as any agency, as a matter of constitutional due process and equal protection rights.

Finally, the Attorney General's frivolous, bad-faith invocation of a "standing" defense in his Reply-Opposition, as likewise in his dismissal motion, is manifest upon reading the commentary on the subject of standing in Siegel, New York Practice, §136 (1999 ed., pp. 223-5). Such commentary quotes and discusses *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6 (1975), a case cited in the Attorney General's dismissal motion (at p. 25), *without* interpretive discussion. According to the

commentary:

> "Although a question of 'standing' is not common in New York, its infrequent appearance is likely to be where administrative action is involved. A good example is *Dairylea Cooperative, Inc. v. Walkley*... The court said that '[o]nly where there is a clear legislative intent negating review... or lack of injury in fact will standing be denied.' The test today is a liberal one, according to *Dairylea*, and the right to challenge administrative action, articulated under the 'standing' caption, is an expanding one.
> ... With the taxpayer suit having been expressly adopted in New York, and with the Court of Appeals having acknowledged that in general 'standing' is to be measured generously, the occasion for closing the court's doors to a plaintiff by finding that his interest is not even sufficient to let him address the merits, which is what a 'standing' dismissal means, should be infrequent. Ordinarily only the most officious interloper should be ousted for want of standing."

As to the Reply-Opposition's misleading claim (at p. 11) that Petitioner's request for sanctions in connection with the Attorney General's *res judicata*/collateral estoppel defense is "because she is suing as an 'individual,' and not as the Coordinator of CJA" (at p. 11), this is a gross deceit upon the Court as to the principal basis for Petitioner's request for sanctions relating to the Attorney General's *res judicata*/collateral estoppel defense in Point II of his moving Memorandum. Such may be seen by Petitioner's opposition to that Point in her Memorandum (at pp. 62-67), wherein she identifies "several wilful and deliberate material misrepresentations", the first of which she expressly identifies as follows:

> "None is more egregious... and so dispositively vitiates a defense founded on *res judicata* and collateral estoppel, than the Attorney General's characterization that Petitioner's allegations concerning the 'false' and 'fraudulent' nature of Justice Cahn's decision dismissing the prior Article 78 proceeding is a 'conclusory claim. (at p. 13)."

The Reply-Opposition does not deny or dispute Petitioner's showing (at pp. 62-65) that there is nothing "conclusory" as to her assertion of the fraudulence of Justice Cahn's decision and that it is "supported by the 'detail' required by CPLR §3015(b)". Nor does it deny or dispute the complete accuracy of that detail or that it vitiates any *res judicata*/collateral estoppel defense. Under such circumstances, and where, in addition, none of Petitioner's other meritorious arguments in her opposition to Point II are denied or disputed by the Reply-Opposition, it is frivolous for the Attorney General to try to foist his specious *res judicata*/collateral estoppel on the Court.

Indeed, it may be noted that neither in his Point II nor Reply-Opposition does the Attorney General distinguish that Justice Cahn's decision was not a summary judgment dismissal under §3211(c), but dismissal under §3211(a)(7) – failure to state a cause of action. Such ground does not "carry the full res judicata impact of a summary judgment disposition unless the court invokes CPLR §3211(c) and specifically treats it as such." Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, C3211:23. Justice Cahn's dismissal decision, explicitly granting Respondent's motion pursuant to CPLR §§3211(a)(7) and 7804(f), was not a summary judgment disposition in Respondent's favor. This would have required "adequate notice to the parties pursuant to CPLR §3211(c); *Four Seasons Hotels, Ltd. v. Vinnik* (1987, 1st Dept), 515 NYS2d 1, as well as identification in the order of such summary judgment treatment, Siegel, New York Practice (1999), §270 (at pp. 429-30); Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, C3211:44, 46. There was no such notice and the

decision nowhere refers to summary judgment or CPLR §3211(c).

As pointed out in Petitioner's moving Memorandum of Law (at p. 64-65), the Attorney General, apart from making conclusory assertions about Justice Cahn's decision, nowhere analyses it. Careful analysis of the decision is required, in order to establish "identity of issues" – which is the "second" inquiry in determining the applicability of collateral estoppel *after* "the first inquiry", *to wit*, "whether it is being used only against one who has already had a day in court", Siegel, New York Practice, §462 (1999 ed., p. 742):

> "Caselaw suggests with good reason that in the final analysis collateral estoppel is sui generis, that its 'crowning consideration' is fairness, that rigidity has no place in its application, and that 'all the circumstances of the prior action must be examined to determine whether the estoppel is to be allowed.'" *Id*, p. 743.

Aside from Justice Cahn's bogus claim as to the constitutionality of 22 NYCRR §7000.3, *as written*, Justice Cahn NEVER determined Petitioner's challenge to the unconstitutionality of §7000.3, *as applied*, as represented by Respondent's summary dismissals, *without* findings of facial insufficiency, of the nine complaints annexed to the Verified Petition in the prior proceeding. This may be seen from the fact that Justice Cahn's dismissal decision *falsified* the challenge to pretend that "petitioner contends that the Commission wrongfully *determined* that her particular complaints lack facial merit and declined to take further action thereon" (emphasis added). It is this false contention, NEVER made by the prior Petitioner, that Justice Cahn held to be "not before the court" – while *not* ruling on the prior Petitioner's ACTUAL *as applied* challenge, resting on the

lack of any determination. Needless to say, the Attorney General's dismissal motion, likewise, falsifies the prior Petitioner's *as applied* challenge – a fact pointed out in Petitioner's moving Memorandum (at pp. 42-43, 85-86). Furthermore, where, as here, there is a complete lack of clarity as to the basis for Justice Cahn's determination that the issue is "not before the court" – no factual specificity or legal authority therefor appearing in his decision – there can, for that additional reason, be no "identity of issues" to sustain collateral estoppel. *Id*, pp. 473-4.

The Attorney General's attempt to "modif[y]...to a limited extent" his irrelevant "privity" argument based on the fact that Petitioner herein, like the Petitioner in the prior proceeding, each brought their suits against Respondent as "separate individuals" – rather than, as his Memorandum supporting dismissal had pretended, each "as and on behalf of CJA", is sanctionable. Not only is it irrelevant in the face of Petitioner's uncontroverted showing that Justice Cahn's decision is a fraud, but the Reply-Opposition neither claims, let alone demonstrates, that the lawyer-Petitioner in the prior Article 78 proceeding was controlled by the non-lawyer Petitioner in this proceeding. Moreover, the Reply-Opposition's objection to the issues raised by Petitioner herein relative to the eight complaints against powerful, politically-connected judges, involved in the prior Petitioner's challenge ignores the fact that, as hereinabove stated, those issues: (a) were NOT addressed by Justice Cahn's decision; (b) are for purposes of establishing Respondent's pattern and practice of protectionism (¶FIFTY-FOURTH); and (c) are quite independent of Petitioner's right to challenge Respondent's purported dismissal of her

October 6, 1998 facially-meritorious judicial misconduct complaint, *without* any finding of facial insufficiency, as likewise, her right to challenge to Respondent's failure to acknowledge or determine her facially-meritorious February 3, 1999 judicial misconduct complaint. This, in addition to her other plainly non-identical Claims for Relief, as detailed in her moving Memorandum of Law (at pp. 66-67).

As to the Reply-Opposition's mischaracterization of Petitioner's "standing" as having been based on the eventual consequence of Respondent's investigation of her facially-meritorious October 6, 1998 judicial misconduct complaint against Justice Rosenblatt (as well as against his fellow Appellate Division, Second Department justices – unidentified here, as in the Attorney General's dismissal motion), examination of Petitioner's Memorandum of Law (at pp. 77-79) shows that was not the basis for her "standing" argument. Indeed, her assertion as to the eventual consequence of Respondent's investigation was part of her lengthy response to the Attorney General's unfounded contention that investigation of the complaint would have conferred "no direct benefit to petitioner because it results in neither monetary nor injunctive relief for the complainant".

Finally, the Reply-Opposition falsely makes it appear (at p. 12) that Petitioner is seeking sanctions "because the Attorney General has raised defenses of justiciability, standing, and failure to state a claim upon which relief can be granted in Points II and IV of respondent's memorandum". The most cursory examination of pages 68-95 of Petitioner's Memorandum, which the Reply-Opposition cites, without

discussion, shows that Petitioner did not seek sanctions merely because of defenses asserted in Points III and IV of the dismissal motion. Rather, it was because those defenses were predicated on "a pattern of wilful and deliberate misrepresentation, distortion, and concealment of the allegations of the Verified Petition" (at pp. 68, 81). The Reply-Opposition does not deny or dispute any of Petitioner's innumerable record references in pages 68-95, establishing, *prima facie*, the deceptive advocacy on which the Attorney General founded the Point III and IV defenses. Nor does it address a single one of Petitioner's arguments therein. Consequently, its unsupported, boiler-plate assertion (at p. 12) that "each of these defenses are meritorious in law and fact, and are supported by a reasonable argument based upon existing caselaw" is not only insufficient as a matter of law, but a brazen deceit upon the Court.

Similarly, the bald assertion that "the petition should be dismissed in its entirety" based on "all the reasons set forth in Respondent's Memorandum, and for the reasons set forth in the July 13, 1995 decision in Sassower v. Commission on Judicial Conduct" (at pp. 12-13) – when the Reply-Opposition has not denied or disputed the showing in Petitioner's omnibus motion that "the reasons" therein are founded on fraudulent claims – is to further deceive the Court.

Moreover, it is long settled law that a motion to dismiss an entire complaint consisting of several causes of action is denied, if at least one of the causes of action is sufficient", *Advance Music Corp. v. American Tobacco Co.*, 296 NY 79 (NY Ct of Appeals 1946).

The Attorney-General's Conclusion Is A Misrepresentation To The Court

The Attorney General asserts that "respondent's cross-motion should be granted". Respondent made no "cross-motion". This misrepresentation of the dismissal motion, repeating the same misrespresentation in the "Conclusion" of the Memorandum supporting the Attorney General's dismissal motion, as likewise in Mr. Kennedy's "Wherefore" paragraph of his supporting affirmation therein, reflects the carelessness with the truth pervading the Attorney General's entire submission on the motions before the Court.

Petitioner's Conclusion

Respect for the rule of law and fundament ethical precepts mandates denial of Respondent's dismissal motion and the granting of Petitioner's omnibus motion by a fair and impartial tribunal, uncompromised by self-interest and political considerations.

Respectfully submitted,

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