CITY COURT OF THE CITY OF WHITE PLAINS
STATE OF NEW YORK: COUNTY OF WESTCHESTER

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JOHN McFADDEN,

Petitioner (Overtenant),

Index #SP1502/07

Respondent's Affidavit in Opposition to Petitioner's Cross-Motion & in Further Support of Respondent's Motion Underlying her Order to Show Cause

-against-

ELENA SASSOWER,

Respondent (Subtenant)
16 Lake Street – Apt. 2C
White Plains, New York

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the respondent *pro se*, whose home of twenty years is the subject of this proceeding. I am fully familiar with all the facts, papers, and proceedings heretofore had herein.

2. This affidavit is submitted in opposition to the November 15, 2007 cross-motion of Leonard A. Sclafani, Esq., attorney for petitioner John McFadden, and in further support of my motion underlying my order to show cause, signed by Judge Hansbury on November 9, 2007.

3. In view of the proceedings on the November 16, 2007 return date of my order to show cause, wherein Judge Friia vacated the Court's notice of a November 20, 2007 trial herein, only limited comment on the threshold stay-of-trial relief sought by my order to show cause is necessary. Suffice to say, Mr. Sclafani's affirmation in support of his cross-motion omits the salient fact that I had moved by order to show cause – and did so to stay the November 20, 2007

trial. Such stay-of-trial relief was, therefore, entirely unopposed by him. Consequently, in advance of the November 16, 2007 return date, Mr. Sclafani could and should have apprised the Court that he was not opposed to the requested stay. Especially was this appropriate if he himself was intending to cross-move for reargument of Judge Hansbury's October 11, 2007 decision (Exhibit "HH")[1] – as to which I had a right to respond. Plainly, no court could reasonably be expected to decide the serious and substantial relief sought by the motion underlying my order to show cause – as well as Mr. Sclafani's own reargument relief – yet proceed with a November 20, 2007 trial. A letter from him to the Court could have easily obviated the necessity of appearances on November 16, 2007, imposing not only on my time, but the Court's – and on the many lawyers and litigants who were unnecessarily kept waiting for a full half hour as a result. Indeed, on November 16, 2007, Mr. Scalfani himself initially gave good and sufficient reasons for the Court's postponement of the November 20, 2007 trial date, only to do a 180-degree flip-flop when Judge Friia apprised him that the Court's calendar did not permit an alternate trial date earlier than January.[2]

4. Mr. Sclafani's concealment of my order to show cause and its stay-of-trial relief is illustrative of the material omission, deceit, and outright fraud that permeate his 16-page affirmation. This is now the third time that Mr. Sclafani has submitted an affirmation "under penalty of perjury", without affirming it "to be true".[3] Such affirmation – like his August 23,

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[1] My moving affidavit in support of my order to show cause annexes Exhibits GG, HH, and II. This affidavit annexes Exhibits JJ, KK, and LL.

[2] No court stenographer took down the November 16, 2007 proceedings. It was, however, taped – a copy of which I have requested.

[3] See ¶8 of my September 5, 2007 affidavit in support of my cross-motion and ¶7 of my September 11, 2007 reply affidavit. The referred to legal authority, as set forth in footnote 3 of my September 5, 2007 affidavit, is as follows:

2007 affirmation in support of his motion for default/dismissal and his September 5, 2007 affirmation in opposition to my September 5, 2007 cross-motion and in further support of his default/dismissal motion – is false over and again, and knowingly so – as hereinafter shown.

5. Needless to say, Judge Hansbury's wilful failure to take "appropriate action"[4] in the face of my overwhelming showing of Mr. Sclafani's flagrant fraud and deceit by his two prior affirmations has emboldened Mr. Sclafani to repeat his performance now a third time.

6. As stated by me on November 16, 2007, Mr. Sclafani's cross-motion warrants imposition of maximum costs and sanctions pursuant to 22 NYCRR §130-1.1 *et seq.* – which I herein request. This is additional to the maximum costs and sanctions sought by the fourth branch of my September 5, 2007 cross-motion, denied, *without reasons*, by Judge Hansbury's October 11, 2007 decision. Such *without-reasons* denial also encompassed my cross-motion's fifth branch: to refer Mr. Scalfani and his co-conspiring client, the petitioner John McFadden, to disciplinary and criminal authorities pursuant to this Court's mandatory responsibilities under

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> "CPLR §2106: 'The statement of an attorney...when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.' (underlining added).
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> According to McKinney's Consolidated Laws of New York Annotated, 7B, p. 817 (1997), Commentary by Vincent C. Alexander. 'While attorneys always have a professional duty to state the truth in papers, the affirmation under this rule gives attorneys adequate warning of prosecution for perjury for a false statement'.
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> 'Those who make affidavits are held to a strict accountability for the truth and accuracy of their contents.', 2 Carmody-Wait 2d §4:12, citing *In re Portnow*, 253 A.D. 395 (2nd Dept. 1938)."

[4] §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct:

> "(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility *shall* take appropriate action." (underlining added)

See discussion at ¶¶188-189 of my September 5, 2007 cross-motion affidavit, including footnote 26.

§100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.[5]

7. As further stated by me on November 16, 2007, the only trial warranted herein is as to the amount of compensatory and punitive damages due me on my Counterclaims – since, as *a matter of law*, I am entitled to the granting of the second and third branches of my September 5, 2007 cross-motion: dismissal of the Petition and summary judgment on those Counterclaims.

8. For the convenience of the Court, a Table of Contents follows:

TABLE OF CONTENTS

[5] My analysis of Judge Hansbury's *without reasons* denial of these two branches is set forth at ¶¶42-47 of my moving affidavit in support of my order to show cause.

* * *

APPLICABLE LEGAL STANDARDS REINFORCE MY ENTITLEMENT TO THE GRANTING OF MY MOTION & MANDATING DENIAL OF MR. SCLAFANI'S CROSS-MOTION, *AS A MATTER OF LAW*

9. The fundamental adjudicative standard applicable to my instant motion is the same as governed adjudication of my September 5, 2007 cross-motion. That standard, prominently set forth by my two affidavits in support of my cross-motion and quoted by my affidavit in support of my order to show cause [hereinafter "OSC affidavit"], is as follows:

> "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)."
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> "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).
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> "It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause...and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause." II John Henry Wigmore, Evidence §278 at 133 (1979).

10. As hereinafter shown, Mr. Sclafani's affirmation is based, throughout, on material omission, deceit, and fraud[6]. Such reinforces my entitlement to the relief sought by my motion and mandates denial of Mr. Sclafani's cross-motion, *as a matter of law*.

MR. SCLAFANI'S CROSS-MOTION FOR REARGUMENT IS BASED ON A MYRIAD OF PERJURIES AND DECEITS AND MUST BE DENIED, *AS A MATTER OF LAW*

11. Mr. Sclafani's deceit as to his cross-motion for reargument of Judge Hansbury's October 11, 2007 decision begins with his ¶2, purporting that his cross-motion is

> "for re-argument of petitioner's motion for summary judgment and the October 11, 2007 Decision and Order that denied it." (underlining added).

This is a flagrant lie. Mr. Sclafani's August 23, 2007 motion, made on Mr. McFadden's behalf, did not seek "summary judgment". Moreover, and as evident from the final section of Mr. Sclafani's affirmation (¶¶42-48) pertaining to consolidation, the "summary judgment" to which his ¶2 refers is NOT in this proceeding, as would otherwise be reasonably assumed, but in Mr. McFadden's still open 18-year old proceeding against me and my mother under #651/89 – which, together with the Co-Op's still open 19-year old proceedings against Mr. McFadden and myself under #434/88 and #500/88, form the basis of my First Affirmative Defense.

12. The factual and legal spuriousness of Mr. Sclafani's attempt to have the Court go outside this proceeding to grant summary judgment for Mr. McFadden in his dormant #651/89 proceeding, which Mr. Sclafani previously attempted not by his August 23, 2007 default/dismissal motion, but by his September 5, 2007 opposition/reply affirmation to my cross-

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[6] The definition of "fraud" from New York's Disciplinary Rules of the Code of Professional Responsibility appears at ¶187 of my September 5, 2007 cross-motion affidavit by its footnote 25. Such definition is consistent with that in Black's Law Dictionary (7th edition, 1999):

> "1. a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usu. A tort, but in some cases (esp. when the conduct is willful) it may be a crime...."

motion for dismissal/summary judgment in this proceeding, was particularized by ¶¶60-78 of my own September 11, 2007 reply affidavit. Needless to say, Mr. Sclafani's instant affirmation addresses NONE of the facts, law, or legal argument which I there presented – or the distillation thereof at ¶¶26-28 of my OSC affidavit pertaining to my entitlement, upon the granting of reargument, to dismissal of Mr. McFadden's petition based on my First Affirmative Defense.

13. Tellingly, the section of Mr. Sclafani's affirmation entitled "Petitioner's Motion for Re-Argument" (¶¶5-19) contain NO mention of Mr. McFadden's supposed "motion for summary judgment and the October 11, 2007 decision and order that denied it". Indeed, such section restricts itself to what Mr. Sclafani's ¶5 describes as the:

> "two branches of the motion of petitioner that were decided by the October 11, 2007 Decision and Order; to wit, petitioner's motion for a default judgment and petitioner's motion for dismissal of respondent's various 'affirmative defenses' and 'counterclaims' pursuant to CPLR §3211."

14. Yet, the denied default judgment is <u>not</u> actually part of the reargument Mr. Sclafani seeks. This is clear from Mr. Sclafani's ¶¶6-19, with his ¶19 making it explicit. Indeed, Mr. Sclafani wholly conceals that his August 23, 2007 motion had sought a default judgment on <u>two grounds</u>[7], <u>not one</u> – and, as to the one he identifies, my alleged "failure to timely answer[] the petition" (¶6), he <u>falsely</u> represents that the Court's denial thereof was "consistent" with his having withdrawn it. That this alleged "consisten[cy]" is yet another <u>flagrant lie</u> – because the true facts reinforce Judge Hansbury's demonstrated actual bias, is established by ¶¶56-58 of my OSC affidavit, quoting Judge Hansbury's own words in denying a default based on my supposed untimeliness.

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[7] The unmentioned ground is my supposed default in paying court-ordered use and occupancy for June and July 2007 – as to which Mr. Sclafani continued to mislead the Court in the days prior to Judge Hansbury's October 11, 2007 decision. He did this by sending the Court a copy of his bogus October 5, 2007 letter to me (Exhibit JJ-1). I challenged him, by my October 8, 2007 letter (Exhibit JJ-2) – to which I received no response.

15. As for Mr. Sclafani's reargument of the denial of that branch of his August 23, 2007 motion as sought dismissal of my Affirmative Defenses and Counterclaims – the subject of his ¶¶7-19 – such is based on a myriad of perjuries and deceits, all arising from his failure to identify, let alone confront, ANY of the facts, law, and legal argument presented by my OSC affidavit. This includes my ¶¶56-65 appearing under the title heading "The Decision's Grounds for Denying Mr. Sclafani's Motion Conceal its Demonstrated Perjuriousness & Condones its Flagrant Legal Baselessness", which began:

> "The decision denies Mr. Sclafani's default/dismissal motion in two paragraphs that completely cover-up the egregiousness of his motion, chronicled by my moving and reply affidavits. Thus, whereas my cross-motion affidavit had demonstrated that Mr. Sclafani's motion was based on knowingly false and deceitful factual claims, over and beyond its being unsupported by legal authority and any affidavit from Mr. McFadden, the decision adopts my legal arguments – without so-acknowledging – yet ignores the demonstrated fraudulence of the motion's factual claims…" (¶56)

and similarly closed:

> "…nearly 60 pages of my cross-motion affidavit detailed the perjury and deceit of virtually each and every sentence of Mr. Sclafani's default/dismissal motion – as likewise of the material allegations of Mr. McFadden's Verified Petition, which Mr. Sclafani had additionally signed. I made a similar showing as to the fraudulence of Mr. Sclafani's opposing/reply affirmation – and Mr. McFadden's skimpy five-paragraph affidavit it appended – noting that such not only reinforced my entitlement to all the relief I had sought on my cross-motion, but
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> > '…to the extent the Court might have been charitably inclined to limit discharge of its mandatory 'Disciplinary Responsibilities' against Mr. Sclafani and Mr. McFadden by imposition of sanctions and costs under 22 NYCRR §130-1.1 *et seq.*, there should now be no doubt that referral to the Westchester County District Attorney is in order for their perjuries, as likewise referral of Mr. Sclafani to the appropriate grievance committee.' (¶3)
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> 65. This particularized showing of fraud by the petitioner and his attorney – spanning a total of nearly 100 pages – is all completely covered-up by the decision, thereby endorsing such flagrantly violative conduct by them, both past and prospective." (¶¶64-65).

16. Because Judge Hansbury predicated his denial of Mr. Sclafani's August 23, 2007 dismissal motion on its legal insufficiency, completely ignoring the perjury and fraud I had documented, Mr. Sclafani bases his reargument on its legal sufficiency, purporting that Judge Hansbury "misunderstood" and "overlooked" such fact. In so doing, he likewise ignores my showing of perjury and fraud by him and his client and embarks on a new set of perjuries in support of his legal sufficiency claim.

A. Mr. Sclafani purports to having "personal knowledge of the facts regarding several of [my] 'affirmative defenses' and 'counterclaims'"(¶8) and "personal knowledge of facts necessary for the Court to have dismissed [my] affirmative defenses and counterclaims" (¶11). This is false.

Of my TEN Affirmative Defenses, Mr. Sclafani has personal knowledge only as to the second ("*Petitioner's Receipt of Use and Occupancy*"). Mr. Sclafani's ¶12 cites only this Second Affirmative Defense, falsely introducing it with the phrase "for example". Moreover, as to this Second Affirmative Defense, Mr. Sclafani's personal knowledge does NOT support his motion to dismiss it, for which he seeks reargument. This he conceals by the careful phrasing in his ¶12: "petitioner's counsel did have personal knowledge of the facts relevant to respondent's claim" – hiding that this "relev[ance]" proves, rather than disproves, my claim's factual basis. Thus, in purporting that it was he who "actually returned" to me the checks for June and July 2007 use and occupancy, Mr. Sclafani concedes the falsity of the Verified Petition's ¶14 that "no part" had been "received" by Mr. McFadden. Such falsity is the gravamen of my Second Affirmative Defense, along with the Petition's omission of any allegation that my purportedly not-received checks had been returned to me. As I have asserted, time and again, they were not.

Of my FOUR Counterclaims, Mr. Scalfani cites no "example" of his personal knowledge. This, notwithstanding he does have a degree of personal knowledge as to the Verified Petition, which he signed with Mr. McFadden – and which is the subject of my Fourth Counterclaim ("*Ensuring the Integrity of the Judicial Process*"). Yet here, too, his personal knowledge as to the Petition's ¶14 does NOT support his motion to dismiss such Counterclaim, for which he seeks reargument.

Mr. Sclafani then further deceives as to his personal knowledge by his ¶13:

> "to the extent that there were any allegations of fact in petitioner's counsel's affirmation about which counsel had no personal knowledge, petitioner also submitted the affidavit of petitioner, himself, who did have personal knowledge of those facts." (underlining added for emphasis).

As he well knows, "the extent" of his testimonial incapacity with respect to my Affirmative Defenses and Counterclaims is nearly total.

B. Mr. Sclafani conceals (¶¶8, 13, 14, 19) the pertinent facts pertaining to Mr. McFadden's affidavit:

(i) it was NOT part of his August 23, 2007 dismissal motion, but submitted only after my September 5, 2007 cross-motion had identified and shown that Mr. Sclafani's motion was legally insufficient because of the absence of any affidavit from Mr. McFadden attesting to the facts of which he – not Mr. Sclafani – had personal knowledge;

(ii) it was a pitiful five-sentences long, failed to attest that Mr. McFadden had read my cross-motion or even my Answer, and failed to come forward with critical information, including as to the purported basis of this proceeding: the supposed "oral agreement" of a month-to-month tenancy, alleged by ¶8 of his Petition and denied by my Answer's ¶SECOND, with substantiating

proof presented by ¶¶150-163 of my cross-motion in support of summary judgment[8];

(iii) its endorsement and adoption of Mr. Sclafani's August 23, 2007 moving affirmation, put Mr. McFadden's imprimatur to Mr. Sclafani's perjury therein, already exposed by my 63-page September 5, 2007 affidavit supporting my cross-motion, with its endorsement and adoption of Mr. Sclafani's comparably perjurious accompanying opposing/reply affirmation thereafter exposed by my 35-page September 11, 2007 reply affidavit.

C. Mr. Sclafani purports (¶8) that "petitioner's verified petition" also supported the dismissal motion. This is false. Mr. McFadden's skimpy Verified Petition, whose material allegations were vague and conclusory, was insufficient, *as a matter of law*, to support dismissal of my particularized and documented "VERIFIED ANSWER with Affirmative Defenses & Counterclaims", which denied those allegations. This was so-demonstrated and reinforced by my September 5, 2007 cross-motion – including its ¶¶149-184, appearing under the section heading "My Entitlement to Summary Judgment", establishing the perjuriousness of the Petition's material allegations and my entitlement to dismissal/summary judgment based on my Answer, Affirmative Defenses, and Counterclaims.

D. Mr. Sclafani purports (¶8) that "other admissible documentary evidence" also supported his dismissal motion. This is false. His "other evidentiary proof", specified at ¶¶15-16, is either irrelevant, insufficient, or substantiates my denials of material allegations of the

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[8] Indeed, Mr. Sclafani's instant affirmation concludes by repeating (at ¶48) that this case proceeds on a "different basis than the prior cases in that the agreements underlying respondent's right to remain in occupancy of the subject premises were different in the two cases." – by which he means the "oral agreement" creating a supposed month-to-month tenancy. As such, he reinforces what ¶163 of my cross-motion affidavit stated:

> "A finding that there was no 'oral agreement' suffices for dismissal of the Petition based thereon, in view of Mr. Sclafani's repeated insistence, above-quoted, that such is the basis of this proceeding."

Verified Petitions and my Affirmative Defenses and Counterclaims.

- Mr. Sclafani's first item: "affidavits and other proofs of service of the notice of petition and petition on respondent in this matter", annexed to his dismissal motion, is wholly irrelevant, as my Affirmative Defenses did not contest service;

- Mr. Sclafani's second item: "correspondence from petitioner's counsel to respondent evidencing the return to respondent of her rent checks for the period following the expiration date of her tenancy…", annexed to his dismissal motion, corroborates my denial of the Verified Petition's ¶14 and my Second Affirmative Defense [as ¶¶31-33 of my OSC affidavit itself highlights];

- Mr. Sclafani's third item: "the opinions, and the Decisions and Orders…in the [federal] case of *Sassower v. Field et al*", annexed to his dismissal motion, corroborate my Fifth Affirmative Defense and my Sixth Affirmative Defense, and even my First Counterclaim [see ¶¶89-90, 123-131 of my cross-motion and the substantiating proof it annexed];

- Mr. Sclafani's fourth item: "true copies of his stock and lease for his apartment", annexed to his September 5, 2007 opposition/reply affidavit, substantiate my denial of the Verified Petition's ¶8 of "an oral agreement" creating a month-to-month tenancy [see fn. 5, at p. 13 of my September 11, 2007 reply affidavit];

- Mr. Sclafani's fifth item: "a Decision of this Court in the case of McFadden v. Sassower, Index #651/89 pursuant to which this Court held in abeyance a determination of a motion for summary judgment that petitioner had made in that case pending the outcome of the above cited federal litigation", substantiates my Seventh Affirmative Defense [see ¶¶76-78 of my September 11, 2007 reply affidavit].

E. Mr. Scalfani also claims that my "own averments" support his dismissal motion (¶8) and that "the facts necessary for the Court to have adjudicated petitioner's motion on its merits were admitted by [me] and/or were not in dispute" (¶18). This is false – and Mr. Sclafani conspicuously specifies none of my so-called "averments" or "admi[ssions]" supporting his dismissal motion. As for the single "example" he does provide, "that branch of petitioner's motion as sought dismissal of respondent's defense of 'equitable estoppel' on the ground that the facts as respondent alleged them to be failed to support the defense as a matter of law." (¶18), he is presumably referring to my Fifth Affirmative Defense ("*Equitable Estoppel and Unjust*

Enrichment"). Mr. Sclafani's deceit in moving to dismiss this affirmative defense was particularized by ¶¶79-92 of my September 5, 2007 cross-motion – the accuracy of which was not denied or disputed by Mr. Sclafani's September 5, 2007 opposing/reply affidavit (see ¶¶64-65 thereof).

F. Mr. Sclafani also claims that "applicable law" and "cited legal authorities" (¶¶8, 17) support his dismissal motion. However, as demonstrated by my cross-motion, his relatively few "cited legal authorities" were INAPPLICABLE to the material pleaded allegations of my ten Affirmative Defenses, for which reason, the allegations were flagrantly falsified and omitted by his dismissal motion.

17. Consequently, Mr. Sclafani's cross-motion for reargument must be denied, *as a matter of law*.

MR. SCLAFANI OMITS – AND THEREFOR DOES NOT OPPOSE -- CRITICAL RELIEF SOUGHT BY MY MOTION

18. Mr. Sclafani's opposition to my motion, which he continually refers to as my "application", is not to its entirety, but to select portions. Thus, his ¶4 states that his affirmation is submitted:

> "in opposition to respondent's application for an order disqualifying Judge Brian Hansbury on the grounds of alleged bias and for 're-argument and renewal' of the October 11, 2007 Decision and Order insofar as it denied respondent's cross-motion for dismissal of the petition on various grounds."

19. Apart from omitting my requested stay-of-trial relief, Mr. Sclafani omits my requested relief if Judge Hansbury's disqualification[9] is denied:

> "disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, by him or such other judge as is determining this motion, of any

[9] Nor does Mr. Sclafani accurately recite my asserted grounds for Judge Hansbury's disqualification, *to wit*, for "demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14 based on his October 11, 2007 decision & order"

facts bearing upon their impartiality"

Also omitted is my "other relief as may be just and proper", which I had specified to include,

> "transfer of this proceeding to another court to ensure the appearance and actuality of impartial justice."

20. These are additionally omitted from the balance of Mr. Sclafani's affirmation and, specifically, his ¶¶20-23, entitled "Respondent's Motion to Disqualify Judge Hansbury" and his "WHEREFORE" clause (pp. 16-17). They are, therefore, unopposed.

21. Further, and contrary to the inference of Mr. Sclafani's ¶4, my motion's reargument and renewal branch is NOT limited to Judge Hansbury's October 11, 2007 decision denying my "cross-motion for dismissal of the petition on various grounds". Rather, I seek, without limitation:

> "reargument and renewal of the October 11, 2007 decision & order and vacatur based thereon."

22. As only the second branch of my six-branch September 5, 2007 cross-motion was for "dismissal of the petition on various grounds", Mr. Sclafani's ¶4 also does not oppose reargument and renewal of Judge Hansbury's denial of my cross-motion's five other branches:

- my cross-motion's first branch, *to wit*, referral to the New York State Department of Housing and Community Renewal of the Verified Petition's disputed ¶13 – entitlement to which was demonstrated at ¶¶48-54 of my OSC affidavit;

- my cross-motion's third branch, *to wit*, summary judgment pursuant to CPLR §3211(c)" – entitlement to which was demonstrated at ¶¶13-41 of my OSC affidavit;

- my cross-motion's fourth branch, *to wit*, maximum costs and sanctions against him and Mr. McFadden, pursuant to 22 NYCRR §130-1.1 *et seq.*, entitlement to which was demonstrated at ¶¶42-47 of my OSC affidavit;

- my cross-motion's fifth branch, *to wit*, referral of Mr. Sclafani to the appropriate Grievance Committee, with referral of both him and Mr. McFadden to the Westchester District Attorney's Office for criminal prosecution for perjury and fraud – entitlement to which was demonstrated at ¶¶42-47 of my OSC affidavit;

- my cross-motion's sixth branch, *to wit*, other and further relief, specified to include "transfer and removal of this proceeding to the Supreme Court for disposition – entitlement to which was highlighted at ¶55 of my OSC affidavit.

23. Nor are these five decisive branches included in the balance of Mr. Sclafani's affirmation and, specifically, his ¶¶24-30 and ¶¶33-41 under his section heading "Respondent's Application for Re-Argument and Renewal". Indeed, Mr. Sclafani's initial ¶24 under that all-encompassing heading begins by repeating, "Respondent purports to seek 're-argument and renewal' of her cross-motion for dismissal of the petition" (underlining added).

24. Even were the legal argument presented by Mr. Sclafani's ¶¶24-30 and ¶¶33-41 to be deemed opposition to the whole of my requested reargument/renewal and not just to the second branch of my September 5, 2007 cross-motion, such would be no opposition, as *a matter of law*, because – as hereinafter shown – Mr. Sclafani's legal argument is worthless.

25. Thus, unopposed by Mr. Sclafani are my requests for disclosure[10] and transfer and for reargument/renewal of Judge Hansbury's October 11, 2007 decision denying five of the six branches of my September 5, 2007 cross-motion.

MR. SCLAFANI DOES NOT DENY OR DISPUTE ANY OF THE FACTS PRESENTED BY MY MOTION AS CONSTITUTING THE BASIS FOR JUDGE HANSBURY'S DISQUALIFICATION, AND HIS OPPOSITION ON LEGAL GROUNDS IS BASED ON MISREPRESENTATION OF BOTH FACT AND LAW

26. Mr. Sclafani's opposition to the first branch of my motion for Judge Hansbury's disqualification is contained in four short paragraphs: his ¶¶20-23 under his section heading

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[10] It is unclear to me precisely what Judge Hansbury's status is. The Court's October 19, 2007 notice of trial (Exhibit GG) identifies only two City Court Judges – Judge Friia and Judge Leak – and, upon my inquiry at the Court's Clerk's Office, I was told that Judge Hansbury is a part-time judge. Based on a preliminary response from the Office of the City Clerk of the City of White Plains (Exhibit "KK-2") to my November 13, 2007 FOIL request (Exhibit KK-1), it appears that although Judge Hansbury's initial appointment was as a part-time judge, the White Plains Common Council appointed him to serve, as a full-time judge, effective April 1, 2007 for the remainder of his part-time term, which expires May 13, 2009.

"Respondent's Motion to Disqualify Judge Hansbury". Such neither identifies, nor confronts, ANY of the facts, law, or legal argument presented either by my 35-page moving OSC affidavit or by my accompanying 6-page memorandum of law – both devoted exclusively to judicial disqualification/disclosure.

27. Instead, Mr. Scalfani engages in utterly dishonest characterization, purporting (at ¶20) that I am seeking Judge Hansbury's disqualification based on:

> "nothing more than respondent's pique, expressed in vitriolic hyperbole, that Judge Hansbury denial (sic) respondent's cross-motion for dismissal of the petition and for relief in this matter."

This is then followed by brief argument, with inapplicable legal citation based thereon[11], fashioned from the pretense that I have alleged that Judge Hansbury's "erred" by his October 11, 2007 decision (¶21) and that such is "erroneous" (¶22).

28. This is false. I have NOT alleged "error" by Judge Hansbury – *to wit*, wrong decision-making that is the result of some good-faith adjudication. Rather, my motion expressly asserts – and demonstrates – that his October 11, 2007 decision is a knowing and deliberate "fraud" by him, wilfully disregarding the most elementary adjudicative standards, set forth in the record before him, and falsifying the facts, which could not have been clearer and more unequivocal, also in the record before him, entitling me to dismissal of the Petition, summary judgment on my Counterclaims, and costs/sanctions against, and disciplinary/criminal referrals

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[11] I was unable to examine the second of Mr. Sclafani's three cited cases, *People v. Byrne*, as his citation of "163 N.Y.S. 680", is apparently incorrect. I have received no response to my November 21, 2007 faxed letter to him, alerting him to that fact (Exhibit LL). Suffice to say – particularly in light of Mr. Sclafani's cited case of *Ortiz v. New York*, 518 N.Y.S. 2d 913 (1987), which, referring to "a lack of State law" interpreting the language of the Chief Administrator's Rules pertaining to disqualification, states that "discussion of Federal decisions is instructive" and goes on to cite U.S. Supreme Court's decisional law – the pertinent decision of the U.S. Supreme Court came nearly seven years later, *Liteky v. United States*, 510 U.S. 540 (1994). It was there that the Supreme Court articulated the "impossibility of fair judgment" standard for judicial disqualification – clearly germane to the pattern of insupportable, fraudulent "judgment" evinced by Judge Hansbury's October 11, 2007 decision.

of, Mr. Sclafani and Mr. McFadden for fraud and deceit. Such bad-faith denial of my entitlement, having NO basis in fact or law and brazenly "protecting" the perjury-committing petitioner and his attorney, is grounds not only for Judge Hansbury's disqualification and reversal of his decision on appeal, but for disciplinary prosecution against him and removal from office – which is why my memorandum of law set forth the pertinent legal citations it did. As stated at page 3 therein:

> "Although recusal on non-statutory grounds is 'within the personal conscience of the court', a judge's denial of a motion to recuse will be reversed where the alleged 'bias or prejudice or unworthy motive' is 'shown to affect the result', *People v. Arthur Brown*, 141 A.D.2d 657 (2nd Dept. 1988), citing *People v. Moreno*, 70 N.Y.2d 403, 405 (1987); *Matter of Rotwein*, 291 N.Y.116, 123 (1943); 32 New York Jurisprudence §44, *Janousek v. Janousek*, 108 A.D.2d 782, 785 (2nd Dept. 1985): 'The only explanation for the imposition of such a drastic remedy...is that...the court became influenced by a personal bias against defendant.'"

29. As demonstrated by my motion, without contest from Mr. Sclafani, my entitlement to dismissal of the Petition, summary judgment on my Counterclaims, and "appropriate action" against Mr. Sclafani and Mr. McFadden for fraud and deceit are matters of law. There is NO "explanation" for Judge Hansbury's denial thereof other than his bias – and Mr. Scalfani has offered none.

MR. SCLAFANI'S OPPOSITION TO MY REARGUMENT/RENEWAL RELIEF IS FALSE AND DECEITFUL

30. Mr. Sclafani's opposition to my reargument/renewal relief is set forth at ¶¶24-41 of his affirmation under a heading "Respondent's Application for Re-hearing and Renewal", containing three subsections – each false and deceitful.

Mr. Sclafani's Subsection "a. Respondent's Motion is Procedurally Defective" (¶¶24-30)

31. Mr. Sclafani's ¶¶24-29 purport that in seeking reargument and renewal of my

"cross-motion for dismissal of the petition", my "application" has two procedural defects, requiring that it be denied.

32. The first alleged procedural defect, according to Mr. Sclafani's ¶¶25-27, is that I have "failed" to "separately identify and support" my request for reargument and renewal, as CPLR §3221(f) requires. This is false. ¶54 of my motion contains the following explicit prefatory language:

> "By way of renewal, on October 23, 2007, the Westchester District Rent Office of the Division of Housing and Community Renewal sent me a notice..." (underlining added).

33. Perhaps it is to overcome this ¶54 pertaining to the first branch of my cross-motion to refer the Petition's disputed ¶13 to the Department of Housing and Community Renewal that Mr. Sclafani's ¶24 confines its opposition to my "cross-motion for dismissal of the petition" – which is my cross-motion's second branch. I made no renewal request with respect to that branch as I had no new facts or intervening new law, as renewal requires.

34. Tellingly, Mr. Sclafani offers no interpretive caselaw that my explicitly identified and supported ¶54 renewal request does not suffice for purposes of satisfying CPLR §3221(f).

35. Nor does Mr. Sclafani claim any confusion created by the balance of my motion as to whether it is for reargument or renewal. It is plainly all reargument as it is "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but...not...any matters of fact not offered on the prior motion" (CPLR §2221(d)(2)). Indeed, Mr. Sclafani concedes as much by his subsection "c. Respondent's application is a Rehash of the Issues raised on Her Cross-Motion", whose ¶¶33-39 assert that I have offered no new facts or intervening change in the law, as renewal requires, but have only reiterated and quoted from my prior papers.

36. The second alleged procedural defect, according to Mr. Sclafani's ¶28, is that my motion purportedly "failed to include a copy of [my] original cross-motion and supporting papers as the law requires." This is also false insofar as what "the law requires".

37. CPLR §2214(c), entitled "Furnishing papers to the court", states:

> "Each party shall furnish to the court all papers served by him. The moving party shall furnish at the hearing all other papers not already in the possession of the court necessary to the consideration of the questions involved. Where such papers are in the possession of an adverse party, they shall be produced by him at the hearing on notice served with the motion papers. Only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct." (underlining added).

The interpretive commentary in McKinney's Consolidated Laws of New York Annotated, C:2214:23 "Furnishing Papers to the Court", by Professor David Siegel, could not be more explicit:

> "If any paper relied on is already in the court's file, it need not be furnished again. In fact, it is often the practice for the clerk to send the whole file up to the judge for the motion. If that's not the local practice, however, it may be a good idea to arrange in advance to have the item removed from the file and included with the moving (or opposing) papers being submitted to the court." (underlining added).

38. At bar, all the papers on which my motion relied were in the Court's file. Indeed, this Court's "local practice", whereby the Court's Clerk provides the file to the judge, was evident on the November 16, 2007 return date of the order to show cause. The voluminous file was physically before Judge Friia, who commented on its volume – stating words to the effect that a wheel barrel would be necessary to haul it away to be reviewed.

39. Mr. Sclafani's cross-motion does not identify any paper not readily-accessible to the Court from its file of this case.

40. Were parties to be required to annex all prior papers, previously filed with the Court, necessary for the Court's adjudication – and to do so notwithstanding such prior papers had been recently submitted and were readily-accessible from the Court's file – would mean that with every motion, the parties would potentially have to replicate the entire file contents. The results would overwhelm the Court and parties with needless paper.

41. Indeed, were such to be required – which it is not – Mr. Sclafani's own August 23, 2007 default/dismissal motion would be procedurally defective for failing to annex my "VERIFIED ANSWER with Affirmative Defenses & Counterclaims". Plainly such document was absolutely "necessary to consideration of the questions involved" on his motion.

42. Finally, as Mr. Sclafani's ¶30 makes evident, he has no defense to my requested reargument/renewal motion "on its merits" – a fact further evident from the deceits upon which he fashions his Subsection c, as demonstrated by ¶¶48-54 herein.

Mr. Sclafani's Subsection "b. The Omission of Respondent's 'Answer and Counterclaims From the Order" (¶¶31-32)

43. Mr. Sclafani's ¶31 purports that since, by my own admission, my "Anser and Counterclaim" (sic) was not an exhibit to my September 5, 2007 cross-motion, "the Court was not obliged to consider it". He provides no legal authority for this proposition – and it is frivolous and deceitful.

44. As the above commentary to CPLR §2214(c) makes clear, I was not required to annex my "VERIFIED ANSWER with Affirmative Defenses & Counterclaims" to my cross-motion, as it was already in the Court's file, readily accessible to Judge Hansbury.

45. Nor could the Court have decided my cross-motion as its October 11, 2007 decision did without the benefit of my "VERIFIED ANSWER with Affirmative Defenses & Counterclaims" – and Mr. Sclafani makes no showing, either factual or legal, as to how Judge

Hansbury could have done so.

46. Also without legal authority, frivolous, and deceitful is Mr. Sclafani's ¶32, claiming:

> "to the extent that the Court did, in fact, consider respondent's Answer and Counterclaims, all that is necessary is for the Court, now, to issue an amended order including respondent's Answer and Counterclaims as one of the documents considered."

47. Mr. Sclafani seemingly implies that the Court can *sua sponte* issue an "amended order" – blithely ignoring a reargument/renewal motion pursuant to CPLR §2221 – a rule entitled "Motion affecting prior order". As stated by my ¶11:

> "upon reargument/renewal, this Court must clarify whether or not it read my 'VERIFIED ANSWER with Affirmative Defenses & Counterclaims' and, if so, include same in its recitation of the 'papers read'..."

Mr. Sclafani's Subsection "c. Respondent's Application is a Rehash of the issues raised on Her Cross-Motion" (¶¶33-41)

48. Mr. Sclafani's ¶33 purports that I have no basis for renewal as I offer no supervening additional facts or change in law. This is false – ignoring that my ¶53 expressly provides "By way of renewal," the supervening additional fact of the October 23, 2007 notice of the Westchester Office of the Division of Housing and Community Renewal Office, germane to Judge Hansbury's October 11, 2007 denial of the first branch of my cross-motion.

49. His ¶¶34-35, 37-38 then purport that I have not met the standard for reargument. This is also false – accomplished by his concealing what that standard for reargument affirmatively is and substituting instead what it is not, which he contends is what I have done. Thus, he purports that I have merely offered "a rehash of the arguments that [I] had previously presented through the cross-motion that the Court denied" (¶34), that I "address claims and issues precisely the same as those that were litigated, and that the Court decided, in the prior motion

practice that the Court determined by its October 11, 2007 Order" (¶38), but that "A motion to re-argue (or to renew) a prior motion may not be utilized to authorize the unsuccessful party to argue again the precise issues previously determined", for which unexceptional proposition he cites two cases (¶37).

50. The standard for reargument, which CPLR §2221(d)(2) itself sets forth, is that it:

> "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

51. This is precisely what my reargument motion does – meticulously demonstrating that Judge Hansbury denied my cross-motion by wilfully and deliberately "overlook[ing] or misapprehend[ing]" the uncontested, documentary facts in the record before him, as likewise black-letter law, also uncontested and in the record before him – all entitling me to the granting of my cross-motion, *as a matter of law*.

52. Mr. Sclafani's concealment of the true nature of my reargument motion – namely, that it presents a line-by-line analysis of Judge Hansbury's October 11, 2007 decision, demonstrating its denial of my September 5, 2007 cross-motion to be factually and legally insupportable, with material deceits as to the grounds for denying Mr. Sclafani's August 23, 2007 default/dismissal motion, permits the further flagrant deceit of his ¶39:

> "Each of respondent's argument were addressed in petitioner's moving papers on his prior motion for dismissal of respondent's various 'affirmative defenses' and 'counterclaims' and in petitioner's opposition to respondent's prior cross-motion for dismissal of the petition."

53. Obviously, Mr. Sclafani's August 23, 2007 dismissal motion and September 5, 2007 opposition to my cross-motion, which his ¶¶40-41 annex and ask the Court to consider "as part of petitioner's opposition to respondent's instant application", do not address ANY aspect of my showing that Judge Hansbury's October 11, 2007 decision cannot be justified by the facts or

law.

54. That Mr. Sclafani blithely places these two prior submissions before the Court – notwithstanding my instant motion highlights how resoundingly my September 5, 2007 cross-motion and my September 11, 2007 reply affidavit had established their fraudulence, from beginning to end – only underscores the pathology of Mr. Sclafani's conduct.

MR. SCLAFANI'S CROSS-MOTION FOR CONSOLIDATION IS BASED ON A MYRIAD OF DECEITS, IS LEGALLY UNSUPPORTED AND INSUPPORTABLE, AND MUST BE DENIED, *AS A MATTER OF LAW*

55. Mr. Sclafani's notice of cross-motion purports to seek "consolidation" – relief he discusses at ¶¶42-48 of his affirmation under the title heading "Consolidation of the Instant Case with other pending Cases between the Parties".

56. This is the only place in Mr. Sclafani's affirmation where he identifies my motion as challenging any specific aspect of Judge Hansbury's October 11, 2007 decision and its basis. Conspicuously, Mr. Sclafani does not deny or dispute the accuracy of my challenge, set forth at ¶¶23-30 of my OSC affidavit in connection with my entitlement to dismissal of Mr. McFadden's petition based on my First Affirmative Defense ("*Open Prior Proceedings*").

57. As examination of my motion's ¶¶23-30 make readily apparent, including the referred-to ¶¶48-58 of my September 5, 2007 cross-motion affidavit and ¶¶54-79 of my September 11, 2007 reply affidavit, Mr. Sclafani's consolidation request is fashioned from a litany of already-demonstrated falsehoods and deceits. Yet, quite apart from these perjuries, Mr. Sclafani's requested consolidation must be denied, *as a matter of law*. Quite simply, there is NO legal authority that would countenance a consolidation motion that fails to identify the specific cases sought to be consolidated and fails to give the parties therein notice so that they might be heard – and Mr. Scalfani cites none.

58. Such consolidation must also be denied because Mr. Sclafani's reason for so-moving is false. As stated by his ¶44, he seeks consolidation only:

> "...to the extent that [the] Court does not determine to abide the request of petitioner in his original motion for the Court separately to adjudicate the pending cases forthwith."

As set forth at ¶11 herein, there is NO such request in the "original motion", made by Mr. Sclafani on Mr. McFadden's behalf. Indeed, it was only after my September 5, 2007 cross-motion affidavit highlighted (at ¶155) the summary judgment posture of Mr. McFadden's case #651/89 against me and my mother, that Mr. Sclafani included in his September 5, 2007 opposing/reply affirmation a request for summary judgment in that case, in his closing paragraphs, ¶¶45-54. Although the deceits of these paragraphs were meticulously chronicled by ¶¶54-79 of my September 11, 2007 reply affidavit – and are so-summarized by ¶¶23-30 of my instant motion – Mr. Sclafani blithely repeats them here.

59. In the interest of judicial economy, I refer the Court to what I particularized at ¶¶64-78 of my September 11, 2007 affidavit rebutting, *inter alia*, Mr. Sclafani's reiterated deceit in ¶¶45-47 of his instant affirmation that "all of the papers" have been submitted with respect to the still-pending judgment motion in #651/89 and that the loss that I and my mother suffered in the federal case settles Mr. McFadden's summary judgment entitlement.

60. Suffice to say that ¶63 of my September 11, 2007 reply affidavit pointed out that Mr. Sclafani had provided NO legal authority as to how to activate long-dormant proceedings, involving additional parties. I stated:

> "surely it cannot be done summarily – let alone by the summary granting of a 14-year old summary judgment motion therein – without a formal motion made under the index number of such proceedings, giving notice to the affected parties. Such affected parties would be my mother, a respondent in open proceeding 651/89, and the Co-Op, the petitioner in open proceedings 434/88 and 500/88."

61. Mr. Sclafani still provides NO legal authority in pressing for the Court to render summary judgment in #651/89, without notice to the parties therein – much as he provides no legal authority for purporting to move for consolidation, without notice to the parties in the to-be-consolidated cases he does not even specify.

* * *

WHEREFORE, the demonstrated perjury, deceit, and fraud that pervades the cross-motion of Leonard A. Sclafani, Esq., on behalf of petitioner John McFadden, mandates that it be denied, with imposition of maximum costs and sanctions against both Mr. Sclafani and Mr. McFadden, pursuant to 22 NYCRR §130-1.1 *et seq*., with referral of Mr. Sclafani to disciplinary authorities for his substantial violations of New York's Disciplinary Rules of the Code of Professional Responsibility (*inter alia*, 22 NYCRR §1200.3(a)(4) and §1200.33(a)(5)) and referral of him and his complicit client to criminal authorities for violation of Penal Law §210.10 and other applicable provisions pertaining to perjury and "deceit or collusion, with intent to deceive the court or any party" (Judiciary Law §487).[12] Such cross-motion does not constitute opposition, *as a matter of law*, to respondent's motion underlying her order to show cause, but, rather, *as a matter of law*, reinforces her showing of entitlement to the relief sought.

Elena Ruth Sassower

ELENA RUTH SASSOWER

Sworn to before me this
26th day of November 2007

Notary Public

LAURA MARJI
Notary Public, State of New York
No. 01MA6049278
Qualified in Westchester County
Commission Expires Oct. 10, 20[illegible]

[12] See ¶¶185-189 of my September 5, 2007 cross-motion affidavit.

TABLE OF EXHIBITS