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

ORDER TO SHOW CAUSE FOR STAY OF TRIAL, Disqualification/ Disclosure, Reargument/ Renewal & Other Relief

-against-

ELENA SASSOWER,

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

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Upon the annexed affidavit of the respondent *pro se* ELENA SASSOWER, duly sworn to on November 8, 2007, the exhibits annexed thereto, her accompanying memorandum of law, and upon all the papers and proceedings heretofore had,

LET petitioner JOHN McFADDEN show cause before this Court at the White Plains City Courthouse at 77 South Lexington Avenue, White Plains, New York 10601, on the 16th day of November, 2007 at 9:30 a.m., or as soon thereafter as the parties or their counsel can be heard, why an order should not be granted staying trial of this proceeding, presently scheduled for November 20, 2007, pending determination of respondent's within motion:

(a) to disqualify Part-Time White Plains City Court Judge Brian Hansbury 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 and to vacate the decision & order by reason thereof, and, if denied, for 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 facts bearing upon their impartiality; and

(b) for reargument and renewal of the October 11, 2007 decision & order pursuant to CPLR §2221 and, upon the granting of same, vacating the decision and order.

(c) granting such other relief as may be just and proper, including transfer of this proceeding to another court to ensure the appearance and actuality of impartial justice.

Alternatively, if all the foregoing relief is denied, for a stay pending determination of respondent's appeal thereof – and of the October 11, 2007 decision & order – to the Appellate Term of the Appellate Division, Second Department.

Answering affidavits, if any, shall be served upon respondent by overnight mail at least three days before the return date hereof.

SUFFICIENT CAUSE APPEARING THEREFOR, let personal service of this order to show cause, together with the papers upon which it is based upon the office of petitioner's counsel, LEONARD SCLAFANI, P.C., 18 East 41st Street, Suite 1500, New York, New York 10017 on or before the 14th day of November 2007, be deemed good and sufficient service.

Dated: White Plains, New York
November 9, 2007

ENTER:

Judge, White Plains City Court

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 Support of Order to Show Cause for Stay of Trial, Disqualification/ Disclosure, Reargument/ Renewal & Other Relief

-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.

2. This affidavit is submitted in support of an order staying the trial, presently scheduled for November 20, 2007 (Exhibit GG)[1], pending determination of this motion:

(a) to disqualify Part-Time White Plains City Court Judge Brian Hansbury for

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[1] This motion continues the previous sequence of exhibits. My Exhibits A-G are annexed to my "VERIFIED ANSWER with Affirmative Defenses & Counterclaims". My Exhibits H-AA are annexed to my Notice of Cross-Motion. My Exhibits BB-FF are annexed to my Affidavit in Reply to Petitioner's Opposition to my Cross-Motion.

demonstrated actual bias and interest based on his October 11, 2007 decision & order (Exhibit HH) and to vacate the decision & order by reason thereof, and, if denied, for disclosure by him or such other judge determining this motion; and

(b) for reargument and renewal of the October 11, 2007 decision & order and vacatur based thereon;

(c) for such other and further relief as may be just and proper, including transfer of this proceeding to another court to ensure the appearance and actuality of impartial justice.

Alternatively, if all the foregoing relief is denied, I seek a stay pending determination of my appeal of such denial – and of the October 11, 2007 decision & order – to the Appellate Term of the Appellate Division, Second Department.

3. No other stay of trial has been previously sought from this or any other Court.

4. As hereinafter demonstrated, absent rank incompetence, no fair and impartial tribunal could have rendered the October 11, 2007 decision & order [hereinafter "decision"], as it flagrantly violates controlling legal and adjudicative standards and falsifies the factual record to deprive me of relief to which I am entitled, *as a matter of law*. That relief, which would have obviated a trial – and which must properly do so upon this motion – is the granting of my cross-motion to dismiss the Petition, for summary judgment on my Counterclaims, and for costs and sanctions against, and disciplinary and criminal referrals of, petitioner, John McFadden, and his attorney, Leonard A. Sclafani, Esq., for fraud and deceit. The decision denies all such dispositive relief without identifying ANY of the facts, law, or legal argument presented by my cross-motion, and without citing ANY

applicable law.

5. As the decision effectively repudiates "the rule of law" and any "judicial process", I believe Judge Hansbury's conduct at trial – as to which my "VERIFIED ANSWER with Affirmative Defenses & Counterclaims" demanded a jury – will be equally contrary to legal and adjudicative standards and evidence, with a result adverse to me. Indeed, based on the decision's concealment of my "Affirmative Defenses & Counterclaims" and failure to make even the most rudimentary determinations with respect thereto, I believe Judge Hansbury will not only deny me a jury trial, but will maneuver to exclude from the trial my "Affirmative Defenses & Counterclaims", as they are decisive of my entitlement to dismissal of the Petition and recovery of substantial compensatory and punitive damages from petitioner.

6. I am unaware as to the basis upon which Judge Hansbury, a part-time judge, was designated to decide my serious and substantial cross-motion and petitioner's motion[2] – and whether that assignment carries over to the whole of this case, including the trial. The Court's notice of the November 20, 2007 trial (Exhibit GG) is not from Judge Hansbury and does not bear his name. Rather, it is a form from the Court's Chief Clerk, whose name is signed by the Clerk of the Landlord/Tenant Part, giving no indication that Judge Hansbury is the judge assigned to this case or that he will be presiding over the trial.

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[2] I also do not know whether Judge Hansbury, in fact, authored the decision. Indeed, telling insight into how this Court operates was provided by Chief Judge Jo Ann Friia, who presided over the proceedings herein on September 6, 2007:

> "This will go, as you know, to our court attorney for review and then the Judge for signature." (Exhibit BB, p. 2, lns. 16-17).

It should be obvious, however, that whichever judge has been assigned and/or calendared for the trial must have sufficient opportunity to make appropriate determinations based on this motion. A November 20, 2007 trial date does not afford that opportunity.

7. It must be noted that at some point, either while my cross-motion for maximum costs and sanctions pursuant to 22 NYCRR §130-1.1 *et seq.* was *sub judice* – or shortly before, when I inquired at the Clerk's Office, including to the Chief Clerk herself, about the notice describing the signature-certification requirement of §130-1.1, posted on the Clerk's Office window[3] – the posted notice was taken down.

8. It must be further noted that neither Judge Hansbury nor this Court's other three judges have made any disclosure of facts, known to them, bearing upon the appearance and actuality of their bias and interest. For purposes of this motion, I now highlight footnote 7 at page 29 of my reply affidavit in support of my cross-motion, wherein I stated:

> "I herein request that the Court make disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of any facts bearing upon its ability to be fair and impartial – or otherwise disqualify itself pursuant to §100.3E thereof and Judiciary Law §14 – so that this important and substantial case is decided on the facts and law."

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

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[3] Reference to the posted notice appears at ¶185 of my moving affidavit in support of my cross-motion, as well as in the "WHEREFORE" clause of my reply affidavit (at p. 35).

TABLE OF CONTENTS

* * *

THE OCTOBER 11, 2007 DECISION MANIFESTS THE COURT'S ACTUAL BIAS REQUIRING VACATUR UPON THE COURT'S DISQUALIFICATION OR UPON THE GRANTING OF REARGUMENT & RENEWAL

10. The paltry October 11, 2007 decision, signed by Judge Hansbury (Exhibit HH) is a single page, prefaced by an initial page listing the "papers…read", followed by a final page stating "THIS DECISION CONSTITUTES THE ORDER OF THE COURT", in capitalized, underlined, and bold-faced type. Notably missing from the CPLR §2219(a) requirement of "papers used on the motion" is my "VERIFIED ANSWER with Affirmative Defenses & Counterclaims". This omission is noteworthy because a copy of such

voluminous document was not annexed to my cross-motion, in contrast to Mr. McFadden's scanty Verified Petition, a copy of which Mr. Sclafani annexed to his default/dismissal motion[4], presumably because such is required in taking a default. Consequently, it is entirely possible that the Court's denial of my cross-motion was without having "read" my "VERIFIED ANSWER with Affirmative Defenses & Counterclaims" and the substantiating exhibits it annexed. Indeed, that possibility is reinforced by the language the decision twice uses in denying the relief sought by my cross-motion pursuant to "CPLR §§3211(a)(1); (2); (4); (5); (10) and 3211(c)" . Thus, it states:

> "The moving papers and documentary exhibits annexed thereto fail to conclusively establish entitlement to the requested relief. Rather, a comprehensive review of the motion papers and exhibits discloses triable issues of fact with respect to the nature and terms of respondent's tenancy." (underlining added).

11. My "VERIFIED ANSWER with Affirmative Defenses & Counterclaims" and their extensive annexed exhibits are not physically part of these cited "papers"– and nowhere else in the decision are they mentioned. Consequently, 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", *Hobart v. Hobart*, 85 N.Y. 637 (1881), *Deutermann v. Pollock*, 36 A.D. 522, 524 (2nd Dept. 1899):

> "A party is entitled to have recited in an order all of the papers which he or his adversary has used upon the motion from which the order results (*Farmers' Nat. Bankv. Underwood, 12 A.D. 269*)..."

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[4] Not annexed was the Notice of Petition – at least not to the copy of the motion that Mr. Sclafani served me.

The Decision's Denial of my Cross-Motion
is Legally & Factually Unsupported & Insupportable

12. The decision disposes of my cross-motion in three paragraphs. Because my second and third branches for dismissal and summary judgment obviate the need for a trial, I will address the decision's denial of those branches first, followed by its denial of my equally decisive – and mandatory – fourth and fifth branches for costs/sanctions and disciplinary/criminal referrals, before addressing the decision's denial of my first branch.

13. **The Second and Third Branches of my Cross-Motion** were for the following relief:

> "(2) Granting a judgment of dismissal to Respondent under CPLR §§3211(a)1, 2, 4, 5 (collateral estoppel), and 10;
>
> (3) Granting summary judgment to Respondent pursuant to CPLR §3211(c)"

The decision transforms these two separate branches into a single branch, stating:

> "That branch of respondent's motion pursuant to CPLR §§3211(a)(1); (2); (4); (5); (10) and 3211(c) is denied. The moving papers and documentary exhibits annexed thereto fail to conclusively establish entitlement to the requested relief. Rather, a comprehensive review of the motion papers and exhibits discloses triable issues of fact with respect to the nature and terms of respondent's tenancy. Further, in view of the issues of fact presented, the Court declines to treat respondent's motion to dismiss as an application for summary judgment (*see generally Bowes v. Healy*, 40 AD3d 566; CPLR §3211[c])."

14. The decision does not specify in what respect my "moving papers and documentary exhibits fail to conclusively establish entitlement to the requested relief". Nor does it identify any conflicting evidence creating "triable issues of fact with respect to the nature and terms of respondent's tenancy". Such claims are nothing less than a fraud by

the Court – especially as they are purported to be based on "comprehensive review of the motion papers and exhibits" (underline added).

15. My reply affidavit provided the Court with a convenient road-map of the record, beginning with my entitlement to summary judgment and dismissal, which it summarized at the outset:

> "4. In the interest of judicial economy – and because there is literally no opposition, *as a matter of law*, to that branch of my cross-motion as seeks summary judgment pursuant to CPLR §3211(c) or, for that matter, to the branch of my cross-motion as seeks dismissal based on my Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Affirmative Defenses pursuant to CPLR §3211(a)1 – each of these defenses being 'founded upon documentary evidence' – I will first address my entitlement to the granting of summary judgment/dismissal – and the legal standards applicable thereto before replying to Mr. Sclafani's affirmation section by section.
>
> 5. Such will demonstrate that the Petition must be thrown out 'on the papers' because, *as a matter of law*, there are no fact issues upon which to waste the Court's time by a trial..." (italics in the original).

16. The applicable evidentiary standards for dismissal and summary judgment motions were then set forth as follows:

> "10. 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). [fn.3].

[fn.3] '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).

11. In *Zuckerman v. City of N.Y*, 49 NY2d 557 (1980), our highest state court articulated the strict requirements on summary judgment motions:

> '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... 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

12. '[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, §39:[120 (2004 ed., p. 254)]. '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

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> '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...' 6B Carmody-Wait 2d, §39:69: (1996 ed., pp. 225-6).

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); *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).

13. '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).

14. Additionally, relevant is *Ellen v. Lauer*, 620 N.Y.S.2d 34 (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, 590 N.Y.S. 831.

15. Moreover, and as set forth by my cross-motion (at ¶4), '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)."

17. My reply affidavit then followed this with two sections, respectively entitled, "My Entitlement to Summary Judgment is *As A Matter of Law*" and "My Entitlement to Dismissal is *As A Matter of Law*":

> **"<u>My Entitlement to Summary Judgment is *As A Matter of Law*</u>**
>
> 16. My cross-motion for summary judgment as to the Petition pursuant to CPLR §3211(c) is set forth at ¶¶149-184 of my affidavit therein. These 36 paragraphs, spanning 11 pages of my affidavit and encompassing the extensive exhibits annexed to my Answer and cross-motion, corroborate the truth of my denials of the Petition's ¶¶6, 7, 8, 9, 10, 11, 13, and 14, showing them to be false:
>
> ¶¶150-163 particularize facts demonstrating the falsity of the Petition's ¶8 as to a supposed 'oral agreement' between Mr. McFadden and myself – with my ¶¶161-162 specifying the minimal information an affidavit from Mr. McFadden would have to contain in substantiation of an 'oral agreement':
> (a) its date;
> (b) whether it was face-to-face or by phone;
> (c) the terms allegedly agreed to, including duration of occupancy, occupancy charges, and persons covered;
> (d) an explanation as to why such "agreement" was oral, rather than written;
>
> ¶¶164-174 particularize facts demonstrating the falsity of the Petition's ¶¶6 and 7 as to a supposed end and termination of the October 30, 1987 contract of sale and occupancy agreement – with my ¶174 identifying that Mr. McFadden had not come forward with any affidavit denying or disputing my ¶TWENTY-THIRD of my Seventh Affirmative Defense, *to wit*,
>
> 'Notwithstanding the federal suit ended in 1993, adverse to respondent, petitioner did not then or thereafter seek her eviction by reason thereof or otherwise clarify the basis of her occupancy, as he readily could have';
>
> ¶¶175-179 particularize facts demonstrating the falsity of the Petition's ¶¶9, 10, and 11 as to a supposed 'rental' whose 'term expired on May 31, 2007';

¶¶180-182 particularize facts demonstrating that the Petition's ¶13 as to the supposed lack of rent regulation with respect to my occupancy of the apartment was disputed;

¶¶180-184 particularize facts demonstrating the falsity of the Petition's ¶14 as to petitioner's supposed non-receipt of any 'part' of 'use and occupancy' since the supposed termination of the term of my 'tenancy'.

17. Mr. Sclafani's opposition/reply affirmation contains a single pertinent paragraph – ¶68 – under a title heading 'Respondent is Not Entitled to Summary Judgment' (at p. 20), whose single sentence states:

'Respondent's papers offer nothing upon which summary judgment could, or should, be granted to her dismissing the petition herein or otherwise.'

18. This bald-faced deceit is immediately apparent from examination of what my 'papers…offer' in support of summary judgment – *to wit*, my cross-motion's ¶¶149-184.

19. As for Mr. McFadden's affidavit, it endorses the truth of Mr. Sclafani's affirmation, incorporating all its statements and allegations, without making any statement as to having read my cross-motion or even my Answer.

20. As established by the above-quoted legal authorities, such affidavit and affirmation do not constitute opposition, *as a matter of law*, but, indeed, by their deceit buttress my entitlement to summary judgment, *as a matter of law*.

My Entitlement to Dismissal is *As A Matter of Law*

21. My cross-motion for dismissal of the Petition based on my Fifth Affirmative Defense (*Equitable Estoppel and Unjust Enrichment*), my Sixth Affirmative Defense (*Detrimental Reliance*), my Seventh Affirmative Defense (*Implied Contract, Detrimental Reliance & Fraud*), my Eighth Affirmative Defense (*Extortion and Malice*), my Ninth Affirmative Defense (*Breach of Covenant of Good Faith & Fair Dealing*), and my Tenth Affirmative Defense (*Fraud; Retaliatory Eviction; & Intentional Infliction of Emotional Distress*)[fn.4] – each pursuant to CPLR §3211(a)1 for defenses

[fn.4] 'These are my six substantive affirmative defenses – and are preceded by four procedural affirmative defenses: (1) *Open Prior Proceedings*; (2) *Petitioner's*

'founded upon documentary evidence' – is set forth at ¶¶79-121 of my moving affidavit therein. Such paragraphs are additionally buttressed by my showing with respect to my First Counterclaim (*Prior Proceedings*), my Second Counterclaim (*Fraud from April 2003 Onward & Extortion*), my Third Counterclaim (*Fraud & Intimidation in June 2006, Retaliatory Eviction*), and my Fourth Counterclaim (*Ensuring the Integrity of the Judicial Process*), set forth at ¶¶122-148 of my cross-motion affidavit. These 69 paragraphs of my affidavit, spanning 23 pages and encompassing the voluminous exhibits annexed to my Answer and cross-motion, not only documentarily establish the truth of my six substantive affirmative defenses and four counterclaims, but that Mr. Sclafani's motion to dismiss them violated fundamental rules pertaining to such motions and was, again and again, an outright fraud on the Court.

22. The totality of Mr. Sclafani's opposition to my requested relief of dismissal of the Petition based on these affirmative defenses and counterclaims consists of two paragraphs – his ¶¶6[4]-65 – under his title heading 'Respondent's 'Fifth', 'Sixth', 'Seventh', 'Eighth', Nine', and 'Tenth' 'Affirmative Defenses' and 'First', 'Second', 'Third', and 'Fourth' 'Counterclaims' Are Meritless'.

¶6[4] purports that my cross-motion

> 'add nothing of substance to the question as to the sufficiency of those defenses and counterclaims but simply rehash the same meritless assertions as respondent raised in her Answer and as petitioner has addressed in his moving papers herein.',

With ¶6[5] thereupon asserting,

> 'For the reasons set forth in petitioner's motion, those 'Affirmative Defenses' and 'Counterclaims' must be dismissed.' (¶6[5]).

23. Once more, these bald-faced deceits are immediately apparent from examination of these 69 paragraphs of my cross-motion: ¶¶79-148, meticulously demonstrating not only the 'merit' of my six substantive affirmative defenses, but the flagrant deceit of Mr. Sclafani's motion in seeking to dismiss them.

24. As for Mr. McFadden's affidavit, it endorses the truth of Mr.

Receipt of Use and Occupancy; (3) *Lack of Subject Matter Jurisdiction*; (4) *Failure to Join Necessary Parties* – as to which my cross-motion seeks dismissal on other CPLR §3211 grounds."

Sclafani's affirmation, without making any statement as to having read either my cross-motion or Answer.

25. As established by the above-quoted legal authorities, such affidavit and affirmation do not constitute opposition, *as a matter of law*, but, indeed, by their deceit buttress my entitlement to the Petition's dismissal pursuant to CPLR §3211(a)1, *as a matter of law*, based on my six affirmative defenses, each 'founded upon documentary evidence'." (italics in the original).

18. "[C]omprehensive review" of the foregoing and the balance of my 35-page reply affidavit and its referred-to record references expose the brazen deceit of decision's completely unsubstantiated claim that there are "triable issues of fact with respect to the nature and terms of [my] tenancy". There are none, *as a matter of law* – and the decision cites NO law in support of factual specificity it does NOT provide.

A. As highlighted by my above-quoted reply affidavit (¶¶16-20), Mr. McFadden failed to come forward with ANY evidence in substantiation of his Petition's bald ¶8 of an "oral agreement" creating a supposed month-to-month tenancy, denied by my Answer. The existence of such purported "oral agreement" was resoundingly rebutted by ¶¶150-163 of my affidavit in support of my cross-motion, without controversion by Mr. McFadden, either by his own affidavit, or by any statements in Mr. Sclafani's opposing affirmation, adopted by him. Adding to this, my reply affidavit pointed out (at p. 13, fn. 5), that documentary evidence that Mr. Sclafani himself annexed to his opposing affirmation, *to wit*, Mr. McFadden's proprietary lease:

> "contains a pertinent provision entitled 'Subletting', from which it is clear that Mr. McFadden could not have lawfully entered into any 'oral agreement' with me subletting the apartment. He was required to give me a lease, with a copy to the Co-Op for approval."

B. Also documentarily refuted is the factual predicate for the alleged "oral agreement": namely, (i) that the October 30, 1987 occupancy agreement supposedly ended and terminated upon the Co-Op's refusal to give its consent to the contract of sale, alleged in the Petition's ¶¶6 and 7; and (ii) that Mr. McFadden (and the Co-Op) supposedly had no money to remove me from the apartment, following the conclusion of the federal lawsuit upon my supposed refusal to vacate, none of which was alleged in the Petition, but, rather, asserted by Mr. Sclafani in open court and his affirmations.

** The evidentiary facts establishing the continued validity of the occupancy agreement and contract of sale were set forth at ¶¶164-174 of my affidavit in support of my cross-motion, without controversion by Mr. Sclafani and Mr. McFadden – and so-highlighted by ¶16-20 of my reply affidavit.

** The evidentiary facts establishing that Mr. McFadden never sought my removal from the apartment following the conclusion of the federal lawsuit, that he and the Co-Op could *readily* have done so, with virtually no expenditure of money, and, that, moreover, he had ample monies available to him (through the Co-Op) from the $102,370 that my mother and I had been forced to pay in sanctions/attorney fee costs to the Co-Op and other defendants in the federal litigation, were set forth at ¶¶158, 54-55, 87(b),(c),(d), 104, 173-174 of my affidavit in support of my cross-motion, without controversion by Mr. Sclafani and Mr. McFadden – and so-highlighted by ¶¶16-20, 76-78 of my

reply affidavit.

Consequently, *as a matter of law*, I was entitled to dismissal of the Petition and, especially, in light of Mr. Sclafani's repeated assertions that the very basis of the Petition is the "oral agreement" creating the month-to-month tenancy – a fact both my moving affidavit (at ¶¶57-58, 67, 72, 77-78, 150, 163) and reply affidavit (¶¶58-59, 85) highlighted

19. As for the Court's admission that "in view of the issues of fact presented", it "decline[d] to treat [my] motion to dismiss as an application for summary judgment" – in other words, that it did NOT adjudicate my entitlement to summary judgment – the decision's single cited case of *Bowes v. Healy*, provides NO legal authority for such proposition. *In Healy*, the Appellate Division, Second Department stated:

> "although the Supreme Court was authorized to treat the motion as one for summary judgment upon "adequate notice to the parties" (CPLR 3211[c]), no such notice was given, and none of the recognized exceptions to the notice requirement are applicable here (*see Mihlovan v Grozavu*, 72 N.Y.2d 506, 531 N.E.2d 288, 534 N.Y.S.2d 656). Neither party made a specific request for summary judgment, and the record does not establish that they deliberately charted a summary judgment course (*see Mihlovan v Grozavu, supra*; *Moutafis v Osborne*, 18 AD3d 723, 795 N.Y.S.2d 716; *Sta-Brite Servs., Inc. v Sutton*, 17 AD3d 570, 794 N.Y.S.2d 70). Moreover, the motion was not one which exclusively involved 'a purely legal question rather than any issues of fact' (*Mihlovan v Grozavu, supra* at 508; *Moutafis v Osborne*, *supra*). Under these circumstances, the Supreme Court erred in treating the defendant's motion as one for summary judgment without providing notice.

20. At bar, I made a "specific request for summary judgment" by a separate branch of my cross-motion – and Mr. Scalfani responded to this deliberately charted course by his opposing affirmation, in which Mr. McFadden concurred, thereby presenting the Court with the "purely legal question" as to whether such opposition was sufficient, *as a*

matter of law, to defeat my right to summary judgment. The answer to that "purely legal question" was demonstrated by my reply affidavit to be NO. Indeed, my reply affidavit helpfully summarized the utterly non-probative and false nature of their opposition, at the outset:

> "7. Mr. Sclafani, once again, affirms (at ¶1) his affirmation 'under penalty of perjury', without affirming it 'to be true'. Such affirmation – like his August 23, 2007 affirmation in support of Mr. McFadden's default/dismissal motion – is false over and again, and knowingly so – as hereinafter shown.
>
> 8. Unlike Mr. McFadden's default/dismissal motion, which was unsupported by any affidavit of Mr. McFadden – and whose deficiency on that ground was highlighted by my cross-motion (at ¶7) – Mr. Sclafani now appends to his opposition/reply a five-sentence affidavit from Mr. McFadden. Such is deficient for any purpose other than to make Mr. McFadden liable for the multitudinous perjuries in Mr. Sclafani's two affirmations. This, because Mr. McFadden attests to having read Mr. Sclafani's two affirmations and to incorporating all of their statements and allegations, but does not attest to having read either my Answer – against which Mr. Sclafani made his affirmation in support of the dismissal motion – or my cross-motion – against which Mr. Sclafani made his opposition/reply affirmation.
>
> 9. The facial deficiencies of Mr. Sclafani's two affirmations – and now Mr. McFadden's affidavit – are all the more stunning when seen against rudimentary legal and adjudicative principles, set forth in the treatises and caselaw[fn], of which Mr. Sclafani, a seasoned practitioner, cannot be ignorant."

21. Because the decision omits any reference to my "Affirmative Defenses & Counterclaims", it conceals that my entitlement to summary judgment was not limited to dismissal of the Petition, as might be inferred. Rather, the unrebutted documentary evidence ALSO entitled me to dismissal based on my six substantive Affirmative Defenses – constituting a complete defense to the Petition, with an award of summary judgment on

my four Counterclaims. Indeed, *as a matter of law*, the only trial to be held is one as to "the amount of compensatory and punitive damages" due me on my Counterclaims [5].

22. As for my four procedural Affirmative Defenses, these also entitled me to dismissal of the Petition, *as a matter of law*. These are my First Affirmative Defense ("*Open Prior Proceeding*"), my Second Affirmative Defense ("*Petitioner's Receipt of Use and Occupancy*"), my Third Affirmative Defense ("*Lack of Subject Matter Jurisdiction*"), and my Fourth Affirmative Defense ("*Failure to Join Necessary Parties*").

23. **As to my First Affirmative Defense ("*Open Prior Proceedings*")**, it was set forth in my Answer as follows:

> "FOURTH: The Petition materially omits that petitioner brought two prior eviction proceedings against respondent in White Plains City Court under index numbers 504/88 and 651/89, the latter of which remains open. The Petition also materially omits that petitioner himself, as well as respondent, are both respondents in prior proceedings against them in White Plains City Court brought by 16 Lake Street Owners, Inc. under index numbers 434/88 and 500/88, the former open as to petitioner, and the latter open as to both petitioner and respondent, wherein 16 Lake Street Owners seeks to terminate petitioner's proprietary lease and evict respondent.
>
> FIFTH: By reason of these open proceedings, petitioner is barred from commencing the instant proceeding and the petition must be dismissed."

24. In responding to Mr. Sclafani's motion to dismiss this First Affirmative Defense, my affidavit in support of my cross-motion (¶¶48-58) and, thereafter, my reply affidavit (¶¶54-79) showed that Mr. Sclafani equivocated as to whether Mr. McFadden's prior proceeding under 651/89 remained open and ignored entirely the Co-Op's prior open proceedings under 434/88 and 500/88. Indeed, ¶50 of my cross-motion affidavit stated that

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[5] See the "WHEREFORE" clause of my reply affidavit.

Mr. Sclafani's failure to deny or dispute that the Co-Op's open proceedings under 434/88 and 500/88 barred Mr. McFadden's instant proceeding made it

> "irrelevant whether Mr. McFadden's prior proceeding against me under index number 651/89 bars his instant proceeding, because the open proceedings under index numbers 434/88 and 500/88, in which we are both respondents, do".

Mr. Sclafani's opposing/reply affirmation did not deny or dispute this – a fact I pointed out at ¶56 of my reply.

25. Nor did Mr. Sclafani's opposing/reply affirmation deny or dispute my cross-motion's showing (¶¶51-55) as to the appropriateness of dismissal based on the Co-Op's open prior proceedings. In pertinent part, my cross-motion's recitation was as follows:

> "51. That Mr. Sclafani falsely claimed to the Court on July 16th that the Co-Op Board had now 'restarted their efforts' to evict me after having years ago 'run out of funds and the ability to proceed' (Exhibit I-1, p. 8. lns. 12-16), makes dismissal based on the Co-Op's prior proceedings all the more compelled so that the true facts of Mr. Sclafani's fraud herein and that of his client may be revealed.
>
> 52. I am completely unaware of any 'restarted...efforts' of the Co-Op Board to evict me. The facts, chronicled by my Answer[fn.11], are to the contrary...
>
> 54. As for Mr. Sclafani's July 16th assertion to the Court that by the time I had lost my federal lawsuit, the Co-Op had 'run out of funds' to evict me, it is the most brazen of lies. Not only was the Co-Op's defense of the federal lawsuit fully paid for by its insurer, State Farm[fn.12], but following

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"[fn.11] See my Ninth Affirmative Defense (¶¶FORTIETH through FORTY-SIXTH") and the pertinent paragraphs of my Tenth Affirmative Defense, particularly ¶¶FIFTIETH)."

"[fn.12] Because the Co-Op and other defendants were fully insured, they ignored and rebuffed the fair and reasonable, good-faith offers made by me, my mother, and lawyers on our behalf to avoid and minimize the federal lawsuit and obviate the completely unnecessary City Court proceedings. Such behavior by them continued after our March 1991 loss of the case at trial, when they rejected and

> the Co-Op's successful motion for attorneys fees and sanctions against myself and my mother, it and other insured defendants refused to reimburse State Farm for the monies that defense counsel had already been paid. State Farm thereafter moved to intervene – as a result of which, in September 1992, the U.S. District Court ordered that the amount of our supersedeas bond, $102,370, be deposited into court (Exhibit P-1). In August 1993, the U.S. District Court found that it had 'no jurisdiction, much less present ability, to decide the conflicting claims to the funds' and ordered that the monies would be retained in court, pending either a separate civil action or some other disposition (Exhibit P-3).
>
> 55. As of this date – 14 years later – the whereabouts of this $102,370 is completely unknown to me and my mother. Nor do we know whether Mr. McFadden had any side deal with the defendants or State Farm with respect to such monies, including for payment of his own attorneys fees in the federal action and City Court, arising from his collusive cooperation with them."

26. My reply affidavit (¶¶60-79) then exposed the deceit of Mr. Sclafani's opposing/reply affirmation, which, while continuing to equivocate as to whether Mr. McFadden's prior proceeding under 651/89 is open, annexed the December 19, 1991 decision therein of former White Plains City Court Judge James Reap and argued that this Court should forthwith grant Mr. McFadden summary judgment based thereon.

27. The decision herein does not confront my First Affirmative Defense based on "Open Prior Proceedings". Rather, it ends by appending a paragraph that, without identifying <u>any</u> connection to either my cross-motion or Mr. Sclafani's motion, states:

> ignored our offers to end further proceedings, *to wit*, our federal appeals, and their City Court proceedings and to vacate the apartment within 60 days. The annexed correspondence is illustrative – beginning with our lawyer's November 23, 1988 letter to Mr. McFadden's lawyer handling the federal action and his lawyer handling the City Court proceedings (Exhibit O-1); our lawyer's December 15, 1988 letter to the Co-Op's lawyer (Exhibit O-2); our lawyer's March 29, 1991 letter to the Co-Op's lawyer and his response (Exhibits O-3 & O-4): and my mother's October 8, 1991 letter to the Co-Op's lawyer (Exhibit O-5), followed by her October 17, 1991 letter to all defense counsel (Exhibit O-6)."

"Last, the Court has reviewed 'Decision on Motion' dated December 19, 1991 under Index No. 651/89 and notes the following: The Hon. James B. Reap is retired. Since the Order 'reserved decision' it does not fall within the ambit of CPLR 9002. Additionally, to the extent a prior action remains pending, the Court is not required to enter an order of dismissal under CPLR 3211 (a) (4). Rather, the Court will consolidate any prior pending action with the instant proceeding to avoid duplicative trials and promote judicial economy (*see Toulouse v. Chander*, 5 Misc.3d [A], FN.9)."

28. Such bizarre, out-of-sequence paragraph not only fails to identify my First Affirmative Defense, but replicates Mr. Sclafani's misconduct in connection therewith:

(a) by failing to affirmatively acknowledge Mr. McFadden's open prior proceeding;

(b) by concealing entirely the Co-Op's prior proceedings, also open; and

(c) by citing Judge Reap's December 19, 1991 decision, notwithstanding such is not the last document "under Index No. 651/89" from which the status of that proceeding would be determined – a fact highlighted by ¶¶155-156 of my affidavit in support of my cross-motion and ¶¶73-75 of my reply affidavit, the latter detailing that the December 19, 1991 decision was the predictable product of a biased court, being materially false and misleading.

29. As for *Toulouse v. Chander*, whose correct citation is 5 Misc. 3d 1005A; 798 N.Y.S.2d, it is NOT authority for this Court's *sua sponte* consolidation of open proceedings it has NOT even identified. In *Toulouse*, the court found that a plaintiff and defendant simultaneously filed actions in a "race to the courthouse" – and the plaintiff there cross-moved for consolidation. Such sharply contrasts to the case at bar, where Mr. McFadden filed his Petition in face of the Co-Op's still-open 18-1/2 year-old proceedings against him and me under 434/88 and 500/88 and his own still-open 18-year-old proceeding against me and my mother under 651/89. Nor was his response to my First Affirmative Defense a motion for consolidation. Rather, his dismissal motion concealed

the Co-Op's prior proceedings and game-played as to the status of his own prior proceeding, as to which the Court has done likewise.

30. CPLR §602 is entitled "Consolidation" and specifies that such is "upon motion". No motion was made by either me or Mr. Sclafani for consolidation, let alone a motion with notice to the parties in the open prior proceedings who are not parties herein – the Co-Op in 434/88 and 500/88 and my mother in 651/89 – each having a right to be heard with respect thereto.[6] It is blackletter law that it is improper for a court to order consolidation *sua sponte* – and such will be reversed on appeal, *AIU Insurance Company, v. ELRAC*, 269 A.D.2d 412 (2nd Dept. 2000); *Lazich v. Vittoria & Parker*, 196 AD2d 526, 530 (2nd Dept. 1993); *Singer v. Singer*, 33 AD2d 1054, 1055 (2nd Dept. 1970). Here, the Court not only acted *sua sponte*, but (i) without even specifying the open proceedings it was purporting to consolidate; (ii) without giving notice to the parties in those proceedings; and (iii) without making the necessary changes to the caption, consistent with consolidation. This, although it is also blackletter law that "Upon consolidation the action takes on one caption and culminates in one judgment which pronounces the rights of all parties (Siegel, NY Prac, §127, p 156)", *Scigaj v. Welding*, 478 N.Y.S.2d 211 (2nd Dept. 1984). As such, the decision's purported "consolidation" is not just legally unauthorized, but sham.

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[6] *Cf.* ¶63 of my reply affidavit which noted that activating "long dormant proceedings, involving additional parties...surely cannot be done summarily...without a formal motion made under the index number of such proceedings, giving notice to the affected parties".

31. **As to my Second Affirmative Defense (*"Petitioner's Receipt of Use and Occupancy"*)**, it was set forth in my Answer as follows:

> "SIXTH: The Petition falsely states (at ¶14) that 'no part' of the use and occupancy for the subject apartment had been "received" by petitioner since 'respondent's tenancy terminated', *to wit*, May 31, 2007. In fact, petitioner 'received' respondent's check for June occupancy under a May 31, 2007 coverletter (Exhibit G-11). This was prior to the June 22, 2007 date the Petition was signed. Additionally, petitioner 'received' respondent's check for the July occupancy under a June 30, 2007 coverletter (Exhibit G-12). This was prior to the July 9, 2007 date the Petition was served.
>
> SEVENTH: By reason thereof and the absence of any allegation in the Petition that such payments were returned to respondent – which they were not (Exhibit G-13) – the instant proceeding must be dismissed." (underlining in the original).

32. There is no issue of fact as to the falsity of the Petition's ¶14 with respect to petitioner's supposed non-receipt of any "part" of the use and occupancy after May 31, 2007. Mr. Sclafani's in-court admission on July 16, 2007 (Exhibit I-1, pp. 16-18) and by his ¶¶11-13, 44-46 of his affirmation in support of his dismissal motion, annexing copies of my received checks for the June and July occupancy (Sclafani's Exhibit C to his motion) are dispositive. This is detailed at ¶¶18-19, 60-64 of my cross-motion, whose concluding statement on the subject was as follows:

> "64. Under such circumstances, and as asserted by ¶SEVENTH of my Answer, the Petition was required to allege that Mr. McFadden had returned to me my payment for 'use and occupancy' that he had received from me after termination of my 'tenancy'. Mr. Sclafani's ¶40 offers no legal authority for the contrary. Based thereon, this proceeding must be dismissed pursuant to CPLR §3211(a)1."

33. Thus, this Second Affirmative Defense presented the Court with a purely legal question", *to wit*, whether the Petition was required to have alleged return of my "use

and occupancy" payment, as to which I was entitled to adjudication.

34. **As to my Third Affirmative Defense ("*Lack of Subject Matter Jurisdiction*")**, it was set forth in my Answer as follows:

> "EIGHTH: The Petition fails to state a cause of action. The October 30, 1987 occupancy agreement (Exhibit A-2), which was pursuant to a contract of sale (Exhibit A-1), expressly states: 'in no way do the parties intend to establish a landlord-tenant relationship'.
>
> NINTH: Consequently, this Court lacks subject matter jurisdiction and the proceeding must be dismissed."

35. My entitlement to dismissal based thereon was set forth at ¶¶65-72 of my cross-motion, whose concluding statement was:

> "72. Consequently, once this Court finds that the Petition's alleged 'oral agreement' of a month-to-month tenancy is a fabrication and that the October 30, 1987 occupancy agreement has been the basis of my continued occupancy (as set forth at ¶¶150-17[4] herein in support of my cross-motion for summary judgment), this proceeding must be dismissed pursuant to CPLR §3211(a)2 based on the language of the October 30, 1987 occupancy agreement that 'in no way do the parties intend to establish a landlord/tenant relationship."

36. Such was not denied or disputed by Mr. Sclafani's opposition papers and my reply affidavit (¶¶80-85) highlighted the state of the record with respect to this Third Affirmative Defense, concluding as follows:

> "85. As hereinabove stated, the legal standards pertaining to dismissal/summary judgment motions required Mr. McFadden to confront the particulars of my ¶¶150-174 by a responsive affidavit, if his proceeding was to survive. He has not done so, nor has Mr. Sclafani done so by an affirmation and any memorandum of law or pertinent citation to legal authorities. As such I am not only entitled to dismissal pursuant to CPLR §3211(a)2 for lack of subject matter jurisdiction, but summary judgment pursuant to CPLR §3211(c)."

37. *As a matter of law*, Mr. McFadden failed to raise any issue of fact with

respect to my dispositive ¶¶150-174, thereby entitling me to dismissal/summary judgment based on this Third Affirmative Defense.

38. **As to my Fourth Affirmative Defense ("*Failure to Join Necessary Parties*")**, it was set forth in my Answer as follows:

> "TENTH: The Petition fails to name respondent's mother, Doris L. Sassower, who was a party to, and signator of, the contract of sale (Exhibit A-1), the occupancy agreement (Exhibit A-2), the sublet agreement (Exhibit B-1), as well as herself an approved occupant (Exhibit B-2). She is 'a necessary party' and was so-recognized by White Plains City Court in the prior City Court proceedings.
>
> ELEVENTH: By reason thereof, this proceeding must be dismissed."

39. My entitlement to dismissal based thereon was set forth at ¶¶73-78 of my cross-motion, whose concluding statement was:

> "78. Consequently, once this Court finds that the Petition's alleged 'oral agreement' of a month-to-month tenancy between myself and Mr. McFadden is a fabrication and that the October 30, 1987 occupancy agreement has been the basis of my continued occupancy (as set forth at ¶¶150-174 herein in support of my cross-motion for summary judgment), this proceeding must be dismissed pursuant to CPLR §3211(a)10 because my mother is a necessary party."

40. Such was not denied or disputed by Mr. Sclafani's opposition papers and my reply affidavit (¶¶86-87) highlighted the state of the record with respect to this Fourth Affirmative Defense, concluding as follows:

> "87. As to [Mr. Sclafani's] claim that my mother was 'not a party to the agreement between petitioner and respondent upon which the petition is based' (¶63) – by which he means the 'oral agreement' creating a month-to-month tenancy – I was also 'not a party' to it, as it is a fiction, established by my uncontested ¶¶150-163, entitling me to summary judgment, *as a matter of law*." (italics in the original).

41. *As a matter of law*, Mr. McFadden failed to raise any issue of fact with respect to my dispositive ¶¶150-163, thereby entitling me to dismissal/summary judgment based on this Fourth Affirmative Defense.

42. **The Fourth and Fifth Branches of my Cross-Motion** were for the following relief:

> "(4) Awarding costs and imposing sanctions in the maximum amount allowed by law against Petitioner JOHN McFADDEN, his counsel, Leonard A. Sclafani, P.C., and Leonard A. Sclafani, Esq., *personally*, pursuant to 22 NYCRR §130-1.1 *et seq.*,
>
> (5) Referring Leonard Sclafani, Esq. to the appropriate Grievance Committee authorities for his knowing and deliberate violation of New York's Disciplinary Rules of the Code of Professional Responsibility, including 22 NYCRR §1200.3 (DR 1-102: 'Misconduct') and §1200.33 (DR 7-102: 'Representing a Client Within the Bounds of the Law'), as well as to the Westchester District Attorney's Office for criminal prosecution under the Penal Law for perjury and under Judiciary Law, §487(1) for 'deceit, with intent to deceive the court', pursuant to this Court's mandatory 'Disciplinary Responsibilities' under the Chief Administrator's Rules Governing Judicial Conduct, 22 NYCRR §100.3D(2)".

43. Here, too, the decision, converts two branches of my cross-motion, into one, stating:

> "That branch of respondent's motion which seeks the imposition of sanctions and a referral to the Disciplinary Committee is denied."

44. The decision gives no reasons for its bald denial – and such cannot remotely be justified, either factually or legally, given my fully-documented showing of fraud and deceit by Mr. Sclafani and Mr. McFadden – spanning from the Verified Petition they each signed. One has only to examine the Table of Contents to my 63-page moving affidavit in support of my cross-motion and my 35-page reply affidavit to see, in an instant, that these

documents are virtually entirely focused on particularizing such misconduct, factually and legally. Indeed, in addition to my factual showing – none of which the decision identifies – my moving affidavit's final section (¶¶185-189) also provided the Court with discussion of the applicable legal and ethical provisions, mandating the granting of requested costs/sanctions and disciplinary/criminal referrals. Mr. Sclafani's concealment of this final section – and his deceit with respect thereto – were then highlighted in the final section of my reply affidavit (¶¶88-90).

45. The Court's wilful failure to make any findings as to the multitudinous perjuries painstakingly chronicled by the nearly 100 pages of my affidavits was with knowledge that doing so would reinforce my entitlement to dismissal/summary judgment under applicable legal principles. I so-stated at the outset of my moving affidavit in support of my cross-motion, citing pertinent authority:

> "3. No court having any respect for the integrity of its judicial proceedings can condone, let alone grant, a motion such as Mr. Sclafani has put before this Court. As hereinafter shown, it not only violates fundamental rules of practice and procedure, but is a deceit and fraud on the Court.
>
> 4. Such demonstrated deceit and fraud buttress my entitlement to dismissal/summary judgment against Mr. McFadden, who has participated in, and sought to benefit from, Mr. Sclafani's misconduct. As the treatises recognize:
>
> > '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).
> >
> > '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).

46. Indeed, the Court could not make findings without also establishing my Fourth Counterclaim [¶¶NINTY-FIRST & NINTY-SECOND] addressed to "Ensuring the Integrity of the Judicial Process".

47. The decision's total cover-up of the demonstrated perjuries and other misconduct of Mr. Sclafani and Mr. McFadden, to further deny me the summary judgment/dismissal to which I am entitled, is a further flagrant fraud by the Court, demonstrative of its actual bias and interest, as no fair and impartial tribunal would otherwise allow a petitioner and his attorney to engage in such tactics.

48. **The First Branch of my Cross-Motion** was for the following relief:

> "(1) Referring the disputed issue raised by the Petition's ¶13 and Respondent's Answer thereto as to whether Respondent is a protected tenant under the Emergency Tenants Protection Act or other rent regulation to the Department of Housing and Community Renewal, and pending such review, holding this proceeding in abeyance".

49. As with my other denied branches, the decision materially misrepresents my requested relief and does not identify any of the facts, law, or legal argument I presented. It also rests on a false claim for which its citation to a lower court decision is utterly indefensible – as that decision was long ago REVERSED ON APPEAL. Thus, the decision states:

> "The branch of respondent's motion for an order referring this matter to the Department of Housing and Community Renewal is denied. Having reviewed the papers, the Court finds that it has subject matter jurisdiction over this proceeding. More specifically, whether or not the petitioner's cooperative apartment is subject to the ETPA involves interpretation of statute/regulation and resolution of this issues is not within the particular expertise of the DHCR (*see e.g. Davis v. Waterside Housing Co., Inc.*, 182 Misc.2d 851)."

50. Aside from the fact that my cross-motion raised NO question as to the Court's "subject matter jurisdiction" *vis-à-vis* DHCR (¶¶5, 182 of my moving affidavit; ¶¶26-35 of my reply), the cited 1999 lower court ruling in *Davis v. Waterside* was reversed in 2000 by the Appellate Division, First Department, 274 A.D.2d 318, on precisely the point of that agency's "expertise".

> "The IAS court erred in ruling that...the issues before the court were 'not within DHCR's specialized field and do not involve that agency's technical expertise.' To the contrary, the Legislature has specifically authorized that agency to administer questions relating to rent regulation (McKinney's Uncons Laws of NY § 8628 [c] [ETPA § 8 (c)])."

51. Nor is the coverage question, as the decision falsely frames it, limited to "interpretation of statute/regulation". As pointed out by my moving affidavit (¶¶5, 182) and reply (¶¶26-35), it includes such factual issues as whether anyone ever filed the necessary paperwork with DHCR removing the apartment from coverage. Obviously, unless the Court is planning to subpoena DHCR to testify at trial as to what its file reflects, it will not have such pertinent information for adjudication.

52. Indeed, even had *Davis v. Waterside* not been reversed as to DHCR's "expertise" – which it resoundingly was – the lower court ruling was distinguishable. The lower court there noted that DHCR had already issued a relevant advisory opinion which it

could utilize in making its determination, without the necessity of further assistance from DHCR. Here, the decision does not purport that any comparable DHCR advisory opinion is available for its guidance.

53. By way of renewal, on October 23, 2007, the Westchester District Rent Office of the Division of House and Community Renewal Office mailed me a notice (Exhibit II) stating:

> "It is our understanding from conversations you had with staff in this office, and from statements which are part of your complaint (attached), that you are currently in court on this matter.
>
> Therefore, since the Division has concurrent jurisdiction with the courts we cannot act on this complaint but must defer to the court.
>
> However, if the court requests a determination by DHCR, or the case is removed from the court calendar, then you may request an Administrative Determination to determination whether your apartment is subject to the ETPA."

54. Based upon the appellate decision in *Davis v. Waterside*, reinforcing my uncontested recitation in support of my cross-motion's first branch in my moving affidavit (¶¶5, 182) and my reply (¶¶26-35), it is "In the interest of judicial economy" to refer the question of whether I am covered by ETPA or other rent regulation "to the agency with the expertise and resources to make that determination, *to wit*, the Office of Rent Administration of the New York State Division of Housing and Community Renewal".

55. As for my final **Sixth Branch of my Cross-Motion**, the decision does not identify or adjudicate it:

> "(6) Granting such other and further relief as may be just and proper, including transfer and removal of this proceeding to the Supreme Court for disposition."

Such omission is all the more significant, as transfer/removal to Supreme Court is plainly warranted by the nature and scope of my substantive Affirmative Defenses and Counterclaims.

The Decision's Grounds for Denying Mr. Sclafani's Motion Conceal its Demonstrated Perjuriousness & Condones its Legal Baselessness & Deficiency

56. 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. Indeed, the decision even adopts those fraudulent claims:

> "That branch of petitioner's motion for a default judgment based upon respondent's alleged failure to serve and file and answer in a timely fashion is denied. While it may be true that the respondent's answer was served and filed beyond the time set by the Court, it is nonetheless apparent that the delay was minimal and petitioner has failed to establish any prejudice as a result thereof. Further, in accord with the State's strong public policy of disposition on the merits, a default is not warranted on the facts presented (*see generally Classie v. Stratton Oakmont, Inc.*, 236 AD2de 505)." (underlining added)

57. Tellingly, the decision does not identify the basis upon which it "may be true" that my "answer was served and filed beyond the time set by the Court". As highlighted by my cross-motion affidavit (¶¶30-43) and my reply (¶¶36-38), such is absolutely NOT TRUE and the documentary proof, recited therein, that is part of the City

Court file, includes:

> (1) a notation by or on behalf of Judge Press, approving my July 20, 2007 letter-request that my time to answer the Petition be extended to August 20, 2007 – referred-to at ¶31 of my cross-motion affidavit and annexed thereto as Exhibit K-2;
>
> (2) an affirmation of service attesting to mailing of my Answer on August 20, 2007 and confirmatory U.S. postal service records – referred-to at ¶¶36-38 of my cross-motion affidavit, with the postal records annexed thereto as Exhibit M-2;
>
> (3) the City Court date and time stamp on my Answer, reflecting its filing in the Court on August 20, 2007.

58. Moreover, if the Court actually "read" and "reviewed the papers", as the decision purports, it would know that Mr. Sclafani himself withdrew this ground for a default judgment against me after ¶¶30-43 my cross-motion affidavit resoundingly showed him to be an out-and-out liar with respect thereto – demanding his production of the U.S. postal-metered envelope in which my Answer had been mailed to him. Indeed, ¶¶36-38 of my reply affidavit not only detailed the facts pertaining to Mr. Scalfani's belated withdrawal of that ground, but that the responding ¶¶30-43 my cross-motion affidavit, which I had been needlessly burdened to write, remained

> "pertinent to adjudication of the branches of my cross-motion for sanctions and costs against him and Mr. McFadden, for their referral to criminal authorities, and for referral of Mr. Sclafani to disciplinary authorities." (¶38 of my reply affidavit).

59. As for Mr. Sclafani's other ground for seeking a default judgment against me, my purported non-payment of "use and occupancy", the decision also fails to identify that I had resoundingly demonstrated its fraudulence by ¶¶11-29 of my cross-motion affidavit. The accuracy of these paragraphs was entirely undenied and undisputed by Mr.

Sclafani – a fact highlighted by ¶39 of my reply affidavit, whose ¶¶40-51 then demonstrated Mr. Sclafani's further deceit with respect to this issue. The decision simply ignores this completely uncontested showing in denying the default for alleged "non-payment" – which it limits to the legal ground that:

> "the Court is without authority to enter a default judgment based upon respondent's alleged nonpayment of use and occupancy (*see generally Stepping Stones Associates v. Seymour*, 184 Misc.2d 990)."

60. Here, too, the decision does not acknowledge that I had pointed out, at the very outset of my cross-motion affidavit, indeed in a section entitled "MR. SCLAFANI'S MOTION IS VIOLATIVE OF LAW & DEFICIENT ON ITS FACE"(¶¶7-9), that Mr. Sclafani's motion had not cited "any legal provision for its requested relief of a default judgment".

61. In a separate, second paragraph, the Court's decision denies "The balance of petitioner's motion". It only passingly identifies "petitioner's motion" as "to dismiss" and leaves out what it sought to dismiss, namely my "Affirmative Defenses & Counterclaims". The whole of this second paragraph reads:

> "The balance of petitioner's motion is denied in its entirety. Where, as here, a motion to dismiss is supported by the affirmation of an attorney with no personal knowledge of the facts, the Appellate Division has held that denial of the application is proper (*see e.g. Nahrebeski v. Molnar*, 286 AD2d 891; *Arriaga v. Laub Co.*, 233 AD2d 244; *Subgar Realty Corp. v. Gothic Lumber v. Millwork, Inc.*, 80 AD2d 774)."

62. Here, too, the decision rests on a legal deficiency that it does not identify as having been raised by me. This, notwithstanding I raised it in my cross-motion's ¶7 – the very first paragraph of my section "MR. SCLAFANI'S MOTION IS VIOLATIVE OF

LAW & DEFICIENT ON ITS FACE". I therein stated:

> "7. The violations of law and deficiencies of Mr. Sclafani's motion are discernible from the face of the motion – beginning with its notice of motion.[fn] It identifies that the motion is supported only by Mr. Sclafani's affirmation and annexed exhibits. In other words, no affidavit from Mr. McFadden attests to the facts of which Mr. McFadden – not Mr. Sclafani – has personal knowledge. As hereinafter shown, Mr. Sclafani's personal knowledge relates only to the first part of the motion that seeks a default judgment against me, not the second alternative part where he makes factual allegations in support of dismissal of my affirmative defenses and counterclaims." (underlining added).

63. This legal deficiency, however, was just the beginning of what my cross-motion showed. Thus, my immediately following ¶8 stated:

> "8. As for Mr. Sclafani's affirmation, its deficiencies are obvious from the outset. Although he affirms that it is 'under penalty of perjury' (at p. 1), he does not affirm it 'to be true'[fn.3]. As hereinafter shown, Mr. Sclafani's affirmation is false over and over again – and knowingly so..." (underlining added).

64. Thereupon, the next nearly 60 pages of my cross-motion affidavit detailed the perjury and deceit of virtually each and every sentence of Mr. Scalfani'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

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"[fn.3] See 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).

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'.

'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)."

to the fraudulence of Mr. Scalfani'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

> "...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)

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.

WHEREFORE, inasmuch as respondent is entitled, *as a matter of law*, to vacatur of the October 11, 2007 decision & order, whether by way of disqualification or reargument/renewal, she is also entitled to a stay of trial pending determination thereof, either by this Court or by the Appellate Term of the Appellate Division, Second Department.

ELENA RUTH SASSOWER

Sworn to before me this
8th day of November 2007

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

Notary Public

TABLE OF EXHIBITS