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.

Exhibit-2

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:

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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".