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

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JOHN McFADDEN,

Petitioner,

Index #SP651/89
#SP-2008-1474

Respondent's Affidavit in Opposition to the Attorney General's Cross-Motion, in Reply to Petitioner's Opposition to the Motion, & in Further Support of the Motion

-against-

DORIS L. SASSOWER and ELENA SASSOWER,

Respondents.

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

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

1. This affidavit is submitted in opposition to the October 3, 2008 "cross-motion to dismiss" of the New York State Attorney General, by Assistant Attorney General Dian Kerr McCullough, purporting to represent the non-party White Plains City Court Clerk Patricia Lupi in this landlord-tenant proceeding between private parties. It is also submitted in reply to the September 25, 2008 affirmation of petitioner's counsel, Leonard A. Sclafani, Esq. Each of these attorneys oppose my September 18, 2008 motion, notwithstanding its SOLE purpose is to ensure to integrity of the record on appeal and secure the proper functioning of the Clerk's Office. This

affidavit is also submitted in further support of such essential motion.[1]

2. As shown herein, Ms. McCullough's "cross-motion to dismiss" and Mr. Sclafani's opposing affidavit are not just frivolous, they are deceitful and fraudulent, compelling any fair and impartial tribunal to take "appropriate action" pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.[2] Such rightfully includes imposition of sanctions and costs pursuant to §130-1.1 *et seq.* and referring them to disciplinary and criminal authorities, which I herein request.

3. This affidavit is without prejudice to my contention that the judges of White Plains City Court – and none more so than Judge Friia – are disqualified for pervasive actual bias and interest, as set forth at ¶3 of my motion. Such disqualification divests Judge Friia, who presided on the September 26, 2008 return date of the motion and who presumably will be retaining it, of jurisdiction to proceed.[3]

4. This motion, seeking procedural, rather than substantive relief, was made in White Plains City Court only because of advice I received from the Clerk's Office of the Appellate Term, including its Clerk, Paul Kenny. Such is identified at ¶4 of my motion as follows:

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[1] This affidavit, annexing Exhibits M-Q, continues the sequence of exhibits begun by my motion

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

> "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."

[3] Judge Friia's self-interest in this proceeding, born of her complicity in Clerk Lupi's misconduct, creates an absolute disqualification.

"4. This motion is made on advice of the Clerk's Office of the Appellate Term, which received from the Clerk's Office of White Plains City Court a July 30, 2008 'Clerk's Return on Appeal' for #651/89 (Exhibit F-1) and a July 31, 2008 'Clerk's Return on Appeal' for #1502/07 (Exhibits G-1) – each deficient, *as a matter of law*, and materially false. Likewise deficient were the listings of 'Papers Forwarded to Appellate Term' (Exhibits F-2, G-2), accompanying each 'Clerk's Return on Appeal'. According to Appellate Term Chief Clerk Paul Kenny, the preferred procedure is for me to make a motion in this Court prior to seeking relief from the Appellate Term, including for its so-ordering of a subpoena to Chief Clerk Lupi for the documents and information I requested from her by letters dated July 30, 2008 (Exhibit H) and August 22, 2008 (Exhibit K)." (italics in the original).

5. In light of the Court's disqualification – and its lack of jurisdiction resulting therefrom – this motion should be transferred to the Appellate Term, where, in any event, I will appeal an adverse decision of this Court, including one failing to refer Ms. McCullough, her supervisors in the Attorney General's Office, Mr. Sclafani, as well as Clerk Lupi, to disciplinary and criminal authorities, as compelled by the record herein.

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

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* * *

The Attorney General's Cross-Motion is Not Just Frivolous, It is Fraudulent

7. Ms. McCullough provides NO legal authority for the Attorney General's representation of Clerk Lupi in opposition to my motion. Upon information and belief, the Attorney General's representation of Clerk Lupi is unlawful. Clerk Lupi is not a party to this proceeding and therefore she cannot lay claim to the Attorney General's representation pursuant to Public Officers Law §18. Nor is she entitled to representation pursuant to Executive Law §63.1, which predicates the Attorney General's participation in litigation upon the "interest of the state". Ms. McCullough's cross-motion does not claim that the Attorney General's representation of Clerk Lupi is based on the "interest of the state"[4] – and the facts underlying my motion prelude any

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[4] In an effort to ascertain the basis for the Attorney General's representation of Clerk Lupi, I have attempted to secure a copy of her request for same and the Attorney General's approval thereof. I did this, initially, by asking Ms. McCullough for these on September 26, 2008 promptly upon the conclusion of the proceedings before Judge Friia. Ms. McCullough replied that such was "attorney-client privilege", turning to Mr. Sclafani for his concurrence, which he immediately gave, laughing along with her that I had made such request.

In fact, Clerk Lupi's written request for representation and the Attorney General's authorization thereof are discoverable through the Freedom of Information Law [Public Officers Law Article VI], as confirmed by the Executive Director of the Committee on Open Government, the state agency charged with advising on the subject. Consistent therewith, I wrote to the Public Access Officers of the Attorney General's Office and Office of Court Administration, requesting same (Exhibits M-1, M-3). The Office of Court Administration responded that they have no records responsive to [my] request, but that I should "check with the Attorney General's Office, as there is no requirement that court employees send representation requests to [the Office of Court Administration]" (Exhibit M-4). The Attorney General's Office has advised that my request has been "directed to the appropriate bureau" and that a response will be forthcoming (Exhibit M-2).

On Monday, September 29, 2008, I telephoned McCullough and told her what I had been advised by Mr. Freeman and that I had already made FOIL requests of the Attorney General's Office and Office of Court Administration. In addition to challenging the legitimacy of the Attorney General's representation of Clerk Lupi, I asserted my right – pursuant to Executive Law §63.1 – to the Attorney General's representation and/or intervention on my behalf based on the "interest of the state" which I was upholding by my motion.

I thereafter left messages for Ms. McCullough's superior, Judith McCarthy, who is the Assistant Attorney General in Charge of the Westchester Regional Office – following which I

determination other than that it is I who am championing those interests by this motion. Consequently, Ms. McCullough's appearance for Clerk Lupi must be stricken and her cross-motion rejected.

8. To conceal the unlawfulness of the Attorney General's representation of Clerk Lupi, Ms. McCullough has fashioned her cross-motion, to which she has affixed an incorrect index number, 02-12153, on materially contradictory and misleading claims and falsehoods and on NO APPLICABLE LAW.

9. Thus, the first sentence of the first paragraph of Ms. McCullough's affirmation purports that the Attorney General is "attorney for respondent Patricia Lupi, Chief Clerk of the City of White Plains", with her "concluding WHEREFORE" clause again identifying the Chief Clerk as "respondent" (underlining added). (see also ¶7). This is false. Ms. Lupi is NOT a respondent – a fact admitted by Ms. McCullough's first paragraph in stating:

> "Although the Chief Clerk is not a party to this action, the sole remedy that Elena Sassower ('Movant') seeks is for an order to compel the Chief Clerk to perform certain ministerial acts as it pertains to the above-

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faxed and hand-delivered a September 29, 2008 letter to her entitled "Determining the 'interest of the state', pursuant to Executive Law §63.1..." – to which Ms. McCullough was an indicated recipient (Exhibit N).

Despite my repeated phone messages for Ms. McCarthy on Wednesday, October 1st, and Thursday, October 2nd, I did not receive a return call from her until Friday, October 3, 2008. I summarized for her the reasons why I believed there was no legal basis for the Attorney General's representation herein – and reiterated my request that the Attorney General come in on my behalf to uphold the state's interest in the integrity of court records and the proper functioning of the Clerk's Office. I told her that there was no legitimate defense to Clerk Lupi's conduct and urged her to review the dismissal motion that Ms. McCullough had stated she would be making, as I anticipated it would be fraudulent. I further requested that she take steps to refer the manipulation and falsification of court records, at here at issue, to the Attorney General's Public Integrity Bureau for investigation.

referenced action." (underlining added)

10. NO legal authority is cited by Ms. McCullough for the proposition that a non-party Clerk has standing to interpose opposition, let alone by the Attorney General in a landlord-tenant proceeding between private parties.

11. It is to buttress the illusion that the Attorney General's representation of Ms. Lupi is lawful that Ms. McCullough falsely purports that I have commenced a mandamus-type proceeding in City Court:

> "Movant, however, commenced this proceeding in the City Court of White Plains. The subject matter of this action is for mandamus to compel which, in accordance with CPLR Article 78 is outside the jurisdiction of this Court. This motion should have been filed in the Supreme Court of Westchester County. As such, this court does not have subject matter jurisdiction and the case should be dismissed under 3211(a)(2) of the CPLR." (¶6, underlining added).

12. The material deceit that I have "commenced this proceeding in the City Court" is the false factual predicate for Ms. McCullough's first "DISCUSSION" point, "The City Court of White Plains Does Not Have Jurisdiction to Hear this Motion" (at p. 2) – and the basis for the relief specified by her original October 3, 2008 notice of cross-motion "to dismiss" (Exhibit O-1):

> "an order pursuant to Section 3211(a)(2) of the Civil Practice Law and Rules, dismissing the complaint in its entirety on the ground that this Court lacks subject matter jurisdiction over the claim." (underlining added).

13. Such could not be granted *a matter of law*, as there is no "complaint" by which I have "commenced this proceeding". Nor is there a "petition" – as might be inferred from Ms. McCullough's misleading references to same in her ¶¶1, 9. Indeed,

because I have neither a "complaint" nor "petition", CPLR §3211(a)(2) is inapplicable as I have no "causes of action" which can be "dismissed" for lack of subject matter jurisdiction . Tellingly, Ms. McCullough provides no legal authority for invoking CPLR §3211(a)(2) – and dismissal pursuant thereto is materially inconsistent with her "WHEREFORE" clause, requesting that the Court "deny Movant's application".

14. Ms. McCullough's attempt to resolve such inconsistency by her amended October 3, 2008 notice of cross-motion, which she transmitted to the Court by an October 6, 2008 coverletter (Exhibit O-2), is no less inconsistent. The amended notice of cross-motion – still entitled "to dismiss" and under a legal back still entitled "to dismiss" for a motion filled with invocations for dismissal (¶¶1, 4, 6, 12) – now seeks:

> "an order pursuant to Section 3211(a)(2) of the Civil Practice Law and Rules, denying the motion in its entirety on the ground that the Court lacks subject matter jurisdiction over the claim." (underlining added).

Yet, CPLR 3211(a)(2) is not applicable to "denying the motion". It is applicable for making a motion to dismiss on grounds that "the court has not jurisdiction of the subject matter of the cause of action".

15. Ms. McCullough does not purport that this Court does not have jurisdiction over its own Chief Clerk. Nor does she purport that the Court cannot order the Chief Clerk's compliance with the relief requested by my motion within this landlord-tenant proceeding, as opposed to in a "proceeding" or "action" that I "commenced" (¶6).

16. As for Ms. McCullough's second "DISCUSSION" point, "The Motion

Fails to State a Claim for Mandamus to Compel" (p. 3), she therein purports that I have not met the standards for mandamus relief under Article 78. However, I am not proceeding under Article 78 where such standards apply. I am proceeding by motion within a landlord-tenant proceeding where there is NO constraint on the Court's ordering the Clerk's performance of even discretionary acts, as, for instance, its ordering

> "an explanation for her failure to respond to [my] hand-delivered August 22, 2008 and August 28, 2008 letters – and requiring her responses to those letters". (notice of motion, ¶1(g)).

17. Indeed, Ms. McCullough makes no claim that Article 78 standards apply to such motion as I have made within this landlord-tenant proceeding – and none of her cited cases stand for the proposition that such standards apply. In fact, her cited cases in both her first and second "DISCUSSION" points, all pertaining to Article 78, are irrelevant to my motion – leaving her cross-motion LEGALLY UNSUPPORTED.

18. In any event, Ms. McCullough's pretense (at ¶9) that I failed to demonstrate a "clear legal right" to the requested relief and failed to provide "any statute" or "any statutory...evidence" pertaining thereto is false. Supporting my request for an order requiring Clerk Lupi to furnish the Appellate Term with "a proper 'Clerk's Return on Appeal'" for this proceeding and for #1502/07 is my August 22, 2008 letter to Clerk Lupi, annexed as Exhibit K to my motion and expressly incorporated therein. Such identified the statute for the "Clerk's Return on Appeal": §1704(b) of the Uniform City Court Act, whose mandatory language I cited and

quoted:

> "...the return shall be made by the clerk forthwith upon filing the notice of appeal. Such return shall contain the judgment or order appealed from and all the original papers upon which the judgment or order was rendered or made, duly authenticated by the certificate of the clerk having the custody thereof, or copies thereof duly certified by such clerk, and shall have annexed thereto the opinion of the court, if any, and the notice of appeal."

and specified the respects in which the purported "Clerk's Returns" for the appeals in both proceedings were deficient, *as a matter of law:*

> (a) they were not certified by Chief Clerk Lupi – or even by Deputy Clerk Ward;[5]
>
> (b) they did not transmit "all the original papers upon which the judgment or order was rendered or made, duly authenticated by the certificate of the clerk having the custody thereof, or copies thereof duly certified by such clerk"[6];
>
> (c) they falsely attested to "settlement", governed by §1704(a) of the Uniform City Court Act;

Ms. McCullough simply ignores this.[7]

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[5] "an individual who certifies a document does more than merely state a fact, he actually vouches, attests or warrants that the information being certified is true *(cf., Mutual Ventures v Barondess*, 17 Misc. 2d 483, 484-485). Thus, the requirement is hardly meaningless and we will not presume that the Legislature deliberately employed an unnecessary term *(see*, McKinney's Cons Laws of NY, Book 1, Statutes § 231)", *Thalmann v .Bullock et al.*, 144 A.D.2d 174; 535 N.Y.S.2d 120 (Appellate Division, 3rd Dept. 1988).

[6] Also noted was that none of the transmitted documents were entered.

[7] Ms. McCullough's ¶10 despicably purports, as relevant, that I have "an extensive history of controversial interactions with state officers of the court regarding this case. Several other state officers, have, in fact, requested dismissal from proceedings involving this case because of controversial actions that have occurred involving Movant and related claims." Such is completely irrelevant to my entitlement to the relief sought by my motion, in addition to being materially false. To my knowledge, only a single state officer recused himself – and that was Judge Hansbury, whose demonstrated actual bias herein was resoundingly demonstrated by my

19. ¶6 of my motion stated that my annexed and incorporated correspondence presented the facts entitling me to ALL my motion's requested relief. Ms. McCullough does not deny or dispute this – nor even identify ANY of the facts and legal argument contained by my letters as to the Clerk's duties. This includes my assertion that it is the Clerk's duty to maintain a docket sheet of the cases, absent which she has no basis for claiming the completeness of the record transmitted to the Appellate Term (see Exhibits H, p. 2; Exhibit K, p. 4).

20. Tellingly, notwithstanding the unlimited resources at the Attorney General's disposal, Ms. McCullough has not come forward any statutory or rule provisions pertaining to the White Plains City Court Clerk and her duties of office. Nor has she furnished the Court with a statement from Clerk Lupi as to her duties, which she readily could have done. Among the relevant statutory provisions whose language is mandatory: Judiciary Law §255, entitled, "Clerk must search files upon request and certify as to result", which states:

> "A clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office...and certify that a document or paper, of which the custody legally belongs to him, can not be found." (underlining added).

and Judiciary Law §255-b, entitled "Dockets of clerks to be public", which states:

> "A docket-book, kept by a clerk of a court, must be kept open, during the business hours fixed by law, for search and examination by any person." (underlining added).

November 9, 2008 order to show cause, resulting in his recusing himself.

These are plainly germane to my showing, established by my July 30, 2008 and August 22, 2008 letters, of Clerk Lupi's wilful and deliberate failure to confirm, "in writing", that she has no docket sheets for #651/89, #434/88, #500/88, #504/88, and #652/89, and to furnish

> "such specific documents or entries in the 'files' and 'records' of White Plains City Court as led [her] to represent to Judge Friia that prior City [C]ourt proceedings, except for #651/89, are closed and upon which [Judge Friia] relied, to my prejudice (Tr. 29-30, 34-35)"[8]

– the transcript reference being to the proceedings before Judge Friia on June 30, 2008.

21. So that Clerk Lupi's mandatory duties might be accurately accounted-for, as well as the supervisory and administrative duties of the senior judge of White Plains City Court, *to wit*, Judge Friia, especially as relates to the White Plains City Court's Clerk's Office, annexed hereto (Exhibit P-1) is a copy of my October 6, 2008 letter to Tomme Berg, District Executive of the Ninth Judicial District, with a copy to John Eiseman, Records Access Officer of the Office of Court Administration, requesting publicly-available documents and information pertaining to same, including

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[8] "A statement signed by the custodian of public records 'that he has made diligent search of the records and found no record or entry of a specified nature, is prima facie evidence that the records contain no such record or entry,' if the statement is accompanied by a certificate as to the signatory's legal custody of the records. (*See* CPLR 4521; *see also* CPLR 4540.) 'The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such non-existence.' (*Deshong v City of New York*, 176 NY 475, 485, 68 N.E. 880, 14 N.Y. Ann. Cas. 169 [1903]; *see also Jackson v Miller*, 6 Cow 751, 753-54 [Sup Ct 1827], *aff'd* 6 Wend 228 [1830]; *Matter of Atlantic Refining Co., Inc. v Zoning Board of Appeals of the Vill. of Sloan*, 14 Misc 2d 1022, 1026, 180 N.Y.S.2d 656 [Sup Ct, Erie County 1958].)", *Whitfield v. City of New York, et al,* 16 Misc. 3d 1115A, 847 N.Y.S.2d 899 (2007) (Supreme Court, Kings Co.), (underlining added).

pursuant to §124 of the Rules of the Chief Administrator & F.O.I.L (Article VI of the Public Officers Law). Also annexed is Mr. Eiseman's responding letter (Exhibit P-2), received yesterday, in which he declines to provide "statutory and rule provisions applicable to the Chief Clerk and the Senior Judge of the White Plains City Court" as, *inter alia*, "overbroad and burdensome on its face". His response to my request for "records concerning the duties and responsibilities of the Chief Clerk of White Plains City Court" is that I may ascertain same from "the title standard for the Chief Clerk position, which defines those duties and responsibilities", available on the Unified Court System's website, www.courts.state.ny.us.

22. I have not found any "title standard" for "Chief Clerk" on the Court System's website, even using the "search" feature. The closest I've found is "Court Clerk", whose description includes the following "Typical Duties" (Exhibit P-3):

- "Records and maintains records of court proceedings;"
- "Gathers the documents pertaining to a case and places these in a file in order to create and maintain an accurate and permanent record of each case"; and
- "Answers telephone and over-the-counter inquiries from attorneys, judges, parties to the case, the public and court personnel regarding court procedures and the filing of court documents".

23. Upon information and belief, Chief Clerk Lupi's duties – as to which she has no discretion – include maintaining docket sheets for each case. Certainly, §1704 of the Uniform City Court Act establishes the Clerk's non-discretionary duty to certify original records for transmittal to the Appellate Term, whose completeness cannot be

certified without a docket sheet. Where original records have been destroyed and replaced by microfilm/microfiche, this reasonably entails transmitting the microfilm/microfiche to the Appellate Term, in addition to any hard copies made therefrom. Especially is this so where, as at bar, the Clerk's "Return on Appeal" for #651/89 falsely purports that the transmitted record are originals when, in fact, they are copies from microfilm/microfiche whose incompleteness is obvious on their face.

24. Finally, over and beyond the Court's jurisdiction to issue an order requiring Clerk Lupi to furnish the Appellate Term with the items enumerated by the first branch of my motion is its jurisdiction with respect to my motion's second branch:

> "referring Chief Clerk Lupi for disciplinary and criminal investigation and prosecution for official misconduct, obstruction of justice, and other crimes involving violation of her oath of office, including tampering with court records and false statements to Judge Friia as to the status of #651/89 and related cases and/or her complicity in Judge Friia's misrepresentations as to those cases".

25. Such jurisdiction is consistent with this Court's "Administrative Responsibilities" and "Disciplinary Responsibilities" under §§100.3C(2) and D of the Chief Administrator's Rules Governing Judicial Conduct[9] and triggered by the facts particularized by the correspondence between myself and Clerk Lupi annexed to my motion. Based thereon, the Court's obligation is to make referrals not only to disciplinary authorities, but to criminal ones. This is evident from such relevant

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[9] §100.3C(2) states:

> "A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties."

provisions of the Penal Law as:

Penal Law §195.00. Official misconduct:

"A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor."

Penal Law §175.20. Tampering with public records in the second degree:

"A person is guilty of tampering with public records in the second degree when, knowing that he does not have the authority of anyone entitled to grant it, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant.

Tampering with public records in the second degree is a Class A misdemeanor."

Penal Law §175.40. Issuing a false certificate:

"A person is guilty of issuing a false certificate when, being a public servant authorized by law to make or issue official certificates or other official written instruments, and with intent to defraud, deceive or injure another person, he issues such an instrument, or makes the same with intent that it be issued, knowing that it contains a false statement or false information.

Issuing a false certificate is a class E felony."

Penal Law §175.30. Offering a false instrument for filing in the second degree:

"A person is guilty of offering a false instrument for filing in the second degree when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with,

registered or recorded in or otherwise become a part of the records of such public office or public servant.

Offering a false instrument for filing in the second degree is a class A misdemeanor."

Penal Law §200.20. Rewarding official misconduct in the second degree:

"A person is guilty of rewarding official misconduct in the second degree when he knowingly confers, or offers or agrees to confer, any benefit upon a public servant for having violated his duty as a public servant.

Rewarding official misconduct in the second degree is a class E felony."

Penal Law §200.25. Receiving reward for official misconduct in the second degree:

"A public servant is guilty of receiving reward for official misconduct in the second degree when he solicits, accepts or agrees to accept any benefit from another person for having violated his duty as a public servant.

Receiving reward for official misconduct in the second degree is a class E felony."

Penal Law §195.05. Obstructing governmental administration in the second degree:

"A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

Obstructing governmental administration is a class A misdemeanor."

Mr. Sclafani's Opposing Affirmation is Not Just Frivolous, It is Fraudulent

26. As is his custom, Mr. Sclafani does not address any of the facts, law, or legal argument presented by my motion, while baldly making material assertions he knows to be false. Thus, in disparaging my requested relief for an order directing that Clerk Lupi provide the Appellate Term with docket sheets, Mr. Sclafani's ¶2 purports that "most" of the cases related to this proceeding "have been closed for many years". Mr. Sclafani identifies no documents substantiating this bald claim, which he knows to be false. As set forth by my July 30, 2008 and August 22, 2008 letters to Ms. Lupi, annexed as Exhibits H and K to my motion, my examination of the copies of the microfilm/microfiche made by the White Plains City Court Clerk's Office, as well as my own original files, disclosed that all the prior cases from 1988 and 1989 are open, except one. Mr. Sclafani provides no statement as to his own examination of such files or of original files of Mr. McFadden and Mr. McFadden's former lawyers, Lehrman, Kronick & Lehrman.

27. Although Mr. Sclafani's ¶4 baldly purports that there is "no requirement that the Court or its Chief Clerk provide any microfilm or microfiche to the Appellate Term of the Supreme Court either as part of a 'Clerk Return on Appeal' or otherwise", he does not purport to have done any research on the subject. Nor does he deny or dispute my assertion that the microfilm/microfiche would reasonably reflect the status of the 1988 and 1989 cases, that their status is a central issue on my appeals to the Appellate Term, and that transmittal of the microfilm/microfiche to the Appellate Term

would enable it to verify whether the papers from #651/89 that the White Plains Clerk's Office transmitted without identifying them as copied from microfilm/microfiche are a full replication thereof.

28. Nor does Mr. Sclafani reveal, in baldly asserting (at ¶6) that "there is no requirement" that Clerk Lupi respond to my letters, that among the "information and explanations" sought therein is the basis for her purported statement to Judge Friia – upon which Judge Friia relied, to my prejudice, rejecting my request for "a sworn statement" – that all the 1988 and 1989 cases are closed, except for this one.

29. Although Mr. Sclafani objects (at ¶7) that such letters "constitute ex-parte communications", he provides NO legal authority for the proposition that such are "improper". Indeed, because *ex parte* communications with the Clerk, as opposed to the Court, are NOT improper[10], he falsely lumps them together – knowing full well that I have never had improper *ex parte* communications with the Court.[11]

30. As for Mr. Sclafani's claim (at ¶8) that my letters are "not part of the Court's official file", I never asserted they were. However, my letters to Clerk Lupi are now part of the "official file" inasmuch as they are exhibits to my motion, expressly incorporated by ¶6 thereof.

31. Tellingly, Mr. Scalfani has not availed himself of the opportunity that my

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[10] At no time did Clerk Lupi ever indicate that my letters to her were "improper" because Mr. Sclafani was not an indicated recipient thereof. As may be seen from her August 7, 2008 letter to me (Exhibit J), she also did not indicate him as a recipient of her letter.

[11] In this regard, Mr. Sclafani's claim to Judge Friia on September 26, 2008 that Judge Hansbury had reprimanded me for such conduct is false. Such was never an issue before him or any other judge herein.

motion has afforded him of addressing the content of my letters. This includes that portion of my July 30, 2008 letter (Exhibit H, pp. 2-3) pertaining to his notice of appearance, dated June 30, 2008, found within the file of #651/89, for a proceeding he identified as "*John McFadden v. Elena Sassower John Doe*", without an index number. Nor has he come forward with any statement as to his knowledge of the facts and circumstances concerning Ms. Lupi's assigning #651/89 with a further index number, *to wit*, #2008-1474, or even when and whether he ever received from the Court the trial notice, dated May 30, 2008, which I also found within the file of #651/89, of which I had no prior knowledge.

32. Insofar as Mr. Sclafani purports (at ¶5) that "there is no requirement that the Court or its Chief Clerk send to the Appellate Term any papers that are not part of the official record in this case", he has NOT specified what he is talking about – and I have not sought to have anything transmitted which is "not part of the official record in this case".

33. As for Mr. Sclafani's assertion (at ¶9) that "a good portion of [my] motion" is based on "an ex-parte conversation" that I "claim[]" to have had with the Appellate Term's Clerk Paul Kenny, only one of my motion's eight paragraphs, pertains to that conversation. Such is my motion's ¶4 – quoted hereinabove at ¶4. For the convenience of the Court – and in view of its importance – it is:

> "4. This motion is made on advice of the Clerk's Office of the Appellate Term, which received from the Clerk's Office of White Plains City Court a July 30, 2008 'Clerk's Return on Appeal' for #651/89 (Exhibit F-1) and a July 31, 2008 'Clerk's Return on Appeal' for

> #1502/07 (Exhibits G-1) – each deficient, *as a matter of law*, and materially false. Likewise deficient were the listings of 'Papers Forwarded to Appellate Term' (Exhibits F-2, G-2), accompanying each 'Clerk's Return on Appeal'. According to Appellate Term Chief Clerk Paul Kenny, the preferred procedure is for me to make a motion in this Court prior to seeking relief from the Appellate Term, including for its so-ordering of a subpoena to Chief Clerk Lupi for the documents and information I requested from her by letters dated July 30, 2008 (Exhibit H) and August 22, 2008 (Exhibit K)." (italics in the original).

34. Mr. Sclafani purports (at ¶¶10-11) that he read this to Mr. Kenny, who "assured [him] that [I] had not accurately reported his conversation and that he did not give me the advice or counsel that [I] claim[] to have received from him." Notably, Mr. Sclafani provides no particulars.

35. By letter faxed to Mr. Sclafani on October 7, 2008 (Exhibit Q-1), to which Mr. Kenny was an indicated recipient (Exhibit Q-3), I called upon Mr. Sclafani to particularize so that I might respond appropriately by this affidavit. His October 9, 2008 faxed letter to me – indicating no copy for Mr. Kenny (Exhibit Q-2) – declined to elaborate. I herein reiterate the truth of what my ¶4 asserts.

36. Notwithstanding my August 22, 2008 letter (Exhibit K) recites the deficiencies of the "Clerk's Return on Appeal", including as to parts of the record missing from the transmittal to the Appellate Term, Mr. Sclafani falsely purports (at ¶13) that I do not "provide any objective evidence that the Clerk's Return on Appeal was, somehow, incomplete" and that my motion "fails to provide copies of any documents that [I] claim[] were, or should have been, part of the Court's official file in this matter". This is flagrantly deceitful as Mr. Sclafani conceals the existence of my

itemization of missing documents, whose accuracy he does not deny or dispute, and such itemization more than suffices to demonstrate the incompleteness of Clerk Lupi's transmittal.

37. It is without identifying any of the particulars of the deficiencies of the two "Clerk's Returns on Appeal", recited by my August 22, 2008 letter (Exhibit K) – or to acknowledge the prejudice to me resulting thereto, including as to the status of the 1988 and 1989 cases – that Mr. Sclafani falsely purports (at ¶14) that what I have set forth are "technical errors", "de minimus" and that I have "not been, and will not be, prejudiced in anyway as a result thereof".

38. Finally, Mr. Sclafani's pretense (at ¶15) that my request for disciplinary and criminal investigation of Clerk Lupi is "frivolous per se" and that she "should regard herself flattered" to be among a long list of those who have "engaged in fraudulent illegal conduct towards [me] and who have been victimized [my] frivolous motions seeking to refer them for discipline and prosecution", the record establishes that I have always particularized the misconduct of those for whom disciplinary and criminal referrals are warranted – including here.

ELENA RUTH SASSOWER

Sworn to before me this
10th day of October 2008

Notary Public

BELINDA HAUGHTON
Notary Public, State of New York
No. 01HA6179682
Qualified in Westchester County
Commission Expires Dec. 24, 2011