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

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DORIS L. SASSOWER,

Petitioner,

-against-

COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF NEW YORK,

Respondent.

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Index No.
95-109141

**PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S DISMISSAL MOTION AND IN FURTHER SUPPORT OF HER VERIFIED PETITION, MOTION FOR INJUNCTION AND DEFAULT JUDGMENT, FOR SANCTIONS AND OTHER RELIEF**



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## THE FACTS

Due to time constraints and in the interest of avoiding needless duplication, Petitioner respectfully refers the Court to her accompanying Affidavit and her Verified Petition for a fuller statement of material facts beyond those hereinafter discussed. However, certain facts--wholly omitted by Respondent--bearing on Petitioner's default application should be borne in mind by the Court.

It is undisputed and indisputable that prior to the May 3, 1995 return date of the Verified Petition, Respondent failed to appear, answer or move "at least five days before such time", as CPLR §7804(c) explicitly requires. As more particularly discussed in Petitioner's May 11, 1995 Affidavit in Support of Default Judgment, incorporated herein by reference, notwithstanding that Respondent was in default on May 3, 1995, the Attorney General, by Assistant Oliver Williams, nonetheless, and without the notice to Petitioner which the Court's published rules requires be given to an adverse party, applied for, and obtained, a six week adjournment of this Article 78 proceeding to June 15, 1995.

Such ex parte adjournment was immediately thereafter rescinded upon Petitioner's objection, by direction of the Administrative Judge of this Court, and the case was restored to the May 11, 1995 calendar.

Despite his wilful and deliberate default, rendering Respondent without standing, Mr. Williams, again in violation of this Court's published rules and contrary to law, inter alia, CPLR §3215(a), sought an adjournment over Petitioner's objection, necessitating Petitioner's court appearance on May 11, 1995 to oppose it (Exhibit "O" to Petitioner's accompanying Affidavit). Such adjournment was, nonetheless, granted for an additional four weeks, to June 12, 1995, all pleas of exigent public interest notwithstanding.

## PRELIMINARY STATEMENT

The foregoing background is demonstrative that Respondent and its counsel, the Attorney General of the State of New York, feel themselves free to operate as if they are "above the law", flouting at every turn the basic rules of law and procedure intended to govern all litigants, be they the government or private persons.

As was the case with his Affirmation in Opposition to Application for a Preliminary Injunction, Assistant Attorney General Oliver Williams' Affirmation in Support of Respondent's Motion to Dismiss violates the rules governing motion practice in this Court, as embodied in the Uniform Rules for the New York State Trial Courts. 22 NYCRR §202.8 explicitly directs that "Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law."

The aforesaid Uniform Rule provision reflects decisional law, going back years and years. See, Cronin v.

International Union of Electrical Radio & Machine Workers, Local 465, C.I.O., 117 N.Y.S.2d 702 (N.Y. Co. 1952), where a respected jurist of this Court threw out the affidavit of the attorney for defendant (in the days before attorneys were permitted by CPLR §2106 to make affirmations), who had made a motion to dismiss in an action brought for injunctive relief. In granting the injunction, the Court made the following pertinent statement:

> "Insofar as the motion to dismiss is concerned, it involves purely questions of law and affidavits cannot be utilized upon such a motion. Moreover, the "affidavit" of the attorney for defendant is nothing more than legal argument, with citation of authorities and quotations therefrom and, is, in reality, a law brief. The courts have heretofore expressed specific disapproval of this practice of submitting "affidavit-briefs, a fact of which counsel should be apprised if not aware thereof. These affidavits are not to be enumerated on this motion to dismiss; they are rejected and the clerk is directed to physically delete these affidavits...." at 703.

No brief has been provided by Assistant Attorney General Oliver Williams, representing Respondent, who, instead, includes his legal citations and argument in his two Affirmations.

Furthermore, it is basic that affidavits and affirmations which set forth "facts" shall be made by affiants and affirmants who have personal knowledge thereof, or, at least, set forth the basis of information and belief, where such knowledge is absent. Both Mr. Williams' Affirmations fall short in these two critical respects. In neither does he state or show that he has personal knowledge or set forth the source

thereof, if any, or of his information and belief.

It is long-settled law that "An affirmation by an attorney without personal knowledge is without probative value and must be disregarded." Soybel v. Gruber, 132 Misc. 2d 343 (N.Y.Co. 1986), citing Koump v. Smith, 25 N.Y.2d 287, 300 N.Y.S.2d 858.

Almost a century ago, in Fox v. Peacock, 97 App. Div. 500, 90 N.Y.S. 137 (1904), the Court stated:

> "It has too long been the rule to need citation of authority, that such averments in an affidavit have no probative force. The court has a right to know whether the affiant has any reason to believe that which he alleges in an affidavit."

Consequently, Mr. Williams' two aforesaid Affirmations (opposing the injunction motion and in support of his dismissal motion) are violative of fundamental rules and completely non-probative. Such affirmations, unaccompanied by any affidavit of the party involved, here the Respondent, to the limited extent they present factual allegations, raise no factual issue.

Since Petitioner's factual allegations are, therefore, uncontradicted by any probative evidence, they cannot serve to defeat her entitlement to the injunctive relief requested or to summary judgment in her favor on her Verified Petition.

## POINT I

### A. Respondent's Failure To Annex A Copy Of The Verified Petition To Its Dismissal Motion And To File With The Court All Papers Required To Be Furnished To It By The Verified Petition And By CPLR §2214(c) Require Denial Of Its Motion

Where a motion necessitates study of a pleading, as a dismissal motion obviously does, it has long been the law and the rules of this court that same must be made part of the motion or it will be denied. Rothouse v. The Association of Lake Mohegan Park Property Owners, Inc., 235 N.Y.S.2d 307 (1962).

Respondent's dismissal motion does not include a copy of the Petition sought to be dismissed, without which an overburdened court cannot make an intelligent evaluation of its legal sufficiency.

Likewise, Respondent's failure to file the necessary records requested at "TWENTY-FIRST" of the Petition:

> "including the original complaints filed by Petitioner, together with the exhibits and evidentiary proof supplied in support thereof, so that the Court may further verify the substantial and documented nature of her complaints",

similarly calls for denial of the motion. CPLR §2214(c) requires the movant to ensure that the Court has all necessary papers for proper consideration of the motion. Petitioner has given Respondent additional notice of such requirement both orally and in writing.

B. The Dismissal Motion Fails To Meet The Basic Legal Standard Applicable to Such Motions

As noted hereinabove, in making a pre-answer motion to dismiss, pursuant to CPLR §7804(f) and §3211(a)(7) "for failure to state a cause of action", the Attorney General has not provided a brief to support Respondent's dismissal motion, as called for under the Uniform Trial Court Rules (22 NYCRR §202.8(c)). Nor has he provided any legal citations showing the standard to be applied by the Court on such motion or that he has met it, which the applicable law hereinafter discussed establishes, overwhelmingly, that he has not.

It is elementary that a dismissal motion made under the aforesaid statutory provisions is one addressed solely to the legal sufficiency of the pleading. For such purpose, as this state's highest law officer is chargeable with knowing, the allegations of the pleading and all reasonable inferences flowing therefrom are presumed true. Underpinning & Foundation Constructors, Inc. v. Chase Manhattan Bank, N.A., 46 N.Y.2d 459, 414 N.Y.S.2d 298 (1979); Burke v. Sugarman, 35 N.Y.2d 39, 358 N.Y.S.2d 715 (1974); De Paoli v. Board of Education, 92 A.D.2d 894, 459 N.Y.S.2d 883 (2d Dept. 1983)--involving an Article 78 proceeding and a dismissal motion made under CPLR §7804(f). It is also elementary that on such a motion "the allegations must be liberally construed and considered in their most favorable light in support of the petition", Lichtensteiger v. Housing & Dev. Administration, 338 N.Y.S.2d 201 (1st Dept. 1972)--also involving an Article 78 proceeding and a dismissal motion made under CPLR

§7804(f)--citing McDonald v. Colden, 181 Misc. 407, 91 N.Y.S.2d 323, affd. 267 App. Div. 881, 46 N.Y.S.2d 467, affd. 294 N.Y. 172, 61 N.E.2d 432. See, also, Underpinning v. Chase, supra,, citing Westhill Exports v. Pope, 12 N.Y.2d 491, 496.

Notwithstanding the foregoing rudimentary and long-settled standard, which should have indicated to Respondent's counsel the utter baselessness of a dismissal motion under CPLR §3211(a)(7), which is in the nature of a common law demurrer, Mr. Williams, rather than assuming the truth of the Verified Petition's allegations, as such motion commands, instead, argues against them. He, thereby, implicitly concedes the legal sufficiency of Petitioner's pleaded factual allegations.

Another basic rule of law that our state's highest law officer is expected to know is that if he wants to attack the truth of the pleaded factual allegations, the appropriate motion is not to dismiss "for failure to state a cause of action", pursuant to the aforecited statutory provisions, but for summary judgment of dismissal.

Such motion, however, is not properly made prior to joinder of issue. In the context of an Article 78 proceeding, our state's highest court has held that the express direction of CPLR §7804(f) calls for deferring relief "on the merits" until after the filing of an answer. Council of Teachers v. BOCES, 53 N.Y.2d 100 (1984) and numerous cases cited therein.

In fact, Respondent's counsel has not moved for summary judgment relief which is available on a pre-Answer

dismissal motion under CPLR §3211(c), which he could have easily requested as part of his dismissal motion under CPLR §3211(a)(7). By the explicit language of that provision, such motion can not be granted, sua sponte, by the Court, without its first giving "adequate notice to the parties" so as not to violate their due process rights. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 401 N.Y.S.2d 182 (1977); See, also, Gifts of Orient, Inc. v. Linden Country Club, 89 App.Div.2d 508 (1st Dept. 1982).

Moreover, apart from the afore-cited decisional law making pre-answer summary judgment relief unavailable in an Article 78 proceeding, Council of Teachers v. BOCES, supra, the Attorney General has failed to meet the applicable standard for summary judgment "on the merits" by its failure to present probative evidence and legal authority to support same.

As illustrative, Mr. Williams' dismissal motion does not allege or come forth with probative evidence that my complaints were, in fact, determined by Respondent to be on their face without merit, as he would have the Court infer. Indeed, the most cursory review of my complaints--even without the evidentiary proof they annexed and proffered--shows that such complaints presented Respondent with meticulously specific, legally-cognizable allegations of judicial misconduct. As discussed more fully at ¶¶16-17 of Petitioner's accompanying affidavit, Mr. Williams has conceded that where such allegations of judicial misconduct are presented, Article VI, Section 22a of the Constitution and Judiciary Law, §44.1 impose upon Respondent

a mandatory duty of investigation.

Most egregiously, Mr. Williams has failed to provide any legal authority, let alone legislative history, to support his bald claim in his Affirmation (at ¶11) that the rule provision being challenged is "consistent" with the applicable constitutional and statutory provisions. Examination of 22 NYCRR §7000.3 shows it to be facially "inconsistent" and patently irreconcilable with Article VI, Section 22a of the Constitution and Judiciary Law §44.1. To argue otherwise is specious, in bad faith, and sanctionable.

## POINT II

**PETITIONER IS ENTITLED TO SUMMARY JUDGMENT IN HER FAVOR PURSUANT TO CPLR §§7804(e), 409(b), 3211(c)**

As demonstrated at ¶¶21-32 of Petitioner's accompanying Affidavit, and as shown herein by the legislative history and legal authorities cited, Petitioner is entitled to summary judgment in her favor.

**Respondent's Self-Promulgated Rule 22 NYCRR §7003, As Written And As Applied, Is Unconstitutional And Statutorily Unauthorized In That Such Rule Converts Respondent's Mandated Duty To Investigate Complaints Into A Discretionary Option**

Although the present Article 2-A of the Judiciary Law §44.1 (Exhibit "1") was enacted in 1978, after passage of the 1977 constitutional amendment which created the present Commission on Judicial Conduct, research shows it to be the starting point for examining Respondent's mandatory duty to investigate complaints of judicial misconduct. Indeed, the wording of §41.1:

> "Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit..." (emphasis added)

preceded the 1977 constitutional Amendment (Exhibit "2") and replicates, verbatim, the pertinent wording of §43 of the original Article 2-A (Exhibit "3"), which, in 1974, created the "Temporary State Commission on Judicial Conduct".

Indeed, in 1976, when Article 2-A was amended (Exhibit "4"), following the 1975 constitutional Amendment making the

"Temporary State Commission" permanent (Exhibit "5"), the Legislature retained the above-quoted wording of §43--even while making additions and deletions to the balance of that section (Exhibit "4").

Although the 1976 emendation of Article 2-A (Exhibit "4") left intact the prefatory wording of §43 from the 1974 version (Exhibit "3"):

> "The commission shall receive a complaint against any judge with respect to his qualifications, conduct, fitness to perform, or the performance of his official duties" (emphasis added)

with subdivisions (a) and (b) then elucidating the Commission's investigative duty following receipt of a complaint, the 1975 constitutional Amendment (Exhibit "5") worded the Commission's duties as follows:

> "The commission <u>shall receive and investigate</u> complaints of the public with respect to the qualifications, conduct, or fitness to perform or the performance of the official duties of any judge or justice of any court within the unified court system and may, on its own motion, <u>initiate investigations</u> with respect to the qualifications, conduct, or fitness to perform or the performance of the official duties of any such judge or justice." (Article VI, Section 22k, emphasis added).

In 1977, the constitutional Amendment creating the Commission as it exists today altered the above-quoted wording--which is now the preface to Article VI, Section 22a (Exhibit "2"):

> "...The commission...shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system[1]..." (emphasis added).

Such wording of Article VI, §22(a) of the Constitution (Exhibit "1") was then replicated, essentially verbatim, as the prefatory opening of §44.1, when, in 1978, the Legislature amended Article 2-A. This prefatory opening was then followed up by subdivisions (a) and (b), representing the "law" as to the Commission's investigative duty.

Consequently, the "shall...investigate" phrase of Article VI, Section 22a of the Constitution must be interpreted in the context of subdivisions (a) and (b), which preceded it and which the Legislature retained through three versions of Article 2-A (Exhibits "1", "3", and "4") in the four years within which the two constitutional Amendments creating the Commission were passed (Exhibits "2" and "5").

The treatises accord "shall" a presumptively mandatory meaning, in contrast to "may", a term connoting "discretion", 82 C.J.S. Statutes §380. A particularly relevant discussion of the subject is contained in D'Elia on Behalf of Maggie M. v. Douglas R., 524 N.Y.S. 2d 616 (Fam. Ct. 1988):

> "The terms 'shall' and 'may' have opposite meanings; the former mandatory, the latter discretionary. When different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction

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[1] The wording of Article VI, Section 22a continues with the words "in the manner provided by law..."

between them is intended. McKinney's Consol. Laws of N.Y., Book 1, Statutes, Sec. 236, at 403; Albano v. Kirby, supra, 369 N.Y.S.2d at 530, 330 N.E. 2d at 619, citing Waddell v. Elmsndorf, 10 N.Y. 170, 177.

It has been the long recognized rule of construction in the courts of this state that words be construed in accordance with their usual, common and ordinary meaning. (See, McKinney's Consol. Laws of N.Y. Book 1, Statutes, Sec. 232; Riegert Apartments Corp. v. Planning Board of the Town of Clarkstown, 78 A.D. 2d 595, 432 N.Y.S.2d 40, aff'd 57 N.Y. 2d 206, 455 N.Y.S.2d 558, 441 N.E.2d 1076 (2nd Dept. 1982). The plain and ordinary meaning of the word 'shall' denotes command, whereas 'may' denotes permissiveness.

Generally, it is presumed that the use of the word 'shall' when used in a statute is mandatory, while the word 'may' when used in a statute is permissive only and operates to confer discretion, especially where the word 'shall' appears in close juxtaposition in other parts of the same statute. Metro Burak, Inc. v. Rosenthal & Rosenthal, Inc., 51 A.D.2d 1003, 380 N.Y.S.2d 758 (2nd Dept. 1976); 82 C.J.S. Statutes, Sec 380. The deliberate use of the word 'may' shows a settled legislative intent not to impose a positive duty."

Such discussion reinforces the meaning to be accorded "shall" and "may", as they respectively appear in Judiciary Law §44.1(a) and (b), where such words are in close proximity, and juxtaposed with one another.

Moreover, only by a mandatory interpretation of the "shall" of Judiciary Law §44.1(a) does Judiciary Law §44.1(b) make any sense. Plainly, Judiciary Law §44.1(b) would be superfluous were Judiciary Law §44.1(a) to be read as anything other than mandating that Respondent investigate complaints of

judicial misconduct filed with it.

This logical interpretation of Judiciary Law §44.1(a) is further supported by the decision of our state's highest court in Nicholson v. State Commission on Judicial Conduct, 431 N.Y.S.2d 340 (1980). In that case, the New York Court of Appeals, referring to the present Judiciary Law (Exhibit "1"), goes on to state:

> "The Judiciary Law implements the constitutional authorization and establishes the commission, granting it broad investigatory and enforcement powers (see Judiciary Law, §§41, 42, 44). Specifically, the commission must investigate following receipt of a complaint, unless that complaint is determined to be facially inadequate (Judiciary Law, §44, subd.1)..." at 346-7 (emphasis added).

A year following the aforesaid Court of Appeals' decision in Nicholson, supra, the Commission's administrator, Gerald Stern, testified at public hearings before the combined Judiciary Committees of the New York Senate and Assembly as to the effort that went into the promulgation of Article 2-A and the excellence of that legislation:

> [December 18, 1981 Transcript, pp. 6-8]
>
> "It was just about four years ago when we met in Albany, almost on a daily basis, as I recall, during the months of December and March and April of 1978; that is, December of 1977, as part of a task force of representatives of the judiciary and the Commission, meeting with your respective committees to discuss new legislation to implement the recently adopted Constitutional Amendment.
>
> We spent a great deal of time together and came up with legislation which is now Article

> 2-A and, based upon the nearly three and a half years of experience the Commission has had with this legislation, the Commission has asked me to appear today and take a very strong position in telling you that this--the legislation has worked extremely well. It was the product of a few hectic months of consideration and consideration of a wide range of views concerning judges' rights and the powers of the Commission. It is an excellent piece of legislation. It has worked well, and we recommend that no changes be made on balance in the legislation.
> ...
> I want to emphasize today that, on a comparative basis, legislation -- Article 2-A of the Judiciary Law -- is the very best in the country. I am familiar with procedures and laws in the United States. 50 states have commissions. I am on boards, national boards, committees, have met often with my colleagues in other states, and I can tell you that this is the very best legislation in the country governing procedures for commissions on judicial conduct."

Just as the 1978 emendation of Article 2-A (Exhibit "1") replicated the wording of Article VI, Section 22a of the Constitution (Exhibit "2"), so too the provision contained in Article VI, Section 22c requiring that the rules and procedures to be adopted by the Commission "not [be] inconsistent with law"[2] (Exhibit "2") was incorporated into the 1978 version of Article 2-A. Thus, whereas the 1974 and 1976 versions of Article 2-A, which, in identical wording, gave the Commission power to makes rules and procedures "necessary to carry out the provisions and purposes of this article" (Exhibits "3" and "4"), the 1978 version of Article 2-A added the proviso of Article VI, Section 22c of the Constitution, to wit, that such rules and procedures

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[2] See, footnote 1 hereinabove.

be "not inconsistent with law" (Exhibit "2), which reinforced Article VI, Section 22a "in a manner provided by law" (Exhibit "2"). Thus, §42.5 of the present Judiciary Law (Exhibit "1") permits the Commission:

> "To adopt, promulgate, amend and rescind rules and procedures not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article." (emphasis added)

Nevertheless, when the Commission, thereafter, promulgated 22 NYCRR §7000 et seq., its rule numbered §7000.3 was plainly "inconsistent with law" and not "in a manner provided by law", since it made Respondent's investigation of a facially-meritorious judicial misconduct complaint optional, whereas the Judiciary Law imposed upon Respondent a mandatory duty. In pertinent part, said 22 NYCRR §7000.3 reads:

> (b) Upon receipt of a complaint, or after an initial review and inquiry[3], the complaint may be dismissed by the commission or, when authorized by the commission, an investigation may be undertaken." (emphases added)

Such rule, with its discretionary "may", is clearly unconstitutional and statutorily unauthorized. As set forth at paragraphs "SEVENTEENTH" and "EIGHTEENTH" of the Verified Petition, 22 NYCRR §7000.3 has converted Respondent's mandatory duty ["shall"] to investigate complaints of judicial misconduct to a discretionary function ["may"], without even providing the defined standard against which performance can be measured

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[3] 22 NYCRR §7000.3 defines the phrase "initial inquiry and review", as well as "Investigation" in a definitions section. See, §7000.1(i) and (j).

[Judiciary Law §44.1(b)], dispensing with the requirement that Respondent determine that a complaint summarily dismissed be first determined to be "on its face without merit."

The unconstitutionally and statutorily violative result of §7000.3 is demonstrated by Respondent's summary dismissals of Petitioner's complaints of judicial misconduct, without a determination that her complaints so-dismissed were on their face "without merit" and where objective examination shows the complaints to be facially meritorious, the allegations of judicial misconduct detailed and well documented.

## POINT III

**PETITIONER HAS ESTABLISHED HER ENTITLEMENT TO INJUNCTIVE RELIEF STAYING RESPONDENT FROM DISMISSING COMPLAINTS WITHOUT A DETERMINATION THAT THEY ARE FACIALLY WITHOUT MERIT**

As discussed at ¶¶33-41 of Petitioner's accompanying Affidavit and further shown herein by citation to legal authority and legislative history, Petitioner has fully met "the three-pronged test" for injunctive relief, referred to by Mr. Williams in his May 22, 1995 Affirmation in Opposition, with ample citations to legal authority.

A. As To The First Prong: The Merits:

Mr. Williams' Affirmation in Opposition to the injunction provides no legal authority to support the constitutionality of 22 NYCRR §7000.3--and does not even mention 22 NYCRR §7000.3, except to acknowledge (at ¶2) that its constitutionality, as written and applied, is being challenged by Petitioner.

Indeed, even in his Affirmation in Support of Respondent's dismissal motion, which Mr. Williams claimed he needed time to research[4], he again fails to provide any legal authority to support the constitutionality of 22 NYCRR §7000.3.

As discussed at Point II hereinabove, on its face, the wholly discretionary 22 NYCRR §7000.3 is patently "inconsistent with law" in that Article VI, Section 22a of the Constitution and Judiciary Law §44.1 mandate investigation by Respondent of

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[4] See, Exhibit "O" to Petitioner's accompanying Affidavit, p. 6.

facially-meritorious complaints of judicial misconduct.

Additionally, Mr. Williams nowhere alleges or offers evidentiary proof that, as applied, 22 NYCRR §7000.3 is constitutional. Such allegation, moreover, would require an affidavit from a party with first-hand knowledge of the facts--which Mr. Williams does not have and does not claim to have.

B. As To The Second Prong: Irreparable Injury:

By Respondent's own statistics[5], and as alleged at paragraph "THIRTY" of the Verified Petition, in 1993, Respondent summarily dismissed 1275 of the 1457 complaints it received--representing 87.5%. That amounts to summary dismissals of more than 100 complaints of judicial misconduct per month.

Mr. Williams, who, as hereinabove set forth, has no personal knowledge of any facts herein, does not even claim that the aforementioned 1275 summary dismissals were preceded by the constitutionally and statutorily-required "determination" by Respondent that all such dismissed complaints were on their face without merit.

As documentarily established, inter alia, by the four complaints of judicial misconduct filed with Respondent by Petitioner in 1994, annexed to the Verified Petition as Exhibits "G", "H", "I", and "J" and by Respondent's December 13, 1994 and January 24, 1995 letter dismissals of those complaints (Exhibits "L-5" and "L-6"), Petitioner's facially meritorious, detailed and

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[5] See, Exhibit "Q" to Petitioner's accompanying Affidavit.

documented complaints were summarily dismissed by Respondent with no reason whatever stated as to the basis therefor.

The result of Respondent's failure to meet its constitutional and statutory investigatory mandate is to inflict upon the public the gross injury of judges who are biased, abusive, dishonest, incompetent--just to name a few descriptions of their unfitness. The effect is to destroy the lives of litigants and lawyers, who have the misfortune to have cases before these judges and to create havoc in the justice system as judicial victims, seeking redress, initiate further litigation, including undertaking otherwise needless appeals generated from the abuses of judges at the trial level.

This overloads our justice system, creating backlogs and requiring more judges--the expense of which the public is required to bear.

All this brings the judiciary into scorn and disrepute. As commented upon by then Governor Malcolm Wilson, when he signed into law Judiciary Article 2-A creating the Temporary State Commission, "[p]ublic confidence in the judiciary requires a responsive procedure..." (Governor's Memorandum).

As shown by Respondent's own statistics and documented by Respondent's handling of Petitioner's complaints, 22 NYCRR §7000.3 is <u>not</u> a "responsive procedure". Nor does it protect the public, as the Constitution and statute intended.

C. As To The Third Prong; Balancing of Equities:

As set forth at ¶40 of Petitioner's accompanying Affidavit, Respondent has neither alleged nor shown that there would be any injury to either Respondent or the public interest by the injunction.

Respondent could still summarily dismiss complaints--provided it first determined that such complaints were on their face without merit, which is what Judiciary Law §44.1 expressly requires.

Inasmuch as Mr. Williams contends 22 NYCRR §7000.3 is "consistent" with Article VI, Section 22a of the Constitution and Judiciary Law §44.1, there can be no prejudice in enjoining Respondent from doing what Mr. Williams claims it is not doing, namely, dismissing facially-meritorious complaints.

## POINT IV

**PETITIONER IS ENTITLED TO SANCTIONS, COSTS, AND EXPENSES PURSUANT TO 22 NYCRR §130-1.1 et seq. AND TO RELIEF UNDER JUDICIARY LAW §487(1)**

From the foregoing, and the factual presentation set forth in Petitioner's accompanying Affidavit, it may be seen that all of the criteria for assessment of sanctions, costs, and expenses upon Respondent and the Attorney-General under §130-1.1 (c) are fully met:

Such provision defines conduct as "frivolous" if:

(i) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or

(ii) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.

Such is the case at bar where Respondent has needlessly burdened me and the Court with a wholly meritless dismissal motion, similarly frivolous papers in opposition to my injunction application, and engaged in oppressive and demonstrably unethical tactics since the inception of this litigation.

Moreover, the false, fraudulent, and deceitful statements made in legal documents filed with the Court by Mr. Williams, in collusion with the Respondent to delay this proceeding and injure me and the public interest, make invocation of Judiciary Law §487(1) highly appropriate.

## CONCLUSION

**RESPONDENT'S DISMISSAL MOTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION OR DENIED AND PETITIONER GRANTED SUMMARY JUDGMENT IN HER FAVOR FOR THE RELIEF SOUGHT IN THE PETITION, AS WELL AS AN INJUNCTION AND SANCTIONS.**

Dated: White Plains, New York
June 8, 1995

Respectfully Submitted,

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On the Brief

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Elena Ruth Sassower, Paralegal Assistant

mission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken.

7. The commission shall appoint and at pleasure may remove an administrator who shall be a member of the bar who is not a judge or retired judge. The administrator of the commission may appoint such deputies, assistants, counsel, investigators and other officers and employees as he may deem necessary, prescribe their powers and duties, fix their compensation and provide for reimbursement of their expenses within the amounts appropriated therefor.

§ 42. Functions; powers and duties

The commission shall have the following functions, powers and duties:

1. To conduct hearings and investigations, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to an investigation; and the commission may designate any of its members or any member of its staff to exercise any such powers, provided, however, that except as is otherwise provided in section forty-three of this article, only a member of the commission or the administrator shall exercise the power to subpoena witnesses or require the production of books, records, documents or other evidence.

2. To confer immunity when the commission deems it necessary and proper in accordance with section 50.20 of the criminal procedure law; provided, however, that at least forty-eight hours prior written notice of the commission's intention to confer such immunity is given the attorney general and the appropriate district attorney.

3. To request and receive from any court, department, division, board, bureau, commission, or other agency of the state or political subdivision thereof or any public authority such assistance, information and data as will enable it properly to carry out its functions, powers and duties.

4. To report annually, on or before the first day of March in each year and at such other times as the commission shall deem necessary, to the governor, the legislature and the chief judge of the court of appeals, with respect to proceedings which have been finally determined by the commission. Such reports may include legislative and administrative recommendations. The contents of the annual report and any other report shall conform to the provisions of this article relating to confidentiality.

5. To adopt, promulgate, amend and rescind rules and procedures, not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article. All such rules and procedures shall be filed in the offices of the chief administrator of the courts and the secretary of state.

6. To do all other things necessary and convenient to carry out its functions, powers and duties expressly set forth in this article.



Article 2A 1978

Ex 1

§ 43. Panels; referees

1. The commission may delegate any of its functions, powers and duties to a panel of three of its members, one of whom shall be a member of the bar, except that no panel shall confer immunity in accordance with section 50.20 of the criminal procedure law. No panel shall be authorized to take any action pursuant to subdivisions four through eight of section forty-four of this article or subdivision two of this section.

2. The commission may designate a member of the bar who is not a judge or a member of the commission or its staff as a referee to hear and report to the commission in accordance with the provisions of section forty-four of this article. Such referee shall be empowered to conduct hearings, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that the referee may deem relevant or material to the subject of the hearing.

§ 44. Complaint; investigation; hearing and disposition

1. The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge, and, in accordance with the provisions of subdivision d of section twenty-two of article six of the constitution, may determine that a judge be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge be retired for mental or physical disability preventing the proper performance of his judicial duties. A complaint shall be in writing and signed by the complainant and, if directed by the commission, shall be verified. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have notified the judge of the complaint, the commission shall also notify the judge of such dismissal.

2. The commission may, on its own motion, initiate an investigation of a judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the judge involved before it, in which event the judge shall be notified in writing of his required appearance, either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior to such appearance. In either case a copy of the complaint shall be served upon the judge at the time of such notification. The judge shall have the right to be represented by counsel during any and all stages of the investigation in which his



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which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

**[Commission on judicial conduct; composition; organization and procedure; review by court of appeals; discipline of judges or justices.]** § 22. a. There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties. The commission shall transmit any such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

b. (1) The commission on judicial conduct shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of the unified court system, and one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.

(2) The persons first appointed by the governor shall have respectively one, two, three, and four-year terms as he shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three, and four-year terms as he shall designate. The person first appointed by the temporary president of the senate shall have a one-year term. The person first appointed by the minority leader of the senate shall have a two-year term. The person first appointed by the speaker of the assembly shall have a four-year term. The person first appointed by the minority leader of the assembly shall have a three-year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him for such appointment. Membership shall also terminate if a member attains a position which would have rendered him ineligible for appointment at the time of his appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

c. The organization and procedure of the commission on judicial conduct shall be as provided by law. The commission on judicial conduct may establish its own rules and procedures not inconsistent with law. Unless the legislature shall provide otherwise, the commission shall be empowered to designate one of its members or any other person as a referee to hear and report concerning any matter before the commission.

Ex 2

d. In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

e. The court of appeals may suspend a judge or justice from exercising the powers of his office while there is pending a determination by the commission on judicial conduct for his removal or retirement, or while he is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

f. Upon the recommendation of the commission on judicial conduct or on its own motion, the court of appeals may suspend a judge or justice from office when he is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

g. A judge or justice who is suspended from office by the court of appeals shall receive his judicial salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that he shall be paid his salary for such period of suspension.

h. A judge or justice retired by the court of appeals shall be considered to have retired voluntarily. A judge or justice removed by the court of appeals shall be ineligible to hold other judicial office.

i. Notwithstanding any other provision of this section, the legislature may provide by law for review of determinations of the commission on judicial conduct with respect to justices of town and village courts by an appellate division of the supreme court. In such event, all references in this section to the court of appeals and the chief judge thereof shall be deemed references to an appellate division and the presiding justice thereof, respectively.

j. If a court on the judiciary shall have been convened before the effective date of this section and the proceeding shall not be concluded by that date, the court on the judiciary shall have continuing jurisdiction beyond the effective date of this section to conclude the proceeding. All matters pending before the former commission on judicial conduct on the effective date of this section shall be disposed of in such manner as shall be provided by law. (Section 22 repealed and new section 22 added by vote of the people November 8, 1977.)

**[Removal of judges.]** § 23. a. Judges of the court of appeals and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein.

6. Six members of the commission shall constitute a quorum of the commission and the concurrence of five members of the commission shall be necessary for any action taken or determination rendered. Two members of a three-member panel of the commission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken or determination rendered.

7. The commission shall appoint and at pleasure may remove an administrator who shall be an attorney. The administrator of the commission may appoint such deputies, assistants, counsel, investigators and other officers and employees as he may deem necessary, prescribe their powers and duties, fix their compensation and provide for reimbursement of their expenses within the amounts appropriated therefor.

**§ 42. Functions, powers and duties**

The commission shall have the following functions, powers and duties:

1. Conduct hearings, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to an investigation.

2. Confer immunity when the commission deems it necessary and proper in accordance with section 50.20 of the criminal procedure law; provided, however, that at least forty-eight hours prior written notice of the commission's intention to confer such immunity is given the attorney general and the appropriate district attorney.

3. Request and receive from any court, department, division, board, bureau, commission, or other agency of the state or political subdivision thereof or any public authority such assistance, information and data as will enable it properly to carry out its functions, powers and duties.

4. Make an annual report to the governor, the legislature and the chief judge of the court of appeals of its work; provided, however, that such report shall be subject to the confidentiality requirements of section forty-four.

5. Adopt, promulgate, amend and rescind rules and procedures necessary to carry out the provisions and purposes of this article. All such rules and procedures shall be filed in the office of the state administrator and the secretary of state.

6. Do all other things necessary and convenient to carry out its functions, powers and duties expressly set forth in this article.

**§ 43. Complaint, investigation, hearing and disposition**

1. The commission shall receive a complaint against any judge with respect to his qualifications, conduct, fitness to perform, or the performance of his official duties. A complaint shall be in writing and verified unless the commission shall otherwise direct. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant.

deletions by ~~strikeouts~~



Article 2A 1974

Ex 3

5. The commission may establish and designate three-member panels. Any such panel may exercise all the functions, powers and duties of the commission as provided in sections forty-two and forty-three unless otherwise directed by the commission; provided however, that no such panel is or may be authorized to confer immunity in accordance with section 50.20 of the criminal procedure law.

6. ~~Six~~ Five members of the commission shall constitute a quorum of the commission and the concurrence of five members of the commission shall be necessary for any action taken ~~or determination rendered~~ pursuant to paragraphs four through eight of section forty-three. Two members of a three-member panel of the commission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken ~~or determination rendered~~.

7. The commission shall appoint and at pleasure may remove an administrator who shall be an attorney. The administrator of the commission may appoint such deputies, assistants, counsel, investigators and other officers and employees as he may deem necessary, prescribe their powers and duties, fix their compensation and provide for reimbursement of their expenses within the amounts appropriated therefor.

§ 42. **Functions, powers and duties**

The commission shall have the following functions, powers and duties:

1. Conduct hearings and investigations, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to an investigation; and the commission may designate any of its members or any member of its staff to exercise any such powers except that hearings shall be conducted before at least two commission members.

2. Confer immunity when the commission deems it necessary and proper in accordance with section 50.20 of the criminal procedure law; provided, however, that at least forty-eight hours prior written notice of the commission's intention to confer such immunity is given the attorney general and the appropriate district attorney.

3. Request and receive from any court, department, division, board, bureau, commission, or other agency of the state or political subdivision thereof or any public authority such assistance, information and data as will enable it properly to carry out its functions, powers and duties.

4. Make an annual report to the governor, the legislature and the chief judge of the court of appeals of its work; provided, however, that such report shall be subject to the confidentiality requirements of section forty-four.

5. Adopt, promulgate, amend and rescind rules and procedures necessary to carry out the provisions and purposes of this article. All such rules and procedures shall be filed in the office of the state administrator and the secretary of state.

6. Do all other things necessary and convenient to carry out its functions, powers and duties expressly set forth in this article.

§ 43. **Complaint, investigation, hearing and disposition**

1. The commission shall receive a complaint against any judge with respect to his qualifications, conduct, fitness to perform, or the performance of his official duties. A complaint shall be in writing and signed by the complainant and if directed by the commission shall be verified ~~unless the commission shall otherwise direct~~. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it deter-



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mines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have required the appearance of the judge involved before it, the commission shall also notify the judge of such dismissal.

2. The commission may, on its own motion, initiate an investigation of a judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the judge involved before it, in which event the judge shall be notified in writing of his required appearance either personally at least three days prior to such appearance or by certified mail, return reciept requested, at least five days prior to such appearance and a copy of the complaint shall be served upon the judge at the time of such notification. The judge shall have the right to be represented by counsel during any and all stages of the investigation at which his appearance is required and to present evidentiary data and material relevant to the complaint. ~~Suggestions and recommendations may be made to the judge with respect to his conduct and the performance of his official duties, and a~~ A transcript shall be made and kept with respect to ~~the statement made to the judge and his response thereto~~ all proceedings at which testimony or statements under oath of any party or witness shall be taken. Such transcript shall be confidential except as otherwise permitted by section forty-four.

4. If in the course of or after an investigation, the commission determines that it is appropriate to render an admonition to a judge, it may do so with or without a hearing. A copy of such admonition shall be given to the judge.

~~4.~~ 5. If in the course of an investigation, the commission determines that a hearing is warranted it ~~may~~ shall direct that a formal written complaint signed and verified either by the person making the complaint or by the administrator of the commission be drawn and that a hearing be held with respect to such complaint. The judge involved shall be ~~given at least ten days' personal notice of the hearing and a copy of the complaint shall be served upon him at the time of such notification~~ notified in writing of the date of the hearing either personally at least ten days prior to such hearing, or by certified mail, return receipt requested, at least twelve days prior to such hearing and a copy of the complaint shall be served upon him at the time of such notification. ~~If~~ The judge may, and if directed by the commission, ~~the judge~~ shall, file with the commission within a time specified an answer in writing to the complaint. The complainant may be notified of the hearing and unless he shall be subpoenaed as a witness by the judge, his presence thereat shall be within the discretion of the commission. The hearing shall not be public unless the judge involved shall so demand in writing. At the hearing the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The judge ~~may~~ shall have the right to be represented by counsel during any and all stages of the hearing and shall have the right to call and cross-examine

against whom charges have been preferred, the nature of the charges and the date set for hearing these charges, which shall not be less than sixty days after the giving of such notice. Immediately upon receipt of such notice, the legislature shall be deemed to be in session for the purpose of this proceeding. If any member of the legislature prefers the same charges against the judge or justice concerned within thirty days after receipt of such notice and if such charges are entertained by a majority vote of the assembly, proceedings before the court on the judiciary shall be stayed pending the determination of the legislature which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judge or justice for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

f. The court on the judiciary shall have power to designate the attorney for the commission on judicial conduct to act as counsel to conduct the proceeding, to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial, to grant immunity from prosecution or punishment, as may be provided by law when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and to make its own rules and procedures for the investigation and trial.

g. The court on the judiciary shall have such further powers and duties as may be provided by law.

h. The judges or justices while exercising the powers of a court on the judiciary shall serve without additional compensation but the legislature shall provide moneys by appropriation to meet the expenses of the court.

i. A judge or justice may not exercise the powers of his office while charged with a felony or while a proceeding for his removal or retirement by the court on the judiciary is pending. A judge or justice may not exercise the powers of his office nor receive his judicial salary upon pleading guilty to or being found guilty of a felony pending review of the conviction by a court of appellate jurisdiction.

j. An appeal may be taken by either the commission on judicial conduct or the respondent to the court of appeals by permission of such court from a final determination of the court on the judiciary.

k. There shall be a commission on judicial conduct, the organization and procedure of which shall be as the legislature shall provide. The commission shall receive and investigate complaints of the public with respect to the qualifications, conduct, or fitness to perform or the performance of the official duties of any judge or justice of any court within the unified court system and may, on its own motion, initiate investigations with respect to the qualifications, conduct, or fitness to perform or the performance of the official duties of any such judge or justice. The commission may either recommend to the chief judge of the court of appeals the convening of the court on the judiciary, for stated reasons, to hear and determine charges against a judge or justice, or determine that a judge or justice be censured, suspended or retired, as provided by law. The commission shall transmit any determination of censure, suspension or retirement to the chief judge of the court of appeals who shall give written notice of such determination to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for the convening of the court on the judiciary to hear and determine the charges, in which event the court on the judiciary may impose whatever disciplinary measures it may determine, including removal. If such judge or justice

1975 Constitutional Amendment
Ex 5

## AFFIDAVIT OF SERVICE

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

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

Deponent is not a party to the action, is over 18 years of age, and resides at White Plains, New York.

On June 9, 1995 Deponent personally served a true copy of the within:

> PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S DISMISSAL MOTION AND IN FURTHER SUPPORT OF PETITIONER'S VERIFIED PETITION, MOTION FOR INJUNCTION AND DEFAULT, AND FOR SANCTIONS

upon: Attorney General of the State of New York
Attorney for Respondent
120 Broadway
New York, New York 10271

Elena Ruth Sassower
ELENA RUTH SASSOWER

Sworn to before me this
9th day of June 1995

Louise Di Crocco
Notary Public

LOUISE Di CROCCO
Notary Public, State of New York
No. 4718571
Qualified in Westchester County
Commission Expires ~~March 30, 1997~~
12-10-96