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

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

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

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

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

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

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

Ex NN-1

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

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

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

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

> "10. The affidavit is 'the foremost source of proof on motions', Siegel, New York Practice , §205 (1999 ed., p. 324). In dismissal motions, it is 'the primary source of proof', Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, C3211:43 (1992 ed., p. 60), as it is on summary judgment motions, Siegel, New York Practice, §281 (1999 ed., p. 442). [fn.3].

[fn.3] 'An affidavit must state the truth, and those who make affidavits are held to a strict accountability for the truth and accuracy of their contents', Corpus Juris Secundum, Vol. 2A, § 47 (1972 ed., p. 487). 'False swearing in either an affidavit or CPLR 2106 affirmation constitutes perjury under Chapter 210 of the Penal Law', Siegel, New York Practice, §205 (1999 ed., p. 325). 'Affidavits on any motion should be made only by those with knowledge of the facts, and nowhere is this rule more faithfully applied than on the motion for summary judgment.' *Id*, §281 (p. 442).

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

> 'To obtain summary judgment it is necessary that the movant establish his cause of action... 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b]). Normally, if the opponent is to succeed in defeating a summary judgment motion, he must make his showing by producing evidentiary proof in admissible form... We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form...or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions...or unsubstantiated allegations or assertions are insufficient' (*Alvord v. Swift & Muller Constr. Co.,* 46 NY2d 276, 281-282; *Fried v. Bower & Gardner*, 46 NY2d 765, 767; *Platzman v. American Totalisator Co.*, 45 NY2d 910, 912; *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290).' at 562

12. '[T]he basic rule followed by the courts is that general conclusory allegations, whether of fact or law, cannot defeat a motion for summary judgment where the movant's papers make out a prima facie basis for the grant of the motion', Vol. 6B, Carmody-Wait 2d, §39:[120 (2004 ed., p. 254)]. 'A party opposing a motion for summary judgment cannot rely on mere denials, either general or specific...it is not enough for the opponent to deny the movant's presentation. He must state his version and he must do so in evidentiary form.' *Id.* §39:56 (pp. 163-4). The party seeking to defeat summary judgment 'must avoid mere conclusory allegations and come forward to lay bare his proof...', Siegel, New York Practice §281 (1999 ed., p. 442). '[M]ere general allegations will not

---

'An affidavit opposing a motion for summary judgment must indicate that it is being made by one having personal knowledge of the facts. An affidavit not based on personal knowledge constitutes hearsay and may not be utilized to defeat a motion for summary judgment...' 6B Carmody-Wait 2d, §39:69: (1996 ed., pp. 225-6).

suffice', Vol. 6B Carmody-Wait 2d §39:52 (1996 ed., p. 157). '[T]he burden is on the opposing party to rebut the evidentiary facts and to present evidence showing that there exists a triable issue of fact. Such party must assemble, lay bare, and reveal his proofs...some evidentiary proofs are required to be put forward', *Id.*, §39:53 (pp.159-60); *Stainless , Inc. v. Employers Fire Ins. Co.*, 418 NYS2d 76, *affd.* 49 NY2d 924, as well as Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16).

13. 'Failing to respond to a fact attested in the moving papers...will be deemed to admit it', Siegel, New York Practice, §281 (1999 ed., p. 442) -- citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 599 (1975), itself citing *Laye v. Shepard*, 265 N.Y.S.2d 142 (1965), aff'd 267 N.Y.S.2d 477 (1st Dept. 1966) and Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. 'If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it' *id.* (1992 ed., p. 324). '[I]f answering affidavits are not produced, the facts alleged in the movant's affidavits will usually be taken as true", 2 Carmody-Wait §8:52 (1994 ed., p. 353). Where answering affidavits are produced, they "should meet traversable allegations" of the moving affidavit. "Undenied allegations will be deemed to be admitted, *id*, citing *Whitmore v. J. Jungman, Inc.*, 129 NYS 776, 777 (S.Ct., NY Co. 1911).

14. Additionally, relevant is *Ellen v. Lauer*, 620 N.Y.S.2d 34 (1st Dept., 1994) – cited in 6B Carmody-Wait 2d (1996) §39:54 (at p. 161):

> 'A court reviewing a motion for summary judgment will tend to construe the facts 'in a light most favorable to the one moved against, but this normal rule of summary judgment will not be applied if the opposition is evasive, indirect, or coy.", citing *Siegel*, New York Practice §281 and *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 170 A.D.2d 108, 573 N.Y.S.2d 981 (1st Dept. 1991), *aff'd* 80 N.Y.2d 377, 590 N.Y.S. 831.

15. Moreover, and as set forth by my cross-motion (at ¶4), 'when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party.' Corpus Juris Secundum Vol. 31A, 166 (1996 ed., p. 339)."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶6[4] purports that my cross-motion

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

With ¶6[5] thereupon asserting,

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

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

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

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

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

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

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

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

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

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

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

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

reply affidavit.

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

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

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

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

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

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

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

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

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

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

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

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

---

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

Exhibit-2