Respondent's September 11, 2007 reply affidavit

> accordance with its December 17 (sic), 1991 decision...the Court grant summary judgment to petitioner seeking a warrant of eviction against respondent from the subject premises",

neither my Answer nor my cross-motion claim that the Court should decide such open prior case – let alone that it should do so "against me". Rather, my Answer and cross-motion assert that Mr. McFadden's open prior proceeding against me under 651/89, as likewise, the Co-Op's open prior proceedings against both him and me under 434/88 and 500/88, bar the instant action – for which reason the instant proceeding should be dismissed pursuant to CPLR 3211(a)4.

63. Mr. Sclafani provides no legal authority for how such long-dormant proceedings, involving additional parties, may be activated, but surely it cannot be done summarily – let alone by the summary granting of a 14-year old summary judgment motion therein – without a formal motion made under the index number of such proceedings, giving notice to the affected parties. Such affected parties would be my mother, a respondent in open proceeding 651/89, and the Co-Op, the petitioner in open proceedings 434/88 and 500/88.

64. However, were Mr. Sclafani to make a properly-noticed motion therein, Mr. McFadden would still not be entitled to summary judgment on his 14-year old undecided motion for summary judgment. Indeed, Mr. Sclafani's glib representation at ¶46 that "All the papers necessary for the disposition of the motion had been submitted" – for which he relies on Judge Reap's December 19, 1991 decision (at ¶49), as he likewise relies on it for his false claims that the outcome of the federal action against me entitles Mr. McFadden to summary judgment based on *res judicata*, collateral estoppel and issue preclusion (his ¶¶47-48) – violates both fundamental due process and black-letter law. Mr. Sclafani can be presumed to know this from my cross-motion's Exhibit Y, as well as from elementary rules governing application of *res judicata*, collateral estoppel, and issue preclusion, set forth in caselaw and treatise authority.

Exhibit 3

65. Exhibit Y of my cross-motion consists of my mother's December 16, 1991 "Responding Affidavit" and my own December 16, 1991 "Responding Affidavit", subscribing to, and incorporating, my mother's affidavit. Such were our submissions before Judge Reap when he rendered his December 19, 1991 decision with respect to Mr. McFadden's first summary judgment motion, dated November 25, 1991. Evident from ¶¶2 and 3 of my mother's affidavit, is that Judge Reap could not lawfully deny our "request to supply additional papers in opposition" to Mr. McFadden's summary judgment motion. The reason is the nature of the "additional papers", which those paragraphs identify. As stated:

> "2. This Affidavit is without prejudice to a motion for recusal, change of venue and other relief, which Respondents will make at such time as these proceedings are no longer stayed pursuant to the prior decision of this Court.
>
> 3. Petitioner's instant motion for summary judgment is premature and violative of the stay heretofore granted by this Court, and hence will not at this time be addressed as to its substance. In the interest of expediency, this Affidavit is strictly limited to the factual question as to whether Petitioner correctly contends that these proceedings are no longer subject to the stay because allegedly the related federal action has been concluded. Respondents reserve their right to address Petitioner's other material factual allegations – all of which are vigorously denied and disputed – by appropriate response at a later date, should the instant motion not be dismissed in accordance with Respondents' position."

66. Aside from our absolute right to interpose a motion for recusal/change of venue so that the proceeding could be heard by a fair and unbiased tribunal – which Judge Reap and the City Court were not – no summary judgment could be rendered where we denied and disputed the material factual allegations of Mr. McFadden's motion, expressing reserving our right to address same, if our showing as to its prematurity was not adopted by Judge Reap, which, by his December 19, 1991 decision, it was.

67. Conspicuously, Mr. Sclafani has not placed before the Court a copy of Mr. McFadden's November 25, 1991 summary judgment motion, upon which Judge Reap rendered his December 19, 1991 decision. Nor has he put forward Mr. McFadden's subsequent October

20, 1992 summary judgment motion, as to which there is no decision by Judge Reap or any other judge. Both these motions were made by the law firm, Lehrman, Kronick & Lehrman, which were Mr. McFadden's attorneys in all the prior City Court proceedings.

68. Mr. McFadden's November 25, 1991 summary judgment motion was supported only by Mr. McFadden's own affidavit, with no accompanying attorney's affirmation or memorandum of law. Such motion did not assert, nor make any argument with respect to, *res judicata*, collateral estoppel, and issue preclusion. Indeed it failed to identify, including by any of its annexed exhibits, that Mr. McFadden had been a co-plaintiff in the federal action, had withdrawn himself as co-plaintiff nearly a year prior to the adverse jury verdict, nor any of the consequences of his withdrawal.

69. The standards for invocation of *res judicata*/collateral estoppel are reflected in *Gramatan Home v. Lopez*, 46 N.Y.2d 481 (1979), wherein the Court of Appeals enunciated:

> "Collateral estoppel...is but a component of the broader doctrine of *res judicata*...As the consequences of a determination that a party is collaterally estopped from litigating a particular issue are great, *strict requirements for application of the doctrine must be satisfied* to insure that a party not be precluded from obtaining at least one full hearing on his or her claim. ... First, *it must be shown* that the party against whom collateral estoppel is sought to be invoked had a full and fair opportunity to contest the decision said to be dispositive of the present controversy. Additionally, *there must be proof* that the issue in the prior action is identical, and thus decisive, of that in issue in the current action [*Schwartz v. Public Administrator of County of Bronx*], (24 N.Y.2d, at p. 71)." (*Gramatan*, at 485, emphasis added).

70. The first inquiry on collateral estoppel is "whether it is being used only against one who has already had his day in court" – for which, together with a careful analysis to establish "identity of issues", "all the circumstances of the prior action must be examined to determine whether the estoppel is to be allowed." Siegel, New York Practice, §462 (1999 ed., pp. 742-3). As stated:

> "Caselaw suggests with good reason that in the final analysis collateral estoppel is sui generis, that its 'crowning consideration' is fairness, that rigidity has no place in its application, and that 'all the circumstances of the prior action must be examined to determine whether the estoppel is to be allowed.'" *Id*, p. 743.

71. Mr. Sclafani does not claim that Judge Reap's December 19, 1991 decision complies with the "strict requirements" for application of *res judicata*, collateral estoppel, and issue preclusion. His ¶¶47-48 conspicuously do not quote, or even identify, Judge Reap's stated factual basis for application of these doctrines, *to wit*, that "all respondents' claims in the federal action were dismissed and it is those exact claims that form their defense in the City Court summary proceeding." Nor does Mr. Sclafani himself independently assert such factual basis – let alone meet any standard of specificity in particularizing my federal claims, the grounds of their dismissal, and compare them to my claims in defending against the referred-to City Court proceeding. Such is all the more telling as my cross-motion expressly noted (at p. 33, fn. 18) that his dismissal motion had not repeated the false statement in his July 17, 2007 letter to Judge Press (Exhibit N) that the federal court decisions and orders had "dismissed on their merits" "the claims of Elena Sassower and her mother Doris Sassower, involving the events, facts, and circumstances underlying and precipitating the instant action."

72. As Judge Reap should have realized based on the March 20, 1991 "jury verdict and judgment of the U.S. District Court" (Exhibit X) – to which his December 19, 1991 decision refers – Mr. McFadden had ceased to be a co-plaintiff with myself and my mother in the federal action and (by reason thereof) virtually the entirety of our federal complaint "causes of action 2 through 8 and 10" – the causes of action involving corporate non-compliance – were withdrawn.

73. Mr. Sclafani – whose ¶45 states that the status of 651/89 "as of 1992" was that McFadden had a "pending...motion for summary judgment" – does not identify the date of that motion – presumably October 20, 1992. Nor does he distinguish that such motion is not the

same as Mr. McFadden's previous summary judgment motion, to which Mr. Scalfani makes reference at ¶¶46-49, also with no date. This enables Mr. Sclafani's false representation (at ¶46) that "All of the papers necessary for disposition of the motion had been submitted", substantiating it (at ¶49) by the December 19, 1991 decision on the earlier summary judgment motion.

74. It further enables Mr. Sclafani to misleadingly represent, also at ¶46, that "the Court elected to hold its determination of the motion in abeyance pending a final decision in federal court". He has no basis to speculate as to what Judge Reap "elected" – and certainly the December 19, 1991 decision shows that Judge Reap was perfectly capable of explaining the situation, which for reasons unknown he did not do.

75. Upon information and belief, Judge Reap – and the other judges of White Plains City Court – subsequently recused themselves from cases involving my mother.[7] This would have included Mr. McFadden's open proceeding against me and my mother under 651/89 as to which no decision had been rendered on Mr. McFadden's October 20, 1992 summary judgment motion.

76. In any event, by June 1993, there was "a final decision in federal court" – thereby clearing the way for the Court to determine Mr. McFadden's pending October 20, 1992 summary judgment motion. All that was needed from Mr. McFadden's lawyers was a letter to the Court that the federal case was finally over and asking for a decision on the unadjudicated summary judgment motion. This would have entailed virtually no expense and no emotional energy. As such, it puts the lie to Mr. Sclafani's representation to Judge Press in open court on July 16th that

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

by the time the federal case was over, Mr. McFadden "lack[ed]...the funds to proceed to complete the [e]viction" -- which was Mr. Sclafani's pretext as to why Mr. McFadden thereafter made "an agreement,...oral, [of] a month-to-month tenancy with me (Exhibit I-1, p. 5, lns. 12-24), as likewise ¶¶86-88 of Mr. Sclafani's affirmation on his dismissal motion purporting that because Mr. McFadden was "Exhausted both mentally and financially", he "took no action" to remove me upon the conclusion of the federal action, but, instead allowed me to remain, "on a month to month basis in exchange for the payment of varying amounts of rents, as from time to time, the parties agreed".

77. Needless to say, if Mr. Sclafani believes the December 19, 1991 decision entitled Mr. McFadden to summary judgment at the conclusion of the federal action, such powerfully reinforces my Seventh Affirmative Defense based on Implied Contract[8], Detrimental Reliance & Fraud, whose ¶TWENTY-THIRD states:

> "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 done. To the contrary, he fostered in respondent the belief that he was honoring the terms of the October 30, 1987 occupancy agreement and contract of sale." (underlining added).

78. Neither Mr. Sclafani nor Mr. McFadden has answered the obvious question as to why Mr. McFadden did not seek my eviction upon the federal litigation's conclusion in June 1993, when, based on Judge Reap's December 19, 1991 decision, he readily could have. That Mr. McFadden did not do so from mid-June 1993 or in the 14 years since, however, was a conscious choice by him and his attorneys, who were fully knowledgeable of the December 19,

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[8] *Cf.* Mr. Sclafani's ¶52 that falsely purports that I cannot and do not rest on "any subsequent agreement, express or implied, written or oral, between the parties herein". This, because I "affirmatively assert[] that [I] remain[] in occupancy of the premises at issue under the temporary occupancy agreement". Examination of my affirmative defenses and counterclaims shows this to be yet another one of Mr. Sclafani's lies.

1991 decision.[9] Indeed, this may explain why Mr. Sclafani has not put before the Court Mr. McFadden's October 20, 1992 pending summary judgment motion, which annexed the December 19, 1991 decision as an exhibit and made it the focus of the five-paragraph supporting affirmation of his attorney, who cited to, quoted from, and annexed it, albeit without any independent assertion as to the truth of Judge Reap's factual basis for holding *res judicata*, collateral estoppel, and issue preclusion applicable.

79. Finally, with respect to Mr. Sclafani's ¶53 assertion that my cross-motion and Answer seek "to preclude this Court from ruling on matters the subject of the subsequent events". This is flagrantly false. As my Answer's affirmative defenses and counterclaims make evident – as likewise my cross-motion, seeking dismissal and summary judgment based thereon – I have placed before the Court nearly 20 years of "subsequent events" to the October 30, 1987 occupancy agreement and contract of sale on which to rule.

Mr. Sclafani's Section Entitled "This Court has Subject Matter Jurisdiction Over These Proceedings"is a Sanctionable Deceit

80. Mr. Sclafani does not identify that his ¶¶55-61 are responding to my cross-motion's ¶¶65-72 section entitled "Mr. Sclafani's Deceit as to my Third Affirmative Defense (Lack of Subject Matter Jurisdiction)". He does not deny or dispute the accuracy of my showing therein, largely focused on his misrepresentation that he was seeking dismissal of such affirmative defense "as a matter of undisputed fact and as a matter of law", which was false. My Answer had both denied that there was any "oral agreement" wherein I became his month-to-month tenant and that the occupancy agreement and contract of sale had ended and terminated – denials Mr. Sclafani had concealed.

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[9] In pleading ignorance, a showing is required "that the ignorance is unavoidable and that with diligent effort the fact could not be ascertained." Siegel, §281 New York Practice (1999 ed., p. 442). *See* also, C3212:16, Civil Practice Law and Rules (1999 ed., p. 324).