SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: NINTH & TENTH JUICIAL DISTRICTS

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JOHN McFADDEN,

Respondent,

-against-

DORIS L. SASSOWER,

Respondent,

ELENA SASSOWER,

Appellant.

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Appellate Term:
#2008-1427 WC

White Plains City Court:
#SP-651/89
#SP-2008-1474

Affidavit in Reply, in Support of Sanctions, & in Further Support of Order to Show Cause for Reargument/ Renewal & Other Relief

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss:

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

1. I am the above-named appellant *pro se*, fully familiar with all the facts, papers, and proceedings heretofore had.

2. This affidavit is timely-submitted[1] in reply to the pervasively false, fraudulent, and perjurious October 28, 2008 affidavit of respondent McFadden in opposition to my order to show cause for reargument/renewal & other relief, as well as in support of imposition of

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[1] By faxed letter dated October 24, 2008, I requested an opportunity to submit reply papers, which Justice Molia granted, modifying the return date of my order to show cause from Friday, October 31, 2008 to Monday, November 3, 2008. My October 24, 2008 letter is annexed as Exhibit M, continuing the sequence of exhibits begun by my August 13, 2008 vacatur/dismissal motion.

sanctions and costs, pursuant to 22 NYCRR §730.3(g)[2], against Mr. McFadden and his attorney, Leonard Sclafani, Esq., who presumably drafted the affidavit[3], and their referral to criminal and disciplinary authorities for perjury and other misconduct. Additionally, it is submitted in further support of my aforesaid order to show cause.

3. Mr. McFadden's affidavit, served on me but, upon information and belief, not on respondent DORIS L. SASSOWER, is no opposition, *as a matter of law*. With the exception of the section of his affidavit entitled "Ms. Sassower's Complaints Concerning the Clerk's Return on Appeal and the Clerk of the White Plains City Court are Baseless" (¶¶35-49), his 17-page affidavit fails to identify, let alone confront, ANY of the grounds for my motion. Thus, his section "Sassower's Motion for Reargument/Renewal is "Meritless" (¶¶10-17) identifies NONE of the material errors and deficiencies in the order and decision that my affidavit demonstrates as warranting reargument. Likewise his section "Ms. Sassower's Motion for a Stay of Payment of Use and Occupancy Must Also Be Denied" (¶¶18-34) identifies NONE of the facts, law, and legal arguments upon which I am seeking to have the Court withdraw its *sua sponte* condition that I pay "rent/and or use and occupancy…within ten 10 days from the date of [the] order" to Mr. McFadden. As for Mr. McFadden's final section, "Ms. Sassower's Request For an Extension of Time to Obtain

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[2] 22 NYCRR §730.3(g), promulgated by the Appellate Division, Second Department, states:

> "Any attorney or party to a civil appeal who, in the prosecution or defense thereof, engages in frivolous conduct as that term is defined in 22 NYCRR subpart 130-1.1(c) shall be subject to the imposition of such costs and/or sanctions as authorized by 22 NYCRR subpart 130-1 as the court may direct."

[3] I believe that Mr. Sclafani may have signed Mr. McFadden's name to the affidavit, as well – and annex the signature page (Exhibit N) for comparison with the signature pages of Mr. McFadden's prior affidavits to this Court.

Counsel" (¶¶50-56), my motion does not seek such relief.

4. As hereinafter demonstrated, my entitlement to ALL the relief sought by my order to show cause is reinforced by the material deceit that pervades virtually every paragraph of Mr. McFadden's affidavit. As the treatises recognize:

> '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).
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> 'It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause...and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.' II John Henry Wigmore, Evidence §278 at 133 (1979)."

5. Before addressing the material falsehoods that infuse Mr. McFadden's prefatory paragraphs, I will detail his deceits pertaining to his four titled sections of his affidavit. For the convenience of the Court, a Table of Contents follows:

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* * *

Mr. McFadden's Deceit that my "Motion for Reargument/Renewal is Meritless"

6. Instead of confronting ANY of the facts, law, and legal argument presented by my order to show cause in support of reargument and renewal – essentially spanning the whole of my moving affidavit – Mr. McFadden rests on a succession of falsehoods. Thus, after his ¶¶10-12 summarize CPLR §2221 pertaining to reargument and renewal, his ¶13 baldly purports that I have failed "to identify separately or support separately" such relief, as CPLR §2221(f) requires. This is utterly false:

- My ¶6 identifies, as reargument, the facts and law pertaining to the Court's *sua sponte* conditioning of my stay pending appeal on my paying Mr. McFadden "rent/and or use and occupancy";

- My ¶31 identifies, as renewal, the subsequent fact of my September 18, 2008 motion in White Plains City Court pertaining to the Clerk's Return on Appeal";

- My ¶34 identifies, as reargument, the facts supporting the Court's deferment of the December 5, 2008 due date for my perfecting the appeal herein and the November 13, 2008 due date for my perfecting the appeals in *John McFadden v. Elena Sassower*, #SP-1502/07 [#2008-1428 WC; #2008-1433 WC];

- My ¶38 identifies, as reargument, the facts and law pertaining to the Court's errors as to Judge Friia's July 3, 2008 decision & order and her July 21, 2008 judgment being "entered", as well as its *sua sponte* invocation of CPLR 5512(a) and citation to *Neuman v. Otto*, 114 AD2d 791 (1985), to deem my July 23, 2008 notice of appeal from the July 3, 2008 decision & order as also encompassing the July 21, 2008 judgment of eviction;

- My ¶42 identifies, as renewal, if not reargument, the facts pertaining to my August 14, 2008 notice of appeal of Judge Friia's July 21, 2008 judgment of eviction, warrant of removal, as well as of her July 3, 2008 decision & order, mistakenly returned to me by this Court's Clerk's Office under a September 29, 2008 coverletter;

- My ¶44 identifies, as reargument, the facts and law pertaining to the Court's erroneous and inconsistent captioning on its order and decision and its denial, rather than dismissal, of my mother's order to show cause,

7. Mr. McFadden then purports, by his ¶14, that my requested renewal "fails to identify any new facts or law that [I] could not have presented on [my] prior application that would change the Court's October 1, 2008 decision". Also false. My order to show cause identifies facts which could not have been presented on my "prior application", as they occurred after my July 30, 2008 order to show cause for a stay pending appeal and my August 13, 2008 vacatur/dismissal motion were submitted. These new facts are:

- my September 18, 2008 motion in White Plains City Court to compel White Plains City Court Clerk Lupi to file proper Clerk's Returns on Appeal – and the fraudulent opposition thereto by Mr. Sclafani, on behalf of Mr. McFadden, and by the State Attorney General, on behalf of Clerk Lupi – as demonstrated by my October 10, 2008 responding affidavit therein. Such is particularized by my ¶¶29-31;

- this Court's erroneous return to me, under a September 29, 2008 coverletter, of my August 14, 2008 notice of appeal – which I have now resubmitted to the White Plains City Court Clerk's Office for retransmittal to this Court. Such is particularized by my ¶¶39-42.

8. Mr. McFadden's ¶15 purports that my requested reargument is not based "on facts or law allegedly overlooked and misapprehended by the court in determining [my] prior motion." Again false. My affidavit presents a mountain of facts and law, which the Court "overlooked" and "misapprehended":

(a) the fact that the order & decision I received from this Court was undated (¶2);

(b) the fact that Mr. McFadden had made NO request that the Court condition a stay pending appeal on my paying him rent and/or use and occupancy (¶3);

(c) the fact that my August 13, 2008 vacatur/dismissal motion demonstrated that Mr. McFadden has no legal right to any monies under his March 27, 1989 Petition and that I am entitled to dismissal of the Petition, *as a matter of law*, based on documentary evidence and lack of jurisdiction (¶3);

(d) the fact that Mr. McFadden's March 27, 1989 Petition specifies no rent pursuant to the "month to month rental agreement" under which I and my mother are purported to have "entered in possession" of the subject apartment (¶4);

(e) the law limiting a court to the allegations of the pleading - in this case the allegations of Mr. McFadden's March 27, 1989 Petition (¶5);

(f) the fact that the October 30, 1987 occupancy agreement constituting the true basis by which I and my mother "entered in possession" of the subject apartment expressly disavows a landlord-tenant relationship – as a consequence of which this Court, as the appellate tribunal for White Plains City Court, is without jurisdiction to order "use and occupancy" (¶5);

(g) RPAPL 749, holding that "issuance of a warrant of removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant" – with the consequence that the October 30, 1987 occupancy agreement that the warrant asserts as the basis of my occupancy is "cancel[led]" and I am relieved of any obligation to pay its "use and occupancy" (¶11);

(h) the fact that the October 30, 1987 occupancy agreement fixed monthly "use and occupancy" at $1,000 (fn. 5, p. 5);

(i) the fact that my payments to Mr. McFadden in excess of the $1,000 monthly "use and occupancy" wrongfully induced by Mr. McFadden and are the basis of affirmative defenses and my Second Counterclaim in *John McFadden v. Elena Sassower*, #SP-1502/07 – before this Court on appeals #2008-1428 WC and #2008-1433 WC (fn. 5, p. 5);

(i) the law pertaining to fraud (¶12);

(j) the inequity of a direction of any payment to Mr. McFadden for reasons directly relating to my July 30, 2008 order to show cause for a stay pending appeal (¶¶13-25);

(k) the fact that #651/89 may be a "closed" proceeding – and dismissible for lack of jurisdiction, without necessity of appeal (¶¶25, 28);

(l) the fact that the "Clerk's Return on Appeal" is deficient, thereby making it improper for the Court to further condition my stay pending appeal on perfecting the appeal by December 5, 2008 (¶¶32-34);

(m) the fact that Judge Friia's July 3, 2008 decision & order is not entered, nor her July 21, 2008 judgment of eviction and warrant of removal – contrary to the Court's order and decision (¶¶35-38, 43);

(n) the fact that that Judge Friia's July 21, 2008 judgment of eviction does not "ministerially implement[]" her July 3, 2008 decision & order, thereby making it prejudicial for the Court to have *sua sponte* invoked CPLR §5512(a) and *Neuman v. Otto*, to deem my July 23, 2008 notice of appeal from the July 3, 2008 decision & order as encompassing the July 21, 2008 judgment of eviction (¶38);

(o) the fact that I filed a separate August 14, 2008 notice of appeal from Judge Friia's July 21, 2008 judgment of eviction and warrant of removal, thereby making it superfluous for the Court to have *sua sponte* invoked CPLR §5512(a) and *Neuman v. Otto*, to deem my July 23, 2008 notice of appeal from the July 3, 2008 decision & order as encompassing the July 21, 2008 judgment of eviction (¶38);

(p) the fact that the Court's captioning on its order and decision is erroneous and inconsistent (¶44);

(q) the fact that the Court's order and decision erroneously deny, rather than dismiss, my mother's order to show cause (¶44).

9. Mr. McFadden then follows these three successive paragraphs of falsehood with his ¶16, also demonstrably false. He purports that my "application" is "little more than a rehash of the ranting and raving contained in [my] earlier motions for a stay and for dismissal of the case below" – and that these "original claims and arguments were less than frivolous when I originally made them and have not changed or risen in stature or merit since then". Tellingly, Mr. McFadden fails to identify even a single example of this alleged "ranting and raving" or of where I have inappropriately reprised my "earlier motions".

Examination shows that my instant order to show cause, like my "earlier motions" is dispositive – which is why Mr. McFadden has not confronted their factual or legal showing, either then or now.

Mr. McFadden's Deceit that my "Motion For a Stay of Payment of Use and Occupancy Must Also Be Denied"

10. Instead of confronting ANY of the facts, law, and legal argument I have presented for the Court's withdrawing its *sua sponte* direction of payment to Mr. McFadden as a condition of my stay pending appeal – spanning ¶¶2-25 of my moving affidavit – Mr. McFadden again rests on a succession of falsehoods and deceits. These start with the title. The payment direction is not simply "use and occupancy", but "rent/ and or use and occupancy". Mr. McFadden omits the actual, two-fold payment direction – and not only from the title of this section, but in its paragraphs: ¶¶18-19, 28, 32, as well as at the outset of his affidavit by his ¶2, thereby effectively conceding the documentary fact that his March 27, 1989 Petition specifies no rent for the "month to month rental agreement" by which I and my mother are alleged to have "entered in possession" of the subject apartment (Exhibit O-1)[4]

11. Also deceitful are Mr. McFadden's ¶¶18-20, 32-34, as well as his ¶2, by their references to the "October 1, 2008 decision and order". Such ignores that the order and decision I received from the Court are undated, as set forth at ¶2 of my affidavit and substantiated by my Exhibit H. This concealment is material as the Court directs that I pay Mr. McFadden "within 10 days from the date of [the] order". Acknowledging the date's omission would prevent Mr. McFadden from pretending, as his ¶19 falsely does, that there is

[4] As copied from the microfilm/microfiche reproduction in the Clerk's Return on Appeal, Mr. McFadden's March 27, 1989 Petition is annexed hereto as Exhibit O-1.

"no excuse" for my failing to make payment by October 10, 2008, and (at ¶20) that I have "wilfully disobeyed the October 1, 2008 order".[5]

12. Mr. McFadden then falsely purports that the relief I seek is "without a shred of a legitimate basis" (¶20) and that my "claims and arguments herein are frivolous" (¶22). In so doing, he does not identify what my "claims and arguments" are and goes on to purport that they "consist of little more than foolish sophistry presented in a self righteous, vitriolic and unseemly manner" (¶30) and that I have "failed to demonstrate any legitimate litigable issue that would result in a decision of this Court on [my] appeal overturning the judgment against [me]" (¶29, underlining added). These are bald characterizations – and here, too, Mr. McFadden provides not a single example of what my order to show cause actually sets forth. Indeed, the closest he comes is by his ¶21 where he purports that I "challenge[] the authority of this Court to impose conditions or (sic) the grant of the stay" (¶21), for which his ¶¶23-27 set forth generic and unexceptional law as to the Court's authority and discretion to impose conditions to its granting of a stay, with passing argument as to its "inherent power". Such is completely untethered to ANY of the specifics of what I have set forth. This includes Mr. McFadden's one paragraph containing a relevant legal proposition: his ¶29:

> "Only where the circumstances of the case so justify should the court grant a stay pending appeal without imposing conditions that secure the opposing party from suffering damages thereby. *Sternbach v. Friedman*, 29 A.D. 480, 51 N.Y.S. 1068."

13. Such "circumstances" that make the Court's *sua sponte* direction of payment to Mr. McFadden as a condition for my stay pending appeal unjust and inequitable, if not beyond its jurisdiction, are comprehensively detailed at ¶¶2-25 of my order to show cause,

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[5] Mr. McFadden also falsely purports that I "admit[]" that I received the Court's decision and order on October 2, 2008, despite my ¶2 expressly stating that I received it on October 3, 2008.

with both fact and law. Illustrative of their fact-based, law-supported nature are my ¶¶3-6, which I herein quote with their appended footnotes 2 & 3. These suffice to rebut Mr. McFadden's deceit that I have offered "little more than foolish sophistry presented in a self righteous, vitriolic and unseemly manner" (¶30):

> "3. The Court's undated order and decision condition my stay pending appeal upon payment to Mr. McFadden 'within 10 days from the date of this order' of 'any and all arrears in rent/ and or use and occupancy at the rate most recently payable...and to continue to pay use and occupancy at a like rate as the same become due' – a condition not requested by Mr. McFadden, a fact the order and decision do not identify. Such *sua sponte* direction is after denying, *without reasons*, my fact-specific and document-supported August 13, 2008 vacatur/dismissal motion which demonstrated that Mr. McFadden has no legal right to any monies under the March 27, 1989 Petition and that I am entitled to dismissal of the Petition, *as a matter of law*, based on documentary evidence and lack of subject matter jurisdiction.
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> 4. As shown, the underlying March 27, 1989 Petition, verified by Mr. McFadden in this alleged holdover proceeding, specifies no rent pursuant to the 'month to month rental agreement' under which I and my mother, Doris L. Sassower, are purported to have 'entered in possession' of the subject apartment.
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> 5. It is my belief that the Court's power on the appeal of Judge Friia's decision & order granting summary judgment to the March 27, 1989 Petition is limited by the Petition's allegations of 'a month to month rental agreement' for which no rent is payable. As a consequence, the Court is without jurisdiction to order 'use and occupancy'[fn.2] – and especially as the

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"[fn.2] *See* my September 2, 2008 memorandum of law, pages 20-21, quoting the New York Court of Appeals in *Lamphere v. Lang,* 213 N.Y. 585, 588; 108 N.E. 82 (1915):

> 'The law on the subject is clear. 'Pleadings and a distinct issue are essential to every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint would serve no useful purpose.' (*Romeyn* v. *Sickles*, 108 N. Y. 650, 652.) 'The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, '*secundum allegata et probata*,' is fundamental in the administration of justice. Any substantial departure from this rule is sure to produce surprise, confusion and injustice.' (*Day* v. *Town of New Lots*, 107 N. Y. 148, 154; *Northam* v. *Dutchess Co. Mut. Ins. Co.*, 177 N. Y. 73.)'

October 30, 1987 written Occupancy Agreement, which is the actual basis upon which I and my mother 'entered in possession', expressly disavows a landlord-tenant relationship, putting such additional or alternative direction beyond this Court's jurisdiction as the appellate tribunal for the White Plains City Court.[fn.3]

6. The Court's order and decision neither cite legal authority nor give any reasons for *sua sponte* conditioning my stay pending appeal on my paying Mr. McFadden 'rent' or 'use and occupancy'. Such is properly the basis of reargument and, upon the granting thereof, clarification by the Court." (underlining and italics in my October 15, 2008 moving affidavit).

14. As highlighted by ¶¶9, 15, 17, 47 of my order to show cause, my August 13, 2008 vacatur/dismissal motion is dispositive as to the fraud committed by Mr. McFadden's March 27, 1989 Petition (Exhibit O-1), its bootstrapping of White Plains City Court's lack of jurisdiction arising from the occupancy agreement and contract of sale, and his other

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Also quoted in *Cohen v. City Company of New York et al.*, 283 N.Y. 112, 117; 27 N.E.2d 803 (1940).

My memorandum of law additionally quoted, as "A similar statement of law, even more relevant", the Appellate Division, Third Department in *Gordon v. Ellenville and Kingston Railroad Company*, 119 A.D. 797, 802; 104 N.Y.S. 702:

> '...to permit a recovery would be to allow the plaintiff to allege one cause of action and recover upon another. The effect would be not only to change the action from one cause to another and different ground of action, but it would authorize a recovery upon evidence which disproves the cause of action alleged in the complaint.'"

"fn.3 The Occupancy Agreement, part of a Contract of Sale for the subject apartment, was unambiguous: '...in no way do the parties intend to establish a landlord/tenant relationship'. As the Contract of Sale was not to have been completed within 90 days after its execution and I and my mother had not defaulted thereunder, White Plains City Court was required to have dismissed Mr. McFadden's Petition herein because it did not have jurisdiction to hear the case in a summary proceeding. In such circumstances, 'the proper remedy, in an action to recover possession, is by ejectment...'. *Orange County Development Corp. v. Perez*, 67 Misc.2d 980; 325 N.Y.S.2d 608 (Co. Ct, Orange County 1971), dismissing the petition in that case. See also, *Barbarito v. Shilling*, 111 A.D.2d 200, 1985, 489 N.Y.S.2d 86 (1985), where the Appellate Division, Second Department reversed the order of the Supreme Court trial part to which the summary proceeding had been transferred and which had directed payment for use and occupancy of the premises *pendente lite*."

fraudulent acts by his counsel's drafting of the judgment of eviction and warrant of removal, which Judge Friia signed on July 21, 2008, without change (Exhibits O-3, O-4), as well as the legally insufficient and deceitful summary judgment motion upon which he secured Judge Friia's July 3, 2008 decision & order (Exhibit O-2).

Mr. McFadden's Deceit that my "Complaints Concerning the Clerk's Return on Appeal and the Clerk of the White Plains City Court are Baseless"

15. This is the only section of Mr. McFadden's affidavit that remotely identifies any semblance of the arguments presented by my order to show cause – but only after disparaging them as "ranting and ravings" (¶35) – "all…meritless" (¶36).

16. Thus, his ¶37 identifies that I have asserted that neither Judge Friia's July 3, 2008 decision & order nor her July 21, 2008 judgment were entered by White Plains City Court – which his ¶38 then rejects as:

> "unsupported by fact or evidence and is easily disproved by examination of the Clerk's Return on appeal that includes these documents among those entered in the proceedings."

This is false – and, tellingly, Mr. McFadden offers no supporting "facts or evidence". Thus, he does not annex copies of the supposedly entered documents or explain why he has not done so. Nor does he purport to have gone to this Court's Clerk's Office to view the Clerk's Return on Appeal and to have there found the originals entered.

By contrast, my August 22, 2008 letter to Chief Clerk Lupi – embodied by my third branch of relief and identified by my ¶28 and as having been placed before the Court on my August 13, 2008 vacatur/dismissal motion[6]. Such letter recounted that I had gone to this Court's Clerk's Office, inspected the Clerk's Return on Appeal, and discovered that Judge

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[6] Exhibit G-2 to my September 2, 2008 reply affidavit.

Friia's July 3, 2008 decision & order are not entered, her July 21, 2008 judgment of eviction are not entered, and her July 21, 2008 warrant of removal are not entered.

On October 23, 2008, I was again at this Court's Clerk's Office and again inspected the Clerk's Return on Appeal for #651/89. Once again, I saw that neither the July 3, 2008 decision & order, nor the July 21, 2008 judgment of eviction, nor the July 21, 2008 warrant of removal are entered. Indeed, the judgment and warrant are not original documents, but copies – and these do not even bear a stamp showing that they were filed after Judge Friia signed them. Annexed hereto as Exhibit O is a copy of these documents which Senior Clerk David Ryan made for me, at my request, from the Clerk's Return on Appeal.

17. Mr. McFadden's ¶39 then purports that "Notably" I have "admit[ed] that [my] own appeal herein is from those very rulings of the court below". Yes, I have "admit[ted] that my appeal is from unentered rulings. And it is precisely because the Clerk's Return on Appeal establishes that they are unentered that my affidavit seeks (¶¶35-38), upon the granting of reargument, correction of the Court's order and decision erroneously purporting them to be entered, when they are not.

18. Mr. McFadden's ¶40 asserts that I have claimed that "the Clerk's Record on Appeal is deficient because it does not include either a docket sheet for the case below or the actual microfiche of the record maintained by the City Court in the case below" – and rejects same as "equally meritless", stating:

> "There is no provision in the law for a lower court to transmit, as part of a Clerk's Return on Appeal, microfiche of the documents that it includes in the Clerk's Return in addition to copies of those documents themselves." (¶40); and
>
> "...the White Plains City Court does not maintain docket sheets on the cases before it and did not do so for the case below; moreover, there is no provision

> in law requiring the City Court to keep or maintain docket sheets for the cases it handles. Indeed, it is common among lower courts that docket sheets are not maintained." (¶41).

This is false and misleading. My August 22, 2008 letter to Chief Clerk Lupi recited (at pp. 2-4) numerous deficiencies of the Clerk's Return on Appeal for #SP-651/89. This includes by its certification, which Clerk Lupi did not sign, that "originals" were being transmitted to this Court, when, in fact, virtually the entire transmittal was copies made from microfilm/microfiche. Nor were these transmitted copies complete. Missing were, *inter alia*, annexed exhibits to which the copied documents referred, as well as other documents, which my own copy of the record contained. My letter, therefore, asked Ms. Lupi whether these additional items had been transmitted to this Court, whether they were part of the microfilm/microfiche; and that she confirm, in writing, that she had no docket sheet for #SP-651/89 and the related City Court proceedings, noting that in the absence of a docket sheet, she would have no means of verifying the completeness of the record. Additionally, my letter reiterated my prior requests for access to the microfilm/microfiche. Clerk Lupi did not respond – and her non-response is encompassed by the third and fourth branches of my order to show cause, whose purpose is to ensure that this Court has a proper record before it of #SP-651/89, rather than, as it now has, a materially incomplete copy.

19. Mr. McFadden's ¶42 purports that Clerk Lupi's non-response to "[my] incessant letters after several of them accused her of fraud and deceit provides no basis either for any of the relief that [I] seek[], either through [my] instant motion or, ultimately, on [my] appeal". This is false. My letters to Clerk Lupi are appropriate and professional in every respect and the description in my August 22, 2008 letter of the deficiencies of her Clerk's Returns on Appeal and the questions I therein itemized – to which Clerk Lupi has not

responded – suffice for the granting of the third, fourth, and fifth branches of my order to show cause and immediate dismissal of Mr. McFadden's March 27, 1989 Petition, if this is a "closed" proceeding – with further benefits, favorable to me, with respect to my appeals in *John McFadden v. Elena Sassower*, SP-1502/07 [#2008-1428 WC & #2008-1433 WC], if the related 1988 and 1989 City Court cases are "open".

20. Mr. McFadden's ¶42 additionally purports that my "entitlement to the inclusion in the Clerk's Return of documents from other [White Plains City Court] cases" is "patently frivolous so as to require no substantive comment". This, too, is false, as Mr. McFadden well knows in failing to identify that at issue are not "documents from other cases", but the complete records of those cases, beginning with *John McFadden v. Elena Sassower*, #SP-1502/07, with which #SP-651/89 was purportedly consolidated. As for the further "other cases", they are the related 1988 and 1989 City Court cases which were to have been consolidated with #SP-1502/07, but were not because Clerk Lupi allegedly represented to Judge Friia that they were "closed".

21. As for Mr. McFadden's ¶43 that I have "utterly failed to demonstrate how, if at all, any of the problems that [I] claim[] exist in the Clerk's Return on Appeal herein would prejudice [me] on my appeal here or require that [I] be afforded additional time to perfect [my] appeal", this is yet another flagrant falsehood. ¶25 of my moving affidavit identified that "a proper Clerk's Return on Appeal" would provide the Court with "the information and documentation necessary to determine whether #SP-651/89 is a 'closed' case and the facts and circumstances pertaining to [Clerk Lupi's] assigning it a new docket number, #SP-2008-1474" – this being essential to the first of my "Lack of Jurisdiction" grounds of appeal presented by ¶FOURTH of my July 30, 2008 affidavit in support of my order to show cause

for a stay pending appeal:

> **"Upon information and belief, #651/89 is closed and petitioner's March 27, 1989 Petition was dismissed for want of prosecution at some point during the past 15 years of dormancy.**
>
> For this reason, the White Plains City Court Clerk opened a new docket number for this 1989 proceeding, #SP-2008-1474. Such was done surreptitiously and without notice to the parties, so as to circumvent my legal entitlement to dismissal of petitioner's diametrically different Petition in his 2007 proceeding, *John McFadden v. Elena Sassower*, #1502/07, and summary judgment on my counterclaims therein." (bold in the original).

My ¶28 then quoted from my September 2, 2008 reply affidavit in support of my August 13, 2008 vacatur/dismissal motion that:

> "Like the other issues forming the basis of my vacatur/dismissal motion, this Court's determination of the status of [#SP-651/89] may be readily-accomplished – and, if closed, should properly obviate the necessity of appeal."

22. Mr. McFadden's ¶44 asserts that even if my "attacks" against the White Plains City Court Clerk and "demands" pertaining to her Clerk's Return on Appeal were "justifiable", they "are not properly addressed by motion to this Court in these proceedings" and that I have not provided "any authority to the contrary". For this proposition, his ¶45-46 cite to Judge Friia's decision denying the September 18, 2008 motion I made in White Plains City Court to compel Clerk Lupi to file proper Clerk's Returns on Appeal – a motion which ¶¶29-30 of my moving affidavit had identified as *sub judice* . Mr. McFadden, however, does not reveal this fact – let alone offer the date of Judge Friia's decision on the motion – in purporting that I should have "learned" from this ruling that my remedy is an Article 78 proceeding. This is a deceit.

23. Annexed hereto as Exhibit P is a copy of Judge Friia's October 14, 2008 decision & order, filed in White Plains City Court on October 15, 2008 and not received by

me until October 16, 2008 – which was the day after I had submitted my order to show cause to this Court. Such decision does NOT deny or dispute that White Plains City Court has administrative jurisdiction over its own Clerk's Office, which is what this Court's Clerk's Office believed when it advised me that I should make such motion, prefatory to making a motion before this Court and/or appealing to this Court any denial of relief by the White Plains City Court. Such instruction by this Court's Clerk's Office is reflected by ¶29 of my October 15, 2008 affidavit herein. It is further detailed at ¶4 of my moving affidavit in support of my September 18, 2008 motion and at ¶¶4, 33-35of my October 10, 2008 reply affidavit therein. As noted at ¶15 of my reply affidavit, Clerk Lupi's own attorney, the State Attorney General, did not purport that White Plains City Court does not have jurisdiction over its own Clerk – or that it could not order the Clerk's compliance with the relief requested by my motion within the landlord-tenant proceeding under #SP-651/89.

24. So that this Court can have the benefit of the record of my September 18, 2008 motion, a copy is transmitted herein consisting of:

(a) my September 18, 2008 motion;

(b) Mr. Sclafani's September 25, 2008 affirmation in opposition;

(c) the Attorney General's October 3, 2008 cross-motion to dismiss & October 6, 2008 letter with amended notice of cross-motion;

(d) my October 10, 2008 affidavit in opposition to the Attorney General's cross-motion, in reply to Mr. Sclafani's opposition to the motion, & in further support of the motion;

(e) Judge Friia's October 14, 2008 decision & order – with my October 16, 2008 notice of appeal therefrom.

These will additionally enable this Court to verify for itself the litigation fraud of Mr. Sclafani and the Attorney General, identified at ¶¶25 and 30 of my moving affidavit herein,

to which Mr. McFadden's ¶46 takes exception.

25. Finally, Mr. McFadden's ¶¶47-48 are false and deceitful with respect to my request for a conference pursuant to 22 NYCRR §730.2(a) and an extension of time for perfecting my appeals. Firstly, his claim that "it is clear from a plain reading of the rule that it was not intended for arbitration of questions...as to the sufficiency or propriety of a Clerk's Return on Appeal" is false. 22 NYCRR §730.2(a) – quoted in full at fn. 12 of my moving affidavit (p. 20) – is completely flexible, allowing for a conference for "any...matters which...may aid in the disposition of the appeal or proceeding". Secondly, Mr. McFadden purports that I have requested an extension "to perfect [my] appeal until after such conference", which is also false. I have sought an extension not only with respect to my appeal herein, but my appeals in *John McFadden v. Elena Sassower*, #SP-1502/07 [#2008-1428 WC & #2008-1433 WC] – without any connection to any conference. Rather, as reflected by the fourth branch of my order to show cause, I have asked that the Court defer my appeals:

> "to a date no sooner than 45 days after this Court's written notification of its receipt of proper 'Clerk's Returns on Appeal', the docket sheets and microfilm/microfiche requested by [my] August 22, 2008 letter, and Clerk Lupi's responses to that letter's inquiries."

26. Mr. McFadden's ¶48 purports that my request for a conference pursuant to 22 NYCRR §730.2(a) is "nothing short of a further attempt...to stall and delay". Again false. It is the most expeditious way to clarify the record and resolve issues with respect to the Clerk's Return on Appeal herein – and so-stated at ¶43 of my moving affidavit.[7]

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[7] Such paragraph additionally noted my belief that there was no Clerk's Return on Appeal for #SP-2008-1474 – the additional index number Clerk Lupi surreptitiously assigned to #SP-651/89 without notice or explanation. Upon my visit to the Clerk's Office on October 23, 2008, I verified that that is, in

Mr. McFadden's Deceit that I have Requested "an Extension of Time to Obtain Counsel"

27. Mr. McFadden's ¶50 purports that "perhaps the most transparent of all [my] ploys further to delay and confuse these proceedings is [my] request for an extension of time to perfect my appeal in order to obtain counsel."

28. This is pure fiction. My order to show cause does not seek such relief. Rather, it requested, in the event the Court did not grant me an interim stay pending determination of my motion, which it did not:

> "a 30-day stay to enable me to consult with counsel skilled in landlord-tenant matters to advise me as to the legal consequences, if any, to my appellate rights of an order of this Court vacating its stay for failure to make the directed payments, resulting in execution of Judge Friia's July 21, 2008 warrant of removal, removing me from my home of nearly 21 years. Alternatively, I request that this Court's order expressly state that such removal is without prejudice to my appellate rights and that I retain the right of repossession upon my successful appeals." (underlining added).

29. Mr. McFadden does not oppose this actual relief – and, plainly, no delay would be occasioned by an order of this Court expressly stating that my appellate rights are unaffected by my eviction pursuant to the July 21, 2008 warrant and that I retain the right of repossession of the apartment upon my successful appeals. Consequently, Mr. McFadden must be deemed as joining in such requested order, which should be granted in the event the Court does not withdraw the *sua sponte* payment condition it attached to my stay pending appeal.

30. Obviously, this appeal could be most expeditiously addressed by obviating it

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fact, the case: there is no Clerk's Return on Appeal for #SP-2008-1474.

It must be noted that Judge Friia's October 14, 2008 decision on my motion to require Clerk Lupi to provide this Court with proper Clerk's Returns on Appeal identifies ONLY the "1474/08" index number and NOT #SP651/89 (Exhibit P).

entirely – which is why I made my August 13, 2008 vacatur/dismissal motion. Mr. McFadden does not deny or dispute my assertions at ¶¶3, 9, 10, 15, 17, 47 of my moving affidavit that such motion is dispositive and that I am entitled to its granting, *as a matter of law* – relief expressly sought by the second branch of my order to show cause. Indeed, based on the record before this Court, highlighted by my August 13, 2008 vacatur/dismissal motion and September 2, 2008 reply affidavit[8], it should be evident that Mr. McFadden has NO DEFENSE in fact or law to ANY of my appellate grounds specified at ¶FOURTH of my July 30, 2008 order to show cause for a stay pending appeal – grounds for which this Court has overwhelming documentary substantiation. This includes my 51-page analysis of Judge Friia's July 3, 2008 decision & order, embodied in my legally-sufficient July 18, 2008 order to show cause for her disqualification for pervasive actual bias and interest, which Judge Friia refused to sign on July 21, 2008, signing instead, without change, Mr. Sclafani's drafted judgment of eviction and warrant of removal.

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[8] As stated at ¶18 of my September 2, 2008 reply affidavit:

> "...if Mr. McFadden truly believes my appeal to be meritless, as he contends in opposing my stay pending appeal[fn], it is in his interest to have this Court swiftly adjudicate, by my vacatur/dismissal motion, the narrow issues presented by ¶¶6-12 of my August 13, 2008 affidavit whose resolution would otherwise have to await the appeal that is months away."

The appended footnote quoted Mr. McFadden's contentions, from his August 8, 2008 affidavit in opposition to my order to show cause for a stay pending appeal as follows:

> "...Ms. Sassower has failed to demonstrate that her appeal has any merit or is likely to succeed.' (at ¶123, underlining added). Also, '...Ms. Sassower has failed to provide any legitimate basis for this Court to grant a stay pending her appeal.' (at ¶124, underlining added)."

Mr. McFadden's Materially Deceitful Prefatory Paragraphs Designed to Mislead & Prejudice the Court

31. Mr. McFadden begins his affidavit by purporting, at ¶¶1 and 2, that the judgment of possession against me that is the subject of my appeal was "entered...in White Plains City Court". This is false. As stated by my ¶¶35-38 – and among the grounds for my reargument – the July 21, 2008 judgment of eviction has not been entered. [See, additionally, ¶¶16-17, *supra*.].

32. Mr. McFadden's ¶2 refers to this Court's October 1, 2008 decision and order. This is deceitful, as he does not here or later in his affidavit reveal that the order and decision that I received from the Court were undated. Such is set forth by my ¶2 and my Exhibit H thereto – whose accuracy Mr. McFadden does not deny or dispute. [See, additionally, ¶11, *supra*.]

33. Mr. McFadden's ¶2 also purports that the October 1, 2008 decision and order "required [me] to pay use and occupancy". This is materially incomplete, as the Court's payment direction was "rent/ and or use and occupancy" [See, additionally, ¶10, *supra*.].

34. Mr. McFadden's ¶¶3 and 5 are utterly false in purporting that my order to show cause is frivolous and is:

> "reflective of the type of frivolous, vexatious guerrilla litigation tactics that [I] have employed over the past twenty years through which [I have] succeed (sic) in hijacking possession, use and control of [his] coop apartment to [his] utter and profound economic and personal detriment."
>
> "for the next twenty years up to and including [my] instant application, [I have] engaged in one frivolous litigation strategy after another through which [I have] succeeded in stalling and delaying the entry of final judgment as against [me] and the return of possession and control of [his] apartment."

The merit of my order to show cause is evident from its face – and ALL my litigation submissions are similar in nature, being fact-specific and law-supported throughout. Nor have the past twenty years been filled with litigation between myself and Mr. McFadden, as Mr. McFadden implies. In August 1988, Mr. McFadden joined as co-plaintiff with me and my mother in a meritorious federal action against the Co-Op to enforce the contract of sale. Thereafter, due to intimidation by the Co-Op, including its suing him in White Plains City Court to take away his proprietary lease if he did not evict us [#SP-434/88, #SP-500/88], he sued me, my mother, and my father in White Plains City Court to secure an eviction [#SP-504/88; #SP-651/89; #SP-652/89]. This was effectively stayed until the end of the federal litigation in June 1993. Although Mr. McFadden could readily have secured my removal, at that time, he failed to even request that I vacate the apartment. Instead, he was content to have me remain in occupancy – and would have remained content but for my refusal, in 2007, to abide by his extortion attempts. It was then that Mr. McFadden commenced a new proceeding against me in White Plains City Court, *John McFadden v. Elena Sassower*, #SP-1502/07 by a Petition fashioned on material falsification and concealment. Such is demonstrated by my Fifth through Tenth Affirmative Defenses and Four Counterclaims in my Answer therein[9] – and further particularized and documented by my September 5, 2007 cross-motion for dismissal and summary judgment. My entitlement to such dismissal/summary judgment, *as a matter of law*, is the subject of my appeals to this Court [#2008-1428 WC & #2008-1433 WC].

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[9] Mr. McFadden annexes my Answer as Exhibit V to his August 8, 2008 affidavit in opposition to my July 30, 2008 order to show cause for a stay pending appeal, as well as to his August 18, 2008 affidavit in opposition to my August 13, 2008 vacatur/dismissal motion.

35. Mr. McFadden's ¶4 is materially deceitful in reciting:

> "Ms. Sassower entered into possession of my coop apartment at 16 Lake Street, White Plains, New York under an occupancy agreement that was part of a contract of sale pursuant to which I agreed to sell her my interest as the proprietary leasee of the apartment..."

The inference is that this is what is alleged by his March 27, 1989 Petition underlying THIS proceeding. This is false. The March 27, 1989 Petition alleges that I and my mother "entered in possession" of the subject apartment under a "month to month rental agreement" – allegations documentarily disproven by the contract of sale and occupancy agreement. Such is the basis for my dispositive August 13, 2008 vacatur/dismissal motion, whose denial, *without reasons*, is among the grounds of my reargument motion.

36. Mr. McFadden's ¶4 is materially false in reciting:

> "When the Board of Directors of the coop corporation rejected her application to purchase the apartment (for good reason)[fn], the contract expired by its terms and Ms. Sassower was required to vacate the apartment and tender possession back to your affirmant."

Following the Co-Op Board's rejection of the purchase, Mr. McFadden joined me and my mother as a co-plaintiff in the federal lawsuit to enforce the contract of sale precisely because the Board did not have "good reason" for its rejection of the purchase, interfered with a shareholder override, and violated other policies, procedures, and guidelines. This participation by him constituted his consent to an adjourned date for the closing, entitling me to remain in occupancy of the apartment, pursuant to the terms of the occupancy agreement. Such interpretive analysis of the occupancy agreement, set forth, *inter alia*, at ¶¶167-171 of my September 5, 2007 cross-motion for summary judgment/dismissal in *John McFadden v. Elena Sassower*, #SP-1502/07 – and, most recently, by ¶¶34-36 of my August 13, 2008 vacatur/dismissal motion – has not only never been denied by Mr. McFadden, but, by his

attempt to conceal his participation as a co-plaintiff in the federal action, he reinforces same.

37. Mr. McFadden's ¶6 is materially false in asserting that throughout the past twenty years, I have been making "only minimal payments of court ordered use and occupancy". The occupancy agreement fixes "use and occupancy" at $1,000 per month, which I full paid from 1987 through 2001. Beginning in 2002, I began to pay Mr. McFadden more money because of what he asserted to be "increased costs". I did this, without question, until October 2006, in the good-faith belief, which Mr. McFadden induced, that we would ultimately be consummating the apartment sale. At that point, I was paying Mr. McFadden $1,660 per month and he requested another $115, as to which he made no claim of "increased costs" Upon my questioning him as to his "costs", he refused to provide any elaboration and threatened me with eviction if I did not pay his unilateral and unexplained increase. Such is summarized by my Seventh Affirmative Defense ("Implied Contract, Detrimental Reliance & Fraud") and my Eighth Affirmative Defense ("Extortion & Malice") in *John McFadden v. Elena Sassower*, #SP-1502/07, copies of which are annexed as Exhibit I to my order to show cause herein.

38. Mr. McFadden's ¶6 is also materially misleading in referencing the "fair market value of the rent for my apartment". I am not a renter, but a contract vendee in possession. The Co-Op long ago expressed its readiness to favorably entertain my purchase of the apartment and I long ago offered to renegotiate with Mr. McFadden a fair market price for his sale of the apartment – facts which Mr. McFadden conceals from the Court. Such is set forth, with documentary substantiation, by my Ninth Affirmative Defense ("Breach of Covenant of Good Faith & Fair Dealing") in *John McFadden v. Elena Sassower*, #SP-1502/07, and reflected by my Second Counterclaim.

39. Mr. McFadden's ¶6 is additionally misleading because, even were I a renter, which I am not, there is a question as to whether I am protected under the Emergency Tenants Protection Act or other applicable rent regulations. Mr. McFadden opposed my request that such question be referred by White Plains City Court to the agency with the expertise and resources to make that determination, *to wit*, the Office of Rent Administration of the New York State Division of Housing and Community Renewal, which was the first branch of relief sought by my September 5, 2007 cross-motion in *John McFadden v. Elena Sassower*, #SP-1502/07. The denial of this requested relief by White Plains City Court Judge Brian Hansbury's October 11, 2007 decision & order, to which he adhered by his January 31, 2008 decision & order, are before this Court on my appeals therein [#2008-1428 WC & #2008-1433 WC]. Moreover, neither here – nor in his prior submissions – has Mr. McFadden provided any substantiation of the costs he complains he incurs for mortgage, insurance, and maintenance of the apartment. Indeed, in 2007, Mr. McFadden's refusal to provide any information about same, after unilaterally demanding from me a $115 monthly increase in "use and occupancy" and threatening me with legal action if I did not unquestioningly accept same, gave rise to his lawsuit against me, *John McFadden v. Elena Sassower*, #SP-1502/07 – a fact concealed by his Petition therein, but set forth by my Eighth Affirmative Defense ("Extortion and Malice"), with substantiating documentation.

40. Mr. McFadden's ¶7 is false and fraudulent in asserting that "the federal discrimination suit against the coop corporation and its board of directors was frivolous". He was a co-plaintiff therein, familiar then and thereafter with the good and sufficient facts and law upon which it rested, as likewise with the good and sufficient facts and law upon which the lawsuit's corporate non-compliance causes of action rested. His knowledge of the merit

of the federal lawsuit, which he sabotaged in collusion with the Co-Op Board, including by his spurious City Court proceedings – #SP-651/89 among them, is set forth by my Sixth Affirmative Defense ("Detrimental Reliance") and is the basis of my First Counterclaim ("Prior Proceedings"). These are both quoted, *verbatim*, at ¶42 of my August 13, 2008 vacatur/dismissal motion.

I expressly incorporate by reference ¶¶41-42 of my August 13, 2008 vacatur/dismissal motion, as these rebut Mr. McFadden's despicable attempt, by his ¶¶7 and 51, to mislead this Court and to defame me and my mother by denigrating the federal lawsuit and our litigation conduct, using the federal court decisions as his props. The decisions of U.S. District Judge Goettel which he annexes – now a third time for this Court – are without basis in fact and law – as Mr. McFadden well knows from original litigation papers in his possession, in addition to our appellate submissions. Indeed, our most important appellate submissions to the Second Circuit Court of Appeals and U.S. Supreme Court were annexed to my September 5, 2008 cross-motion in *John McFadden v. Elena Sassower*, #SP-1502/07 – a fact identified by ¶41 of my August 13, 2008 vacatur/dismissal motion. Additionally, our cross-motion annexed other corroborative documents filed by myself and my mother: (a) our June 9, 1993 impeachment complaint to the House Judiciary Committee against U.S. District Judge Gerard Goettel and the Second Circuit appellate panel; (b) our July 14, 1993 letter to the National Commission on Judicial Discipline and Removal; (c) our March 4, 1996 federal judicial misconduct complaint against the author of the Second Circuit Court of Appeals decision – the same decision that Judge Friia made the pretext for her July 3, 2008 decision herein. This was identified by ¶39 of my September 2, 2008 reply affidavit in further support of my vacatur/dismissal motion – and I further express incorporate that paragraph herein.

CONCLUSION

41. The Appellate Division, Second Department has promulgated 22 NYCRR §730.3(g) for a purpose: to ensure the integrity of appellate proceedings in civil matters. Pursuant to that provision, enacted on September 17, 2008, maximum costs and sanctions must be imposed upon Mr. McFadden, if not Mr. Scalfani, for a frivolous, indeed, fraudulent, opposing affidavit that has burdened both me and this Court. Additionally, and because at issue is perjury by Mr. McFadden – or by Mr. Scalfani, who has signed Mr. McFadden's name to the affidavit – referral to disciplinary and criminal authorities is warranted, including pursuant to this Court's mandatory disciplinary responsibilities under the §100.3D of the Chief Administrator's Rules Governing Judicial Conduct. The necessity that this be done is reinforced by their opposition to my July 30, 2008 order to show cause for a stay pending appeal and to my August 13, 2008 vacatur/dismissal motion – opposition whose frivolousness, fraudulence, and perjury, I resoundingly demonstrated by my reply papers therein, seeking comparable costs and sanctions and disciplinary and criminal referrals, to which I remain entitled.

42. Absent such strong action, Mr. McFadden and Mr. Sclafani will continue to pollute the appellate process with fraud and deceit. This is yet another reason why this Court must grant my August 13, 2008 vacatur/dismissal motion – as the record therein establishes that there is NO DEFENSE to its showing of fraud by Mr. McFadden, beginning with his March 27, 1989 Petition – and no reason for the further wasting of my time and the Court's.

ELENA RUTH SASSOWER

Sworn to before me this
3rd day of November 2008

Notary Public

BELINDA HAUGHTON
Notary Public, State of New York
No. 01HA6179682
Qualified in Westchester County
Commission Expires Dec. 24, 20__