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

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JOHN McFADDEN,

Petitioner,

Appellate Term Docket #
2008-1427 WC

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

Affidavit in Response to Petitioner's August 21, 2008 Order to Show Cause, & in Reply to His Opposition to Respondent's August 13, 2008 Vacatur/ Dismissal Motion & in Further Support of Dismissal/Vacatur Motion

-against-

DORIS L. SASSOWER and ELENA SASSOWER,

Respondents-Appellants.

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

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

1. I am the above-named immediately-affected respondent-appellant *pro se*, whose home of more than 21 years is the subject of this proceeding. I am fully familiar with the facts, papers, and proceedings heretofore had herein.

2. This affidavit is submitted in response to the order to show cause of petitioner, John McFadden, signed by Justice Alan Scheinkman on August 21, 2008, seeking to have this Court accept his untimely-served opposition to my August 13,

2008 vacatur/dismissal motion. Notwithstanding the material deceit of the moving affirmation of his attorney, Leonard Sclafani, Esq., who sought to withhold the order to show cause and his affirmation from me[1], I do not oppose the relief sought – especially as Mr. McFadden's proffered opposition now proves that he has NO defense to ANY of the facts set forth by my vacatur/dismissal motion, none of which he addresses and all of which he conceals on the false pretense that "[my] arguments and legal and factual analysis defy logic and rationality" and are "so patently frivolous as to require no case and verse response".[2] Indeed, nowhere in Mr. McFadden's 40-page opposing affidavit does he deny or dispute the factual basis for my vacatur/dismissal motion, whose logic, rationality, and full documentary substantiation are set forth at ¶¶6-12 of my August 13, 2008 moving affidavit. Nor is there any affirmation from Mr. Sclafani, justifying his drafting of the judgment of eviction and warrant of removal, signed by Judge Friia without change on July 21, 2008 – the first items challenged by my motion.

3. ¶6 of my August 13, 2008 affidavit could not have been clearer – or more

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1 Mr. Sclafani did not include either document in the Fed-Ex envelope delivered to me shortly before 10 a.m. on August 22, 2008, a fact I immediately made known to this Court's senior court clerk, David Ryan, by a voice message I left for him, and then embodied in a fax I sent to Mr. Sclafani at 10:36 a.m. Mr. Sclafani did not respond until 7:23 p.m. that evening, a Friday, when he did so by fax purporting that he had personally placed a conformed copy of the order to show cause and his "supporting affidavit" in the sealed envelope which he had mailed. Copies of my fax to him and his to me are annexed as Exhibits D-1 & D-2, respectively – continuing the sequence of exhibits begun by my August 13, 2008 notice of motion.

I herewith reiterate under penalties of perjury that neither the order to show cause nor Mr. Sclafani's supporting affirmation were in the Fed-Ex envelope and that my first and only receipt of same was by Mr. Sclafani's faxed transmittal.

2 Mr. Sclafani's memorandum of law, Point IV: "Ms. Sassower's Motion is Patently Frivolous", at p. 15.

serious and substantial. Quoting *verbatim* from ¶FOURTH of my July 30, 2008 affidavit supporting my order to show cause for a stay pending appeal[3] and referring to the documentary evidence annexed thereto as exhibits, it stated:

> "**A.** The warrant of removal, signed by Judge Friia on July 21, 2008 (Exhibit C-2) without change from the proposed warrant of removal of petitioner's counsel, completely falsifies the allegations of petitioner's March 27, 1989 Petition (Exhibit B). COMPARE.
>
> **B.** The warrant of removal, signed by Judge Friia on July 21, 2008 (Exhibit C-2) without change from the proposed warrant of removal of petitioner's counsel, materially alters the Petition's caption (Exhibit B), concealing respondents' jurisdictional objection based on improper service upon respondent Doris Sassower. COMPARE.
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> **C:** The judgment of eviction, signed by Judge Friia on July 21, 2008 (Exhibit C-1), without change from the proposed judgment of eviction of petitioner's counsel, materially diverges from her July 3, 2008 decision & order (Exhibit A-2), including by (i) changing the caption; (ii) falsely making it appear that respondents filed no Answer to the Petition; (iii) falsely making it appear that Judge Friia has continuity with #651/89, from its beginning; and (iv) falsely making it appear that Judge Friia's knowledge that is the basis for her deciding petitioner's November 25, 1991 summary judgment motion derives from this proceeding, rather than the separate proceeding, *John McFadden v. Elena Sassower*, #1502/07. COMPARE.
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> **D.** Petitioner's November 25, 1991 summary judgment motion was legally insufficient and deceitful in failing to annex his March 27, 1989 Petition (Exhibit B) and by materially misrepresenting its allegations and the status of the proceeding.
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> **E.** Petitioner's March 27, 1989 Petition (Exhibit B) is a verifiable fraud, established as such by the October 30, 1987 occupancy agreement, contract of sale, and August 1988

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[3] Hereafter referred to as July 30, 2008 order to show cause.

complaint in the federal action, all part of the record herein – barring summary judgment to petitioner, *as a matter of law*."

4. ¶12 of my August 13, 2008 affidavit was equally clear, serious, and substantial in stating:

> "Just as the contract of sale and occupancy agreement suffice for vacatur for 'fraud, misrepresentation, or other misconduct of an adverse party' pursuant to CPLR §5015(a)(3), as well as dismissal of the Petition pursuant to CPLR §§3211(a)(1) based on 'documentary evidence' and CPLR §3212(b), so they also suffice for vacatur for 'lack of jurisdiction to render the judgment or order', pursuant to CPLR §5015(a)(4) and dismissal of the Petition pursuant to CPLR §§3211(a)(2) that 'the court has not jurisdiction of the subject matter'. This, because the contract of sale and occupancy agreement also establish the truth of my second ground of appeal based on 'Lack of Jurisdiction'. As stated by my ¶FOURTH:
>
> > '**B. There is no landlord-tenant relationship between the parties.** Contrary to petitioner's March 27, 1989 Petition purporting that respondents 'entered in possession [of the subject premises] under a month to month rental agreement' on no specified date, for no specified 'rent', with no copy of this purported 'rental agreement' annexed (Exhibit B), respondents 'entered in possession' of the subject premises under an October 30, 1987 written occupancy agreement, which was part of a contract of sale, denominating the parties as 'Sellers' and 'Purchasers' and <u>expressly</u> stating 'in no way do the parties intend to establish a landlord/tenant relationship'....' (bold and underlining in the original)."

5. As set forth by my accompanying reply memorandum of law, <u>the brazen deceit that, *from beginning to end*, pervades Mr. McFadden's opposition to my vacatur/dismissal motion, including by Mr. Sclafani's 16-page opposing memorandum of law, reinforces my entitlement to ALL the relief sought by my motion under applicable legal principles</u>. Consequently, this affidavit and my memorandum of law

are also submitted in reply to Mr. McFadden's opposition to my vacatur/dismissal motion and in further support of the motion. They are additionally submitted in support of imposition of monetary sanctions and costs pursuant to 22 NYCRR §130-1.1 against Mr. McFadden and Mr. Sclafani, over and beyond those which my vacatur/dismissal motion already seeks pursuant thereto.

6. The deceit of Mr. Sclafani's opposing memorandum of law is directly addressed by my reply memorandum of law. Suffice to here say that Mr. Scalfani's opposing memorandum – like Mr. McFadden's opposing affidavit – does NOT address ANY of the facts set forth by my vacatur/dismissal motion, ALL of which it also conceals, and does not present ANY caselaw for ANY of its bad-faith legal argument. Indeed, the only law it cites, 22 NYCRR§730.1 and §732.7, and CPLR §5704, is for its Point I argument "Ms. Sassower's Motion is Procedurally Defective", whose frivolous, indeed fraudulent, nature is demonstrated by my memorandum of law.

7. As I do not oppose Mr. McFadden's August 21, 2008 order to show cause, only limited comment about the deceit of Mr. Sclafani's 3-1/2 page supporting affirmation is necessary – and this because Mr. Sclafani elaborates upon its most material deceit in his memorandum of law, where it forms a basis for opposing my vacatur/dismissal motion. As this deceit pertains to my July 18, 2008 order to show cause which Judge Friia refused to sign, it also relates to ¶¶108-116 of Mr. McFadden's affidavit, whose flagrant and knowing falsity is then regurgitated by Point III of Mr. Sclafani's memorandum of law in its legally-unsupported argument that res judicata,

collateral estoppel, and issue preclusion require denial of my vacatur/dismissal motion.

8. Thus, in explaining the circumstances giving rise to Mr. McFadden's order to show cause for an extension of time, ¶¶5-6 of Mr. Sclafani's affirmation purport that he was "not totally clear" what the three separately-bound documents served upon him on August 13, 2008 related to and that there was "confusion" about them.

9. Mr. Sclafani's affirmation provides no specificity as to what was "not totally clear" about the three documents:

- my 2-page notice of motion, dated August 13, 2008;
- my "Affidavit in Reply, In Further Support of Stay, & in Support of Vacatur/Dismissal Motion", sworn to August 13, 2008; and
- my July 18, 2008 order to show cause in White Plains City Court, which Judge Friia had refused to sign on July 21, 2008.

It is Mr. Sclafani's memorandum of law that elaborates. There, tucked in his footnote 1, he purports that I "provided no indication as to why or for what purpose [I] had filed or served [my July 18, 2008 order to show cause]" and that "The document itself provides no clue as to whether it was filed or served in connection with [my] August 13, 2008 motion for a stay or in connection with [my] instant motion".

10. This is a brazen deceit – established as such by my August 13, 2008 notice of motion and August 13, 2008 affidavit. Thus, my notice of motion clearly identified that my accompanying July 18, 2008 order to show cause, which Judge Friia had refused to sign, was being submitted along with my August 13, 2008 affidavit and

its annexed exhibits in support of the relief sought by my August 13, 2008 notice of motion. As for my August 13, 2008 affidavit, its ¶15 could not have been more explicit as to the purpose for which my July 18, 2008 order to show cause was being furnished. After reciting, at ¶¶4-14, that Mr. McFadden's affidavit opposing my July 30, 2008 order to show cause for a stay pending appeal had failed to confront virtually all the appellate grounds particularized at ¶FOURTH of that order to show cause, my ¶15 stated:

> "Notwithstanding these uncontested grounds of appeal overwhelmingly meet the standard for a stay pending appeal, I am furnishing further substantiating proof of the merit of my appeal: my July 18 2008 order to show cause for Judge Friia's disqualification for pervasive actual bias and interest, described by my ¶FOURTH as legally-sufficient – and which my ¶FIFTH identifies as containing a 51-page analysis of Judge Friia's decision, particularizing its material omissions and falsifications, including the 16 listed by my ¶FOURTH.[fn2] Such is additionally furnished in refutation of the endlessly false recitation of what Mr. McFadden purports to be the 'relevant facts' at pages 2-33 of his affidavit which not only materially falsifies the procedural background to Judge Friia's July 3, 2008 decision & order so as to make it appear that it resulted from the 'urging' of both Mr. McFadden's counsel and [my]self in this proceeding (¶87), and that I 'sought consolidation' of #651/89 with #1502/07 (¶101), but apparently does not deem 'relevant' ANY discussion of the content of the July 3, 2008 decision & order. Indeed, the extent of what Mr. McFadden has to say about its content is at ¶¶88 and 107:
>
> > 'The City Court, by its decision and order of July 3, 2008 granted your affirmant's summary judgment motion, awarding a judgment of possession to your affiant and directing the issuance of a warrant of eviction as against the Sassowers.'

"fn2 My 51-page analysis is prefaced by a Table of Contents, appearing at page 8 of my affidavit in support of my July 18, 2008 order to show cause for Judge Friia's disqualification."

> 'Upon its consideration of your affirmant's motion, the Court granted it by and through the July 3, 2008 decision and order from which Ms. Sassower now appeals.'

As for the content of Judge Friia's July 21, 2008 judgment of eviction and warrant of removal, signed without change, from Mr. McFadden's attorney's proposed judgment and warrant, Mr. McFadden's affidavit says nothing at all." (¶15, underlining and capitalization in the original).

11. The foregoing rebuts Mr. Sclafani's claim that "[I] provided no indication as to why or for what purpose [I] had filed or served [my July 18, 2008 order to show cause]". His feigned uncertainty is simply a cynical maneuver to justify his failure to timely serve Mr. McFadden's opposition to my August 13, 2008 motion, requiring the extension his order to show cause seeks. Yet, it is also meant to mislead the Court as to the relief I am seeking. Thus, his memorandum leads off by purporting (at p. 4) that the Court has no jurisdiction "to hear a motion to disqualify a lower court judge in a matter before it..." – relief sought by my July 18, 2008 order to show cause, NOT by my August 13, 2008 motion.

12. My July 18, 2008 order to show cause and its appended July 8, 2008 order to show cause are addressed by ¶¶108-116 of Mr. McFadden's affidavit opposing my vacatur/dismissal motion. These are essentially the ONLY paragraphs that are substantively different from Mr. McFadden's August 8, 2008 affidavit opposing my July 30, 2008 order to show cause for a stay pending appeal.[4] Indeed, ¶¶4-107 of Mr. McFadden's instant affidavit are virtually a *verbatim* repetition of the materially false,

[4] These paragraphs replace ¶¶108-124 of Mr. McFadden's prior affidavit purporting to address ¶FOURTH of my July 30, 2008 order to show cause, setting forth my meritorious grounds of appeal.

misleading, and irrelevant ¶¶4-107 of his prior affidavit[5] – with the same exhibits annexed. Consequently, although the length and bulk of Mr. McFadden's instant affidavit give the appearance of formidable opposition to my vacatur/dismissal motion, it is actually puny, consisting of no more than a dozen paragraphs that are different from those Mr. McFadden placed before the Court by his prior affidavit[6] – and these primarily relating to my July 18, 2008 order to show cause and its appended July 8, 2008 order to show cause.

13. Mr. McFadden's few new paragraphs contain few facts, instead substituting characterizations which are brazenly false and knowingly so. In such fashion, he justifies Judge Friia's refusal to sign my July 18, 2008 and July 8, 2008 orders to show cause and gives an aura of credibility to his false pretense, by his ¶115, that:

> "the issues, claims, and arguments that Ms. Sassower has advanced in support of her instant motion are the same as those that the City Court previously and repeatedly rejected and that she is now barred and precluded from relitigating".

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5 The variations between the two are minimal. However, among the significant changes is Mr. McFadden's ¶9 now removes the claim documentarily rebutted by fn. 6 of my August 13, 2008 affidavit "Although the contract did not reflect this fact, it was understood at the time that the Apartment would be occupied only by Elena Sassower...". This silent correction of a single false fact is more than offset by his ¶71, which not only replicates the deceit of ¶71 of his prior affidavit that respondents' federal litigation presented only a single "issue, but adds a parenthesized addition as to what this purported single "issue" is "(that is; were the Sassowers the victims of discrimination)". See, ¶37, *infra*, for further details as to the material nature of this deceit.

6 Mr. McFadden's ¶118 is a reprise, including of his prior affidavit, to which I responded at ¶¶46-57 of my August 13, 2008 affidavit. The only addition necessary is that Mr. McFadden's claim that I am "in violation of a City Court Order", which he repeats from his prior affidavit, is false. Indeed, Mr. McFadden gives no date or other information as to this supposed "City Court Order" of which I am "in violation". There is no such order.

14. This is the crux of Mr. McFadden's defense from which he invokes the doctrines of res judicata, collateral estoppel, and issue preclusion, but without ANY citation of law. Indeed, although Point III of Mr. Sclafani's memorandum of law is entitled "The Doctrines of Res Judicata, Collateral Estoppel and Issue Preclusion Require that this Court Deny Ms. Sassower's Motion" (at pp. 12-15), it provides NO LAW whatever. This is not surprising as the factual prerequisites for such doctrines are altogether absent, as caselaw and treatise authority readily reveal. (See footnotes #7, #13, #16, #18, #19, *infra*).

15. Indeed, the law makes clear that res judicata, collateral estoppel, and issue preclusion cannot be invoked to maintain and perpetuate fraud[7], such as perpetrated by Mr. McFadden and his counsel to conceal the fraudulent March 27, 1989 Petition and the Court's lack of subject matter jurisdiction, both documentarily established by the October 30, 1987 contract of sale and occupancy agreement which Mr. McFadden himself has put before this Court: first by his affidavit opposing my July 30, 2008 order to show cause for a stay pending appeal and then by his instant affidavit opposing my August 13, 2008 vacatur/dismissal motion, where it is identically annexed as his Exhibit A.

16. As directly stated by ¶11 of my August 13, 2008 affidavit – without response by Mr. McFadden or Mr. Sclafani:

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[7] 9 Carmody-Wait 2d 63:487 "a judgment obtained by fraud or collusion may not be used as the basis for the application of res judicata", citing *In Re Shea's Will*, 309 N.Y. 605, 132 N.E.2d (1956). Requisite for preclusion is "a judgment rendered jurisdictionally and unimpeached for fraud", id, at 616 (underlining added).

"No appellate court can uphold a decision awarding summary judgment to a petition alleging that respondents 'entered in possession [of the subject premises] under a month to month rental agreement' for which there is not only NO evidentiary proof, but which is rebutted by evidentiary proof. Nor can an appellate court uphold a warrant of removal that 'completely falsifies' the allegations of the petition for which summary judgment was given and 'materially alters' its caption. Nor can it allow a judgment of eviction that 'materially diverges' from the decision it purports to implement, including by omission of respondents' Answer. All these are readily-verifiable from what is now before this Court, making the requested vacatur/dismissal relief of my motion not only immediately appropriate, but matters of elementary law. No appeal is necessary to resolve these straight-forward, documentarily-established issues. They can be resolved expeditious[ly], now." (capitalization and underlining in the original).

17. It is this proposition that is before the Court on this motion – and Mr. McFadden makes no claim that he would be prejudiced by a substantive determination thereof.

18. Indeed, if Mr. McFadden truly believes my appeal to be meritless, as he contends in opposing my stay pending appeal[8], 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.

* * *

19. So that the Court will have a more complete picture of the outright fraud of Mr. McFadden's affidavit opposing my vacatur/dismissal motion – and of Mr.

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[8] "...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).

Sclafani's opposing memorandum of law based thereon – I will highlight the knowing falsity of Mr. McFadden's most material assertions, purporting to be factual. I begin with ¶¶108-116 relating to my July 18, 2008 order to show cause and its annexed July 8, 2008 order to show cause, each unsigned by Judge Friia. This is followed by an expose of Mr. McFadden's pretense that I am barred by res judicata, collateral estoppel, and issue preclusion from the relief sought by my motion and, indeed, by my appeal. Finally, I conclude by updating the Court as to the status of my inquiry into whether this proceeding is closed – another readily-verifiable documentary ground for the Court to obviate the appeal.

20. As hereinabove quoted, ¶15 of my August 13, 2008 affidavit explicitly stated why I was furnishing my July 18, 2008 order to show cause.

First, it was to substantiate the merit of my grounds of appeal. Specifically, my jurisdictional ground of appeal based on Judge Friia's disqualification for pervasive actual bias and interest, as to which my ¶15 identified my July 18, 2008 order to show cause as "legally sufficient", including by its 51-page analysis particularizing the material falsifications and omissions of Judge Friia's July 3, 2008 decision & order, simultaneously establishing my ground of appeal based on "Denial of Constitutional Due Process".

Second, it was to refute

> "the endlessly false recitation of what Mr. McFadden purport[ed] to be the 'relevant facts' at pages 2-33 of his affidavit which not only materially falsifies the procedural background to Judge Friia's July 3, 2008 decision & order...but apparently does not deem 'relevant' ANY

discussion of the content of the July 3, 2008 decision & order." (capitalization in the original).

21. Mr. McFadden's ¶¶108-116 conceals all this, consistent with Mr. Sclafani's pretense that I had "provided no indication as to why and for what purpose" I had furnished my July 18, 2008 order to show cause.

22. Instead, and without identifying that my July 18, 2008 order to show cause had even sought Judge Friia's disqualification and that it did so by a 51-page analysis of her July 3, 2008 decision & order – facts evident from the most cursory examination of that order to show cause – Mr. McFadden's ¶108 falsely characterizes it as having:

> "attempted to raise, for the most part, the same claims, defenses and arguments that the City Court had rejected in the prior litigations against [me], (in particular the claims that the City Court had rejected through its January 25, 1989 'Combined Decisions' and March 6, 1998 [sic] letter decision above described]"

and as having

> "requested essentially the same form of relief as had been denied to [me] through that decision and other decisions in the prior litigation".

23. This is a flagrant deceit – as Mr. McFadden well knew when he opted not to identify the relief requested by my July 18, 2008 order to show cause, except for my requested "stay of enforcement of the July 3, 2008 decision and order and of the judgment and warrant issued thereby pending a determination of [my] application". The relief he does not identify – NONE of which had been sought in "prior litigation" except for transfer to another court – was:

"(1) to disqualify Judge Friia for demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14, based, *inter alia*, on her July 3, 2008 decision & order & to vacate same by reason thereof, and to transfer this proceeding, the proceeding *John McFadden v. Elena Sassower*, #1502/07, and the record of four other proceedings #434/88 (*16 Lake Street Owners, Inc. v. John McFadden, George Sassower and Elena Sassower*), #500/88 (*16 Lake Street Owners, Inc. v. John McFadden, George Sassower and Elena Sassower*), #504/88 (*John McFadden v. Doris L. Sassower and Elena Sassower*), and #652/89 (*John McFadden v. George Sassower*), to another Court to ensure the appearance and actuality of impartial justice; and, if disqualification/transfer are denied, for disclosure by Judge Friia, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon her fairness and impartiality and that of White Plains City Court;

(2) for reargument and renewal of Judge Friia's July 3, 2008 decision & order pursuant to CPLR §2221 and, upon the granting of same, vacating the decision & order;

(3) for vacatur of Judge Friia's July 3, 2008 decision & order pursuant to CPLR §5015(a)(3) for 'fraud, misrepresentation, or other misconduct of an adverse party', with imposition of maximum costs and sanctions pursuant to NYCRR §130-1.1 *et seq.* against Petitioner, John McFadden, and his attorneys herein, Lehrman, Kronick, & Lehrman, as well as Leonard Sclafani, Esq., his attorney in #1502/07;

(4) for vacatur of Judge Friia's July 3, 2008 decision & order pursuant to CPLR §5015(a)(4) for 'lack of jurisdiction to render the judgment or order'";

(5) for such other and further relief as may be just and proper, including $100 motion costs pursuant to CPLR §8202.

Alternatively, if the interim stay is denied, for a stay of the judgment entered or to be entered in enforcement of Judge Friia's July 3, 2008 decision & order pending appeal thereof". (underlining added in all the above-quoted paragraphs, except this).

24. However, had Mr. McFadden identified this requested relief, his ¶109 could not purport to justify Judge Friia's refusal to sign the order to show cause and what he purports to be her notation "all issues raised have been previously determined by the Court" (underlining added) – misquoting her actual notation "All issues raised have been previously addressed by the Court". As Mr. McFadden and Mr. Sclafani well know,

- Judge Friia never "previously addressed" my right to her disqualification for actual bias and interest, or to disclosure by her of facts bearing upon her fairness and impartiality, or to transfer of this proceeding to another court – and her refusal to address these issues was particularized by the opening pages of my July 18, 2008 order to show cause;

- Judge Friia never "previously addressed" my right to reargument and renewal of her July 3, 2008 decision, pursuant to CPLR §2221 – as I never previously sought such relief;

- Judge Friia never "previously addressed" my right to vacatur of her July 3, 2008 decision for "fraud, misrepresentation, or other misconduct of an adverse party", pursuant to CPLR §5015(a)(3) – as I never previously sought such relief;

- Judge Friia never "previously addressed" my right to vacatur of her July 3, 2008 decision for "lack of jurisdiction to render the judgment or order", pursuant to CPLR §5015(a)(4) – as I never previously sought such relief;.

- Judge Friia never "previously addressed" my right to a stay pending determination of my underlying motion or, alternatively, pending appeal of her July 3, 2008 decision – and her refusal to do so was particularized by the opening pages of my July 18, 2008 order to show cause for a stay.

25. Indeed, the deceit of Mr. McFadden's ¶109 as to relief I had a right to present and which, based on my order to show cause, required a ruling in my favor as to

each branch, is intensified by his ambiguous assertion that Judge Friia had "recognize[d] that the claims, issues and arguments that [I] had proposed to advance had already been finally determined as against [me] in the prior litigations, and, in any case, were meritless". This is Mr. McFadden's own editorial comment, not – as might be inferred – a further notation by Judge Friia on the order to show cause. Moreover, it is false.

26. The only "prior litigations" to #651/89 are #434/88, #500/88, and #504/88 – the subject of Judge Reap's January 25, 1989 "Consolidated Decisions".[9] ¶¶32-37 of my August 13, 2008 affidavit analyzed that decision's denial of my motion to dismiss Mr. McFadden's Petition in #504/88[10] for lack of subject matter jurisdiction, demonstrating that it was "legally and factually insupportable" and that it had not, in fact, determined the issue of the language of the occupancy agreement disclaiming a landlord/tenant relationship. Mr. McFadden does not deny or dispute the accuracy of this analysis in any respect. Nor does he deny or dispute the accuracy of my analysis of Judge Reap's September 18, 1989 decision denying respondents' April 24, 1989 motion

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[9] Judge Reap's January 25, 1989 "Consolidated Decisions" is annexed to Mr. McFadden's affidavit as his Exhibit B, with a further and clearer copy behind what he purports to be respondent's April 24, 1989 dismissal motion, which he annexes as his Exhibit C. I do not know whether the Exhibit C annexed to the Court's original of Mr. McFadden's affidavit contains the full notice of motion and affirmation of Peter Grishman, Esq., but the two copies of Mr. McFadden's affidavit that I received do not. The IMPORTANT missing pages, however, are included at Exhibit C of Mr. McFadden's virtually identical affidavit opposing my order to show cause for a stay – at least in the copy I received.

[10] Mr. McFadden's December 5, 1988 Petition in #504/88 is annexed as Exhibit A-2 to my August 13, 2008 affidavit.

to dismiss Mr. McFadden's identical Petition herein for lack of subject matter jurisdiction.[11] That further analysis, appearing at ¶¶26-30 of my August 13, 2008 affidavit, demonstrated that Judge Reap's September 18, 1989 decision was also insupportable, legally and factually, and that it, too, had made no determination as to the language of the occupancy agreement disclaiming a landlord-tenant relationship.

27. Neither of these two decisions were final adjudications disposing of the jurisdictional issue pertaining to the occupancy agreement. Indeed, Judge Reap's January 25, 1989 decision explicitly stated "The petitioner has the burden of proof on these issues which are properly matters for trial, not a motion to dismiss", thus reserving them for trial – a fact pointed out by my analysis (at ¶37). My analysis also pointed out (at ¶30) was that Judge Reap's September 18, 1989 decision was similarly provisional, resting on Mr. McFadden's "theory" and his January 25, 1989 decision.

28. As for Mr. McFadden's pretense that the "claims, issues and arguments" of my July 18, 2008 order to show cause were "meritless", such flagrant fraud on this Court is only possible because he does not identify ANY of the "claims, issues, and arguments" which my order to show cause presented – or the substantiating facts I provided in support. Indeed, other than his false characterization of my July 18, 2008 order to show cause in his ¶108, he discloses nothing about it and does not deny or dispute the accuracy of its content in any respect. This includes my 51-page analysis of

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[11] Judge Reap's September 18, 1989 decision is annexed to Mr. McFadden's affidavit as his Exhibit E.

Judge Friia's July 3, 2008 decision & order, whose ¶¶28-31 provided an analysis of Judge Reap's September 18, 1989 and January 25, 1989 decisions nearly identical to that presented by ¶¶26-37 of my August 13, 2008 affidavit.

29. Mr. McFadden follows the same approach of false characterization and concealment with respect to my predecessor July 8, 2008 order to show cause in the proceeding under #1502/07, annexed as Exhibit A to my July 18, 2008 order to show cause. Thus, without identifying ANY of its requested relief – or ANY of the facts provided in support – his ¶112 falsely purports that I:

> "attempted again to raise the same issues and claims and to advance the same arguments as [I] had raised and that the City Court had rejected in the prior litigations".

30. The untruth of this is evident from the July 8, 2008 order to show cause. Its requested relief – none of which, except transfer, I had ever sought in "prior litigations", including #651/89, was for a stay of enforcement of Judge Friia's July 3, 2008 decision & order pending adjudication of my motion:

> "(a) to disqualify White Plains City Court Judge Jo Ann Friia for demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14, and to vacate her June 30, 2008 from-the-bench rulings herein and her July 3, 2008 decision & order in *John McFadden v. Doris L. Sassower and Elena Ruth Sassower*, #651/89, and to transfer this proceeding and the record of the three prior proceedings, #651/89, #434/88 and #500/88, the subject of respondent's First Affirmative Defense and embodied by her First Counterclaim, to another Court to ensure the appearance and actuality of impartial justice – and, if denied, for disclosure pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct of facts bearing on Judge Friia's impartiality and for reconsideration of her June 30, 2008 rulings and July 3, 2008 decision, made without basis in fact and law;

(b) to vacate the January 29, 2008 and October 11, 2007 decisions & order of White Plains City Court Judge Brian Hansbury based on his recusal, without explanation, arising from the record of respondent's November 9, 2007 order to show cause;

(c) to grant reargument and renewal of Judge Hansbury's January 29, 2008 decision & order pursuant to CPLR §2221 and vacating its denial of the substantive relief sought by respondent's November 9, 2007 order to show cause;

(d) for findings of fact and conclusions of law as to respondent's entitlement to dismissal of the Petition and summary judgment on her Counterclaims, based on the record of her September 5, 2007 cross-motion and November 9, 2007 order to show cause; and

(e) for such other and further relief as may be just and proper, including, a stay of any and all proceedings in enforcement of Judge Friia's July 3, 2008 decision & order in #651/89 or judgment entered or to be entered thereon, pending the hearing and determination of this motion.

Alternatively, if all the foregoing relief is denied, for a stay of any and all proceedings in enforcement of Judge Friia's July 3, 2008 decision & order in #651/89, or judgment entered or to be entered thereon, pending determination of respondent's appeal thereof." (underlining in the original).

31. It is this concealment that enables Mr. McFadden's ¶113 to make it appear that Judge Friia could legitimately refuse to sign the order to show cause by her notation "the relief requested has either been previously addressed by the Court or is beyond the scope, authority or jurisdiction of this City Court" – in so doing, ignoring Exhibit B to my July 18, 2008 order to show cause, consisting of my July 9, 2008 letter to Judge Friia, challenging her notation as without basis in fact and law as to each branch of my July 8, 2008 order to show cause.

32. Mr. McFadden's brazenly false characterizations of my two orders to show cause, enabling him to portray Judge Friia's refusal to sign them as proper and her accompanying notations as justified, then culminates in his ¶114 that:

> "From the foregoing, the exhibits annexed hereto, and your affiant's accompanying memorandum of law, it is clear that, in summarily denying Ms. Sassower's two proposed orders to show cause, the City Court was on solid ground and acted in accordance with applicable law in that Ms. Sassower was barred from raising the issues, claims and arguments, and from obtaining any of the relief that she sought therein under the doctrines of res judicata, collateral estoppel and issue preclusion." (underlining added)

33. This is a further outright fraud on the Court. As hereinabove shown, the "issues, claims, and arguments" and the relief sought by my July 18, 2008 and July 8, 2008 orders to show cause had never been previously addressed – and Judge Friia's pretense that they had, endorsed by Mr. McFadden, is false. Nor did Judge Friia act "in accordance with applicable law" – and Sclafani's memorandum of law offers NO LAW in support of what she Friia did. This includes NO law as to the applicability of res judicata, collateral estoppel and issue preclusion, which Judge Friia NEVER invoked – and which are legal conclusions, improper for Mr. McFadden's affidavit.

34. Mr. McFadden's affidavit, presumably drafted by Mr. Sclafani, similarly adds legal conclusions as to the applicability of res judicata, collateral estoppel, and issue preclusion at ¶27, relating to Judge Reap's January 25, 1989 "Consolidated Decisions" in #434/88, #500/88, and #504/88:

> "27. Although the Sassowers appealed the 'Consolidated Decisions", they failed to perfect their appeal making the City Court's rulings final and binding against them such that the doctrines of res judicata, collateral

> estoppel and issue preclusion barred and precluded, and now bar and preclude, the Sassowers from raising the same arguments and claims in the proceedings below and before this Court."

His ¶42 does the same thing relating to Judge Reap's September 18, 1989 decision, where he additionally inserts a knowingly false claim as to what that decision had "noted":

> "42. In this regard, the Court noted that the Sassowers had made identical arguments in the earlier summary proceedings above described, each of which the Court had denied by and through its January 25, 1989 'Consolidated Decisions'. As set forth above, because the Sassowers filed a notice of appeal of the 'Consolidated Decisions' in the prior cases but failed to perfect their appeals, the January 25, 1989 'Consolidated Decisions' became final and Elena Sassower was and is, barred by the doctrine of res judicata, collateral estoppel and issue preclusion from raising the same arguments in the proceedings below, on her appeal to this Court and on her instant motion."

35. Thereafter, in reciting, at ¶74, that respondents did not appeal Judge Reap's December 19, 1991 decision on his November 25, 1991 summary judgment motion – a decision that is plainly interlocutory – he appends the following footnote:

> "It is critical to note that all of the defenses that the Sassower [sic] had raised in their answer with the exception of their claim of discrimination had already been determined against them in prior proceeding [sic] as above set forth. <u>The Sassowers were precluded from relitigating the issue</u>. The Sassowers failed to offer any legitimate basis or evidence in opposition to your affiant's summary judgment motion. It is for these reasons that the City Court correctly ruled that the only remaining issue in the case before it was whether the Sassowers would prevail on their Federal claims." (underlining added).

This is knowingly false in numerous respects, all "critical to note":

<u>First</u>, Judge Reap's December 19, 1991 decision: (1) NEVER ruled that "all the

defenses that the Sassower [sic] had raised in their answer with the exception of their claim of discrimination had already been determined against them in prior proceeding [sic]", (2) NEVER ruled that they were "precluded from relitigating the issue" – by which Mr. McFadden appears to mean "precluded from relitigating" their defenses other than "discrimination"; (3) NEVER ruled that they "failed to offer any legitimate basis or evidence in opposition" to Mr. McFadden's November 25, 1991 summary judgment motion; and (4) NEVER stated or intimated that these were "the reasons" for the ruling in his December 19, 1991 decision that "the only remaining issue in the case before [him] was whether the Sassowers would prevail on their Federal claims"

Second, each of these statements from Mr. McFadden's footnote is materially false.

- respondents' June 26, 1990 Answer, which contained a "GENERAL DENIAL" to the Petition and demanded "trial by jury of six", did NOT claim "discrimination" as a defense[12]. Rather, it claimed, as a defense "Collateral Estoppel", which stated:

> "Prior to commencement of this proceeding, Petitioner filed an action in Federal Court under Index No. 88 Civ. 5775 in which Petitioneer was Co-Plaintiff with Respondents, suing 16 Lake Street Owners, Inc., its Board of Directors, et al. for its discriminatory and wrongful conduct in refusing to give its approval to his application to sell his proprietary shares in the subject apartment to Respondents."

Mr. McFadden's false assertion that respondents had raised discrimination as a

[12] Respondents' June 26, 1990 Answer is annexed as Exhibit C-1 to my August 13, 2008 affidavit.

defense to his Petition herein is, apparently, to make it appear that the federal action, with its discrimination cause of action, had some connection to his City Court Petition. It had none – making res judicata, collateral estoppel, and issue preclusion inapplicable.

- respondents were NOT "precluded from relitigating" their defenses (other than the non-existent discrimination defense) by Judge Reap's January 25, 1989 "Consolidated Decisions" in the "prior proceeding(s)". Indeed, had any preclusion been applicable, this would have been so-stated in Judge Reap's September 18, 1989 decision on their April 24, 1989 dismissal motion in this proceeding and, especially if – as Mr. McFadden's ¶42 falsely purports – Judge Reap had there "noted" that respondents had made "identical arguments...each denied by and through the January 25, 1991 'Consolidated Decisions'". Contrary to Mr. McFadden's several false inferences, Judge Reap never purported there was any preclusion based on "prior proceeding(s)" in White Plains City Court. Nor was there any basis for preclusion, *as a matter of law*.

First, because Judge Reap's January 25, 1989 decision had expressly deferred determination of the jurisdictional issue, ruling "The petitioner has the burden of proof on these issues which are properly matters for trial, not a motion to dismiss" (see ¶27, *supra*), such decision was non-final – and finality is prerequisite for res judicata, collateral estoppel, and issue preclusion, making such doctrines

inapplicable, *as a matter of law*.[13]

Second, Judge Reap's January 25, 1989 non-final ruling on jurisdiction related to proceeding #504/88, *John McFadden v. Doris L. Sassower and Elena Sassower*, which was dismissed as to both respondents by a February 28, 1989 decision of White Plains City Court Judge Kellman after a traverse hearing (Exhibit E). Its concluding paragraph:

> "Accordingly, service not having been effected upon either respondent, the court never acquired jurisdiction. The decision is dismissed without prejudice. This shall constitute the order of the court".

Mr. McFadden does not annex a copy of that decision to his affidavit. Instead, his ¶31 falsely represents the dismissal after the traverse hearing as having been as to Doris Sassower alone – which he buttresses by Judge Reap's erroneous March 6, 1989 decision-letter[14] so as to purport that White Plains City Court had held #504/88 "viable only against Elana Sassower". Dismissal of the Petition in #504/88 because "the court never acquired jurisdiction" means that portion of Judge Reap's

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13 9 Carmody-Wait 2d 63:480: Finality of Judgment: Generally

"A judgment sought to be used as a basis for the application of the doctrines of res judicata or collateral estoppel must be final. Thus, in stating the doctrine of res judicata or collateral estoppel, reference is made to the final character of the judgment or the final determination of the matter in the prior action.

The scope of the term 'final judgment' within the meaning of this rule has been declared not to be confined to a final judgment in an action, but to include any judicial decision upon a question of fact or law which is not provisional and subject to change in the future by the same tribunal." (underlining added).

14 Annexed behind Judge Reap's January 25, 1989 "Consolidated Decisions" in both Exhibit B and C to Mr. McFadden's affidavit.

January 25, 1989 "Consolidated Decisions" pertaining to #504/88 is a nullity[15] – as to which there can be no res judicata, collateral estoppel, or issue preclusion, *as a matter of law*.[16]

Third, because Judge Reap's January 25, 1989 decision and September 18, 1989 decision are, in pertinent part, "legally and factually insupportable" (see ¶26, *supra*), as, likewise, his December 19, 1991 decision (see ¶37, *infra*) and December 29, 1992 decision – reflective of his bias for which his disqualification was sought. The absence of a fair and impartial tribunal, as manifested by these decisions[17], makes res judicata, collateral estoppel, and issue preclusion inapplicable, *as a matter of law*.[18] Indeed, "some indicia of correctness" is required for preclusion[19];

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15 No appeal to the Appellate Term was, therefore, necessary from the January 25, 1989 decision – a fact Mr. McFadden disregards in his repetitive and disparaging assertions about respondents failing to perfect same.

16 9 Carmody-Wait 2d 63:486: "In order for a judgment to operate as a conclusive determination of a cause of action, or of facts litigated therein, it is necessary that it should have been rendered by a court of competent jurisdiction. A judgment by a court without jurisdiction of the parties or of the subject matter of the action is not binding upon the parties to the action and has no effect as res judicata." (underlining added).

"a judgment made without jurisdiction is void, a nullity for all purposes, and does not estop even an assenting party. (*Risley* v. *Phenix Bank of City of N.Y.,* 83 N.Y. 318; *Matter of Will of Walker,* 136 N.Y. 20, 29; *McConnell* v. *William Steamship Co., Inc.,* 239 App. Div. 393, 395, affd. 265 N.Y. 594; *Davidson* v. *Ream,* 178 App. Div. 362.)", *White Plains v. Hadermann*, 272 A.D. 507; 72 N.Y.S.2d 155 (2nd Dept. 1947).

Requisite for preclusion is "a judgment rendered jurisdictionally and unimpeached for fraud", *In Re Shea's Will*, 309 N.Y. 605, 616, 132 N.E.2d (1956) (underlining added).

17 This is highlighted at ¶¶27-34, 44, 46-49, 76-86 of my July 18, 2008 order to show cause – along with Judge Friia's failure to make any ruling as to the evidence of Judge Reap's bias, as manifested by his decisions.

18 "*res judicata* is founded upon the belief that ''it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried;

- respondents' opposition to Mr. McFadden's November 25, 1991 summary judgment motion "offered a legitimate basis [and] evidence in opposition". This is evident from their December 17, 1991 affidavits, which Mr. McFadden annexes to his affidavit as Exhibit O, albeit without the substantiating exhibit to Doris Sassower's affidavit. It is further evident from Judge Reap's December 19, 1991 own decision essentially recognizing the legitimacy of respondents' argument that Mr. McFadden's summary judgment motion was premature.

- Judge Reap's ruling that "the only remaining issue in the case before [him] was whether the Sassowers would prevail on their Federal claims" was false, as even if respondents did not prevail, such would not enable Mr. McFadden to secure summary judgment on his Petition herein, let alone on grounds of res judicata, collateral estoppel, and issue preclusion. The federal action, seeking to enforce the contract of sale, could never validate Mr. McFadden's Petition alleging

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but the public tranquility demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.'' (*Fish v Vanderlip*, 218 NY 29, 36-37, quoting Greenleaf's Evidence, §§ 522, 523; see, also, *Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304; *Hendrick v Biggar*, 209 NY 440.) *Ryan v. New York Telephone Company,* 62 N.Y.2d 494, 500; 467 N.E.2d 487; 478 N.Y.S.2d 823 (1984)" (underlining added)

[19] 9 Carmody-Wait 2d 63:455: "The doctrine of collateral estoppel is a flexible one, and a court is not required to automatically apply it, even where the formal prerequisites are met. Indeed, the application is discretionary with the trial court.

Because collateral estoppel places termination of litigation ahead of correct result, courts narrowly tailor the doctrine to ensure that it applies only when circumstances indicate that the issue estopped from further consideration was thoroughly explored in the prior proceeding, and that the resulting judgment has some indicia of correctness." (underlining added).

that respondents "entered in possession" of the subject apartment "under a month to month rental agreement" of an unspecified date, for an unspecified "rent; that the "term" of their rental had "expired" and that they continued in possession "after the expiration of said term". Such Petition was fraudulent, so-established by documents unimpugned by the federal action: the occupancy agreement that was part of the October 30, 1987 contract of sale.

36. Mr. McFadden's affidavit also does not reveal – either in footnote 6 or elsewhere – that in addition to discrimination, respondents' "Federal claims" included corporate non-compliance causes of action which had not been determined in the federal action because they had been forced to drop them, at trial, by Mr. McFadden's withdrawal as co-plaintiff and failure to assign his shareholder rights. As a consequence, respondents' defenses in City Court based on corporate non-compliance could not be barred by res judicata, collateral estoppel, and issue preclusion, *as a matter of law*.

37. As Mr. McFadden knows, but does not reveal, Judge Reap's December 19, 1991 decision was erroneous in its claim

> "...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. Axiomatic principles of res judicata, collateral estoppel and issue preclusion would apply." (underlining added).

This erroneousness, which I repeatedly pointed out in #1502/07, as well as by my July 18, 2008 order show cause herein (at ¶¶85, 87-88), is concealed by Mr. McFadden's

affidavit, including by his rewrite of the decision. Thus, his ¶72, in quoting the December 19, 1991 decision, removes the word "all" before "respondents' claims in the federal action" so as to make it appear that Judge Reap had not predicated his decision on the false assertion that "all respondents' claims in the federal action were dismissed". Mr. McFadden's ¶71 is even more egregious. Its paraphrase of the decision falsely purports that it

> "noted that the only issue remaining in the case following the Court's denial of the Sassower's prior motion for dismissal and other relief was the same issue presented by the Sassowers in their federal litigation (that is; were the Sassowers the victims of discrimination)..."

In other words, Mr. McFadden misrepresents that the December 17, 1991 decision recognized only a single "issue", *to wit*, discrimination – and that it did so "following the Sassower's prior motion for dismissal and other relief", thereby falsely implying that Judge Reap considered his September 18, 1989 decision as a final disposition of the dismissal motion, which, as evident from its face and from the January 25, 1989 "Consolidated Decisions" on which it relied, it was not.

38. So that this Court may have the benefit of the federal complaint – the significance of whose corporate non-compliance causes of action arising from the Co-Op's "violations of the proprietary lease, the corporate bylaws, and admissions requirements, etc." – was recognized by Judge Reap's January 25, 1989 "Consolidated Decisions", quoted at ¶¶33, 35, 36 of my July 18, 2008 order to show cause – a copy is annexed as Exhibit F. Additionally, such complaint, in which Mr. McFadden was a co-

plaintiff to enforce the October 30, 1987 contract of sale and occupancy agreement, substantiates that portion of my vacatur/dismissal motion as challenges Mr. McFadden's Petition herein for fraud and lack of jurisdiction – and the evidentiary significance of the complaint is twice identified in ¶FOURTH of my July 30, 2008 order to show cause with respect thereto.

39. Because Mr. McFadden's repetitive malignment of the federal action and respondents' prosecution thereof is without ANY relevance to the issues germane to this vacatur/dismissal motion, or to my order to show cause for a stay pending appeal, or to the appeal itself, I do not deem it necessary to burden the Court with rebuttal beyond that set forth at ¶42 of my August 13, 2008 affidavit. Suffice to reiterate that the referred-to appellate documents detail the true facts of the case and are available to this Court from the record in #1502/07, in the possession of the Clerk's Office of the Appellate Term. Other corroborative documents, annexed to my September 5, 2007 cross-motion therein, include respondents' June 9, 1993 impeachment complaint to the House Judiciary Committee which Mr. McFadden annexes to his affidavit as his Exhibit M, respondents' July 14, 1993 letter to the National Commission on Judicial Discipline and Removal (Exhibit V-2), and respondents' March 4, 1996 federal judicial misconduct complaint against the author of the Second Circuit Court of Appeals decision in the federal action (Exhibit V-3) – the same decision that Judge Friia made the pretext for her July 3, 2008 decision & order herein. It also includes my published article, "*Without Merit: The Empty Promise of Judicial Discipline*" [The Long Term

View (Massachusetts School of Law), Vol. 4, No. 1 (summer 1997) (Exhibit U), which, under the heading "Direct, First-Hand Experience" (pp. 95-97), describes respondents' post-litigation efforts to secure redress of the fraudulent federal District and Circuit Court decisions, which Mr. McFadden has put before the Court. The fraudulence of these decisions, as detailed therein, vitiates the federal action as a basis for res judicata, collateral estoppel, and claim preclusion in City Court – which, as hereinabove stated, would, in any event, only be applicable to the discrimination claim, not the corporate non-compliance causes of action – neither of which are respondents' defenses to Mr. McFadden's Petition herein, but only to the Co-Op's.

40. In this regard, Mr. McFadden's affidavit is false and deceitful as to the status of the Co-Op's two City Court proceedings, #434/88 and #500/88. As to these two proceedings, as well as his own prior proceeding under #504/88 – all embraced by Judge Reap's January 25, 1989 "Consolidated Decisions – his ¶30 states:

> "Ultimately, as hereinafter more fully discussed, the three above described proceedings were dismissed."

Such is knowingly false. Indeed, his affidavit provides no "hereinafter full[] discuss[ion]" other than his ¶31 falsely purporting that #504/89 had been dismissed as to Doris Sassower, but remained "viable" against me.

41. Mr. McFadden nowhere substantiates the dismissals of the three "above described proceedings" purported in his ¶30. Nor does he substantiate the footnote to his ¶20 asserting that his City Court proceeding against my father under #652/89 was

dismissed[20].

42. I am completely unaware of any dismissals of either the Co-Op's City Court proceedings under #434/88 and 500/88 or of Mr. McFadden's proceeding under #652/89. Such is not reflected by any document in my own files of these three proceedings. Nor was it reflected by the copies of these files which the White Plains City Court Clerk's Office made from microfilm/microfiche and provided for my review as recently as July 21, 2008.

43. If these three proceedings were, in fact, dismissed, such would have been for want of prosecution[21] – and this proceeding would presumably have also been dismissed.

44. ¶¶17-20 of my August 13, 2008 affidavit pertain to my first jurisdictional ground of 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". As stated, "the best evidence" of the status of #651/89 are its docket sheet and other records pertaining thereto and to the opening of #2008-

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[20] This footnote is materially false and misleading in asserting that my father "voluntarily vacated the Apartment and has since consistently claimed that he does not reside there." – by which Mr. McFadden seeks to justify why my father was "not served in these proceedings" and why "The action against him under Index #652/89 was dismissed."

As Mr. McFadden well knows, my father lived in the apartment until years after these litigations had gone dormant and ALWAYS asserted his residence and that he was an interested party. Indeed, my father's opposition to Mr. McFadden's first and second summary judgment motions by reason thereof is set forth at ¶¶22-23, 44, 45-47, 82-83 of my July 18, 2008 order to show cause.

[21] This would further vitiate any res judicata, collateral estoppel, or issue preclusion with respect to Judge Reap's January 25, 1989 "Consolidated Decisions" pertaining to those two proceedings.

1474, the new docket number that the White Plains City Court Clerk's Office opened for this 1989 proceeding "surreptitiously and without notice to the parties". My efforts to obtain the docket sheet and records for #651/89 and #2008-1474 are reflected by my two letters to White Plains City Court Clerk Patricia Lupi, dated July 30, 2008 and August 7, 2008, which I annexed as exhibits B-1 and F-2 to my August 13, 2008 affidavit and as to which, at that time, I had received no response. I stated:

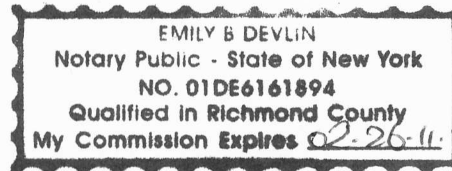
> "Should Clerk Lupi continue to fail to respond – which has been her custom, countenanced by Judge Friia – I will apply to this Court for a subpoena so that the dockets, records, and other information essential to establishing the status of this proceeding and the other related proceedings can be accurately determined and the jurisdictional issues with respect thereto resolved."

45. On August 13, 2008, the postman delivered a letter to me from Clerk Lupi, dated August 7, 2008 (Exhibit G-1), purporting to respond to my July 30, 2008 letter, but ignoring its informational requests. Attached is my August 22, 2008 letter to Clerk Lupi in reply (Exhibit G-2), as well as my follow-up August 27, 2008 letter to her (Exhibit G-3). Although I have received no response to either, this may be due to the possibility that Clerk Lupi has been on vacation, a fact of which I was apprised by an employee at the Clerk's Office upon delivering my August 27, 2008 letter and inquiring as to whether she was in.

46. Like the other issues forming the basis of my vacatur/dismissal motion, this Court's determination of the status of this proceeding may be readily-accomplished – and, if closed, should properly obviate the necessity of appeal.

ELENA RUTH SASSOWER

Sworn to before me
this 2nd day of September 2008



Notary Public