Case No. 2008-1433 WC

To be Argued by:
Elena Sassower
(15 minutes requested)

APPELLATE TERM OF THE SUPREME COURT
NINTH & TENTH JUICIAL DISTRICTS

JOHN McFADDEN,

Cross-Appellant,

-against-

ELENA SASSOWER,

Appellant.

APPELLANT'S REPLY BRIEF*

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***Appeal 1: Judge Brian Hansbury's October 11, 2007 Decision & Order (Westchester City Court #1502/07)**

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INTRODUCTION

This reply brief of appellant Elena Sassower [Sassower] is submitted in response to the brief of the respondent and cross-appellant John McFadden [McFadden], signed and presumably written by his counsel, Leonard Sclafani, Esq. [Sclafani].

As hereinafter demonstrated, Sclafani's brief is no opposition to Sassower's appeal, *as a matter of law*. Its 57 pages and five annexed exhibits are completely non-responsive to Sassower's appellant's brief, which it does not discuss or even mention. Indeed, none of the facts, law, or legal argument summarized and detailed by Sassower's "Questions Presented" (pp. iv-v); her "Introduction" (p. 1); her "Statement of the Case" (pp. 2-35); and her "Argument" (pp. 35-46) are denied or disputed by Sclafani's brief. This includes the facts, law, and legal argument particularized by Sassower's incorporated 30-page, line-by-line analysis of Judge Hansbury's October 11, 2007 decision & order, described by her appellant's brief (at p. 36) as "dispositive of the Questions herein presented". *As a matter of law*, Scalfani thereby concedes the truth of what Sassower's brief and analysis set forth, making his non-responsive opposition to the appeal frivolous *per se*.

Also frivolous is Sclafani's cross-appeal to strike Sassower's ten Affirmative Defenses and four Counterclaims. Like his opposition to the appeal, Sclafani's cross-appeal is fashioned on the most flagrant omissions, falsifications, and deceits, permeating virtually every sentence of his presentation – further reinforcing the merit of Sassower's appeal and the worthlessness of his cross-appeal under the guiding principles quoted at page 14 of Sassower's brief:

> "'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).
>
> '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)."

Consequently, Sassower submits this reply brief not only in further support of her appeal and in opposition to McFadden's (untimely) cross-appeal[1], but for costs and sanctions against McFadden and Sclafani pursuant to this Court's rule 730.3(g)[2], as well as for disciplinary and criminal referrals of them pursuant to this Court's mandatory "Disciplinary Responsibilities" under §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct[3]. Indeed, based on the showing herein that Sclafani is virtually incapable of telling the truth in anything he says – replicating his conduct in White Plains City Court, as well as

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[1] The untimeliness of Sclafani's cross-appeal was pointed out by Sassower's January 15, 2009 letter to this Court's Chief Clerk – annexed as Exhibit A-1 to Sassower's reply brief in #2008-1428-WC, incorporated herein by reference.

[2] "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] "A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."

previously before this Court in opposing Sassower's July 30, 2008 order to show cause for a stay pending appeal, her August 13, 2008 vacatur/dismissal motion, and her October 15, 2008 order to show cause for reargument/renewal, & other relief, all arising from #SP-651/89, *John McFadden v. Doris L. Sassower and Elena Sassower*, and docketed herein as #2008-1427-WC – this Court should consider including a request to disciplinary authorities that they order that Sclafani be medically examined, as his behavior is clearly pathological.

As McFadden's Verified Petition in this case is the foundational document – as likewise Sassower's responding Verified Answer with ten Affirmative Defenses and four Counterclaims[4] – copies are annexed to this reply (Exhibits A and B)[5] to enable the Court to more conveniently determine the brazenness with which Sclafani's brief conceals and falsifies their content. Additionally, because Sassower's 30-page analysis of Judge Hansbury's October 11, 2007 decision is – as stated – "dispositive of the Questions herein Presented" – a copy is also annexed (Exhibit C, pp. 5-35).

To assist this Court in upholding the integrity of the appellate process, Sassower's reply brief herein furnishes the Court with a virtual line-by-line demonstration of the fraud that has been visited upon it by Sclafani's brief, to be passed on to disciplinary and criminal authorities to support their prosecutions of Sclafani and McFadden.

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[4] Contrary to CPLR §§402, 3011, 3012(a), 3019(d), McFadden filed no Reply to Sassower's Counterclaims (Exhibit B, pp. 22-25), each of which "repeat[ed], realleg[ed], and 'reiterat[ed]....as if fully set forth" the prior paragraphs of her Answer – 77 of these being the paragraphs of her ten Affirmative Defenses.

[5] Not annexed, due solely to their volume, are the exhibits substantiating Sassower's Affirmative Defenses and Counterclaims, numbering 110 pages. These are appended to the original Answer in the Court's file.

SASSOWER'S FOURTH COUNTERCLAIM IS DISPOSITIVE OF HER ENTITLEMENT TO DISMISSAL OF McFADDEN'S PETITION & SUMMARY JUDGMENT THEREON

Among the gaping omissions of Sclafani's brief, whose 15-Point argument (pp. 20-57) begins with 13 Points in support of his cross-appeal (pp. 20-49) – each Point corresponding to one of Sassower's ten Affirmative Defenses and the first three of her Counterclaims – is any Point for Sassower's Fourth Counterclaim (Exhibit B, p 25).

Sassower's Fourth Counterclaim is dispositive of her entitlement to summary judgment dismissal of McFadden's Petition, *as a matter of law*. Entitled "Ensuring the Integrity of the Judicial Process", it culminates her Answer to the Petition and is as follows:

> "NINTY-FIRST: Respondent repeats, realleges, and reiterates paragraphs FIRST through NINETIETH, as if fully set forth herein.
>
> NINTY-SECOND: The Petition is based on falsification and omission of material facts, requiring dismissal by reason thereof, imposition of $10,000 sanctions and maximum costs under 22 NYCRR §130-1.1 *et seq.* against petitioner and his attorney, Leonard Sclafani, Esq., both of whom signed it, and, additionally, disciplinary referral of attorney Sclafani pursuant to this Court's mandatory 'Disciplinary Responsibilities' under §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct."

That McFadden's Petition (Exhibit A) warrants imposition of sanctions and costs under 22 NYCRR §130-1.1 *et seq.* was stated by Sassower, in open court and in Sclafani's presence, on the July 16, 2007 return date of the Petition. Such is recounted by Sassower's "Statement of the Case", whose 3-1/2 page recitation (at pp. 3-6) of what transpired, cross-referenced to the July 16, 2007 transcript, is not denied or disputed by Sclafani's own "Statement of the Case" containing but a single paragraph about the return date (at pp. 16-

17). Indeed, Sclafani's brief does not deny or dispute any of Sassower's 33-page "Statement of the Case". This includes as to:

- Sassower's entitlement, *as a matter of law* , to summary judgment dismissal of the Petition, set forth by her *verbatim* quotation of ¶¶149-184 of her September 5, 2007 cross-motion – these being the paragraphs substantiating her Answer's denials to the Petition's material allegations, showing them to be false – appearing at pages 15-23 of her appellant's brief;

- Sassower's entitlement, *as a matter of law*, to sanctions and costs against Sclafani and McFadden, and disciplinary and criminal referral of Sclafani, set forth by her *verbatim* quotation of ¶¶185-189 of her September 5, 2007 cross-motion – appearing at pages 24-26 of her appellant's brief.

SCLAFANI'S "STATEMENT OF THE CASE" REINFORCES SASSOWER'S FOURTH COUNTERCLAIM & IS PERVASIVELY FALSE & DECEPTIVE

Whereas Sassower's "Statement of the Case" (pp. 2-35) begins with McFadden's June 22, 2007 Verified Petition (Exhibit A) – the foundational document – and then proceeds chronologically through the documents in the record underlying Judge Hansbury's October 11, 2007 decision, Sclafani's "Statement of the Case" (pp. 3-19) does not. Instead, it begins with a 12 page-recitation (pp. 3-15) embracing sections entitled "The Prior Proceedings" (pp. 6-8) and "The Proceeding Under Index #SP 651/89" (pp. 8-13), which, if relevant, should have been alleged by McFadden's Petition. Virtually none of it is. However, Sclafani does not disclose this.

Nor does Sclafani disclose that the minuscule fragment of McFadden's Petition that these 12 pages contain – *to wit*, his claim that "the contract [of sale] and the Occupancy

Agreement...terminated by its terms" as result of the Co-Op's denying consent to the purchase (at p. 6) – essentially repeating the Petition's ¶6 and ¶7 – was demonstrated to be false by ¶¶164-174 of Sassower's September 5, 2007 cross-motion, reproduced, *verbatim*, at pages 18-20 of her "Statement of the Case". These quoted and interpreted the "terms" of the occupancy agreement – omitted by McFadden's Petition – and highlighted the further material fact – also omitted by his Petition – that following the Co-Op's rejection of the contract, McFadden joined as co-plaintiff with Sassower and her mother, Doris Sassower, in a federal lawsuit against the Co-Op to enforce the contract of sale, thereby maintaining it viable between the parties.

The balance of Sclafani's first 12 pages of his "Statement of the Case" – virtually every sentence – is not part of McFadden's Petition (Exhibit A). It is also either not part of the record herein or, if it is, it is rebutted and demonstrated to be false by documentary evidence in the record or in the record of "The Prior Proceedings" and "The Proceeding Under Index #SP 651/89"[6] This, too, is concealed by Sclafani's brief. As illustrative,

(a) Sclafani's assertion (at p. 4) that "at the time" of the contract of sale and occupancy agreement, it was "understood that the Apartment would be occupied only by Elena Sassower" is not alleged by the Petition, is not part of the record herein, and its falsity is documentarily established by Exhibit B-1 to Sassower's Answer, consisting of the October 27, 1987 "Sublet Application", signed by McFadden and Doris Sassower, in which the "Persons Who Will Reside in Apartment" are identified as Elena Sassower and her father, George Sassower, and, by Exhibit B-2, consisting of the October 29, 1987 written

[6] A good many of Sclafani's assertions were never asserted below, but were put forward, for the first time, before this Court by McFadden's August 8, 2008 affidavit in opposition to Sassower's July 30, 2008 order to show cause for a stay pending appeal in #SP-651/89.

notification that the Co-Op board had approved Doris Sassower, Elena Sassower, and "members of the immediate family" for occupancy of the apartment;

(b) Sclafani's assertion (at p. 5) that "upon the Coop Corporation's refusal to consent to the sale, Elena and Doris Sassower commenced an action in the United States District Court…in which they claimed, inter alia, that the Coop Corporation had discriminated against them…" is not alleged by the Petition and its material falsity is established by Sassower's September 5, 2007 cross-motion for summary judgment, including ¶¶126-130, whose documentary exhibits show that McFadden also commenced the federal action, most of whose causes of action were for corporate non-compliance (Exhibit Q) – which the Sassowers were forced to drop at trial because McFadden failed and refused to assign them his shareholders rights after withdrawing from the lawsuit (Exhibits W, X);

(c) Sclafani's maligning assertions (at pp. 5, 11-12) as to the outcome of the federal case and the federal court decisions are not alleged by the Petition – and their material falsity is particularized by Sassower's September 5, 2007 cross-motion, including ¶¶89-90, 125, annexing, in addition to the complaint initiating the federal action (Exhibit Q), the Sassowers' relevant appeal papers (Exhibits R, S, T, attachment to Z-1), their federal judicial impeachment complaint (Exhibit V-1); their federal judicial misconduct complaint (Exhibit V-3); their letter to the National Commission on Judicial Discipline & Removal (Exhibit V-2); and Sassower's published article "*Without Merit: The Empty Promise of Judicial Discipline*" (Exhibit U);

(d) Sclafani's assertion (at p. 6) that "all" of the "several holdover proceedings" in White Plains City Court were predicated on the Sassowers being "holdovers following the termination of McFadden's contract of sale, [and] the Occupancy Agreement that was a part thereof" is not alleged by the Petition and its falsity is documentarily established by McFadden's Petition in #SP-504/88. #SP-504/88, *John McFadden v. Doris L. Sassower and Elena Sassower*, is one of the "several holdover proceedings" to which Sclafani refers – but without providing index numbers or captions. Its December 5, 1988 Petition was not based on the "termination" of any contract of sale and occupancy agreement, but on the termination of a supposed "month to month rental agreement" by which the Sassowers were purported to have "entered in possession" of the

apartment.[7]

(e) Sclafani's assertions (pp. 7-8) that Exhibits A and B which he annexes to his brief – these being Judge Reap's January 25, 1989 "Consolidated Decisions" in #SP-454/88, #SP-500/88, and #504/88 and March 6, 1989 letter – are "relevant here" because "they adjudicated as against Sassower some of the same arguments and claims as she made in the proceedings below" – and that they are of "no small significance" as Judge Reap's "Consolidated Decisions" "considered, and rejected, on the merits, many of the claims and arguments Sassower raised in the proceedings below" are not alleged by the Petition, are not part of the record herein, and their falsity is documentarily established by both the record of #SP-651/89 below, containing Sassower's analysis of the January 25, 1989 decision,[8] and the record of #SP-651/89 before this Court containing a comparable analysis[9] – whose accuracy is undenied and undisputed. These analyses demonstrate that the January 25, 1989 decision is legally and factually insupportable in material respects – including by deferring for trial the Sassowers' challenge to the City Court's subject matter, as well as deferring their corporate non-compliance claims;

(f) Sclafani's assertion (at p. 8) that Sassower's failure to perfect an appeal of the January 25, 1989 "Consolidated Decisions" makes them "final and binding as against her such that the doctrines of res judicata, collateral estoppel and issue preclusion precluded, and now preclude, Sassower from raising the same arguments and claims in the proceedings below and before this Court" is not alleged by the Petition, is not part of the record herein, and its falsity is documentarily established by the record of #SP-651/89 before this Court[10];

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[7] McFadden's December 5, 1988 Petition is most conveniently accessible *via* Sassower's August 13, 2008 vacatur/dismissal motion to this Court in #SP-651/89, where it is annexed as Exhibit A-2.

[8] Such analysis appears at ¶¶31B; 33-38 of Sassower's July 18, 2008 order to show cause for Judge Friia's disqualification, etc. (in #SP-651/89), which Judge Friia refused to sign. A copy was provided to Sclafani on August 13, 2008, in further support of Sassower's July 30, 2008 order to show cause to this Court for a stay pending appeal.

[9] See ¶¶31-37 of Sassower's August 13, 2008 affidavit in further support of a stay pending appeal, as well as in support of her simultaneously-made vacatur/dismissal motion. Also, as to the material falsity of Judge Reap's March 6, 1989 letter pertaining to #SP-504/88, see p. 24 of Sassower's September 2, 2008 affidavit, annexing a copy of Judge Kellman's February 28, 1989 decision dismissing that proceeding against both Doris and Elena Sassower, after a traverse.

[10] See, *inter alia*, pp. 23-25 of Sassower's September 2, 2008 affidavit, as well as p. 13 of her September 2, 2008 memorandum of law to this Court rebutting McFadden's attempt, with Sclafani, to previously foist this

(g) Sclafani's assertion (at p. 8) that "all of the above discussed proceedings were either dismissed or withdrawn due to procedural matters that precluded them from advancing any further; (but not on the merits)"[11] – by which he means #SP-434/88, #SP-500/88, and #SP-504/88 – is not alleged by the Petition and, as to #SP-434/88 and #SP-#500/88, is rebutted by Sassower's First Affirmative Defense, which, as the record herein reflects, she based on examination of available file records;

(h) Sclafani's assertion (at p. 9) that in #SP-651/89 McFadden "sought eviction of the Sassowers on the same ground as he had pled in his the (sic) prior cases; to wit, the expiration of the term of the Occupancy agreement upon the Coop Corporation's refusal to approve the sale of the Apartment to the Sassowers" is not alleged by the Petition, is not part of the record herein, and its falsity is documentarily established by McFadden's March 27, 1989 Petition in #SP-651/89[12], which – in identical fashion to his December 5, 1988 Petition – alleges an alleged "month to month rental agreement" by which the Sassowers are purported to have "entered in possession" of the apartment;

(i) Sclafani's assertion (at p. 9) that in #SP-651/89 Judge Reap rejected "on their merits" the Sassowers' "several defenses to the petition", except for "their defense based upon their claims in their then pending federal action", which they had raised "in their answer in that case, in various motions and in opposition to two separate motions made by Mr. McFadden for summary judgment" is not alleged by the Petition, is not part of the record herein, and its material falsity is documentarily established by the record of #SP-651/89. Such shows that the Sassowers made an April 24, 1989 pre-answer dismissal motion raising lack of subject matter jurisdiction, which Judge Reap did not

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argument on the Court. As part thereof, Sassower annexed Judge Kellman's February 28, 1989 decision in #SP-504/88, establishing his dismissal of #SP-504/88 as to both Doris Sassower and Elena Sassower. Such puts the lie to Sclafani's assertion (at p. 8, fn. 3) that #SP-504/88 remained viable as to Elena Sassower, for which he seeks substantiation in Judge Reap's erroneous March 6, 1989 letter that he annexes as Exhibit B to his brief.

[11] Sassower directly challenged Sclafani to substantiate this false assertion by the copy of her January 15, 2009 letter to this Court's Chief Clerk that she sent him. (See Exhibit A-1 to Sassower's reply brief in #2008-1428-WC). She received no response.

[12] McFadden's March 27, 1989 Petition is most conveniently accessible *via* Sassower's August 13, 2008 vacatur/dismissal motion to this Court, where it is annexed as Exhibit A-1. It is also annexed as Exhibit – to Sassower's upcoming appellant's brief in #2008-1427-WC.

reject "on their merits", but, rather, reserved for trial after materially misrepresenting the March 27, 1989 Petition; that the Sassowers made no other formal motions in #SP-651/89, and that their response to McFadden's two summary judgment motions were procedural objections based on the motions' prematurity, without waiving their substantive objections, which they reserved[13];

(j) Sclafani's assertion or inference (at p. 10) that Judge Reap's December 19, 1991 decision "noted" [his] prior unappealed rulings"[14] is not part of the Petition and its falsity is established by the record herein containing the decision, which says nothing about any "prior unappealed rulings", let alone as justification for Judge Reap's *sua sponte* claim therein that "an ultimate federal determination" would entitle McFadden to the granting of summary judgment. Sclafani's previous attempt to similarly mislead this Court was exposed at ¶35 of Sassower's September 2, 2008 affidavit to this Court in #SP-651/89;

(k) Sclafani's assertion (at p. 11) that Judge Reap's December 19, 1991 decision "denied the Sassowers' frivolous request for sanctions and costs" is not part of the Petition and its falsity is established by the record herein containing the decision which does not identify the Sassowers' request for sanctions and costs, let alone identify same as "frivolous". The good and sufficient basis of their request is set forth by their December 16, 1991 affidavits, annexed as Exhibit Y to Sassower's September 5, 2007 cross-motion herein.

(l) Sclafani's assertions (at pp. 12-13) that following the Supreme Court's denial of the Sassowers' petition for a writ of certiorari and their petition for rehearing "McFadden once again moved the City Court for summary judgment, reminding the City Court of its ruling that McFadden would be entitled to summary judgment in the event that the Sassowers were not successful in overturning the jury verdict against them" and that "it not until July 3, 2008, virtually sixteen years after McFadden had filed his summary judgment motion, that the City Court ruled on it, granting a judgment of possession" are not part of the Petition and their falsity is documentarily established by the record herein and in #SP-651/89. These establish that

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[13] Sassower's September 5, 2007 cross-motion annexes as Exhibits Y and Z the Sassowers' responding affidavits to McFadden's two summary judgment motions in #SP-651/89.

[14] See also Sclafani's related false assertion in his fn. 4 (at p. 11).

following the Supreme Court's 1993 denial of the Sassowers' cert petition and petition for rehearing, McFadden did not "again" move for summary judgment in #SP-651/89. His two summary judgment motions in #SP-651/89 were both prior to the Supreme Court's denial. Not until Sassower made her September 5, 2007 cross-motion herein, identifying those two summary judgment motions, did Sclafani seek, by his September 5, 2007 opposing affirmation, to have the White Plains City Court grant McFadden summary judgment in #SP-651/89.

No less deceptive is Sclafani's section "The Proceedings Below" (pp. 13-18). Its first two pages – up to the sentence about the Notice of Termination – is also not part of McFadden's Petition. Nor was it ever sworn to by an affidavit of McFadden in the record herein. Indeed, it, too, is materially false and rebutted by Sassower's Verified Answer and her particularized sworn affidavits:

(a) Sclafani's assertion (at p. 13) that "during the earlier City Court proceedings", the City Court "approved" an "arrangement" whereby "McFadden and the Sassowers agreed that the Sassowers would pay...the sum of $1,000 per month as and for use and occupancy" is not alleged by the Petition and its material falsity is established by the occupancy agreement, annexed as Exhibit A-2 to Sassower's Answer. No court approval was needed for the Sassowers to "pay" the $1,000.00 monthly use and occupancy charge. Such was paid pursuant to the terms of the occupancy agreement which was part of the contract of sale, still in force between the parties by reason of the federal action commenced with McFadden as co-plaintiff;

(b) Sclafani's assertion (at pp. 13-14) that "McFadden and Sassower made and entered into several oral agreements under which Sassower agreed to increases in her monthly payments" is not alleged in the Petition, including its ¶8 alleging a singular "oral agreement", and its material falsity is established by ¶¶TWENTY-SIXTH through TWENTY-EIGHTH of Sassower's Answer and ¶¶150-163 of Sassower's September 5, 2007 cross-motion herein – whose accuracy is undenied and undisputed;

(c) Sclafani's assertions (at pp. 14-15) pertaining to the "leak in the plumbing" that allegedly occurred "In late 2006" are not alleged by the Petition and their

material falsity is documentarily established by Exhibits F-1 to F-28 to Sassower's Answer and summarized by her Tenth Affirmative Defense, spanning her ¶¶FORTY-SEVENTH through EIGHTIETH – whose accuracy is undenied and undisputed.

(d) Sclafani's assertion (at p. 15) as to McFadden's rationale for commencing #SP-1502/07, rather than pursuing a ruling on his pending summary judgment motion in #SP-651/89, is not alleged in the Petition or elsewhere in the record herein or in #SP-651/89.

Only a single paragraph in Sclafani's section "The Proceedings Below" (pp. 13-18) is actually about the Petition (Exhibit A) and it recites none of the Petition's allegations in stating:

> "By his petition, McFadden essentially claims entitlement to a judgment of possession based upon Sassower's failure to remove herself from the premises following the expiration of the thirty day notice period set forth in the above described April 23, 2007, Notice of Termination." (at p. 16).

The balance of the section consists of:

- the single paragraph (at pp. 16-17) about the Petition's return date, which omits Sassower's articulated objections to the Petition, as recounted by her "Statement of the Case" (at pp. 3-6), and falsely purports that Sclafani had "sought, and obtained, an order requiring Sassower to replace the returned checks with new ones" (underlining added);

- A one-sentence-paragraph (at p. 17) falsely purporting that Sassower "failed to serve" Sclafani with her letter to the court requesting an extension of time to answer the Petition – notwithstanding Sassower's "Statement of the Case" (at p. 7) recounts Sclafani's opposition to her letter-request by his own letter[15];

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[15] To further establish Sclafani's deceit – particularly because the next section of his "Statement of the Case" (at p. 19) refers to Sassower's letter as an "ex parte application" and an "ex-parte letter" – annexed is a copy of that July 26, 2007 letter indicating Sclafani as a recipient (Exhibit D-1, p. 3) – and the fax receipt reflecting its transmittal to him (Exhibit D-2).

- 1-1/2 pages (at pp. 17-18) pertaining to Sassower's August 20, 2007 Answer (Exhibit A):

> (a) omitting that Sassower's Answer denied the material allegations of Sclafani's Petition – notwithstanding Sassower's "Statement of the Case" highlighted (at pp. 9, 15-23) these denials, as well as her substantiation thereof by her September 5, 2007 cross-motion;
>
> (b) falsely purporting (at p. 17) that Sassower's First Affirmative Defense (¶¶FOURTH-FIFTH) asserts that McFadden's prior City Court proceeding under #SP-651/89 is based on the "same claims" as those pled in #SP-1502/07 – which it does not;
>
> (c) falsely purporting (at pp. 17-18) that Sassower's Answer "continued to claim that she was entitled to purchase the apartment under the purchase agreement" – and that this "formed the basis for the first of her four 'Counterclaims'" (¶¶EIGHTY-FIRST – EIGHTY-THIRD) – neither of which is so;
>
> (d) falsely purporting (at p. 18) that Sassower's Second Counterclaim (¶¶EIGHTY-FOURTH – EIGHTY-SEVENTH) is based on McFadden's "fraud and extortion by virtue of his failure to sell to her the apartment in 2006", which, by its title, it plainly is not. Rather it is based on McFadden's concealment from 2003 to December 2006 of his "true intent" not to sell Sassower the apartment and his threat thereafter that unless she paid his "unilateral and unexplained increase in the monthly occupancy", he would take legal action to evict her, which is what he did;
>
> (e) falsely purporting that Sassower's Third Counterclaim (¶¶EIGHTY-EIGHTH – NINTIETH) is limited to "a claim sounding in 'retaliatory eviction'", when it is also based on "Fraud & Intimidation" – and so-reflected by its title;
>
> (f) omitting entirely any summary or identification of Sassower's Fourth Counterclaim, "Ensuring the Integrity of the Judicial Process" (¶¶NINTY-FIRST – NINTY-SECOND).

Sclafani's "Statement of the Case" then concludes (at p. 19) with a section entitled

"McFadden's Underlying Motion" consisting of three paragraphs.

- The first paragraph does no more than describe the relief sought by his August 23, 2007 motion, identifying first its request "for an order striking each of Sassower's Affirmative Defenses and Counterclaims".[16]

- The second paragraph is a single-sentence, materially concealing and mischaracterizing the content of Sassower's September 5, 2007 cross-motion:

> "Sassower opposed the [August 23, 2007] motion and cross-moved for an order referring petitioner's counsel to the appropriate Grievance Committees and to the Westchester County District Attorney's Office based upon wild, unsupported and vitriolic claims of attorney misconduct, perjury, fraud, deceit and the like."

- The third paragraph, also a single-sentence, states that the lower court (Judge Hansbury) decided McFadden's motion and Sassower's cross-motion by its October 11, 2007 decision & order, which it purports as having been "described fully in McFadden's within Preliminary Statement".

SCLAFANI's "PRELIMINARY STATEMENT" IS MATERIALLY FALSE AND INTENTIONALLY SCANT IN ITS DESCRIPTION OF JUDGE HANSUBURY OCTOBER 11, 2007 DECISION & ORDER – THE SUBJECT OF SASSOWER's APPEAL

Sclafani's "Preliminary Statement" (at pp. 1-3), like his "Statement of the Case" (at pp. 3-20), is based on falsification and material omission.

His first paragraph begins by identifying the October 11, 2007 decision & order as

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[16] Sclafani then asserts that "in his reply papers" he withdrew the motion's request for a default judgment against Sassower for her supposedly belatedly-filed Answer – purporting that he did so because he "subsequently learned that the court had granted Sassower's ex parte application for additional time to file her answer through her ex-parte letter". This is false, *inter alia*, because there was neither an "ex parte application" nor ex-parte letter" (Exhibit D).

Sclafani also identifies his August 23, 2007 motion as having sought "judgment against Sassower based upon her disobedience of the court's direction to pay use and occupancy" – omitting the adjective "default" before "judgment" and not claiming here – as he had just two pages before – that there had been an

having denied Sassower's September 5, 2007 cross-motion. However:

- he omits that whether Sassower was a protected tenant under the Emergency Tenants Protection Act or other regulations is "the disputed issue raised by the Petition's ¶13 and Respondent's Answer" – so-identified by her cross-motion's first branch in seeking referral to the Division of Housing and Community Renewal. Sclafani's omission that the Petition and Answer have created this "disputed issue" – calling it instead "this matter" – is then elevated to an affirmative misrepresentation in his Point XIV (pp. 50-55), where he purports (at p. 53) that McFadden "could not have submitted his affidavit on his original motion because the issue of Sassower's status as a protected tenant had not been raised by her in her answer but, rather, was first raised by her cross-motion." This is false;

- he omits that the section of the CPLR invoked by the cross-motion's third branch for summary judgment was CPLR §3211(c).[17] Sclafani then elevates this omission to an affirmative misrepresentation in the next paragraph of his "Preliminary Statement" (at p. 2). He there simultaneously conceals that Judge Hansbury's October 11, 2007 decision converted two separate branches of the cross-motion into one, stating: "the court correctly rejected that branch of Sassower's motion pursuant to CPLR §3211 and 3212". This is false. Neither Sassower's cross-motion nor Judge Hansbury's decision relied on CPLR §3212;

- he omits that McFadden – and not just "McFadden's counsel" – was the subject of the cross-motion's fourth branch for "costs and sanctions".

Additionally, this same first paragraph of Sclafani's "Preliminary Statement" (at p. 1) materially adds to his August 23, 2007 motion by purporting that it was "pursuant to CPLR §3211(b) for an order striking the various affirmative defenses and counterclaims alleged by Sassower in her answer herein". This is false. Sclafani's August 23, 2007 motion had not

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"order requiring Sassower to replace the returned checks with new ones..." (at p. 16, underlining added).

[17] Sclafani's omission of the CPLR provision for Sassower's summary judgment branch of her cross-motion contrasts to his identifying "various sections of CPLR §3211" for her dismissal branch (at p. 1).

specified the subdivision of CPLR §3211 – a fact whose significance is discussed at ¶¶44-47 of Sassower's September 5, 2007 cross-motion.

The second paragraph of Sclafani's "Preliminary Statement" (at pp. 1-2) then continues to omit, distort, and falsify in its scanty description of Judge Hansbury's October 11, 2007 decision & order.[18] In a single sentence, it describes the decision's denial of the first branch of Sassower's cross-motion:

> "the court below correctly denied Sassower's cross-motion insofar as it sought referral of Sassower's claim that she was a protected tenant under the Emergency Tenants Protection Act, having found that the issue raised by Sassower was not so complex or unique as to require the 'particular expertise of the DHCR'".

This is false. Judge Hansbury's decision said nothing about "complex[ity] or "unique[ness]". Rather, it asserted that the coverage question "involves interpretation of statute/regulation and resolution of this issue is not within the particular expertise of the DHCR" – citing a case that had been reversed on appeal on precisely the point of the DHCR's expertise. Such deficiency and others, establishing that Judge Hansbury's disposition was not "correct[]", were identified by Sassower's answer to her second "Questions Presented" (at pp. iv-v) and particularized by her corresponding Point II (pp.40-42). Sclafani's "Preliminary Statement" ignores these – as does his Point XIV (pp. 50-55) which, notwithstanding it relates to the subject of Sassower's Point II, is completely non-

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[18] Sclafani's footnote 1 (p. 3) to his "Preliminary Statement" is also deceitful in its implicit admission that Judge Hansbury's October 11, 2007 decision was erroneous in denying his request for a default judgment after he had withdrawn that branch of his August 23, 2007 motion. Not revealed are the pertinent particulars showing how indefensible Judge Hansbury's denial was. These are set forth by Sassower's analysis of the

responsive to it.

By another single sentence, Sclafani describes (at p. 2) the decision's denial of the fourth and fifth branches of Sassower's cross-motion:

> "The court also correctly outright denied Sassower's motion as related to petitioner's counsel".

Sclafani omits any details about the decision's "outright" denial – such as summarized by Sassower's first "Question Presented" (at p. iv) and particularized by her Point I (at pp. 39-40). Sclafani's own Point XV (pp. 55-57) is completely non-responsive to this Point I, showing that Judge Hansbury's disposition was not "correct[]". Indeed, his Point XV, like his "Preliminary Statement" (at p. 2), conceals that Judge Hansbury combined two separate branches into one, denying both without reasons.

Sclafani then gives a two sentence-description of the decision's rejection of the second and third branches of Sassower's cross-motion for dismissal and summary judgment:

> "the court correctly rejected that branch of Sassower's motion pursuant to CPLR §3211 and 3212; however the court did so on procedural grounds and not on the merits of Sassower's claims as it should have. Here, the court found that the papers submitted by the respective parties, including the 'documentary exhibits annexed thereto' disclosed after 'a comprehensive review of the motion papers and exhibits' the existence of 'triable issues of fact'" (at p. 2).

Sclafani thereby replicates the decision's conversion of two separate branches of the cross-motion into one, which he conceals. In addition to misrepresenting CPLR §3212 as invoked by Sassower's cross-motion – which even Judge Hansbury's decision did not do –

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decision (Exhibit C, at ¶¶56-58), without contest from Sclafani.

Sclafani does not specify the decision's "procedural grounds" for denying Sassower relief under CPLR §3211(c).

Sassower's Point I (pp. 36-40) – corresponding to her first "Question Presented" (p. iv) – demonstrated that Judge Hansbury's disposition of Sassower's second and third branches of her cross-motion for dismissal and summary judgment were indefensible in fact and law. Sclafani does not address this Point I here or elsewhere in his brief. Nor does his brief have any Point amplifying the supposed "correct[ness] of Judge Hansbury's denial of the second and third branches of Sassower's cross-motion. The two above-quoted sentences of Sclafani's "Preliminary Statement" (at p. 2) are the entirety of what his brief has to say on a subject highlighted throughout Sassower's brief in #2008-1433-WC, as likewise throughout her brief in #2008-1427-WC: her entitlement, *as a matter of law*, to summary judgment dismissal of McFadden's Petition and the granting of her four Counterclaims – the relief sought by the second and third branches of her September 5, 2007 cross-motion.

Nevertheless, Sclafani purports (at pp. 2, 3) that these – and the other branches of Sassower's motion – should not only have been denied "on procedural grounds", but "on the merits" – a pretense he reiterates in the paragraph preceding his "Argument" (p. 20).

As for Judge Hansbury's denial of "McFadden's motion seeking dismissal on the pleadings of Sassower's affirmative defenses and counterclaims" – the subject of Sclafani's cross-appeal – Sclafani's "Preliminary Statement" purports it was:

> "based entirely on the court's finding that the motion was not supported by the affidavit of a person with knowledge of the facts." (at p. 2).

He then explains why this was "erroneous", stating:

> "...McFadden's motion was based, in part, on issues of law, rather than issues of fact, in part, on undisputable documentary evidence, such as published decisions of various federal courts in which many of Sassower's claims had already been adjudicated against her, in part, on Sassower's own allegations and admissions as set forth in her answer and on her cross-motion (which, for the purposes of McFadden's motion to dismiss, the Court was obliged to deem as true), in part, upon the affirmation of McFadden's counsel who did, himself, have personal knowledge of the facts that supported the affidavit of McFadden, himself; a person who did have personal knowledge of relevant facts." (at pp. 2-3).

This is a deceit – and Sclafani does not reveal, either here or elsewhere in his brief, that he advanced this very same argument previously[19], most particularly by a November 15, 2007 cross-motion for reargument of Judge Hansbury's October 11, 2007 decision – the fraudulence of which Sassower resoundingly demonstrated by a November 26, 2007 opposing affidavit, with no findings made thereon by Judge Hansbury's January 29, 2008 decision.

Judge Hansbury's January 29, 2008 decision is the subject of Sassower's appeal in #2008-1428-WC – incorporated by her appellant's brief herein (at p. 1).

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[19] See ¶¶52-53 of Sassower's September 11, 2007 reply affidavit pertaining to Sclafani's deceitful pretense in his September 5, 2007 affirmation that his August 23, 2007 motion did not require a supporting affidavit from McFadden.

SCLAFANI'S ARGUMENT IS IRRELEVANT TO SASSOWER'S ENTITLEMENT TO SUMMARY JUDGMENT DISMISSAL OF THE PETITION BASED ON ITS MATERIAL FALSITY, & REINFORCES HER ENTITLEMENT TO SUMMARY JUDGMENT ON HER FOUR COUNTERCLAIMS

None of the 15 Points of Sclafani's "Argument" (pp. 20-57) are relevant to Sassower's *matter of law* entitlement to summary judgment dismissal of the Petition based on the falsity of its material allegations. Such entitlement rests on ¶¶149-184 of Sassower's September 5, 2007 cross-motion, substantiating her Answer's denials to the Petition's material allegations, and is reinforced by ¶¶10-20 of her September 11, 2007 affidavit, summarizing the state of the record and law with respect thereto. These establish that the Petition is materially false, thereby making Sassower's ten Affirmative Defenses superfluous for purposes of dismissing the Petition.[20]

Sclafani's first 13 Points pertain exclusively to the purported legal insufficiency of Sassower's ten Affirmative Defenses and three Counterclaims and the purported legal sufficiency of his August 23, 2007 motion. These 13 Points are fashioned on pervasive falsification and omission – replicating his August 23, 2007 motion. Indeed, concealed by Sclafani's brief is that his August 23, 2007 motion could not have been properly granted by Judge Hansbury – and cannot now be granted by this Court – because it falsifies and omits the allegations of Sassower's Affirmative Defenses and Counterclaims, as demonstrated by

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[20] Although McFadden's Petition is dismissible, *as a matter of law*, without the Affirmative Defenses, the Affirmative Defenses remain germane as factual support for Sassower's four Counterclaims. Indeed, the Counterclaims expressly "repeat[], reallege[], and reiterate[]...as if fully set forth" the prior paragraphs of Sassower's Answer – 77 of which are her ten Affirmative Defenses.

¶¶44-144 of her September 5, 2007 cross-motion. Judge Hansbury's cover-up of this particularized demonstration – and of ¶¶4-5, 21-25, 54-56, 80-87 of Sassower's September 11, 2007 reply affidavit pertaining to her *matter of law* entitlement to summary judgment dismissal of the Petition based on her six substantive Affirmative Defenses, if not her four procedural Affirmative Defenses, as well as her entitlement to summary judgment on her four Counterclaims – is highlighted at ¶¶13-41 of Sassower's analysis of his October 11, 2007 decision (Exhibit C), whose accuracy Sclafani does not dispute..

Sclafani's Points II-XIII regurgitate, largely *verbatim*, the fraud and deceit of his August 23, 2007 motion. Where these 12 Points – and his Point I – diverge from his August 23, 2007 motion and supplementing September 5, 2007 affirmation, such only amplifies the further fraud Sclafani seeks to perpetrate upon this Court, as hereinafter demonstrated.

The brazenness and repetition of Sclafani's falsifications with respect to Sassower's ten Affirmative Defenses and four Counterclaims reinforce their merit – and the record entitling Sassower to summary judgment on her Counterclaims, *as a matter of law*. Such relief – and dismissal of McFadden's Petition – was sought by the second and third branches of Sassower's September 5, 2007 cross-motion, for which Sclafani's brief has no Point. They are the subject of Sassower's first "Question Presented" (iv) and her corresponding Point I (pp. 36-40), uncontested by Sclafani.

Sclafani's Fraudulent & Deceitful Point I (pp. 20-24)
(Sassower's First Affirmative Defense –
"Open Prior Proceedings" – Exhibit B, pp. 1-2)

Sclafani's Point I (pp. 20-24) purports to address Sassower's First Affirmative Defense, "Open Prior Proceedings" (Exhibit B, pp. 1-2). It is even more fraudulent and deceitful than ¶¶33-38 of his August 23, 2007 motion, as particularized by ¶¶48-58 of Sassower's September 5, 2007 cross-motion.[21]

As illustrative, Sclafani begins by not only falsifying Sassower's First Affirmative Defense to make it appear that it is based on "prior eviction proceedings", as opposed to "open prior proceedings", but purports that Sassower is seeking dismissal of the Petition herein based on #SP-504/88, a closed case. Thus, he states:

> "She fails to provide any cogent reason as to why the admitted closed proceedings would have constituted a bar to McFadden's commencement and maintenance of the proceedings below." (at p. 20).

This is flagrantly false. Sassower's First Affirmative Defense could not be clearer. It is entitled "Open Prior Proceedings", identifies the "open prior proceedings" at issue: #SP-651/89, #SP-434/88, and #SP-500/88, and concludes by stating, "By reason of these open proceedings, petitioner is barred from commencing the instant proceeding and the petition must be dismissed." Indeed, even Sclafani's August 23, 2007 motion did not purport – as his Point I does – that Sassower's First Affirmative Defense sought dismissal based on #SP-504/88 or any closed case.

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[21] See also ¶¶38-54 of Sclafani's September 5, 2007 opposing/reply affirmation, whose fraud and deceit

Second, Sclafani purports (at p. 21) that as to #SP-651/89 "McFadden did not dispute, indeed he most strenuously agreed, that that case was still open.". Again, flagrantly false – and the record could not be clearer. Over and again, the record shows that Sclafani equivocated as to the status of #SP-651/89. Thus, Sclafani's August 23, 2007 motion:

> "33. Respondent asserts that the petition must be dismissed because of 'prior eviction proceedings against respondent in White Plains City Court under Index #504/88 and #651/89, the latter of which [respondent's claims] remains open.'
>
> 34. Assuming arguendo that such were true...
>
> 35. The prior eviction proceeding that respondent claims is 'open'..." (underlining added).

Then again, Sclafani's September 5, 2007 affirmation:

> "38. As set forth in petitioner's moving papers, any prior proceedings between the parties that remain open as of today's date proceed on facts other than those that petitioner herein relies upon.
> ...
> 40. Under these circumstances, the prior proceedings are no bar to petitioner's instant proceedings regardless of whether they are open or closed.
> ...
> 54. In any case, whatever the Court may determine that it should do with respect to the 'open' prior case between the parties, if it is in fact, still 'open'..." (underlining added).

Likewise, Sclafani's November 15, 2007 cross-motion for reargument of Judge Hansbury's October 11, 2007 decision, which also sought consolidation:

> "45. In this regard, it must be noted that, in the specific case that respondent claims is still pending between the parties, McFadden v. Sassower,

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are particularized by ¶¶54-59 of Sassower's September 11, 2007 reply affidavit.

Index #651/89..." (underlining added).

Third, Sclafani purports (at pp. 21-22) that because #SP-651/89 and this case are "not identical" and do not proceed "on identical facts", the pendency of #SP-651/89 is "not a bar to [McFadden's] commencement or maintenance [of] the proceedings below as a matter of law". His "matter of law" appears to be CPLR §3211(a)(4) which allows dismissal of a subsequent action where 'there is another action pending between the same parties for the same cause of action." Sclafani concedes, however, that Sassower's First Affirmative Defense "did not so state" that it was premised on CPLR §3211(a)(4).[22]

In fact, it is precisely because the Petition in #SP-651/89 and the Petition in #SP-1502/07 are irreconcilably different that the Petition in #SP-1502/07 could not be maintained while #SP-651/89 was still pending. This, because McFadden's Petition in #SP-651/89 purports that Sassower and her mother "entered in possession" of the subject apartment "under a month to month rental agreement", whereas his Petition in #SP-1502/07 purports that Sassower "entered into occupancy and assumed possession initially" under an October 30, 1987 "written temporary occupancy agreement" that was "part of a contract for the sale to her and to her mother" (Exhibit A). Such irreconcilably divergent Petitions could not exist simultaneously, as both could not be true. Indeed, Exhibit A to Sassower's Answer herein, consisting of the contract of sale and the occupancy agreement, documentarily rebuts McFadden's Petition in #SP-651/89.

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[22] Curiously, Sclafani also purports (at p. 22) that Sassower's September 5, 2007 cross-motion had not

To conceal this irreconcilable divergence, Sclafani's Point I essentially falsifies the content of the 1989 Petition in stating (at p. 21):

> "McFadden's 1989 summary proceeding sought eviction based upon the expiration of the term of the 1986 (sic) occupancy agreement, when the Coop Corporation refused to approve the sale of the Coop…",

repeating a comparable deceit from his August 23, 2007 motion (at ¶35). In fact, this is not what the Petition in #SP-651/89 alleged.

Finally, Sclafani's Point I completely omits that Sassower's First Affirmative Defense is also based on the Co-Op's still open proceedings: #SP-434/88 and #SP-500/88 – replicating his pattern of omitting these two open proceedings from his August 23, 2007 dismissal motion, from his September 5, 2007 reply affirmation, and from his November 15, 2007 reargument/consolidation motion.

<u>Sclafani's Fraudulent & Deceitful Point II (pp. 24-26)</u>
(Sassower's Second Affirmative Defense –
"Petitioner's Receipt of Use and Occupancy" – Exhibit B, p. 2)

Sclafani's Point II (pp. 24-26) purports to address Sassower's Second Affirmative Defense, "Petitioner's Receipt of Use and Occupancy" (Exhibit B, p. 2). In so doing, it materially replicates ¶¶39-50 of his August 23, 2007 motion, whose fraud and deceit is established by ¶¶59-64 of Sassower's September 5, 2007 cross-motion. This includes, *inter alia*, falsely asserting and making it appear as if this Second Affirmative Defense rests on the Petition's failure to allege that Sassower's two checks for June and July occupancy had been

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been premised on CPLR §3211(a)(4). This is false.

returned – rather than, in the first instance, the Petition's false ¶14 allegation that McFadden had "received" "no part" of the use and occupancy for the subject apartment after May 31, 2007. This allegation, denied by ¶SECOND of Sassower's Answer and reiterated by her Second Affirmative Defense, is established as false by Sclafani's own admission on the July 16, 2007 return date of the Petition and by his August 23, 2007 affirmation annexing copies of Sassower's received checks for the June and July occupancy – and so-identified at ¶61 of Sassower's September 5, 2007 cross-motion. Thus – and as further highlighted by ¶32 of Sassower's analysis of the decision (Exhibit C) – there is "no issue of fact" as the falsity of the Petition's ¶14 that "no part" of the use and occupancy had been "received".

Sclafani's Fraudulent & Deceitful Point III (pp. 26-30)
(Sassower's Third Affirmative Defense –
"Lack of Subject Matter Jurisdiction" – Exhibit B, pp. 2-3)

Sclafani's Point III (pp. 26-30) purports to address Sassower's Third Affirmative Defense, "Lack of Subject Matter Jurisdiction" (Exhibit B, pp. 2-3). In so doing, it materially replicates ¶¶51-63 of his August 23, 2007 motion, whose fraud and deceit is established by ¶¶65-72 of Sassower's September 5, 2007 cross-motion. This includes, *inter alia*,

> (a) falsely asserting (at p. 28) that Sassower's Answer fails to deny the Petition's ¶6. Such replicates Sclafani's identically-false assertion at ¶55 of his August 23, 2007 motion, identified by Sassower's September 5, 2007 cross-motion as "materially false" (¶6);
>
> (b) falsely asserting (at p. 27) that Sassower had "conceded in her

Answer" that increased occupancy charges were the "result of agreements" between the parties "long after...the occupancy agreement had expired and ...the contract of sale containing the said agreement was canceled". Such replicates the identically-false assertion at ¶54 of his August 23, 2007 motion, identified by Sassower's September 5, 2007 cross-motion as "utterly false" (¶68).

There are some key differences, however, reflective of Sclafani's attempt to purport that the issues are ones of law, not fact, *inter alia*:

(a) Sclafani now removes the reference from ¶53 of his August 23, 2007 motion: that "respondent [is] a month to month tenant under an agreement made between petitioner and respondent subsequent to the expiration of the term of the October 30, 1987 occupancy..." (*cf.* p. 27, middle paragraph), which had been pointed out by ¶67 of Sassower's September 5, 2007 cross-motion as "not 'undisputed fact". He similarly removes the reference that was in his ¶62 that McFadden's proceeding is based on his "termination of a subsequent agreement under which petitioner and respondent had a 'landlord-tenant' relationship" (*cf.*, p. 29, last paragraph) – this having been highlighted by Sassower's ¶67 as not "undisputed fact";

(b) Sclafani now adds, assumedly as documentary evidence, what was never before Judge Hansbury, *to wit*, Judge Reap's September 18, 1989 decision in #SP-651/89 – which he annexes as his Exhibit E. He purports that this decision "ruled against Sassower on this very issue" – a claim he makes in face of Sassower's analysis of the decision, in the record of #SP-651/8923, showing it to be legally and factually insupportable – a showing not denied or disputed by him in any respect.

Sclafani's Fraudulent & Deceitful Point IV (pp. 30-32)
(Sassower's Fourth Affirmative Defense –
"Failure to Join Necessary Parties" – Exhibit B, p. 3)

Sclafani's Point IV (pp. 30-32) purports to address Sassower's Fourth Affirmative Defense, "Failure to Join Necessary Parties" (Exhibit B, p. 3). In so doing, he materially

replicates ¶¶64-70 of his August 23, 2007 motion, whose fraud and deceit were chronicled by ¶¶73-78 of Sassower's September 5, 2007 cross-motion, without contest from Sclafani and without a ruling by Judge Hansbury.

As illustrative, Sclafani's Point IV, like his August 23, 2007 motion, omits that Doris Sassower is an "approved occupant" with a right to live in the apartment pursuant to the October 30, 1987 occupancy agreement and Co-Op approval letter.

Sclafani's Fraudulent & Deceitful Point V (pp. 32-37)
(Sassower's Fifth Affirmative Defense –
"Equitable Estoppel and Unjust Enrichment" – Exhibit B, pp. 3-4)

Sclafani's Point V (pp. 32-37) purports to address Sassower's Fifth Affirmative Defense, "Equitable Estoppel and Unjust Enrichment" (Exhibit B, pp. 3-4). In claiming that "the allegation (sic) set forth in Sassower's answer in support of those purported defenses do not satisfy the elements of such claims or defenses as a matter of law", Sclafani falsifies the allegations of Sassower's Fifth Affirmative Defense and cites inapplicable law pertaining to such falsified allegations in a fashion duplicative of ¶¶71-92 of his August 23, 2007 motion. The fraudulence and deceit of these paragraphs of his motion were particularized by ¶¶79-92 of Sassower's September 5, 2007 cross-motion, without contest from Sclafani and without a ruling by Judge Hansbury

As illustrative, Sclafani's Point V asserts that "Sassower essentially claimed in her Answer and on her cross-motion that "McFadden should have been, and should now be, required to complete the sale of his coop apartment despite the Coop Board's refusal to

approve the sale..." (at p. 33); and "should be equitably estopped from bringing the proceeding below on the basis of his failure to complete the sale" (at pp. 33-4). This repeats what Sclafani said at ¶¶75-76 of his August 23, 2007 motion – which ¶82 of Sassower's September 5, 2007 cross-motion identified as "Both...false".

Among the differences between Sclafani's Point V and his August 23, 2007 motion, reflective of his attempt to falsely purport that there are no fact issues and that "Mr. McFadden's affidavit and verified pleading" were sufficient for the striking of this Affirmative Defense (p. 32):

> (a) removing the allegation from his ¶86 that "At the conclusion of the litigation, [Sassower] continued to refuse to remove herself from the subject premises". This was noted as "documentably false" and "completely non-probative" by ¶87(c) of Sassower's September 5, 2007 cross-motion, which stated "it does not appear in the Petition that Mr. McFadden signed and verified, is not substantiated by any documentation, and is not presented by any affidavit from McFadden in support of this motion"
>
> (b) removing the allegation from his ¶87 that because McFadden was "Exhausted both mentally and financially from the litigation", he "took no action to remove [Sassower] from the premises" upon its conclusion. This was noted as "false" and "completely non-probative" by ¶¶87(d) of Sassower's September 5, 2007 cross-motion, which stated" it does not appear in the Petition that Mr. McFadden signed and verified, is not substantiated by any documentation, and is not presented by any affidavit from Mr. McFadden".

These allegations of Sclafani's August 23, 2007 motion plainly required an affidavit from McFadden, as did other allegations of Sassower's Fifth Affirmative Defense omitted from Sclafani's motion, as for instance, that the Co-Op's sublets are for one-year periods, with renewal requiring approval by the Co-Op board and that McFadden never submitted any

subsequent sublet agreements between himself and Sassower to the Co-Op for her continued occupancy, which at all times rested on the October 30, 1987 occupancy agreement pursuant to the contract of sale.

Sclafani's Fraudulent & Deceitful Point VI (pp. 37-38)
(Sassower's Sixth Affirmative Defense –
"Detrimental Reliance" – Exhibit B, pp. 4-6)

Sclafani's Point VI (pp. 37-38) purports to address Sassower's Sixth Affirmative Defense, "Detrimental Reliance" (Exhibit B, pp. 4-6). Like ¶¶93-94 of his August 23, 2007 motion, which did not identify any of the allegations of Sassower's Sixth Affirmative Defense, Sclafani's Point VI also does not identify any of its allegations. Nevertheless, Sclafani purports that it is "undermined by [Sassower's] own factual allegations set forth in support of her defense and her cross-motion" (at p. 37) and that it is "legally insufficient" (at p. 38). These bald statements are false, as is his inference that the "detrimental reliance" at issue involves "any alleged promise made by McFadden subsequent to the decisions of the federal courts" and Sassower's payment of monthly use and occupancy "to her detriment or only because she believed that she was to have been permitted to purchase the apartment" (at p. 36). In fact, Sassower's Sixth Affirmative Defense has nothing to do with either of these – nor is it disposed of by federal court rulings that "the Coop Corporation was justified in refusing to approval (sic) the sale of McFadden's apartment to her". This is obvious from examination of the Sixth Affirmative Defense (Exhibit B, pp. 4-6), whose actual allegations plainly required a responsive affidavit from McFadden.

As for Sclafani's claim that Sassower's Sixth Affirmative Defense is "barred by the applicable statute of limitations; to wit, CPLR §213", such replicates ¶94 of his August 23, 2007 motion, as to which ¶95 of Sassower's September 5, 2007 cross-motion had stated:

> "this is deceitful and frivolous because the statute of limitations of CPLR §213 expressly pertains to time within which an action may be brought. It has no application to the assertion of affirmative defenses and Mr. Sclafani offers not the slightest legal authority to the contrary."

This was not contested by Sclafani – nor ruled upon by Judge Hansbury.

Sclafani's Fraudulent & Deceitful Point VII (pp. 38-43)
(Sassower's Seventh Affirmative Defense –
"Implied Contract, Detrimental Reliance & Fraud" – Exhibit B, pp. 6-8)

Sclafani's Point VII (pp. 38-43) purports to address Sassower's Seventh Affirmative Defense, "Implied Contract, Detrimental Reliance, & Fraud" (Exhibit B, pp. 6-8), which it distorts and falsifies. In so doing, it materially replicates ¶¶95-105 of Sclafani's August 23, 2007 motion, whose fraudulence and deceit were particularized by ¶¶97-106 of Sassower's September 5, 2007 cross-motion, without contest from Sclafani and without a ruling by Judge Hansbury. The actual allegations of Sassower's Point VII plainly required a responsive affidavit from McFadden

Sclafani's Fraudulent & Deceitful Point VIII (pp. 43-44)
(Sassower's Eighth Affirmative Defense –
"Extortion & Malice" – Exhibit B, pp. 8-9)

Sclafani's Point VIII (pp. 43-44) purports to address Sassower's Eighth Affirmative Defense, "Extortion and Malice" (Exhibit B, pp. 8-9) by mischaracterizing its specific, pleaded allegations as "bald" and "unsupported by any appropriate facts", and purporting that

"Sassower's own factual allegation (sic) disproved her defense". Again, Sclafani conceals the actual allegations of Sassower's Eighth Affirmative Defense – requiring a responsive affidavit from McFadden – and materially replicates ¶¶106-107 of his August 23, 2007 motion, whose fraudulence and deceit were particularized by ¶¶107-111 of Sassower's September 5, 2007 cross-motion, without contest from Sclafani and without a ruling by Judge Hansbury.

Sclafani's Fraudulent & Deceitful Point IX (pp. 44-45)
(Sassower's Ninth Affirmative Defense –
"Breach of Covenant of Good Faith & Fair Dealing" – Exhibit B, pp. 9-11)

Sclafani's Point IX (pp. 44-45) purports to address Sassower's Ninth Affirmative Defense, "Breach of Covenant of Good Faith & Fair Dealing" (Exhibit B, pp. 9-11) by misrepresenting the basis of this defense. "The dealings to which [Sassower] refers" are not – as Sclafani's Point IX purports (at p. 44) –

> "in the context of her failure and refusal to permit contractors and the Coop's insurance carriers entry into the apartment to make needed repairs following a flood, and continued claims to be the rightful owner of the Apartment entitled to make decision as to how it should be repaired."

Sassower's Ninth Affirmative Defense has nothing to do with the flood damage, etc. – as would be obvious had Sclafani's Point IX recited its allegations, rather than baldly purport that "Sassower's own factual allegations undermine the defense". This is not only false, but conceals what the actual allegations of Sassower's Ninth Affirmative Defense makes obvious, namely, that they required a responsive affidavit from McFadden.

Such deceitfulness materially replicates ¶¶108-110 of Sclafani's August 23, 2007

motion, whose fraudulence and deceit were particularized by ¶¶112-116 of Sassower's September 5, 2007 cross-motion, without contest from Sclafani and without a ruling by Judge Hansbury.

Sclafani's Fraudulent & Deceitful Point X (pp. 45-46)
(Sassower's Tenth Affirmative Defense –
"Fraud; Retaliatory Eviction; & Intentional Infliction of Emotional Distress" –
Exhibit B, pp. 11-21)

Sclafani's Point X (pp. 45-56) purports to address Sassower's Tenth Affirmative Defense, "Fraud; Retaliatory Eviction; & Intentional Infliction of Emotional Distress" (Exhibit B, pp. 11-21) by completely concealing its allegations – and the necessity of a responsive affidavit from McFadden. In so doing, Sclafani materially replicates ¶¶111-115 of his August 23, 2007 motion, whose fraudulence and deceit were particularized by ¶¶117-121 of Sassower's September 5, 2007 cross-motion, without contest from Sclafani and without a ruling by Judge Hansbury.

Sclafani's Fraudulent & Deceitful Point XI (pp. 46-47)
(Sassower's First Counterclaim –
"Prior Proceedings" – Exhibit B, p. 21)

Sclafani's Point XI (pp. 46-47) purports to address Sassower's First Counterclaim, "Prior Proceedings" (Exhibit B, p. 22), without identifying or responding to its gravamen: that McFadden "knowingly and deliberately compromised, undermined, and sabotaged [the federal action against the Co-Op' both while he was [the Sassower's] co-plaintiff and after his withdrawal." In so doing, he materially replicates ¶¶116-117 of his August 23, 2007 motion, whose fraudulence and deceit were particularized by ¶¶122-131 of Sassower's

September 5, 2007 cross-motion, without contest from Sclafani and without a ruling by Judge Hansbury.

Sclafani's Point XI is completely non-responsive to ¶¶122-131 of Sassower's cross-motion, as likewise to the actual allegations of Sassower's First Counterclaim, which he fails to identify other than that it is "premised on the proposition that she had 'a meritorious federal action against the Coop and other defendants". These actual allegations required a responsive affidavit from McFadden.

As for Sclafani's newly-made assertion (at p. 47) that "Sassower's own allegations, [and] the documents that Sassower provided in her answer" permit the Court to strike her First Counterclaim, this is an utter deceit. Indeed, his Point XI not only fails to specify the "allegations" and "documents" to which it is referring, but fails to refer to the documents provided by Sassower's September 5, 2007 cross-motion, including those specified by her ¶¶125, 128-131.

Sclafani's Fraudulent & Deceitful Point XII (p. 47)
(Sassower's Second Counterclaim –
"Fraud from April 2003 Onward & Extortion – Exhibit B, pp. 22-23)

Sclafani's paltry two-sentence Point XII (p. 47) purports to address Sassower's Second Counterclaim, "Fraud from April 2003 Onward & Extortion" (Exhibit B, pp. 22-23), without identifying any of its allegations. In so doing, it materially replicates ¶¶118-120 of Sclafani's August 23, 2007 motion, whose fraudulence and deceit were particularized by ¶¶132-137 of Sassower's September 5, 2007 cross-motion, without contest from Sclafani and

without a ruling by Judge Hansbury. His Point XII is completely nonresponsive to Sassower's cross-motion showing and to the actual allegations of Sassower's Second Counterclaim, requiring an affidavit from McFadden.

As for Sclafani's newly-made assertion (at p. 47) that Sassower's Second Counterclaim is "not viable as a matter of law based upon her own allegations and the documentary evidence surrounding this matter", this is an utter deceit – evident from his failure to specify which of Sassower's "allegations" he is talking about and the specific "documentary evidence" to which he is referring.

Sclafani's Fraudulent & Deceitful Point XIII (pp. 48-49)
(Sassower's Third Counterclaim –
"Fraud & Intimidation in June 2006, Retaliatory Eviction" – Exhibit B, pp. 24-25)

Sclafani's Point XIII (pp. 48-49) purports to address Sassower's Third Counterclaim, "Fraud & Intimidation in June 2006, Retaliatory Eviction" (Exhibit B, pp. 24-25) by materially replicating ¶¶121-128 of his August 23, 2007 motion, whose fraudulence and deceit were particularized by ¶¶138-144 of Sassower's September 5, 2007 cross-motion. His Point XIII is completely nonresponsive to Sassower's cross-motion showing, as likewise to the actual allegations of Sassower's Third Counterclaim, which, because they required a responsive affidavit from McFadden, he contorts and falsifies.

It is without reciting the facts as Sassower "alleges them to be" that Sclafani purports (at p. 49) they "do not support any claim of 'fraud' 'intimidation' or 'retaliatory eviction'. This is false.

As for Sclafani's newly-made assertion (at p. 49):

> "The court should recall Sassower's 'Eight Affirmative Defense' under which she claims that McFadden was guilty of 'extortion'. Sassower's own answer plainly demonstrates it is Sassower who was guilty of such crime",

he does not identify where in Sassower's "own answer" it is "plainly demonstrate[d]" that it is she "who was guilty of such crime" – and certainly, it is not in her Eighth Affirmative Defense (Exhibit B, pp. 8-9).

Sclafani's Fraudulent & Deceitful Point XIV (pp. 50-55)
(The First Branch of Sassower's September 5, 2007 Cross-Motion)

Sclafani's Point XIV (pp. 50-55) purports to address the first branch of Sassower's September 5, 2007 cross-motion: referral to the Office of Rent Administration of the NYS Division of Housing & Community Renewal as to whether Sassower is a protected tenant under the Emergency Tenants Protection Act or other rent regulations. In so doing, he not only materially replicates ¶¶3-19 of his September 5, 2007 opposing affirmation, notwithstanding ¶¶26-35 of Sassower's September 11, 2007 reply affidavit demonstrated the fraudulence and deceit of these paragraphs, without contest by Sclafani and without any ruling by Judge Hansbury, but falsely purports (at p. 55) that his September 5, 2007 opposing affirmation was "unrefuted". Indeed, he asserts that together with "the documentary evidence submitted by McFadden and by Sassower herself", the Court was required to not only "refuse to grant Sassower's request for referral of the issue of her status under the EPTA to the DHCR but...determine the issue against Sassower on the merits" (also p. 50).

In the process – and in purporting that Judge Hansbury's October 11, 2007 decision

"correctly" denied the referral sought by this first branch – Sclafani does not deny, dispute, or in any way address the facts, law, and legal argument in Sassower's second "Question Presented" " (at p. iv-v) and Point II (at pp. 40-42), showing that it was not. This includes Sassower's showing that *Davis v. Waterside Housing Co.*, Inc, 182 Misc. 851 (1999), was reversed precisely on the issue for which Judge Hansbury relied upon it: the "expertise" of the DHCR, that such case is distinguishable, and that determination of the coverage issue involves not just "interpretation of statute/regulation" but such factual questions as whether the necessary paperwork had been filed with the DHCR removing the apartment from coverage.

As for Sclafani's claim (at pp. 54-55) that the DHCR's August 28, 2007 notice declining jurisdiction over Sassower's complaint to it demonstrated that her September 5, 2007 cross-motion for a court referral to the DHCR was "disingenuous [at] best", this is rebutted not only by Sassower's ¶5 of her cross-motion (and so-highlighted by ¶¶29-30 of her September 11, 2007 affidavit), but by Sassower's November 9, 2007 order to show cause (Exhibit C, ¶¶53-54), annexing the DHCR's October 23, 2007 notice stating:

> "...if the court requests a determination by DHCR, or the case is removed from the court calendar, then you may request an Administrative determination whether your apartment is subject to ETPA.".

Finally, in crafting his Point XIV, Sclafani not only conceals Sassower's Answer (Exhibit B) as having placed the Petition's ¶13 in issue, but falsely implies and outrightly asserts that it had not. Thus, upon reciting (at p. 51) the content of the Petition's ¶13,

Sclafani does not identify Sassower's Answer and goes on to purport (at p. 53) that McFadden "could not have submitted his affidavit on his original motion because the issue of Sassower's status as a protected tenant had not been raised by her in her answer but, rather, was first raised by her cross-motion." This is utterly false. Indeed, over and beyond Sassower's Answer (Exhibit B), her September 5, 2007 cross-motion, and her September 11, 2007 affidavit which could not have been clearer as to this "disputed issue", is her appellant's brief, both her second "Question Presented" (at p. iv) and her "Statement of the Case" (at p. 9), each explicit as to the "disputed issue" raised by McFadden's Petition and her Answer.

Sclafani's Fraudulent and Deceitful Point XV (pp. 55-57)
(The Fourth & Fifth Branches of Sassower's September 5, 2007 Cross-Motion)

Sclafani's Point XV (pp. 55-57) entitled "Sassower's Claims against McFadden's Counsel were Baseless and Frivolous" consists of five paragraphs – each misrepresenting the record to conceal that he cannot justify Judge Hansbury's without-reasons denial of the fourth and fifth branches of Sassower's September 5, 2007 cross-motion..

The first of Sclafani's paragraphs purports:

> "That branch of Sassower's cross-motion as sought an order referring McFadden's counsel to the Appellate Division's Grievance Committee and to the Westchester County District Attorney's Office for criminal prosecution was, and is, beyond frivolous. Sassower's pleadings and motion are rambling, vitriolic and hyperbolic at the same time that they are utterly lack in supportable substance." (at pp. 55-56).

In other words, although Sclafani's "Preliminary Statement" (p. 1) had recognized that Sassower's September 5, 2007 cross-motion had two separate branches which he there

identified as:

> "d) awarding to her costs and sanctions as against McFadden's counsel, and
>
> e) referring McFadden's counsel to 'the appropriate Grievance Committee authorities' and 'to the Westchester District Attorney's office for criminal prosecution under the Penal Law";

this first paragraph (as likewise his four subsequent paragraphs of his Point XV) entirely omits the "costs and sanctions" branch, which is the fourth branch of Sassower's September 5, 2007 cross-motion, requesting relief not only against Sclafani, but against his client McFadden. As to this fourth branch, expanding Sassower's Fourth Counterclaim for costs and sanctions pursuant to 22 NYCRR §130.1.1 beyond McFadden's Petition to Sclafani's August 23, 2007 motion, Sclafani's brief offers no argument.

As for the fifth branch of Sassower's cross-motion – to refer Sclafani to disciplinary and criminal authorities – Sclafani omits the specific rule and statutory provisions identified as having been violated by him:

> "New York's Disciplinary Rules of the Code of Professional Responsibility, including 22 NYCRR §1200.3 (DR 1-102: 'Misconduct') and 1200.33 (DR 7-102: 'Representing a Client Within the Bounds of the Law')", "the Penal Law for perjury", and "Judiciary Law §487(1) for 'deceit, with intent to deceive the court'".

No reading of Sassower's "pleading" – consisting of her Verified Answer with Affirmative Defenses and Counterclaims (Exhibit B) – and of her "motion" – consisting of her September 5, 2007 cross-motion and her September 11, 2007 reply affidavit – could justify Sclafani's characterization of them in his first paragraph as "rambling, vitriolic and

hyperbolic at the same time that they are utterly lack in supportable substance." Rather, these documents are fact-specific and record-referenced in demonstrating, with virtual line-by-line precision, pervasive perjury and deceit by Sclafani and his client extending:

(1) from McFadden's Petition, which Sclafani also signed;

(2) to Sclafani's August 23, 2007 affirmation;

(3) to Sclafani's September 5, 2007 affirmation;

(4) to McFadden's five-sentence September 5, 2007 affidavit, endorsing Sclafani's August 23, 2007 and September 5, 2007 affirmations.

Sclafani's second and third paragraphs (at p. 56), impugning Sassower, has no bearing on Sassower's *matter of law* entitlement to her fourth and fifth branches of relief, established by the record of her September 5, 2007 cross-motion. This, quite apart from the fact that falsity of these paragraphs is verifiable from the record herein and in the prior City Court proceedings and federal action, establishing the appropriate manner in which Sassower litigated and sought to uphold the integrity of the litigation process.

In a similar vein, Sclafani's one-sentence fourth paragraph (at p. 56), which states:

> "Notably, following the court's October 11, 2007 decision appealed from, Sassower moved the court for recusal of the judge who made the decision and order on the grounds of bias for no other reason than that he did not grant her cross-motion.".

This is a deceit. The good and sufficient basis for Sassower's November 9, 2007 order to show cause to disqualify Judge Hansbury is particularized by her 30-page analysis of his October 11, 2007 decision (Exhibit C, pp. 5-35). Neither then nor now does Sclafani deny

the accuracy of this analysis in any respect. Nor does Sclafani contest that "Such analysis is dispositive of the Questions herein presented", as so-stated by Sassower's appellant's brief (at p. 36). This includes dispositive of her first "Question Presented" (p. iv) as to her entitlement to the granting of her fourth and fifth branches of her September 5, 2007 cross-motion, *as a matter of law*.

Sclafani's final fifth paragraph (at p. 57), also one-sentence long, is also a deceit. It states:

> "The decision of the court below denying that aspect of Sassower's motion as related to McFadden's counsel was properly denied without the need for any lengthy discussion as to why such denial was appropriate."

As highlighted by Sassower's Point I (at p. 39) – corresponding to her first "Question Presented" (p. iv) – Judge Hansbury's denial of the fourth and fifth branches of her September 5, 2007 cross-motion is unaccompanied by "even a pretense of reason and no law" – reflective of the fact that it is "completely unsupported factually and legally and insupportable" (underlining in original).

CONCLUSION

WHEREFORE, *as a matter of law*, Sclafani's opposition to Sassower's appeal is no opposition in fact, and, by its material omissions, falsifications, and deceit, reinforces the merit of Sassower's appeal. Sclafani's (untimely) cross-appeal is, likewise, a demonstrated fraud on the Court and must be denied.

Pursuant to this Court's rule 730.3(g) and §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, this Court's duty is to impose maximum costs and sanctions on Sclafani and his co-conspiring client McFadden and to refer them to disciplinary and criminal authorities.

ELENA RUTH SASSOWER

New York, New York
March 6, 2009