UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET # 96-7805

DORIS L. SASSOWER,

Plaintiff-Appellant,

-against-

Hon. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Defendants-Respondents.

APPELLANT'S BRIEF

DORIS L. SASSOWER
Plaintiff-Appellant, *Pro Se*
283 Soundview Avenue
White Plains, New York 10606-3821
914-997-1677

S.D.N.Y. # 94 Civ. 4514 (JES)

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ISSUES PRESENTED FOR REVIEW

As evidenced from the course of the proceedings and the subject Decision, should the District Judge have recused himself for bias?

1. Did the uncontroverted and documented conduct of the District Judge, as set forth in Plaintiff's Order to Show Cause for his recusal and her motion for reargument, reconsideration, and renewal, show a pattern of pervasive bias requiring him to recuse himself?

2. Did the District Judge wrongfully fail to adjudicate Defendants' litigation misconduct, where the uncontroverted record showed their dismissal motion and Answer were based on fraud, misrepresentation, and other misconduct?

3. Did the District Judge wrongfully delay, fail to sign, and thereafter deny Plaintiff's Order to Show Cause for a Preliminary Injunction, with TRO, where she demonstrated irreparable injury and her entitlement to summary judgment as a matter of law?

4. Did the District Judge wrongfully deny summary judgment to Plaintiff where she expressly sought such relief, her Rule 3(g) Statement and supporting affidavit were uncontroverted by any evidence, and her legal showing of entitlement was undenied and undisputed?

5. Did the District Judge wrongfully convert Defendants' Rule 12(c) dismissal motion into one for summary judgment in their favor where (a) Defendants expressly disclaimed summary judgment relief on their part; (b) he gave Plaintiff no notice of his intention to sua sponte convert Defendants' dismissal motion to one for summary judgment in their favor so that she could be heard in opposition thereto; (c) his stated basis for conversion in Defendants' favor was false as to them; (d) Defendants' dismissal motion and Answer were based on demonstrated fraud, misrepresentation, and other sanctionable misconduct; (e) Defendants presented no evidence rebutting the Complaint's material allegations and failed to defend the constitutionality of New York's attorney disciplinary law, as written and as applied to Plaintiff?

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant, Doris L. Sassower, appearing pro se, respectfully appeals from the Judgment of the District Court for the Southern District of New York [R-2], docketed on May 29, 1996, on the Memorandum Opinion and Order of District Court Judge John E. Sprizzo, dated May 21, 1996 [R-4], reported at 927 F. Supp. 113 (1996). Said Judgment and Order are final, disposing of all claims with respect to all parties.

Federal subject matter jurisdiction in the District Court is set forth in the Verified Complaint, seeking a declaratory judgment under 28 U.S.C. §§2201, 2202, and other equitable relief, as well as money damages, compensatory and punitive, pursuant to 28 U.S.C. §§1331, 1343(3) and 42 U.S.C. §§1983, 1985(3), 1988 [R-27], for violation of her civil rights, guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States, and such other relief as may be just and proper. Jurisdiction of the Circuit Court is invoked as of right under 28 U.S.C. §1291, the Notice of Appeal having been timely served and filed on June 27, 1996 [R-1] and all required fees paid.

STATEMENT OF THE CASE

This case is about extraordinary governmental misconduct by high-ranking New York state court judges and their appointees, serving at their pleasure, to preserve and protect their vested interests in a politically-controlled judiciary -- aided and abetted by the state's highest legal officer, himself a product of a political system. It is about how judicial and disciplinary power was usurped to viciously retaliate against a judicial whistle-blowing attorney, who was in the forefront in speaking out and taking legal steps to challenge corrupt manipulation of state judicial elections by the two major political parties.

On appeal, the case has an added dimension, since the appeal is necessitated by the extraordinary misconduct of the federal District Court judge. Knowingly and deliberately, the District Judge used his judicial office to cover up and protect the state Defendants from the civil, criminal, and disciplinary consequences of their malicious, constitutionally-tortious and unlawful acts -- the subject of this civil rights action against them. This official misconduct is manifest from the course of the proceedings before him [pp. 12-30 infra], as well as from his Memorandum Opinion and Order [hereinafter "the Decision"] [R-4]. Prior to the Decision, the pro se Plaintiff made a formal motion for the District Judge's recusal, pursuant to 28 U.S.C. §144 and §455 [R-643], which he denied from the bench[1]. Plaintiff's motion for reargument, reconsideration, and renewal thereof [R-743] is denied as part of the Decision.

The Decision evidences the same pattern of pervasive bias and dishonesty by the District Judge which had compelled Plaintiff to move for his recusal, thereby validating what was set forth in that motion [R-643]. Now, as then, the District Judge obliterates from consideration all critical facts, flouts fundamental standards of adjudication, and misrepresents or omits controlling law. Only by so doing has the District Judge been able to render his desired Decision: granting Defendants summary judgment -- for which there is not a scintilla of evidence and for which relief they not only did not move but expressly disclaimed -- and denying Plaintiff the relief to which she is overwhelmingly entitled as a matter of law and for which she did move: summary judgment, declaratory and injunctive relief, and sanctions against Defendants.

This appeal is not about good-faith error by the District Judge, but about a willful course of behavior perverting the judicial process. Moreover, after Plaintiff made her recusal motion, the District

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[1] No written decision or order thereon was entered.

Judge's conduct in the proceeding became even more depraved and abusive than previously, raising the specter that he went on to retaliate against Plaintiff, if not for her recusal motion, than for the public testimony she gave about it on November 28, 1995 to the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts [R-890]. This judicial misconduct reached such a magnitude of perversion and prejudice to Plaintiff that she turned to the Chief Judge of the Southern District to exercise his supervisory power over the District Judge for "manifest bias [which] has caused him to run amok" [R-901]. More than ten weeks after Plaintiff's first letter to the Chief Judge [R-901], with no response from him, but less than three weeks after her second letter to the Chief Judge, requesting he recuse himself on conflict-of-interest grounds [R-902], again with no response from him, the District Judge rendered his subject Decision [R-4].

The Decision, when compared with the record, is prima facie evidence of the District Judge's disqualification for bias. The record reveals that the District Judge not only polluted the judicial process by his own misconduct, but knowingly and collusively permitted Defendants to found their defense on deliberate litigation misconduct, without the slightest consequence to them, except for legally and factually insupportable rulings in their favor.

THE COURSE OF THE PROCEEDINGS

Because the Decision obliterates or misrepresents the material allegations of Plaintiff's Complaint, they are set forth in greater detail than would otherwise be required. For the same reason, the procedural history of the case before the District Judge is set forth in greater detail. It similarly is not remotely reflected by the Decision.

A. THE VERIFIED COMPLAINT:

On June 20, 1994, Plaintiff filed this civil rights action in the Southern District of New York, with a Verified Complaint [R-23] seeking equitable and monetary relief under 28 U.S.C. §§2201, 2202, 1331, 1343(3) and 42 U.S.C. §§1983, 1985(3), and 1988 [R-27: ¶11]. Defendants, sued in their official and personal capacities [R-22-23, R-26-27:¶¶9-10], are sitting judges of New York's Appellate Division, Second Department [herein "Second Department"], the Chief Counsel [herein "Casella"], Chairman, and Members of the Grievance Committee for the Ninth Judicial District, and a Special Referee -- all Second Department appointees -- together with the New York State Attorney General, who served as their counsel in an Article 78 proceeding Plaintiff had brought against them under New York's Civil Practice Law and Rules [R-30-2, R-27: ¶10]. Until the events forming the gravamen of the action, Plaintiff was "a distinguished...lawyer, lecturer, and writer...in continuous good standing at the bar for over thirty-five years", with a "thriving private practice, an outstanding career, and a national reputation based on her legal writings, her public advocacy in the area of equal rights and law reform, and her litigation accomplishments in both the private and public sector" [R-28: ¶14].

The 71-page Complaint, with four causes of action [R-83-92], alleged that Defendants, acting individually and in concert, have violated clear and controlling statutes, court rules, and decisional law in a retaliatory vendetta to punish and prevent Plaintiff from exercising her "First Amendment rights and, particularly, her public activities challenging judicial corruption" [R-26: ¶7]. It alleged that Defendants have deliberately deprived Plaintiff of her federal and state constitutionally-guaranteed rights, including her due process and equal protection rights, and that, after exhausting all state remedies, she is without redress in the state court [R-87: ¶234].

The most egregious constitutional violation, pleaded in paragraph "1" of the Complaint [R-23-4], is the Second Department's June 14, 1991 interim Order [R-96] immediately, indefinitely, and unconditionally suspending Plaintiff's law license, until "further order" [herein "Suspension Order"]. Paragraph "2" [R-24] asked the court to declare such Suspension Order "null and void" and "all other disciplinary orders against her" rendered by the Second Department, as well as the statutory provisions and court rules under which those orders were purportedly rendered, particularly, Judiciary Law §90(2) and (10), 22 NYCRR §691.4, §691.4(l)(1) and §691.13(b)(1), "as written and applied"[2].

Paragraph "3" [R-24] alleged that the Suspension Order was:

> "without notice of formal charges, without a hearing, without a finding of probable cause, or any other findings, administrative or judicial, and without any jurisdiction whatsoever" (emphasis added)

and that the Second Department and Casella knew that it was:

> "unlawful and fraudulent and...rendered for political, personal, and private ulterior motivations, totally outside the scope of their judicial/official duties for the sole purpose of discrediting, defaming, and destroying Plaintiff to cause her to cease her activities in exposing judicial corruption." [R-24-25] (emphasis added)

Additionally, paragraphs "4" and "9" reiterated that the Suspension Order "did not arise out of any case or controversy pending before ... [the] Second Department or Grievance Committee" and that the Second Department was "acting in clear and complete absence of jurisdiction and outside its judicial functions" [R-25-27] (emphases added).

The aforesaid paragraphs all appear in the Complaint's introductory section under the heading "Nature of the Action" [R-23], together with three paragraphs alleging that the Second Department's retaliation had a long history, going back to 1979. As a result of such

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[2] The relevant statutory and rule provisions [R-343-361] are reprinted in Plaintiff's Petition for a Writ of Certiorari to the United States Supreme Court, which is part of this record [R-303-439].

bias, a prior bogus disciplinary proceeding against her by the Second Department was transferred to the First Department, which dismissed it, granting Plaintiff leave to seek sanctions against her prosecutors in the Second Department [R-25-6:¶¶5-7; R-43:¶¶71-3]. Thereafter, in retaliation, the Second Department "deliberately failed and refused to transfer any matters" involving Plaintiff and "targeted [her] for disciplinary investigation and prosecution in a selective, discriminatory and invidious manner" [R-26: ¶6; R-41: ¶62; R-54: ¶105; R-63: ¶137; R-77: ¶190; R-71: ¶167; R-77: ¶190].

The Complaint's "Factual Allegations" section particularized how Defendants knowingly violated express jurisdictional and due process prerequisites of Judiciary Law §90 and 22 NYCRR §691.4, et seq., in harassing Plaintiff with a barrage of new bogus disciplinary proceedings -- all brought ex parte and without probable cause -- and how Defendants wrongfully employed the confidentiality provision of Judiciary Law §90(10) to deny her any and all proof as to their jurisdiction and the lawfulness of their acts [R-82: ¶60; See R-53: ¶104; R-61-62: ¶132-3; R-65: ¶146: R-74: ¶178]. Also particularized was the fraudulent means by which, unrelated to any disciplinary proceeding, Plaintiff's law license was suspended: via an October 18, 1990 Order of the Second Department [R-373] which directed Plaintiff to submit to a medical examination. Said Order granted Casella's May 8, 1990 Order to Show Cause, pursuant to NYCRR §691.13(b)(1) [R-349] [R-42: ¶66]. The Complaint alleged that the October 18, 1990 Order, issued the day before Plaintiff was scheduled to argue the appeal of a public interest Election Law case[3] challenging the political

[3] The political background and history of that case, Castracan v. Colavita, (Index # 6056/90, Supreme Ct., Albany Co., Decision/Order, entered 10/17/90, per Kahn, J.); 173 A.D.2d 924; 1991 N.Y.App. Div. LEXIS 5322; 78 N.Y.2d 1041; 1991 N.Y. LEXIS 4684 (NY Ct of Appeals: 1991) as well as its aftermath, including Plaintiff's testimony before the New York State Senate Judiciary Committee in opposition to the confirmation of two

manipulation of state court judgeships [R-45: ¶78], was not a "lawful demand" [R-49: ¶89], being erroneous in at least seven material respects [R-45-6: ¶79]. Most material, and going to the issue of the Second Department's jurisdiction, was its false reference to "an underlying disciplinary proceeding" to Casella's May 8, 1990 Order to Show Cause [R-46: ¶79(c) and (d)] . Such misstatement -- not made by Casella in his May 8, 1990 Order to Show Cause [R-42: ¶68] -- was, thereafter, utilized by him [R-48: ¶87] when, in a January 25, 1991 Order to Show Cause, he moved, pursuant to 22 NYCRR §691.4(l)(1)(i) [R-349], to have Plaintiff suspended for her alleged "failure to comply" with the October 18, 1990 Order, which she was challenging as erroneous and jurisdictionally-void [R-48-9: ¶¶85-9]. Casella's belated claim therein that a completely separate and unrelated February 6, 1990 disciplinary petition against Plaintiff constituted an "underlying disciplinary proceeding" was false and fraudulent [R-48-9: ¶¶87-88; R-43: ¶69; R-68: ¶158; R-76: ¶188] and only relevant to a motion brought under §691.13(c)(1) [R-350], which his was not [R-42: ¶68]. The Complaint stated that neither Casella's May 8, 1990 Order to Show Cause nor his January 25, 1991 Order to Show Cause alleged they had been authorized by the Grievance Committee and that neither was supported by a petition setting forth the charges for which her suspension was sought [R-42: ¶67; R-48: ¶86] -- a jurisdictional requisite for the Second Department's issuance of the October 18, 1990 Order pursuant to §691.13(b)(1) and the June 14, 1991 Order pursuant to §691.4(l).

Notwithstanding Plaintiff vigorously controverted Casella's January 25, 1991 Order to Show Cause to suspend her for alleged "failure to comply" with the October 18, 1990 Order [R-47-9: ¶¶82-85, 89], much as

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gubernatorial nominees to the New York State Court of Appeals, appears in the following paragraphs of the Complaint [R-23]: ¶¶17-18; 32-38, 28-39, 36, 43, 45-53, 63-65, 76-78, 90, 98, 101, 103, 111-125, 128, 131-2, 140, 153, 179-181, 192-194.

she had controverted his May 8, 1990 Order to Show Cause, the Second Department suspended her, without findings, without reasons, and without a hearing "within a few days" of her public announcement that she would appeal the Election Law case to the New York Court of Appeals [R-49: ¶90].

The Complaint alleged that §691.4(l) [R-349] -- the very rule under which the Second Department suspended Plaintiff without findings and reasons -- explicitly requires findings and reasons and that the requirement of findings had been articulated by the New York Court of Appeals years earlier in Matter of Nuey, 61 N.Y.2d 513 (1984) [R-528] [R-51: ¶94]. In that case, New York's highest state court held that an interim suspension order, without findings, must be immediately vacated.

Nevertheless, the Second Department denied, without reasons, Plaintiff's immediate post-suspension Order to Show Cause for vacatur and/or modification of its Suspension Order, in which she even stated her willingness to comply with the October 18, 1990 Order [R-52: ¶¶97-98].

The Complaint also alleged [R-62: ¶134] that in 1992 the New York Court of Appeals reiterated in Matter of Russakoff, 72 N.Y.2d 520 [R-529], the findings requirement -- absent which an interim suspension order must be immediately vacated -- and indicated the constitutional infirmity of interim suspension court rules, including those of the Second Department, which fail to provide for a prompt post-suspension hearing [R-531].

Nevertheless, Defendants deprived Plaintiff of even a post-suspension hearing as to the basis upon which she had been suspended, without a hearing. Despite her showing that her entitlement to immediate vacatur and a hearing was a fortiori to Russakoff's in every respect [R-66: ¶148; R-68: ¶159] and that she was further entitled to vacatur by reason of Casella's "fraud, misrepresentation, and other unethical practices" [R-62: ¶134], the Second Department denied, without reasons, Plaintiff's post-

Russakoff motions [R-64: ¶143; R-70: ¶165].

Plaintiff's "First Cause Of Action For Declaratory Judgment" alleged that in Nuey the New York Court of Appeals had recognized that there is no statutory authority for 'interim' suspensions" of an attorney. It alleged that the Second Department's interim suspension rules represent unauthorized substantive lawmaking by the court and, additionally, are the product of a secret process about which no information is publicly available [R-83-84: ¶¶213-216]. The Complaint pointed out that although Judiciary Law §90(8) provides an appeal of right to attorneys disciplined under final orders [R-85: ¶¶219-220], interimly-suspended attorneys have no appellate rights. It alleged that the Second Department's failure to provide a right of appeal from its statutorily-unauthorized interim suspension orders meant that "the very courts that have created the rules" could disregard and flout them for retaliatory and illegitimate purposes, without check of appellate review and redress in the state court system [R-87:¶228].

The Complaint alleged that all Plaintiff's post-suspension motions for leave to appeal to the New York Court of Appeals the Suspension Order [R-62: ¶134; R-64: ¶143] were denied by the Second Department, without reasons, and that the New York Court of Appeals denied all her requests for review, whether by right or by leave [R-54-5: ¶107; R-57: ¶117; R-64-5: ¶¶144-5]. The Complaint also alleged that Casella, in opposing review by the New York Court of Appeals, had falsely claimed that the February 6, 1990 petition was an "underlying disciplinary proceeding" [R-55: ¶¶108-9] -- as to which he provided no evidentiary support -- and had argued that the unconditional Suspension Order was an unappealable "non-final interlocutory order" [R-55: ¶110].

The Complaint further alleged that Defendants thwarted Plaintiff's attempt to obtain review under CPLR Article 78 of the

Suspension Order, as well as of separate, unrelated ex parte disciplinary orders of the Second Department authorizing three disciplinary proceedings against her -- each without compliance with explicit jurisdictional and due process prerequisites of Judiciary Law §90 and §691.4 [R-346-352] [R-70-1: ¶¶166-170; R-72-4: ¶¶173-178; R-75-6: ¶¶182-184]. The Second Department refused to recuse itself from her Article 78 suit against it and to transfer the proceeding to another Judicial Department [R-75: ¶183], a position defended, without legal authority, by its attorney, the New York Attorney General [R-74: ¶178]. It then granted its attorney's dismissal motion, notwithstanding Plaintiff had exposed that motion as based on false and fraudulent factual statements, unsupported by any affidavit from his clients or any evidentiary showing. Such false statements included that Plaintiff's jurisdictional objections could be adequately addressed in the disciplinary proceeding itself, rather than by way of Article 78. [R-27: ¶10; R-71: ¶170; R-74: ¶178]. The Second Department's dismissal order, adopting that knowingly false claim [R-75: ¶182], was rendered by a five-judge panel, three of whom had participated in every disciplinary order which Plaintiff's Article 78 proceeding sought to have reviewed and a fourth who had participated in more than half of the challenged orders [R-75: ¶184].

The Complaint alleged that after the Article 78 proceeding, Casella and the Grievance Committee continued their refusal to substantiate their jurisdiction [R-76-78: ¶¶187-191; R-80: ¶201], just as they had previously, and that Referee Galfunt and the Second Department continued to refuse to adjudicate the issue, just as they had previously. Although Plaintiff specifically requested then Attorney General Defendant Koppell, to verify this and the litigation misconduct of his office in her Article 78 proceeding [R-79: ¶196; R-80: ¶200; R-81: ¶¶202-204] he failed and refused to do so. Notwithstanding she supplied him with an indexed and

cross-referenced copy of the disciplinary file for such purpose [R-82: ¶205], he failed to examine it and did not retract or correct his office's false and fraudulent submission to the New York Court of Appeals opposing its review of the Second Department's dismissal of her Article 78 proceeding [R-82: ¶208].

As set forth in the last paragraph of the Complaint's "Factual Allegations" section, on May 12, 1995, the New York Court of Appeals dismissed Plaintiff's appeal as of right from the Second Department's dismissal of her Article 78 proceeding upon the ground that "no substantial constitutional question" was directly involved [R-82-3: ¶209].

B. POST-COMPLAINT STATE PROCEEDINGS:

After filing her federal Complaint on June 20, 1994 [R-22], Plaintiff made a motion to the New York Court of Appeals for reconsideration of its denial of her appeal as of right, combining with it a motion for leave to appeal [R-326]. An exhibit entitled "Chronology" was annexed thereto, consisting of 56-pages [R-201-256]. It was, in essence, the 50-page "Factual Allegations" section of Plaintiff's already filed federal Complaint [R-32-83], but included citation cross-references to documents in the disciplinary file. Such annotated "Chronology" was supplied to demonstrate that the Suspension Order and the continuum of disciplinary proceedings brought against Plaintiff were, as alleged in her Article 78 papers, all without and in excess of jurisdiction, unlawful, fraudulent, and retaliatory [R-318, fn.4; R-379-386]. Such showing was completely undenied and uncontroverted by Defendants [R-318, fn. 4; R-379-386].

By Order dated September 29, 1994 [R-11; R-365], the New York Court of Appeals denied, without reasons, that portion of Plaintiff's motion as sought reconsideration of its May 12, 1994 Order dismissing her

appeal of right, and denied for lack of finality that portion seeking leave to appeal. On October 14-17, 1994, Plaintiff served her Verified Complaint in this action upon the Defendants.[4]

C. THE COURSE OF THE PROCEEDINGS BEFORE THE DISTRICT JUDGE:

Defendants sought and obtained two extensions of time to answer the Complaint. The first, granted by Order dated November 14, 1994 [R-524], extended Defendants' time to answer to December 15, 1994, modifying a stipulation between the parties [R-102-3][5]. The second was granted from the bench at the December 23, 1994 status conference, at which Defendants were represented by two Assistant Attorneys General, Oliver Williams and Jay Weinstein.

Prior to that conference, Mr. Weinstein made a letter request, dated December 13, 1994, for extension of Defendants' time to answer or move [R-104]. The pro se Plaintiff responded by letter, dated December 16, 1994 [R-718], detailing false and misleading statements by Mr. Weinstein and complaining of his harassing and oppressive litigation tactics, causing a needless burden on her and the court. She requested that the December 23, 1994 conference be postponed sine die to await the outcome of her petition for a Writ of Certiorari to the U.S. Supreme Court for review of her Article 78 proceeding. The District Judge denied Plaintiff's request.

At the December 23, 1994 conference, the District Judge responded to Plaintiff's December 16, 1994 letter by instructing her not to write any more letters to him. Over objection of Plaintiff, whom the

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[4] Meanwhile, Plaintiff prepared her Petition for a Writ of Certiorari to the U.S. Supreme Court [R-303-439], which was denied on May 15, 1995 [R-12].

[5] In contrast to the Order, the stipulation extended Defendants' time "to answer or otherwise move" [R-103] (emphasis added).

District Judge threatened with contempt[6], he relieved Defendants of their default, directing them to answer by January 3, 1995 and giving them until January 19, 1995 to file their intended dismissal motion. The District Judge stated that he would decide whether Plaintiff would be required to respond to Defendants' dismissal motion and scheduled the next conference date for March 3, 1995 [R-525].

Thereafter, Mr. Weinstein sought a stipulation extending his time to answer until January 9, 1995, claiming that he could not draft an Answer because Casella was on vacation and "a great many of the 251 pleaded allegations...of the complaint pertain to [him]..." [R-105]. Plaintiff stipulated to Mr. Weinstein's request, but told him [R-180, last ¶] that he could himself verify the truth of the Complaint's allegations by referring to the "Chronology" that had been annexed to her motion for reargument to the New York Court of Appeals in her Article 78 proceeding [R-201].

By unverified Answer dated January 9, 1995 [R-108], signed by Mr. Weinstein [R-126], Defendants collectively "den[ied]", "den[ied], upon information and belief", and "den[ied] knowledge and information sufficient to form a belief" the majority of the Complaint's allegations. Expressly "denied" were the Complaint's most critical allegations pertaining to the Second Department's general disciplinary jurisdiction under Judiciary Law §90(2) [R-109: ¶12; R-123: ¶154], as well as the Grievance Committee's general disciplinary jurisdiction under §691.4(a) [R-109: ¶13]. As to Attorney General Koppell, Defendants denied that he was "duly appointed" to office, as Plaintiff alleged [R-110: ¶17]. Over and again, as to allegations relating to specific documents in the disciplinary file or

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[6] There is no stenographic record of the proceedings on December 23, 1994 -- inasmuch as stenographers are only present upon advance arrangement. Plaintiff, thereafter, arranged for a stenographer to record and transcribe *every* court appearance herein [R-183; R-668; R-757].

Article 78 proceeding, Defendants "denied, upon information and belief" or "denied knowledge and information sufficient to form a belief"[7]. Where Defendants "denied" allegations of the Complaint relating to documents, none of which were before the court, they referred the court to them[8]. As to the pleaded non-compliance by Defendants with the explicit jurisdictional and due process requirements of Judiciary Law §90 and §691.4 et seq. [R-346-352], Defendants referred the court to those provisions for their terms[9]. As to the Complaint's allegations regarding the significance of Nuey and Russakoff, Defendants referred the court to those cases for interpretation [R-83: ¶211; R-123: ¶152].[10]

By Notice of Motion dated January 19, 1995 [R-127], Defendants moved to dismiss the Complaint pursuant to Rule 12(c). Supporting the motion was a two-paragraph affidavit from Mr. Weinstein, whose stated purpose was to annex copies of the unpublished decisions in four of the cases cited in his accompanying Memorandum of Law [R-129]. These included Mason v. Departmental Disciplinary Committee, a §1983 action involving attorney discipline, decided by the District Judge [R-133].

In his accompanying Memorandum of Law, Mr. Weinstein, noting that the Complaint "for the purpose of this motion is assumed to be true", [R-144] claimed: (1) that the Complaint alleged that Plaintiff had been suspended "during an underlying disciplinary proceeding pending against

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[7] See Defendants' Answer [R-108-125]: ¶¶82, 87, 89, 90, 91, 93, 95, 97, 102-104, 111, 140, 142-3, 145, 147-148. See also, ¶¶118, 132.

[8] See Defendants' Answer [R-108-125]: ¶¶29, 40, 49, 52, 61, 64, 70, 75, 77, 83, 99, 115, 121, 123-126, 128, 133-134, 137. See also, ¶148.

[9] See Defendants' Answer [R-108-125]: ¶¶23, 27, 38, 42, 53, 95, 104, 107, 110; 116, 117, 153, 154, 157; also ¶84.

[10] As to Plaintiff's specific allegation that her state court motion papers had demonstrated that her right to vacatur of the Suspension Order was a fortiori to that in Russakoff [R-66: ¶148], Defendants "den[ied] knowledge or information sufficient to form a belief" [R-119: ¶103].

her" [R-144]; (2) that there was "no indication in the complaint that [the judicial] defendants were proceeding in the clear absence of all jurisdiction" [R-158]; and (3) that Plaintiff had not alleged that Defendants' actions were "inconsistent with existing law or...violated plaintiff's 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" [R-160]. In summarizing the Complaint's allegations, Mr. Weinstein omitted the paragraphs alleging that Plaintiff had been suspended without written charges, without reasons, without any hearing prior thereto or thereafter, and all paragraphs detailing the unconstitutional and unlawful manner in which the October 18, 1990 Order and the Suspension Order were procured [R-144-5]. Mr. Weinstein further omitted all reference to the pleaded allegations of Defendants' procedurally-violative, jurisdictionally-void, fraudulent and retaliatory conduct. Although his Memorandum acknowledged that Plaintiff was challenging Judiciary Law §90 and §691.4 et seq., Mr. Weinstein did not discuss their jurisdictional and due process requirements [R-144], nor even mention Nuey [R-528] and Russakoff [R-529].

At the March 3, 1995 conference, the District Judge, without hearing Plaintiff, announced that Defendants' dismissal motion was "colorable", requiring her to respond with opposing papers [R-184]. Plaintiff immediately protested that Defendants' motion was fraudulent and based on misrepresentations and omissions. She stated that she wished "to start the Rule 11 clock here and now" [R-189], pointing out that ten allegations of her Complaint asserted that there was no "underlying disciplinary proceeding" to the Suspension Order, whereas Mr. Weinstein's motion misrepresented that the Complaint alleged the contrary [R-189]:

> Plaintiff: "...The first paragraph [of Mr. Weinstein's dismissal motion] starts out with the pivotal, pivotal statement that the suspension arose out of an underlying disciplinary proceeding pending against me. Now, that is a lie. It has been stated --"

Judge: "Is it a lie? I take a very dim view of lawyers telling me lies. Is it a lie?"

Weinstein: "It is not a lie, your Honor." (emphasis added)

Judge: "If it is a lie, Rule 11 will be the smallest sanction you face. Suspension of practicing in the court will be the one you will likely face."

The District Judge refused to address Plaintiff's Rule 11 sanction request [R-198-201], deferring it until the October 27, 1995 argument on Defendants' dismissal motion, when she would have "10 or 15 minutes to say whatever you want to say that is relative to the motion" [R-190, ln. 4], including whether his decision as to colorability was induced by Mr. Weinstein's misrepresentations [R-190, ln. 14]. The District Judge threatened Plaintiff with contempt when she tried to persuade him that a "two-minute" inquiry into the matter would dispense with the need for both the court and her to be burdened with Mr. Weinstein's motion [R-190-1]. The District Judge stated that the reason he was "deferring his ruling" on Rule 11 was because it could be imposed on Plaintiff for opposing Defendants' dismissal motion[11] [R-192, ln. 23].

In reaffirming the standard of a dismissal motion as assuming the truth of the allegations of the pleadings, the District Judge warned Mr. Weinstein:

> "...This is not a place where anyone gets a free ride. Whatever you do and whatever you say in my courtroom you will be asked to account for. There will be consequences here. So be careful what you say in your motion papers. They better be true." (emphasis added)

The District Judge also sua sponte offered Mr. Weinstein the possibility of Rule 11 sanctions against Plaintiff when she expressed willingness to wait until the end of the calendar to have her further application heard [R-195]. This application was for injunctive relief

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[11] The transcript reflects that the District Judge's statement as to the availability of Rule 11 sanctions against Plaintiff was interjected as Mr. Weinstein was inquiring whether Defendants would be permitted to reply to Plaintiff's opposition [R-192, ln. 21-5; R-193, ln. 1].

against the Second Department for continuing to adjudicate matters involving Plaintiff, specifically, its refusal to recuse itself from her appeal in the Wolstencroft case, notwithstanding eight separate allegations of her §1983 Complaint involved that case [R-196-7].

The schedule set by the District Judge at the March 3, 1995 conference was embodied in a March 6, 1995 Order [R-526]. Its introductory recital paragraph erroneously referred to Defendants' motion as one for summary judgment and omitted Plaintiff's request for leave to cross-move for Rule 11 sanctions against Defendants.

By letter dated March 28, 1995, Assistant Attorney General Amy Abramowitz advised, without explanation, that the defense had been "re-assigned" to her [R-168a]. Plaintiff thereafter gave Ms. Abramowitz notice of the sanctionable conduct of her predecessor and, by hand-delivered letter dated May 25, 1995 [R-178], identified the ten specific paragraphs in her Complaint that alleged that there was no "underlying disciplinary proceeding" to her suspension [R-42-3: ¶¶67-69; R-45-6: ¶79(a)-(e); R-47: ¶83; R-48-9: ¶¶87-88; R-52: ¶99; R-55: ¶¶108-109]. To permit Ms. Abramowitz to verify the truth of that ten-times repeated allegation, as well as the Complaint's other allegations, Plaintiff annexed the annotated "Chronology" from her Article 78 proceeding [R-201], cross-referenced to documents in Defendants' possession, custody, or control. Additionally, she annexed a paragraph-by-paragraph 37-page "Critique" of Defendants' Answer demonstrating that more than 150 pleaded denials in their Answer were false and in bad faith [R-275-302]. Plaintiff requested that Defendants' dismissal motion and Answer be withdrawn, warning that if they were not, she would include a sanctions motion with her opposition papers. Plaintiff further annexed a copy of the March 3, 1995 transcript of the court session, referring specifically to the District Judge's statements as to the consequences of lawyers lying.

Plaintiff received no response to her May 25, 1995 letter [R-178]. Consequently, in opposing Defendants' dismissal motion, Plaintiff incorporated her sanctions request [R-177] -- appending her letter as Exhibit "1" to her supporting affidavit [R-172, 178]. Plaintiff's Memorandum of Law argued that Defendants' dismissal motion was frivolous and fraudulent [R-465-6] and that their defenses of Eleventh Amendment, Rooker-Feldman, collateral estoppel, abstention, and immunity were predicated upon misrepresentation of the Complaint [R-463-4; 479-80; 483-5] and of controlling law, including the very cases on which they relied [R-470-486].

Based thereon, Plaintiff requested that Defendants' dismissal motion be converted under Rule 12(c) into one for summary judgment in her favor [R-172-3], since there was not only "no genuine issue of fact" [R-173: ¶20], but no "issue of law genuinely raised". She pointed out that Defendants had failed to advance any interpretation contrary to the plain meaning of the explicit statutory and rule provisions under which the disciplinary orders against her purported to be issued and had failed to deny or dispute the controlling authority of Nuey [R-173: ¶21]. She annexed a copy of her Petition for a Writ of Certiorari to the U.S. Supreme Court for review of her Article 78 proceeding, relying upon the legal authority and argument therein as to the unconstitutionality of New York's attorney disciplinary law, as written and as applied [R-304, R-326-342].

Plaintiff also submitted a Rule 3(g) Statement [R-454], repeating, realleging, and reiterating the material allegations of her Complaint and specifically delineating the respects in which the October 18, 1990 Order and Suspension Order were jurisdictionally void, procedurally violative, and fraudulent [R-455-458: ¶4].

The District Judge's response to receipt of Plaintiff's submission was a two-sentence letter, dated June 26, 1995 [R-723], stating

that her "continued calling" had "disrupted" the Court's secretary and that "all further communications with the Court must be in writing". By letter dated July 26, 1996 [R-724], Plaintiff protested such requirement as onerous, prejudicial, and wholly unwarranted by the facts and circumstances, detailed in 2-1/2 pages. Plaintiff also requested a pre-motion conference to present an Order to Show Cause for Preliminary Injunction, with a temporary restraining order for vacatur of the Suspension Order. She noted that the date by which Defendants were to have opposed her summary judgment motion, July 14, 1995, had passed and that under Rule 56 she was entitled to summary judgment in her favor [R-724].

By letter dated August 3, 1995 [R-727], the District Judge, through his law clerk, did not deny or dispute the factual recitation set forth in Plaintiff's July 26, 1995 letter [R-724]. However, he advised that his "order proscribing oral communications with this Chambers still stands in effect" and that a pre-motion conference be arranged as per the court's individual rules[12]. Several weeks later, Chambers provided Plaintiff with a September 22, 1995 court date to present her Order to Show Cause for a Preliminary Injunction with TRO.

The day after Plaintiff faxed a September 12, 1995 letter to Ms. Abramowitz [R-708], notifying her of the upcoming September 22, 1995 court date, Mr. Weinstein advised that he was "now...assigned to represent [the] State defendants" [R-709] and requested an extension until October 12, 1995 to respond to what he referred to as Plaintiff's "cross-motion" for summary judgment [R-710]. Mr. Weinstein claimed that Defendants' deadline to respond was September 20, 1995 and requested the District Judge so-order the extension, providing a signature line in his hand-delivered letter [R-711]. Mr. Weinstein sent Plaintiff's copy to her by regular

[12] The court's individual rules explicitly permit parties seeking to present Orders to Show Cause and other emergency relief to orally communicate with Chambers.

mail[13].

By letter to the District Judge, dated September 18, 1995 [R-712], Plaintiff protested Mr. Weinstein's continued litigation misconduct, detailing that his extension request was based on false and misleading statements. She pointed out that she had not made a "cross-motion" for summary judgment and that Defendants' deadline to respond to her papers was July 14, 1995 [R-713]. The next day, September 19, 1995, Plaintiff wrote a second letter to the District Judge [R-728], this time detailing his law clerk's abusive treatment of her when she telephoned the previous day. Plaintiff additionally objected to the fact that the court had further delayed the September 22, 1995 date for presentment of her Preliminary Injunction/TRO Order to Show Cause to September 28, 1995, and done so without communicating with her, the moving party, with a right to be heard in opposition, but, rather, with Mr. Weinstein, who relayed it to Plaintiff [R-729].

On September 26, 1995, Plaintiff provided the District Judge with an advance copy of her Preliminary Injunction/TRO Order to Show Cause [R-488] wherein she sought to enjoin the Second Department's continued enforcement of the Suspension Order [R-499-506], to enjoin the Second Department from continuing to adjudicate cases in which she was involved [R-506-512], and such other and further relief as just and proper, including such steps as required to vacate her suspension in the Southern District Court, issued, without a hearing, in violation of its Rule 4 [R-502-3: fn.7; R-903]. Her supporting affidavit detailed the procedural history of the case, demonstrating that, as a matter of law, Defendants' fraudulent dismissal motion had to be denied, with sanctions, and that Plaintiff's unopposed summary judgment request had to be granted [R-493-

[13] This tactic, employed by Mr. Weinstein at the outset of the litigation, was objected to by Plaintiff in her December 16, 1994 letter to the court [R-718].

497]. Additionally, Plaintiff submitted a Memorandum of Law [R-610], which, in addition to discussing the legal standards for injunctive relief, reviewed the salient facts of the case and its posture.

Nevertheless, at the September 28, 1995 presentment [R-668], the District Judge purported not to know the most basic facts about the posture of the case and Plaintiff's suspension, e.g., that the suspension did not rest on any charges relating thereto [R-670]; that Plaintiff had not been afforded any hearing as to the basis of the suspension, either before or since [R-670, R-675]; that the judicial Defendants had issued the suspension and when [R-670-1]; that Plaintiff had attempted to appeal her suspension to the New York Court of Appeals [R-672-3] and had filed a Petition for a Writ of Certiorari in the U.S. Supreme Court [R-673].

The District Judge's only reaction to Plaintiff's oral recitation of due process and equal protection violations of her rights by the state Defendants and the retaliatory political context of her suspension was to respond that what was at issue was review of state court decisions and that lower federal courts lack subject matter jurisdiction to do so, even where a complaint alleges corruption by state judges [R-676, ln. 18].

Mr. Weinstein presented no argument in opposition to Plaintiff's Preliminary Injunction/TRO Order to Show Cause, other than to adopt the District Judge's statement that Plaintiff's sole remedy was in the U.S. Supreme Court [R-681, ln. 2]. The District Judge then sua sponte raised abstention and laches defenses to the Complaint[14] and refused to sign Plaintiff's Preliminary Injunction/TRO Order to Show Cause or to

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[14] Plaintiff responded by pointing out the inapplicability of "laches" [R-689]-- which had not been raised by Defendants -- and that she had already rebutted the defense of "abstention" in her Memorandum of Law in opposition to Defendants' dismissal motion, a copy of which she handed up to the court [R-687-8].

require Defendants to respond to it [R-700]. At Plaintiff's request, he deferred ruling on it until the October 27, 1995 argument [R-696, ln. 16], stating that on such date the issue would be "moot" [R-701, ln. 9].

Although initially stating that Plaintiff's claim that Defendants had failed to timely respond to her summary judgment application appeared to be "a meritorious argument" [R-682], the District Judge relieved Defendants of their default, without a formal motion. He did so based upon a combination of misrepresentations by Mr. Weinstein and his own speculation as to which Mr. Weinstein had made no claim[15]. Ignoring Plaintiff's protests, the District Judge refused to put Mr. Weinstein "on the stand" [R-28] and gave him until October 6, 1995 to file his opposition papers. The District Judge also threatened Plaintiff with contempt when she tried to explain that her request for summary judgment relief was not by way of a cross-motion, but by the conversion authorized by Rule 12 [R-698-700][16].

On October 26, 1995, less than two weeks after Plaintiff's receipt of the September 28, 1995 stenographic transcript [R-760], she hand-delivered to Chambers an Order to Show Cause for the District Judge's recusal, pursuant to 28 U.S.C. §144 and §455 [R-643][17]. Her supporting

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[15] The District Judge took the position that because Plaintiff had telephoned his law clerk on June 15, 1995 to inquire about an extension of time to August 20, 1995, therefore the Attorney General would have been justified in believing that he had until September 20, 1995 for opposition papers, notwithstanding Plaintiff had timely filed. The District Judge made no inquiry as to if and when the Attorney General's office acquired such belief and denied Plaintiff's request to inquire on the subject [R-694-6].

[16] Initially, the District Judge expressed the erroneous belief that Defendants had filed for summary judgment [R-681, ln. 23] and, thereafter, erroneously believed that they had filed a response to Plaintiff's summary judgment request [R-682, ln. 4]. Even after Plaintiff explained she had not made a cross-motion, the District Judge continued to refer to her request for summary judgment as a "cross-motion" [R-693-4; R-698-9].

[17] Unbeknownst to Plaintiff when she filed her October 26, 1995 recusal Order to Show Cause [R-643] was that the Court had issued an October 3,

affidavit alleged a "pervasive personal bias" by the District Judge and that his "impartiality might reasonably be questioned" [R-645, ¶2], describing the District Judge's behavior on September 28, 1995 as the "most recent manifestation of [his] grievously wrongful judicial conduct" [R-647: ¶5]. In particular, it showed, by the District Judge's own decision in Mason v. Departmental Disciplinary Committee [R-704, R-133], that he had misrepresented the law regarding federal court subject matter jurisdiction and the applicability of abstention [R-653-7] and further that the District Judge had wrongfully relieved Defendants of their default [R-661-666].

In the meantime, Defendants had filed, on October 6, 1995, their papers in opposition [R-626] to Plaintiff's summary judgment request, consisting of a Statement in Opposition to her Rule 3(g) Statement, an 2-1/4 page affidavit from Casella, and a 2-1/2 page Memorandum of Law. The introductory paragraph to Defendants' unsworn Statement in opposition to Plaintiff's Rule 3(g) Statement asserted that their dismissal motion was "dispositive", but if denied, that "defendants reserve the right to move for summary judgment at a future time" [R-626]. The 2-1/4 page, 8-paragraph affidavit of Casella did not deny or dispute any of the allegations of Plaintiff's Complaint [R-23] or her Rule 3(g) Statement [R-454], nor deny or dispute any of the record references in her "Chronology" [R-201] or "Critique" [R-275] showing that Defendants' Answer was knowingly false in its responses to more than 150 allegations of the Complaint. Mr. Weinstein's Memorandum of Law cited no law and was devoted exclusively to the sanctions issue [R-639]. Without denying or disputing that the Answer was knowingly false in its responses and that his dismissal motion was

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1995 Order [R-624], purportedly based on the September 28, 1995 "pre-trial conference". The District Judge's Order, not received by Plaintiff until October 30, 1995 -- having been sent in an envelope bearing an October 28th postmark -- misrepresented the motions before him. Referring to Plaintiff and Defendants as having each filed "cross-motions" for summary judgment, the District Judge described Defendants as wishing to "file a reply" to Plaintiff's "cross-motion" for summary judgment.

based on affirmative misrepresentations of the Complaint's allegations and law, he claimed that it had been "a reasonable inference" on his part that Plaintiff had been suspended during "an underlying disciplinary proceeding".

At the outset of the October 27, 1995 oral argument [R-758], the District Judge summarily announced that Plaintiff had "five minutes" to argue her recusal motion and refused to accept her supporting Memorandum of Law [R-730-3][18]. He then timed her presentation [R-759, R-761, R-762]. After Mr. Weinstein declined to respond [R-762], the District Judge, without signing Plaintiff's unopposed recusal Order to Show Cause, denied it under both §144 and §455 [R-764] as untimely and insufficient because the bias alleged was not extrajudicial, but related to the District Judge's conduct in the proceeding [R-764].

The District Judge then called upon Mr. Weinstein to proceed with argument on Defendants' dismissal motion, interjecting two questions [R-767-770]:

Judge: "...She says that you brought on a motion for judgment on the pleadings and therefore everything she says must be taken as true, including her allegations (a) that this interim suspension order was not part of the underlying disciplinary proceeding, and (b) that the courts acted without jurisdiction. She says that she alleges that. You brought a motion for judgment on the pleadings. Let us take that as true. That is the first thing you have to respond to..." (emphasis added)

...

Weinstein: "First of all, let me respond to your first question. I believe in my papers I do state that her suspension arose in an underlying disciplinary proceeding that is now pending." (emphasis added)

Judge: "But she alleges it didn't. Therefore, she says, I have to take that as true."

Weinstein: "Well, the standard for adjudicating this particular motion, of course, is to assume that her allegations in

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[18] The District Judge did not respond to Plaintiff's statement that she had relied on information provided by his secretary that papers on an order to show cause were *not* required in advance of presentment [R-758, ln.15].

her complaint are true."

Judge: "I have to assume it was not part of the disciplinary proceeding. That is what she said. If you had brought on a motion for summary judgment, it would have been different, but you didn't." (emphasis added)

Weinstein: "Number one, I don't know what possible difference it could make; number two, I have a document which this Court can take judicial notice of where the defendant Second Department has called it an underlying proceeding." [October 18, 1990 Order] (emphasis added)

Judge: "Let's get to the second question, which is more basic. Does she make any challenge in her papers, in any allegation in her complaint, to the procedures generally, or does she only complain about the procedures insofar as they apply to her in her case?...

Does she allege in her complaint anything that would challenge the systemwide procedures used by the Appellate Division? -- because under the Rooker and Feldman cases, that is the one area where the district courts do have subject matter jurisdiction.

...My question is: Is there anything in her complaint that alleges that?"

...

Weinstein: "I believe she states in her complaint, that it is a challenge both facially and as applied."

Judge: "I have jurisdiction to resolve the matter generically, don't I?"

Weinstein: "Yes, you do."

Judge: "But you are moving for judgment on the pleadings." (emphasis added)

Weinstein: "I am sorry. I believe you don't. I believe you don't."

Judge: "Rooker and Feldman say I do."

After telling Mr. Weinstein that his dismissal papers were "not terribly edifying" and "not terribly specific" as to which claims he was contending should be dismissed for lack of subject jurisdiction and which for res judicata and collateral estoppel [R-771, ln. 4, ln. 18], the District Judge asked [R-771, ln. 24]:

Judge: "...She said she was deprived of a hearing. Do the statutes provide for no hearing?"

Mr. Weinstein provided no answer and, thereafter, declined to

discuss "what the state disciplinary rules say" [R-783, ln. 7]. He also expressly stated that his argument was "without reverting to a summary judgment motion" [R-783, ln. 25].

When the District Judge turned to Plaintiff, he told her that the two initial questions he had asked Mr. Weinstein were "the only two questions [he was] interested in" [R-772]. Plaintiff thereupon protested Mr. Weinstein's litigation misconduct in connection therewith:

Plaintiff: "...defendants' case, as presented by Mr. Weinstein, is a complete sham and rests on lies, misrepresentations, and outright perjury. It has been reiterated today [by Mr. Weinstein] that this suspension arose out of an underlying proceeding. Mr. Weinstein was warned at the court appearance in March that he would have to document his facts relative to that misrepresentation, because I objected and said the Rule 11 clock is running as of now. I have fully documented that the suspension order did not have any charges, no petition, no hearing, no findings."

Judge: "Was it part of the original proceeding?"

Plaintiff: "No. The answer is not only alleged but documented by the summary judgment motion that is before your Honor."

Judge: "I don't have a summary judgment motion in front of me."

Plaintiff: "I beg your pardon?"

Judge: "I have your motion for summary judgment, not his."

Plaintiff: "Yes. And he is supposed to respond. His response...is worthless because it is sham."

The District Judge afforded Plaintiff no opportunity to argue her entitlement to summary judgment and sanctions [R-785-6] and, initially, did not permit her to submit her affidavit, dated October 27, 1995 [R-734], which sought further sanctions under Rule 56(g) against Defendants for Casella's bad-faith affidavit. Plaintiff's concluding words were to reiterate her sanction request [R-789] after Mr. Weinstein claimed that because the Second Department's October 18, 1990 Order referred to an "underlying disciplinary proceeding", such underlying disciplinary proceeding existed in fact, and that because the February 6, 1990 proceeding preceded the October 18, 1990 Order, it was the "underlying

proceeding" [R-781-2]. The District Judge himself rejected such claims by Mr. Weinstein [R-782].

By Order dated November 9, 1995, the District Judge erroneously recited the posture of the case, inter alia: (1) referring to Defendants' motion for judgment on the pleadings as one for summary judgment; (2) referring to Plaintiff's application for summary judgment as a cross-motion; and (3) omitting any reference to Plaintiff's sanctions request. The Order then directed that Plaintiff:

> "submit to the Court copies of all documents filed in state court proceedings relating to complaints filed against plaintiff pro se, the suspension of plaintiff pro se's license to practice law and the constitutionality of the proceedings therein, on or before January 2, 1996..." [R-794]

By letter dated December 27, 1995[19] [R-790], Plaintiff objected that the aforesaid errors and omissions in the November 9, 1995 Order were material and potentially prejudicial to her rights and reminded the District Judge of her prior attempts to correct him as to the nature of the submissions before him [R-791] [See also fn. 16 infra.].

Plaintiff explicitly stated that she was "not adverse to furnishing a copy of the state court disciplinary file", but wished clarification as to the purpose and legal authority for the District Judge's sua sponte direction that she do so [R-792]. She stated that the requested documents were not required for adjudication of any issue and that if Defendants' dismissal motion raised extraneous issues which could not be adjudicated on the submitted motion papers, it had to be denied as a matter of law since

> "[i]t is the movant who has the burden of supporting his motion with such substantiating documents as may be appropriate, and defendants have failed to meet that burden." [R-791].

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[19] The November 9, 1995 Order was not received by Plaintiff until December 11th [R-790], having been sent in an envelope bearing a December 7, 1995 post-mark [R-795].

Plaintiff pointed out there had been "no evidentiary or testimonial opposition" to her summary judgment application. As to her unsigned Preliminary Injunction/TRO Order to Show Cause, she reiterated the dispositive decisional law of Nuey and Russakoff, as well as the Second Department's own court rule under which she was suspended, requiring findings and reasons [R-792]. Neither the District Judge nor Mr. Weinstein responded to Plaintiff's December 27, 1995 letter [R-790].

By letter dated February 9, 1996 [R-797], Plaintiff again wrote the District Judge, reiterating her request for clarification and guidance and reporting the irreparable injury she was suffering by reason of his failure to adjudicate her Preliminary Injunction/TRO Order to Show Cause.

By letter dated February 23, 1996 [R-800], Plaintiff again wrote the District Judge, contrasting his failure to respond to her December 27, 1995 and February 9, 1996 letters, seeking clarification of his November 9, 1995 facially-erroneous Order, with his Chamber's immediate response to Mr. Weinstein, who -- following receipt of her February 9, 1996 letter -- was able to immediately obtain a variety of dates to present a Rule 41(b) sanction motion against Plaintiff for allegedly "not cooperating" with his November 9, 1995 Order and, thereafter, permission to file same without a pre-motion conference. Plaintiff again referred to the "irreparable prejudice" caused her by the District Judge's inaction on her Preliminary Injunction/TRO Order to Show Cause and requested that if it were not to be granted, her letter be accepted as a renewal of her motion for the District Judge's recusal.

On February 26, 1996, the District Judge's appointments secretary telephoned to apprise Plaintiff that the court would give her five days to make any motion she wished to make. The appointments secretary did not know whether Mr. Weinstein was also so limited in connection with making his intended Rule 41 sanctions motion. Thereafter,

she informed Plaintiff that the District Judge was giving both sides until March 8, 1996 to make their motions. When Plaintiff told her that a response from the District Judge to her unanswered letters "could obviate motions by both sides", the appointments secretary stated that "the Court only answers letters it deems 'worthy of response'". This was recited by Plaintiff to the District Judge in a letter dated March 5, 1996 [R-853], a copy of which she sent to Chief Judge of the Southern District, Judge John Griesa [R-855]. In pertinent part, it stated:

> "If this Court seriously views my December 27, 1995, February 9, 1996, and February 23, 1996 letters to this Court -- and my pending Order to Show Cause for a Preliminary Injunction, filed on September 26, 1995 -- to be 'unworthy of response', then the only conclusion that can be drawn is that the Court is either incompetent or biased to a degree causing it to deliberately misrepresent the significance of what is before it..."

The pro se Plaintiff requested that her March 5, 1996 letter be accepted in lieu of a formal motion for renewal of her recusal motion [R-855], inasmuch as she was suffering physical side-effects from the increasing pressures placed upon her -- including loss of the use of her right hand -- resulting from his continued inaction on her Preliminary Injunction/TRO Order to Show Cause. She annexed a note from her physician [R-860] and asked that she be notified by telephone if a letter application for recusal were not acceptable [R-854].

By Order dated March 5, 1996 [R-753], express mailed to Plaintiff [R-756], the District Judge denied, without reasons, her written request that her letter be considered in lieu of a motion. Plaintiff thereupon proceeded by formal motion, dated March 8, 1996 [R-743], for reargument, reconsideration, and renewal of her recusal Order to Show Cause and for injunctive relief and sanctions against Defendants and their counsel, in the event recusal was not granted [R-744].

By motion dated March 8, 1996 [R-865], Mr. Weinstein moved to dismiss Plaintiff's action pursuant to FRCP 41(b) based on Plaintiff's

alleged failure to comply with the November 9, 1995 Order and for her alleged failure to prosecute the action. Mr. Weinstein's supporting affidavit [R-867], which acknowledged receiving Plaintiff's letters concerning the November 9, 1995 Order, did not deny that neither Defendants nor the District Judge had responded. Nor did it deny that the Order was erroneous and legally unsupported -- as Plaintiff's unresponded-to letters contended.

By Memorandum Opinion and Order, dated May 21, 1996 [R-4], the District Judge, sua sponte, converted Defendants' dismissal motion to one for summary judgment, dismissing Plaintiff's action on the merits and expressly denying Plaintiff summary judgment, preliminary injunction, and recusal. As to Plaintiff's applications for sanctions against Defendants and their counsel for litigation misconduct, as embodied in virtually each and every written submission and reiterated by her at every court appearance, the Decision omitted that issue entirely.

ARGUMENT

THE SUBJECT DECISION IS *PRIMA FACIE* PROOF OF THE DISTRICT JUDGE'S DISQUALIFICATION FOR BIAS

The subject Decision exemplifies and reinforces the pattern of deliberately dishonest, abusive, and biased conduct by the District Judge, demonstrated by the foregoing procedural history. As a matter of law, the record below mandated that Plaintiff be granted summary judgment and injunctive relief and that severest sanctions be imposed upon Defendants and their counsel -- including their referral for disciplinary and criminal investigation. To avoid this legally-compelled result, the Decision obliterates or misrepresents virtually every fact germane to the District Judge's proper adjudication -- and with it -- the controlling law. As herein shown, the Decision is prima facie evidence of the District Judge's disqualification for bias.

POINT I

THE DISTRICT JUDGE WRONGFULLY FAILED TO SIGN PLAINTIFF'S ORDER TO SHOW CAUSE FOR HIS RECUSAL AND WRONGFULLY DENIED IT

The Decision [R-13] fails to identify that Plaintiff sought recusal by way of an Order to Show Cause, which the District Judge did not sign [R-13]. It also omits that Plaintiff's recusal motion was not only brought under 28 U.S.C. §144, but also under 28 U.S.C. §455, as the face of the Order to Show Cause shows [R-643, R-645]. In fact, on October 27, 1995, when the District Judge denied Plaintiff's recusal motion from the bench, he explicitly stated:

> "With respect to the issue of whether or not recusal is required under §144 -- and I am treating the application as one made under §455 as well, in the interest of having one issue presented to the Court of Appeals -- in my view the plaintiff hasn't come close to showing what is required." [R-764]

Whereas §455(b)(1) is construed in pari materia to §144, both referring to "a personal bias or prejudice" against a party or in favor of an adverse party, §455(a) is broader, requiring recusal whenever a judge's "impartiality might reasonably be questioned", Apple v. Jewish Hospital and Medical Center, 829 F.2d 326, 333 (2d Cir. 1987). As this Circuit further recognized in U.S. v. Brinkworth, 68 F.3d 633 (2d Cir. 1995), citing H.R. Rep. No. 1453, 93 Cong, 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6355:

> "[§455(a)] is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge decide the case".

Moreover, §455 has no express timeliness requirement and does not require the filing of a supporting affidavit of bias, Apple, supra, 333.

Under §144, once a timely and sufficient affidavit has been filed against a district judge, he is proscribed from taking further action. Contrary to the normal tenets of construction for a remedial

statute, §144 has been strictly construed so as to permit the very judge whose recusal is being sought to decide the timeliness and sufficiency of the affidavit filed against him, 13A Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 2d, §3542, at 555 (1984 ed.). The predictable result, as reflected in the instant case, is that the District Judge found Plaintiff's timely and sufficient affidavit to be "untimely" and "insufficient".

The transcript shows that the District Judge's stated reason why Plaintiff's affidavit supporting her recusal motion "hadn't come close" to establishing the requisite personal bias was because

> "the law is clear that the basis for personal bias has to result from some personal bias that arises outside the record or is not the result of any conduct or action taken by the Court in response to conduct or arguments made by the parties" [R-764. ln. 2].

The Decision cites no legal authority to support such from-the-bench assertion as to the "clear" law, which the District Judge did not then particularize. In fact, the law of the U.S. Supreme Court -- and this Circuit -- has not only been anything but "clear", but is to the contrary.

More than two years before the subject Decision, the Supreme Court put to rest the notion that disqualification under §144 and §455 could not be based on judicial conduct in the proceeding. In Liteky v. U.S., 114 S.Ct. 1147 (1994), the five judge-majority and the four judges, who concurred only in the judgment, spoke with one voice on the subject. As stated in Justice Kennedy's concurrence:

> "...the Court is correct to conclude that an allegation concerning some extrajudicial matter is neither a necessary nor a sufficient condition for disqualification under any of the recusal statutes." (at 1160, emphasis added).

In applying the "extrajudicial source doctrine" to §455(a) -- which was the issue before the Supreme Court and from which the minority dissented as not ensuring the statutory requirement of recusal whenever a judge's

"impartiality might reasonably be questioned" -- the majority conceded that "there is not much doctrine to the [extrajudicial source] doctrine" (at 1157). This is because the majority construed the "extrajudicial source doctrine" to encompass conduct within a litigation manifesting a bias or prejudice that is "wrongful or inappropriate"[20]. The Court's opinion makes plain that where a judge's behavior within a proceeding is not "within the bounds of...ordinary efforts of courtroom administration" and where he "display[s] a deep-seated favoritism or antagonism that would make fair judgment impossible" a recusal motion is proper (at 1157).

Indeed, years prior to Liteky, this Circuit explicitly stated: "We do not read the authorities as holding that a judge's conduct of proceedings before him can never form a basis for finding bias." United States v. Wolfson, 558 F.2d 59, 63 (2d Cir. 1977), thereafter quoted by the Circuit in United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981)[21].

The Decision does not refer to the District Judge's having found Plaintiff's supporting affidavit "insufficient" on October 27, 1995, but rather as "lacking in merit because it alleged at best a

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[20] The majority appears to reject that these are exceptions" to the doctrine. Thus, when the Court describes (at 1155) the doctrine's "flexible scope", it adds the words "the so-called 'exceptions'"-- thereby signifying its disagreement with that terminology. Similarly, in describing that a bias or prejudice may be "so extreme as to display a clear inability to render fair judgment, it adds "[T]his explains what some courts have called the 'pervasive bias' exception to the 'extrajudicial source doctrine'".

[21] See also, In Re IBM, 618 F.2d 923, 928 (2d Cir. 1980), whose footnote 6 reads in pertinent part:

> "...in court conduct and rulings may be relevant to establish extrajudicial prejudice is a dictum in this court's opinion in Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968). While we agree...the fact is that no case in this circuit has ever found such bias on the basis of a trial court's rulings or conduct."

If 17 years later such dictum remains still true, it is submitted that this case deserves to be the first in which virulent pervasive bias, mandating recusal, is thus established.

dissatisfaction with the Court's rulings" [R-14]. The law is well-settled that it is not the province of the judge who is the subject of a recusal affidavit to decide its "merit". Berger v. United States, 255 U.S. 22, 36 (1921).

Plaintiff's affidavit was more than "sufficient" in alleging the District Court's pervasive and virulent bias: It particularized a pattern of aberrant, abusive, and legally insupportable behavior by the District Judge -- all wrongfully and inappropriately favoring Defendants and prejudicing Plaintiff -- reaching a crescendo on September 28, 1995, when, after two months of court-caused delay, Plaintiff finally was given the opportunity to present her Order to Show Cause for a Preliminary Injunction and TRO. The District Judge's misconduct on that date, the centerpiece of her recusal motion, included: (1) his pretended ignorance of the most basic allegations of the Complaint and the posture of the case -- all set forth in the Order to Show Cause before him [R-650-652]-- which he claimed to have "looked at" [R-701, ln.5]; (2) his deliberate misrepresentation of the law as to his §1983 jurisdiction, as reflected by his own prior decision in Mason v. Disciplinary Committee [R-653-657; R-704]; (3) his courtroom advocacy for Defendants in advancing defenses on their behalf [R-659, See also R-675-81; R-681, ln. 9; R-689, ln. 23]; (4) his relieving Defendants from their default in opposing Plaintiff's summary judgment application, without a formal motion, based on his own speculation and notwithstanding Plaintiff's uncontroverted showing of their litigation misconduct [R-661-666];(5) his refusal to sign Plaintiff's Preliminary Injunction/TRO Order to Show Cause and false pretense that it required no response from Defendants [R-661-662; R-648-650], when it plainly did.

Nor was Plaintiff's renewal of her recusal motion "based upon an assertion that the Court imposed upon her a short deadline to file her motions", as the Decision purports [R-14], but on many months of aberrant,

sadistic, and wrongful behavior by the District Judge from the October 27, 1995 date she presented her recusal Order to Show Cause onward. The District Judge's misconduct on October 27, 1995 included: (6) arbitrarily limiting Plaintiff's recusal argument to "five minutes" and refusing to accept her supporting Memorandum of Law [R-758]; (7) failing to sign her recusal Order to Show Cause and summarily ruling upon it from the bench [R-762]; (8) permitting Mr. Weinstein to orally argue his motion for judgment on the pleadings, but denying Plaintiff a meaningful opportunity to respond thereto or to the District Judge's questions [R: 750, ¶14(a), R-772, R-785, R-789]; (9) denying Plaintiff her right to orally argue her summary judgment/sanctions application [R-751: ¶14(b), R-774, R-785, R-789]; (10) tolerating, without penalty or reprimand, Mr. Weinstein's continued misconduct at oral argument, including repetition of his false claims about an "underlying disciplinary proceeding" and the Second Department's "jurisdiction" [R-749: ¶13; 50, R-783]. Thereafter, (11) his issuing a factually erroneous, legally unsupported November 7, 1995 Order [R-748, ¶9]; (12) his unexplained failure and refusal to respond to Plaintiff's reasonable letter requests for clarification thereof [R-748, ¶¶10-12; R-790; R-797; R-800]; (13) his callous disregard for the irreparable, substantial injury being caused Plaintiff by the Second Department's retaliatory conduct in adjudicating her appeals in other cases in which she was involved [R-797-8; R-801-2; R-854]; and (14) his readiness to entertain Defendants' frivolous and perjurious Rule 41(b) sanctions motion against Plaintiff for her supposed failure to comply with his unexplained, unauthorized November 7, 1995 Order [R-749: ¶¶11, 13]. That the Decision makes it appear [R-21: fn 8] that but for the dismissal of Plaintiff's claims Mr. Weinstein's unfounded Rule 41(b) motion might be seriously entertained only further demonstrates the District Judge's outright perversion of the record and disqualification for bias.

The Decision cites only two cases on the recusal issue -- not on the issue of sufficiency, but explicitly as to timeliness, Brinkworth, supra, and Apple, supra [R-14]. Brinkworth (at 639) approvingly cites Apple in acknowledging that §455 contains no timeliness requirement[22], which has been "judicially implied" and in reiterating what Apple stated: "a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim", Brinkworth (at 639).

The facts impelling Plaintiff's recusal motion and dispelling any doubt as to the District Judge's fixed and biased predisposition were those evidenced by his conduct on September 28, 1995. It was at that point, not earlier, that Plaintiff determined that she could unquestionably meet the high burden of showing the District Judge's unalterable and virulent bias in the litigation[23]. Prior thereto, the District Judge's actions, albeit improperly favoring Defendants, could be camouflaged as part of his so-called administrative handling of the case: instructing Plaintiff not to write to him, then restricting Plaintiff to communicating with him in writing; instructing Plaintiff to respond to Defendants' sanctionable dismissal motion and deferring adjudication on the sanctions issue to adjudication of the motion; and threatening Plaintiff with contempt and sanctions when she sought legitimate relief. Such rulings by

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[22] The Liteky minority also noted there was no analogous time requirement in §455(a) and (b)(1) (at 1160).

[23] The record shows that the District Judge's view of timeliness was part and parcel of his misrepresentation of the law about judicial bias expressed in the litigation [R-773]:

> Plaintiff: "When would your Honor believe that I should have made the recusal motion prior to now?
>
> Judge: "If you had facts that indicated a personal bias outside the record, as the law requires, you should have filed that probably when the case began."

the District Judge made the litigation procedurally burdensome, offensive, intimidating, and unfair for Plaintiff, but, even taken together with his relieving Defendants of their default in answering the Complaint, did not necessarily reach the impossibility of a fair trial standard articulated by the Liteky majority, albeit criticized at length by the minority (at 1161-3). As Plaintiff pointed out to the District Judge at oral argument [R-760], §144 limits a party to one recusal affidavit in the case, US v. IBM, 539 F. Supp. 473 (S.D.N.Y. 1982). Consequently, until she was certain that she could satisfy the high threshold showing of "sufficiency", a §144 motion would have been premature. However, on September 28, 1995 [R-668], the District Judge's conduct was such as to leave no doubt that he would shamelessly pervert law and facts to prevent Plaintiff from obtaining the substantive relief to which she was entitled as a matter of law. Indeed, that is precisely what the District Judge has done in his instant Decision, which, as demonstrated herein, is entirely unsupported by the record and built on falsification, misrepresentation, and omission of material facts and controlling law.

The record before the District Judge showed [R-760, R-731-2] that the transcript of the September 28, 1995 proceedings was "immediately ordered from the court reporter..." and "within two weeks of plaintiff's receipt of the transcript" her recusal Order to Show Cause was filed [R-760, ln. 4, ln. 10][24].

In contrast to Apple, it would appear from Brinkworth that only if a party has not diligently brought a recusal motion after acquiring knowledge of the facts giving rise to claimed bias does the court embark upon a "four-factor test" for determining timeliness of the recusal motion;

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[24] Cf., In Re Roldan-Zapata, 872 F.2d 18, 19 (2d Cir. 1989), dissent from denial of mandamus by Judge Newman, noting the importance of a court transcript to document "evidence of partiality" for recusal motion and petitioner's prompt efforts to obtain same.

to wit, whether (1) the movant has participated in a substantial manner in trial or pre-trial proceedings...(2) granting the motion would represent a waste of judicial resources...(3) the motion was made after the entry of judgment...and (4) the movant can demonstrate good cause for delay".

As pointed out by Plaintiff in support of her recusal Order to Show Cause, the case at bar was still in the pleading stage, with no discovery having been had [R-759]. This contrasts sharply with both Apple and Brinkworth.

POINT II

THE DISTRICT JUDGE WRONGFULLY FAILED TO ADJUDICATE PLAINTIFF'S ENTITLEMENT TO SANCTIONS AGAINST DEFENDANTS

As evident from "The Course of the Proceedings Before The District Judge" [pp. 12-30 infra], no issue was pressed more vigorously by Plaintiff than her entitlement to sanctions against Defendants for their litigation misconduct. Yet, the Decision obliterates that issue and with it any adjudication thereon.

The importance of sanctions to deter and punish conduct that defiles the integrity of the judicial process and the wide range of sanctioning devices available to a court has been the subject of important decisions by the U.S. Supreme Court and by this Circuit. Among this Circuit's decisions, which incorporate those of the Supreme Court and discuss the standards governing imposition of sanctions, are Eastway Construction Corp. v. New York, 762 F.2d 243, 253 (2d Cir. 1985); Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986); Greenberg v. Hilton Int'l Co., 870 F.2d 926 (2d Cir. 1989); McMahon v. Shearson/American Exp., Inc., 896 F.2d 17 (2d Cir. 1990).

These particular Circuit cases are cited in decisions the District Judge has rendered in cases in which he has imposed Rule 11 sanctions, e.g., Yonkers. v. Otis Elevator Co., 649 F. Supp. 716, 735

(1986); Empire Pharmaceutical Society, Inc. v. Empire Blue Cross & Blue Shield, 778 F. Supp. 1253, 1258 (1991); Keles v. Yale University, 889 F. Supp. 729, 735 (1995). In the latter decision, rendered only weeks before Plaintiff filed her written sanction request against Defendants [R-168(b)], the District Judge, citing further Second Circuit authority, noted that the 1993 amendment to Rule 11 did not alter the prior Rule 11 standards insofar as they imposed "an affirmative duty" upon parties and their counsel to conduct "a reasonable inquiry into the factual and legal viability of claims".

The amended Rule 11 expanded the sanctionable conduct from "signing" a paper to "presenting" it to the court -- a term expressly defined as "signing, filing, submitting or later advocating" a paper [Rule 11(b)]. This includes "oral advocacy" based thereon, as recognized in the Advisory Committee's Notes, U.S.C.A. Title 28, 1996 Cumulative Annual Pocket Part, at 222. See also, O'Brien v. Alexander (2d Cir. Docket #95-7976, 12/12/96). The amended Rule requires a "safe harbor" warning to those chargeable with a Rule 11 violations so as to afford them an opportunity to withdraw or correct unfounded claims [Rule 11(c)(1)(A)]. It also defines a court's power to initiate such sanction "on its own initiative" by means of an order to show cause to the "attorney, law firm, or party" whose conduct appears violative of that rule [Rule 11(c)(1)(B)]. The Advisory Committee Notes specifically identify that the court may make an "additional inquiry" to ascertain proximate and ultimate responsibility for the sanctionable misconduct:

> "For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it." (at 223)

In his Keles decision, the District Judge specifically noted that the attorney upon whom he was imposing sanctions had ignored warnings

of possible Rule 11 violations, "thereby necessitating costly motion practice and wasting sparse judicial resources", supra, at 736. This is consistent with the Advisory Committee Notes to the 1993 Amendment that the revision "broadens the scope" of the obligations of attorneys and pro se litigants "to refrain from conduct that frustrates the aims of Rule 1" (at 221). That basic Rule, upon which all other Federal Rules of Civil Procedure rely, is designed "to secure the just, speedy and inexpensive determination of every action", a mandate reinforced by a 1993 amendment, the Advisory Committee's Notes to which state: "As officers of the court, attorneys share this responsibility with the judge.", U.S.C.A. Title 28, 1996 Cumulative Annual Pocket Part (at 23).

At bar, the District Judge denied Plaintiff the equal protection of the sanctions law, with which he is shown to have been quite familiar. Plaintiff's application for sanctions against Defendants was made to the District Judge in her very first letter to him [R-718], complaining of Defendants' unethical and oppressive litigation tactics. This specifically included their refusal to stipulate to suspension of her federal action until the Supreme Court ruled on her Petition for a Writ of Certiorari, then being prepared. The transcript of the March 3, 1995 court conference shows that the District Judge denied Plaintiff's request to place the case on the suspense calendar, over her protest that it would be in the "interests of judicial economy" [R-186, ln. 5] and would spare her from having to litigate "on two fronts" since she did not have "the resources of the State Attorney General's Office" [R-186, ln.16]. Despite Mr. Weinstein's claim that he had not reviewed Plaintiff's Petition for a Writ of Certiorari and thus could not respond to the District Judge's question as to whether a Supreme Court decision would "resolve all the issues" raised by Defendants' motion [R-187, ln. 12], the District Judge countenanced his opposition.

Although the District Judge stated that his denial of Plaintiff's request was based on his view that Defendants' dismissal motion was "colorable" [R-188, ln. 9], he refused to conduct a "two-minute inquiry" into whether, as Plaintiff argued, his decision as to the "colorability" of Defendants' dismissal motion was based on their "pivotal" misrepresentations in that motion [R-190, ln. 20]. Instead, he required Plaintiff to include her Rule 11 sanctions objections in her opposition, stating he would defer consideration "until such time as I have ruled upon the merits of the motion" [R-191]. As plain from the Decision, it was more than a year later that the District Judge ruled on the so-called "merits" of Defendants' motion and, even then, did not adjudicate Plaintiff's sanctions entitlement.

The March 3, 1995 transcript shows that the District Judge stated: "if my decision as to colorability can be satisfactorily proved it was based upon his misrepresenting facts to me, I will hear that on October 27th" -- the date he scheduled for oral argument of Defendants' dismissal motion. Yet, on October 27th, he ignored the issue entirely. On that date, the undisputed and indisputable record before him showed that: (1) Defendants' dismissal motion was predicated on falsification, distortion, and concealment of the material allegations of the Complaint and deliberate misrepresentation of law [R-168b; R-460]; (2) Defendants' Answer was knowingly false, fraudulent, and in bad-faith as to over 150 allegations of the Complaint [R-275]; (3) Defendants' bald denials of her Rule 3(g) Statement, buttressed only by Casella's irrelevant, non-probative, and misleading affidavit [R-630], was sanctionable under Rule 56 [R-734].

The litigation misconduct of Defendants and their co-Defendant counsel, documented in the record before the District Judge, presented a classic Rule 11 case. Indeed, beyond that, it rose to the level of "fraud upon the court", as that term has been applied in this Circuit, Martina

Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (2d Cir. 1960); Kupferman v. Consolidated Research & Mfg. Corp, 459 F.2d 1072, 1078, 1081 (2d Cir. 1972); Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988), Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2d Cir. 1995); See also, Cresswell v. Sullivan & Cromwell, 771 F. Supp. 580, 586 (S.D.N.Y. 1991)[25]. The law is well-established that courts possess inherent power and a duty to defend their integrity and protect themselves from "fraud upon the court", Chambers v. Nasco, Inc., 501 U.S. 32 (1991); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946) and, particularly, where, as here, it involves more than the individual litigants.

At bar, the issues involved corruption by public officials, including high-ranking sitting judges of the State of New York and the state's highest legal officer, the New York State Attorney General, and deliberate misuse of judicial and disciplinary power to retaliate against a judicial whistle-blower, combined with an unconstitutional attorney disciplinary law. Unquestionably, this case transcended the individual litigants. Yet, the District Judge not only ignored Plaintiff's uncontroverted sanctions applications, but disregarded his "own initiative" power under Rule 11(c)(1)(B), as well as his inherent power to evaluate and punish Defendants' fraudulent and deceitful conduct. Exercise of such "initiative" and inherent power is even more warranted where it is on behalf of an unrepresented litigant, who is to be afforded the court's

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[25] See also, DR 7-102(A.5) of the Model Rules of Professional Responsibility: a lawyer may not "knowingly make a false statement of law or fact"; ABA Model Rules of Professional Conduct, Rule 3.3, "Candor Toward the Tribunal"; Rule 8.4 "Misconduct".

protection, Haines v. Kerner, 404 U.S. 519 (1972)[26].

The District Judge's refusal to adjudicate the fraud and misconduct before him constitutes his complicity and collusion therewith. It demonstrates his overriding bias and wrongful protection of Defendants -- not just from liability for sanctions, but from ultimate liability in Plaintiff's federal action. Indeed, the very issues that were at the heart of Plaintiff's sanction applications, if resolved, would have made it impossible for judgment to be rendered to Defendants. The District Judge's awareness of this fact shows in his Decision.

As illustrative, in the Decision's first sentence, the District Judge ambiguously refers to Plaintiff's suspension as resulting "out of state disciplinary proceedings" [R-4]. In the "Background" recitation, he makes it appear, by shearing off the pertinent allegations of the Complaint, that there is some causal connection between the Suspension Order and the February 6, 1990 disciplinary petition [R-5-7]. Thereafter, the District Judge grants the Second Department absolute judicial immunity for acting within its jurisdiction, making reference to a "disciplinary petition" [R-18].

No issue was more pivotal to Plaintiff's repeated sanction requests against Mr. Weinstein than his false claim in Defendants' dismissal motion that her Complaint alleged an "underlying disciplinary proceeding" [R-144], his selective recitation of the Complaint's allegations to make it appear, but without saying so, that there was a causal connection between the Suspension Order and the February 6, 1990 disciplinary petition [R-144-145], and his affirmative claim in his oral

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[26] In the context of her recusal Order to Show Cause [R-657, ¶24], Plaintiff expressly directed the District Judge's attention to his special obligations to her, as a pro se litigant, under Haines v. Kerner. Cf. the District Judge's own citation to Haines v. Kerner in his decisions in other cases: Sadler v. Brown, 793 F. Supp. 87, 88 (1992); Jones v. Capital Cities/ABC, 874 F. Supp. 626, 628 (1995).

advocacy that there was an "underlying disciplinary proceeding" to Plaintiff's suspension [R-768: ln. 2, ln. 17; R-781: ln. 22; R-782: ln. 6]. Clearly, adjudication of Plaintiff's entitlement to sanctions for such pivotal misrepresentations by Mr. Weinstein, all documented by her, would have precluded the District Judge from ambiguously presenting them in his Decision, which is what he needed to do to render judgment for the Second Department and what he wrongfully did do.

The record shows this starkly. On March 3, 1995, Plaintiff requested that "the Rule 11 clock" start running for Mr. Weinstein's fraudulent dismissal motion claim that her Complaint alleged an "underlying disciplinary proceeding" [R-189, ln. 3] -- which Mr. Weinstein unequivocally asserted was "not a lie" [R-189, ln. 17]. She pointed out that ten allegations of her Complaint stated that her suspension was "unrelated to any pending disciplinary proceeding, that there was no underlying disciplinary proceeding" [R-199, ln. 6].

Following the District Judge's instructions, Plaintiff embodied in her opposing papers her sanction request, identifying the specific allegations of her Complaint that there was no "underlying disciplinary proceeding" [R-179; R-463]. Indeed, more than that, Plaintiff provided the District Judge with the precise references to documents in the disciplinary file, as particularized in her "Chronology" [R-201] and "Critique" [R-275], so as to substantiate those allegations [R-181] -- as well as all other allegations of her Complaint, which Defendants' Answer [R-108], submitted by Mr. Weinstein, had "deni[ed]", "den[ied], upon information sufficient to form and belief" or "den[ied] upon information and belief". Her presentation as to the fraudulence and frivolousness of Defendants' Answer, their dismissal motion, and Mr. Weinstein's oral advocacy, was so clear and convincing that Plaintiff combined with it a request for Rule 12(c) conversion for summary judgment in her favor [R-

168(b); R-454].

Even after the District Judge wrongfully relieved Defendants from their default on September 28, 1995, such that they had 3½ months to respond to Plaintiff's summary judgment/sanction application, Mr. Weinstein's opposition papers only further demonstrated the appropriateness of sanctions.

Mr. Weinstein's "Memorandum of Law", which cited no law, made a series of flagrantly false statements of fact [R-640]. Conspicuously, Mr. Weinstein did not place them in an affidavit -- even though the District Judge had instructed him as to such basic requirement on March 3, 1995 [R-194, ln. 9], an instruction he expressly acknowledged [R-194, ln. 15]. Pretending that the sole sanctions issue as to Defendants' Answer was Plaintiff's objection that they had answered collectively -- Mr. Weinstein's Memorandum gave a legally unsupported "gobbledy-gook" response [R-641]. As to Defendants' dismissal motion, Mr. Weinstein did not refer to it and did not deny or dispute that in it he had misrepresented the allegations of the Complaint and misrepresented the law, as detailed by Plaintiff's Memorandum of Law in opposition to his dismissal motion [R-460]. Instead, he pretended that "defendants' statement" about an "underlying disciplinary proceeding" was

> "a reasonable inference from statements contained in the complaint and supported by court documents of which this Court may take judicial notice" [R-641].

This was a further blatant lie. The Complaint not only unequivocally alleged that there was "no underlying disciplinary proceeding" [R-46: ¶79(d), but that the contrary claim, which first appeared in the October 18, 1990 Order, thereafter repeated by Casella with reference to the February 6, 1990 disciplinary petition, was a knowing and deliberate deceit and fraud [R-48: ¶87; R-55: ¶¶108-109]. These are the very challenged documents to which Mr. Weinstein points for his claimed "inference" [R-

641], omitting, by the end of his so-called "Memorandum of Law" the critical first word "underlying" from "disciplinary proceeding" [R-642].

Plainly, Mr. Weinstein's admission in his "Memorandum of Law" that his statement as to an "underlying disciplinary proceeding" was an "inference" was a concession that he had no personal knowledge of that fact. That Mr. Weinstein did not have his clients, who had direct personal knowledge, give an affidavit on the subject or provide him with the documentary proof thereon, reflects a further concession of the truth of the Complaint's pivotal allegation, to which Plaintiff swore, that there no "underlying disciplinary proceeding" to the Suspension Order. Casella's flimsy, but misleading affidavit [R-630], which Mr. Weinstein submitted, is conspicuously silent as to that key issue, as it is to every other. Indeed, it does not deny or dispute even a single one of Plaintiff's record references showing that Defendants' Answer was knowingly false in its responses to over 150 allegations of the Complaint, including those relating to the erroneous October 18, 1990 Order and the separate and unrelated February 6, 1990 disciplinary petition. Such affidavit palpably met the standard for Rule 56(g) sanctions [R-737], Warshay v. Guinness PLC, 750 F.Supp. 628, 640 (S.D.N.Y. 1990).

This was the state of the record before the District Judge in the three weeks prior to the scheduled October 27, 1995 oral argument. Based thereon, one would have expected the District Judge to have canceled the oral argument on Defendants' dismissal motion and to have issued a show cause order to Mr. Weinstein, pursuant to Rule 11(c)(1)(B) [Cf. R-696, ln. 13], giving him notice that he and his state clients were facing severe sanctions, the least of which was Rule 11. This would have been consistent with the District Judge's vehement statements on March 3, 1995 about the dire consequences of lawyers lying, including disciplinary referral and suspension from practice [R-189, ln. 18; R-193, ln. 14; R-194, ln. 20] --

a warning made in the context of Mr. Weinstein's definitive claim about an "underlying disciplinary proceeding". Certainly, at the October 27th oral argument itself, one would have expected the District Judge to be swift, forceful, and severe in demanding an explanation from Mr. Weinstein -- not only as to that demonstrated lie, but about the countless lies permeating his dismissal motion and Answer. Based upon Plaintiff's uncontroverted May 25, 1995 letter to Assistant Attorney General Abramowitz [R-178], showing that Mr. Weinstein was apprised of Plaintiff's annotated "Chronology" even before he prepared Defendants' Answer, the District Judge could have been expected to have rigorously interrogated him as to what inquiry, if any, he had conducted and which Defendants had participated in the drafting of Answer. From the record, it appeared that Casella himself had personally participated therein [R-105][27].

Plaintiff's May 25, 1995 letter [R-178] was the ultimate "safe harbor" warning. It not only specifically requested that Defendants' Answer and dismissal motion be withdrawn on pain of sanctions, but offered Plaintiff's full cooperation and assistance so as to enable the Attorney General to meet his ethical duty. There could be no question, thereafter, as to the larger liability of the Attorney General's office for Mr. Weinstein's misconduct[28]. "Additional inquiry", as contemplated by the

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[27] It may well be that Defendants other than the Attorney General composed the Answer. In denying the Complaint's allegations relative to papers in the Article 78 proceeding, Defendants repeatedly qualify their denials by referring the federal court to the specified court papers for "it's (sic) contents" [R-120ff: ¶¶123, 126, 128, 137; 148; See also 147]. Presumably, in the Article 78 litigation, the Attorney General did not provide copies of the papers therein to his clients. On the other hand, over and again, these same Defendants "deny knowledge and information sufficient to form a belief" and "deny upon information and belief" allegations in the Complaint pertaining to documents from the disciplinary file in their possession, as particularized in Plaintiff's "Critique" [R-275].

[28] Cf. In the very week before Plaintiff made her sanctions motion, Judge Denise L. Cote imposed sanctions upon the Attorney General under Rule 16, Pearson v. Coughlin (S.D.N.Y., Judge Cote), NYLJ, 8/3/95, p.3 "Failure

Advisory Committee Notes, was appropriate, indeed, essential as to why the Attorney General's office had not withdrawn Defendants' dismissal motion and Answer, thereby needlessly burdening Plaintiff and the court. Such failure may have been attributable to the Attorney General's status as a party-defendant in the action, which liability arose out of his official misconduct in representing the Defendants in Plaintiff's Article 78 proceeding. The question whether the Attorney General could ethically represent his co-Defendants herein was a conflict-of-interest issue expressly noted in Plaintiff's affidavit supporting her sanction application [R-170, ¶9].

Nevertheless, the District Judge conducted oral argument as if there were no sanctions or conflict-of-interest issue before him. He entertained Defendants' dismissal motion, inviting Mr. Weinstein to argue it, and reminding him, but not by way of chastisement, that in a motion to dismiss on the pleadings he could not properly argue, as he was, <u>against</u> the allegations of the Complaint [R-766][29]. Nor did the District Judge reprimand Mr. Weinstein during the argument for his disingenuous reply that as between a dismissal motion and summary judgment, he didn't know "what possible difference it could make" [R-768, R-781], and his repetition of his challenged affirmative claim as to the existence of an "<u>underlying</u> disciplinary proceeding", which only three weeks earlier he had admitted to be based on "inference" [R-641].

Of course, the question as to whether there was an "<u>underlying</u>

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to Monitor Assistant Attorney General", "[I]t is the responsibility of that Office to hire Assistants who are capable of performing the work assigned to them, to supervise those Assistants to insure that they are meeting their responsibilities to their clients, their adversaries, and to the Court, and to monitor each of the cases within the Office to insure that the Office's clients are being adequately, if not well represented."

[29] In fact, the issue was far more serious than Mr. Weinstein arguing against the allegations of the Complaint. Mr. Weinstein had misrepresented the allegations of the Complaint so as to conceal that he was arguing against them [R-463].

disciplinary proceeding" bore upon the Complaint's material allegation that the Second Department had acted "without jurisdiction" in suspending Plaintiff's law license.

According to Mr. Weinstein's dismissal motion, there was "no indication in the complaint" that the Second Department was "proceeding in the clear absence of all jurisdiction" [R-158]. The palpable untruth of this material claim was demonstrated in Plaintiff's summary judgment/sanction application [R-479]. Still, at the October 27, 1995 oral argument, the District Judge, although impliedly recognizing that the Complaint alleged that there was no jurisdiction on the part of the judicial Defendants [R-767, ln. 13], allowed Mr. Weinstein to assert that the Second Department had jurisdiction [R-785, ln. 1][30], without any substantiation thereof, and to claim that he had made that argument in his dismissal motion [R-783, ln. 5], which was false. In fact, Mr. Weinstein's dismissal motion simply confined itself to a boiler-plate assertion that there was "no indication in the complaint" that Defendants had acted without jurisdiction [R-158]. It contained absolutely no argument as to the Second Department's jurisdiction and Defendants, in their Answer, had specifically denied Plaintiff's allegation that the Second Department had general disciplinary jurisdiction under §90(2) [R-109: ¶12; R-123: ¶154].

Just as Mr. Weinstein's dismissal motion also claimed that the Complaint had not alleged that Defendants' actions were "inconsistent with existing law" or violated Plaintiff's "clearly established statutory or constitutional rights of which a reasonable person would have known" [R-160], Plaintiff's summary judgment/sanction application rebutted these palpable untruths [R-483-486]. Yet, here too, the Decision, rather than

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[30] As recognized by the District Judge in another case, Equitable Life Assurance Soc. v. Attorney Gen. of United States, 1989 US Dist. Lexis 11274: fn. 2: "...assertions of counsel are of no evidentiary value. See Wyler v. U.S., 725 F.2d 156, 160 (2d Cir. 1983)"

adjudicating Mr. Weinstein's misconduct, purposefully omits, confuses, and misrepresents the law and facts showing that Plaintiff's fundamental constitutional rights were grievously invaded. Thus, much as Mr. Weinstein omitted from Defendants' dismissal motion any mention, let alone discussion, of the express requirements of Judiciary Law §90 and §691.4 et seq. and of the dispositive cases of Nuey and Russakoff -- all of which the Complaint alleged to have been knowingly violated by Defendants, so does the Decision omit or distort them. Indeed, much as Plaintiff's summary judgment/sanction application demonstrated that Mr. Weinstein's dismissal motion had stripped away the Complaint's allegations of law-less, jurisdiction-less, retaliatory conduct by Defendants so as to misrepresent her as just another disgruntled litigant [R-465], the Decision does the same thing.

The compelled inference is that the District Judge did not adjudicate Plaintiff's dispositive sanction applications relative to Defendants' dismissal motion, Answer, and Casella's affidavit because doing so would have required him to identify the very stratagem of falsification and concealment that he himself would use in his Decision to "dump" the case.

POINT III

THE DISTRICT JUDGE WRONGFULLY REFUSED TO SIGN PLAINTIFF'S ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION, WITH TRO, AND WRONGFULLY DENIED IT.

The Decision misrepresents that Plaintiff cross-moved for a preliminary injunction [R-5; R-13; R-21]. In fact, Plaintiff did not cross-move for injunctive relief, but made a separate motion, brought on by Order to Show, with a Temporary Restraining Order [R-488]. The significance of this is that the Decision thereby conceals and fails to disclose that the District Judge refused to sign it either on September 28,

1995, the date Plaintiff was finally permitted to present it, or in the ensuring months, when, pursuant to her second branch of injunctive relief requested in her Order to Show Cause [R-489], she beseeched the District Judge to protect her from the irreparable injury resulting from the Second Department's continuing vicious, retaliatory conduct in refusing to recuse itself from matters involving her and wrongfully adjudicating them to her prejudice [R-797; R-802; R-854].

Nor does the Decision identify what Plaintiff was seeking to enjoin or the basis thereof, to wit: (1) an order enjoining continued enforcement of the Suspension Order, pursuant to the clear and unequivocal mandate of Nuey and Russakoff that an interim order without findings must be immediately vacated [R-499-502; R-617-619]; (2) an order enjoining the Second Department from adjudicating any litigation in which Plaintiff was involved, directly or indirectly, based on documentary evidence[31] that it was retaliating against Plaintiff by law-less adjudications [R-506-512; R-621-623]; (3) other and further relief, including steps to vacate the Southern District's February 27, 1992 Order, which, based on her state court suspension, suspended Plaintiff's law license in the District, without a hearing, in violation of its Rule 4 [R-906-7], which she had expressly invoked [R-502-3, fn. 7]. Plaintiff's Order to Show Cause detailed the irreparable and catastrophic consequences of her unlawful suspension and the Second Department's on-going retaliatory adjudications [R-502-513; R-614-616].

Fed.R.Civ.P. Rule 65(b) authorizes a district judge to grant a

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[31] The full record of the Second Department's law-less adjudication of Plaintiff's appeal in the Wolstencroft case was transmitted to the District Judge in support of her Order to Show, as well as the papers that would comprise the record in her subsequent Wolstencroft appeal [R-508-511: ¶¶47-54; R-607-9]. Because of their bulk, they are not contained in the Record on Appeal herein, but are part of the appellate file, to which this Court is respectfully referred.

temporary restraining order even without notice to the adverse party in cases involving immediate irreparable injury and loss and in such case "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters, except older matters of the same character".

On July 26, 1995, when Plaintiff advised the District Judge that she wished to present a temporary restraining order as part of an Order to Show Cause for a Preliminary Injunction, her letter request [R-724] alerted the District Judge to the state of the record: Defendants had defaulted in opposing her application for summary judgment, Plaintiff's Rule 3(g) Statement was entirely uncontroverted, and, pursuant to Rule 56, she was entitled to summary judgment in her favor. Indeed, Plaintiff had exposed that Defendants' Answer and dismissal motion were fraudulent in every material respect. As to their defenses, Plaintiff's Memorandum of Law [R-478] demonstrated that the doctrines of Rooker-Feldman, collateral estoppel, and abstention were inapplicable to a §1983 action wherein was alleged -- and documented -- an on-going pattern of malicious, bad-faith and retaliatory conduct by Defendants, acting without jurisdiction, to deprive Plaintiff of her constitutionally-protected free-speech, petition, due process and equal protection rights in the context of a flagrantly unconstitutional attorney disciplinary scheme.

It is a fortiori that if Plaintiff were entitled to summary judgment, she was entitled to a TRO, since, by virtue of Defendants' default, hers was not merely a "likelihood of success on the merits" or a "substantial likelihood" thereof, but an absolute. Yet, the District Judge delayed for two months holding the conference at which Plaintiff could present her TRO request as part of her Preliminary Injunction Order to Show Cause.

The District Judge's wrongful conduct on September 28, 1995,

the date Plaintiff was ultimately allowed to present her Preliminary Injunction/TRO Order to Show Cause, is set forth in her subsequent Order to Show Cause for the District Judge's recusal [647-667]. Suffice to say that the District Judge professed ignorance of the basic allegations of the Complaint and the procedural history of the case -- which were focally presented in her Preliminary Injunction/TRO Order to Show Cause precisely because they established Plaintiff's absolute entitlement to relief as a matter of law [R-493-501; R-611-613; R: 616-620: "Likelihood of Success on the Merits"].

Based upon his sua sponte stated concerns that subject matter jurisdiction, abstention [R-681, ln. 9] and laches [R-689, ln. 21] might bar relief -- which Plaintiff had rebutted three months earlier in her papers in support of her right to summary judgment, including her Memorandum of Law [R-460], another copy of which she handed up the court on September 28, 1995 [R-688, ln. 1] -- the District Judge stated:

> "I am not persuaded you come close to meeting the standard for what amounts to preliminary injunctive relief, be it called a TRO or preliminary injunction. If the Court of Appeals feels differently, they will reverse me." [R-693, ln. 8]

He then went even further and claimed that Plaintiff's Order to Show Cause required no response from Defendants [R-701: ln. 4]. This extraordinary statement came after his no less extraordinary assertion that the Preliminary Injunction/TRO Order to Show Cause was returnable simultaneous with its being presented [R-700]. The District Judge made this statement after deferring his ruling on it to October 27, 1995, the date of argument on Defendants' dismissal motion. He made yet a further extraordinary statement, namely, that the Preliminary Injunction/TRO Order to Show Cause would be "moot" on that date [R-701, ln. 9].

Yet, on October 27, 1995, the District Judge did not rule or make reference to Plaintiff's pending Preliminary Injunction/TRO Order to Show Cause and, in the ensuing many months, sadistically ignored

Plaintiff's urgent pleas for exigent relief as to the Second Department's lawless and retaliatory adjudications, the stresses of which Plaintiff advised the court were causing serious injury to her health [R-797; R-802; R-854]. Once again, the District Judge wrongfully delayed her request for an immediate pre-motion conference to bring on yet another motion for emergency relief[32], Cf. Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647 (2d Cir. 1987).

The District Judge's continued wrongful delays and refusal to sign Plaintiff's Preliminary Injunction/TRO Order to Show Cause, like his continued refusal to address Defendants' documented litigation misconduct, is inexplicable except that it served to protect Defendants against ultimate liability in Plaintiff's federal action. Just as adjudication of Plaintiff's sanction applications would have required him to resolve pivotal issues establishing Plaintiff's claims, so requiring Defendants to respond to her Order to Show Cause would have also exposed their lack of a good-faith defense. Indeed, at the heart of Plaintiff's Preliminary Injunction/TRO Order to Show Cause were the material allegations of the Complaint that Plaintiff was suspended without findings and without reasons -- contrary to the explicit jurisdictional and due process requirements of Judiciary Law §90(2) and §691.4 et seq. [R-347-352] -- that she was entitled to immediate vacatur under Nuey [R-528] and Russakoff [R-529]

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[32] At the September 28, 1995 presentment, the District Judge claimed that as to enjoining state court judges from deciding Plaintiff's cases, "I may wait for some guidance from the 17th floor" [R-698, ln. 1] and that he didn't know of "any case in which a federal judge has ever enjoined a state judge from sitting on a case" [R-698, ln. 6]. [Cf. 28 U.S.C. 2283 permitting a federal court to enjoin state court proceedings....in aid of its jurisdiction"]. By contrast, in his decision in Tobias v. Pizzuto, 739 F. Supp. 941 (S.D.N.Y. 1990), the District Judge declined to enjoin New York Supreme Court judges from continued adjudication of matters underlying the 1983 action of the plaintiffs therein because they had not alleged facts sufficient to justify inference of fraud or conspiracy. At bar, Plaintiff had not only alleged sufficient facts of fraud and conspiracy by the judicial Defendants, but had fully documented them.

and, additionally, that she had been deprived of any pre- or post-suspension hearing as to the alleged basis of her suspension, a violation whose constitutional ramifications were evident from Russakoff [R-531], citing Barry v. Barchi, 443 U.S. 55, 66-68 (1979), and Gershenfeld v. Justices of the Supreme Court, 641 F. Supp. 1419 (E.D. Pa. 1986).

Even without a response from Defendants, the papers comprising Plaintiff's Order to Show Cause documentarily established Defendants' unlawful, unconstitutional conduct: the Suspension Order [R-514], on its face, made no findings and stated no reasons and there was nothing ambiguous or unclear about the findings requirement of Judiciary Law §90(2) and §691.4(l)(1), the reasons requirement of §691.4(l)(2) and the mandate of Nuey and Russakoff, directing immediate vacatur under such circumstances.

Indeed, from the record before him, which included two affidavits that had been submitted to the Second Department as to Defendants' violation of Plaintiff's equal protection rights [R-534; R-548], the District Judge knew there was no way Defendants could justify such finding-less Suspension Order nor justify its perpetuation, concomitant with their denial of a hearing to Plaintiff. This was evident from Defendants' dismissal motion [R-143], which omitted the material allegations of the Complaint that Plaintiff's law license was suspended without findings[33], reasons, and a hearing, omitted any mention of Nuey and Russakoff, and omitted any discussion of the jurisdictional and due process requirements of Judiciary Law §90 and §691.4 et seq. It was also transparently obvious from their evasive Answer, which disingenuously deferred to the court for interpretation of §691.4 et seq., the very rules

[33] Defendants' only acknowledgment of Plaintiff's allegation that she was suspended without findings is tucked away in their recitation of her Causes of Action [R-147].

the Second Department had itself promulgated, and under which the Grievance Committee and Casella purport to operate, as well as for interpretation of its operative law, Judiciary Law §90. This, quite apart from deferring to the court for interpretation of Nuey and Russakoff.

That the District Judge knew that such heinous constitutional deprivations could not be confronted without conferring to Plaintiff relief by preliminary injunction and summary judgment may be seen from his Decision: it, too, omits any mention of the foremost issue in Plaintiff's Order to Show Cause: that she was suspended without findings and without reasons, omits any reference to the explicit findings requirement of Judiciary Law §90(2) and §691.4(l)(1), omits any reference to the explicit reasons requirement of §691.4(l)(2), omits Nuey entirely, and obliterates from Russakoff its express holding that an interim suspension order without findings, must be immediately vacated. Indeed, the Decision makes it appear that the issue in Russakoff is a post-suspension hearing [R-8] -- the relevance of which, to the case at bar, the District Judge tellingly does not address, notwithstanding the unrefuted allegations of Plaintiff's Complaint and Rule 3(g) Statement was that she was not only suspended without any pre-suspension hearing, but thereafter was deprived of a post-suspension hearing as to the alleged basis upon which she was suspended.

It is fairly inferred that because of the constitutional infirmity of §691.4(l) in failing to provide for a prompt post-suspension hearing, as reflected by Russakoff, the Decision [R-7] therefore misrepresents the rule under which Plaintiff was suspended as §691.13(b)(1). The Preliminary Injunction/TRO Order to Show Cause [R-494: ¶8; R-500: 10] made very clear that the Suspension Order was issued pursuant to §691.4(l), a fact further reflected by the face of the Suspension Order itself [R-514], annexed to the Order to Show Cause, much as it was also annexed to the Complaint [R-96].

POINT IV

THE DISTRICT JUDGE WRONGFULLY CONVERTED DEFENDANTS' DISMISSAL MOTION TO ONE FOR SUMMARY JUDGMENT IN THEIR FAVOR, *SUA SPONTE*, AND WITHOUT NOTICE TO PLAINTIFF

The District Judge's on-the-record colloquy with Mr. Weinstein at the October 27, 1995 oral argument establishes his awareness, albeit without saying so, that he could not grant Defendants' motion for dismissal on the pleadings because Mr. Weinstein had violated the legal standard for such motion by arguing against the Complaint's allegations that there was no "underlying disciplinary proceeding" to the October 18, 1990 Order and the Suspension Order and that those judicial Defendants were acting "without jurisdiction" [R-767, ln. 11].

Yet instead of denying Defendants' dismissal motion, with sanctions, the District Judge rewarded them by sua sponte and without notice, converting it into one for summary judgment in their favor. This he accomplishes in a quick footnote, as if it were inconsequential act and as if dismissal and summary judgment are interchangeable. Thus, in the conclusion to his Decision [R-21], the District Judge refers to "defendants' motion for summary judgment" -- which characterization, likewise, likewise appears in the Judgment [R-2].

Fed.R.Civ.P. 12(c) expressly states:

> "...all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56"[34].

This fundamental due process requirement has been affirmed by the U.S. Supreme Court, Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) and over and over again by this Circuit, Gagliardi v. Village of Pawling,

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[34] "We give the Federal Rules of Civil Procedure their plain meaning.' Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. , 107, L.Ed 2d 438, 110 S.Ct. 459 (1989). As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.", Business Guides v. Chromatic Com., 112 L Ed. 1140, at 1152.

18 F.3d 188, 191 (2d Cir. 1994); Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991); Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985); Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). See also, Herzog & Straus v. GRT Corp., 23 Fed Rules Serv.2d 370; F.2d (1977). For lower court decisions expressly giving notice of sua sponte conversion, See, Ribando v. Silhouette Optical, Ltd., et al., 94 Civ. 5155 (VLB) (S.D.N.Y. 1994); Jacobson v. Cohen, 151 F.R.D. 526 (S.D.N.Y. 1993).

In contrast to Gagliardi, supra, 191, where this Circuit held that the without-notice conversion of Defendant's motion was "irrelevant because the motion was decided solely on a review of the complaint", here the District Judge stated that his conversion was based on "voluminous affidavits" filed by "both parties" [R-12-3, fn. 3].

Although the District Judge cites Hanson v. McCaw Cellular Communic., 77 F.3d 663 (2d Cir. 1996), the district court decision in that case, 881 F.Supp. 911 (S.D.N.Y. 1995), shows that the affidavit upon which the court relied was identified and discussed (Id., at 915, 919). Here the District Judge fails to identify or discuss any of the "voluminous affidavits" as would support Defendants' entitlement to summary judgment. In fact, Defendants filed no "voluminous affidavits". Their only affidavit in support of their dismissal motion is the 2-paragraph non-affidavit of their counsel, Mr. Weinstein, annexing legal cases [R-129]. Other than that, there is only Casella's 2-1/4 page, 8-paragraph affidavit [R-630], whose irrelevant and non-probative content was the basis for a further sanction application by Plaintiff, pursuant to Rule 56(g) [R-734]. Thus, may be seen that the stated basis for the District Judge's sua sponte without-notice conversion is a flagrant falsehood by him, designed to conceal that there was no evidentiary basis for a conversion to summary judgment in Defendants' favor.

It may be inferred that the reason the District Judge failed to provide any notice to Plaintiff of his sua sponte conversion of Defendants' dismissal motion to one for summary judgment in Defendants' favor is because notice would have enabled Plaintiff to expose in opposition papers -- rather than on appeal -- the utter baselessness of such conversion. The deliberateness with which the District Judge denied Plaintiff notice may be seen from his inexplicable refusal to respond to her four letters of inquiry [R-790, R-797, R-800, R-853] relative to his November 9, 1995 Order [R-794], which explicitly inquired as to the purpose for its sua sponte unauthorized request that she produce for the District Judge a copy of the state disciplinary file. Plainly, this was the time for the District Judge to have divulged his intentions, which apparently were to ferret the file to find support for grounding summary judgment to Defendants. No other purpose could be served by such request since -- as Plaintiff pointed out [R-791] -- the issues before the District Judge were "strictly matters of law, not fact" (emphasis in the original).

POINT V

THE DISTRICT JUDGE'S WRONGFUL DENIAL OF SUMMARY JUDGMENT TO PLAINTIFF AND GRANTING OF SUMMARY JUDGMENT TO DEFENDANTS FLOUTS THE FUNDAMENTAL STANDARDS FOR SUMMARY JUDGMENT AND CONCEALS THE RECORD BEFORE HIM

In denying summary judgment to Plaintiffs and in granting it to Defendants, the District Judge does not recite the standards applicable to summary judgment. By contrast, in innumerable other summary judgment decisions written by the District Judge, those standards are prominently set forth:

> "On a motion for summary judgment, the moving party has the burden of demonstrating that 'there is no genuine issue as to any material fact.' Fed.R.Civ.P. 56(c). It is well-established that a fact is material when its resolution would 'affect the outcome of the suit under the governing law,' and a dispute is genuine 'if the evidence is such that a reasonable jury could

> return a verdict for the nonmoving party.' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 1016 S.Ct. 2505 (1986). On the other hand, a party opposing a motion for summary judgment must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986)", Kozera v. International Brotherhood of Electrical Workers, 892, F. Supp. 536, 542 (1995).

See also, Warren v. Keane, 937 F. Supp. 301 (1996); Osipova. v. Dinkins, 907 F. Supp. 94, 96 (1995); Heath v. Warner Communications, 891 F. Supp. 167, 171 (1995); Keles v. Yale University, 889 F. Supp. 729 (1995); Low v. Equity Programs, 882 F. Supp. 344 (1995); Teachers Insurance and Annuity Association. v. Wometo Enterprises, Inc., 833 F. Supp. 344 (1993); LCA Leasing Corp. v. Borvig Corp., 826 F. Supp. 776, 778 (1993); Yonkers v. Otis Elevator Co., 649 F. Supp. 716 (1986).

In each of the aforesaid decisions, the District Judge discusses both the papers in support of, and in opposition to, the summary judgment motion. In his usual formidable discussion of the evidence presented by those papers, the District Judge raises the issue as to whether sufficient facts have been set forth that raise a triable issue, weighs whether a rational trier of fact could arrive at a determination, and then grants or denies summary judgment based on his discussion and conclusion. This is normal and customary behavior of a judge in performing his adjudicative duties, and is also reflected in cases involving summary judgment where the District Judge does not recite the applicable standards for such relief.

Moreover, in actions brought by a pro se party, the District Judge himself has noted that the law requires him to construe the complaint liberally and deferentially, Heath v. Warner Communications, Inc., supra, 171, citing Morello v. James, 810 F.2d 344, 346 (2d Cir. 1987); Warren v. Keane, supra, pp. 7-8.; See also the District Judge's decision in Jones v. Capital Cities/ABC, Inc., supra, 628; Sadler v. Brown, 793 F. Supp. 87, 88

(1992), citing Haines v. Kerner, supra; Miller v. Garrett, 695 F. Supp. 740, 743 (1988), citing Hughes v. Rowe, 449 U.S. 5, 9 (1980); Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983).

None of this has been done by the District Judge in the subject Decision. The District Judge does not discuss the standards for summary judgment or the motion papers that would support or oppose summary judgment to either party. Nor does he identify any of the evidence or legal argument such papers presented. He thereby conceals the record before him showing that Plaintiff was entitled to summary judgment, as a matter of law, and that Defendants' submissions are inadequate for any purpose, except imposition of sanctions upon them and their counsel, including disciplinary and criminal referral.

A. THE DISTRICT JUDGE WRONGFULLY DENIED PLAINTIFF SUMMARY JUDGMENT, TO WHICH SHE WAS ENTITLED AS A MATTER OF LAW

The Decision consistently misrepresents that Plaintiff "cross-moved" for summary judgment [R-5; R-13; R-21]. Such false statement is notwithstanding Plaintiff pointed out to the District Judge, again and again, that she had not "cross-moved" for summary judgment, but, rather that she was seeking summary judgment by the conversion authorized by Rule 12(c).

Moreover, the District Judge claims [R-13, fn. 4] that he "construes" that Plaintiff is seeking summary judgment. According to the Decision, at some unspecified point after September 28, 1995, Plaintiff "argued that her motion papers do not seek affirmative relief on the merits". The Decision cites no record reference for when Plaintiff allegedly made such argument, which is reflected nowhere in the transcript of the subsequent October 27, 1995 proceedings [R-772a, R-774, R-780-1], nor in Plaintiff's four unanswered letters to the District Judge [R-790, R-797, R-800, R-853], nor in her motion for reconsideration of the District Judge's denial of recusal [R-743]. Quite the contrary, these record

references show that Plaintiff not only explicitly apprised the District Judge of her request for summary judgment, but of her entitlement thereto as a matter of law [R-791, R-854].

Thus, the District Judge attempts to create a false illusion of some "even-handedness" where, having converted Defendants' dismissal motion into one for summary judgment, he is now giving Plaintiff the benefit of the doubt in "constru[ing]" that Plaintiff has moved for summary judgment. Simultaneously, the District Judge portrays Plaintiff as a litigant who is confused or disingenuous as to the nature of her court submissions.

The Complaint was verified before it was served [R-95], its allegations were, additionally, re-sworn to in Plaintiff's affidavit requesting conversion pursuant to Rule 12(c) [R-172: ¶¶18, 19] and, further reiterated and re-alleged in her Rule 3(g) Statement [R-455: ¶2]. Those allegations meticulously detailed how the jurisdiction-less, fraudulent, and retaliatory suspension of Plaintiff's license was accomplished and the deliberateness with which Defendants, acting together and separately, violated black-letter law in perpetuating the suspension and in authorizing and perpetuating a barrage of bogus disciplinary proceedings against her, refusing to establish their jurisdiction and authority when challenged by Plaintiff to do so, and subverting her Article 78 challenge thereto.

Supporting the allegations of Plaintiff's Complaint [R-22] and her Rule 3(g) Statement [R-454] were citation-references to documents in the disciplinary file, as set forth in her annotated "Chronology" [R-201], as well as her "Critique" of Defendants' Answer [R-275]. Such "Critique", expressly referred to in Plaintiff's Rule 3(g) Statement [R-454: ¶1], documented that Defendants' Answer, in responding to over 150 separate paragraphs of the Complaint, was false and known by Defendants to be false.

Finally, Plaintiff's Memorandum of Law [R-460] demonstrated that Defendants' defenses were inapplicable to the pleaded allegations of

the Complaint [R-470-486]. Additionally, by her incorporated-by-reference Petition for a Writ of Certiorari [R-303; R-478], Plaintiff laid out her legal arguments in support of her challenge to the constitutionality of New York's disciplinary law, as written and applied. Citing U.S. Supreme Court and federal decisional law, as well as that of the New York Court of Appeals, Plaintiff outlined four discrete areas of unconstitutionality [R-3304; R-331-341][35]:

I: "New York's Attorney Disciplinary Law Unconstitutionally Permits Interim Suspension Orders Without a Pre- or Post-Suspension Hearing" [R-329-331]

II: "New York's Judiciary Law §90 Is Unconstitutional in Failing to Provide Disciplined Attorneys a Right to Judicial Review, Either By Direct Appeal or by the Codified Common Law Writs" [R-331-334]

III: "The Combination of Prosecutorial and Adjudicative Functions in New York's Disciplinary Scheme Is Unconstitutional and Lends Itself to Retaliation Against Judicial Whistle-Blowers" [R-334-338]

IV: "Judiciary Law §90 and the Related Rules of the Appellate Division, Second Department Are Unconstitutionally Vague and Have Been Applied in an Unconstitutional Manner" [R-338-341]

Fed.R.Civ.P. 56(e) specifies the standards a non-moving party must meet on a summary judgment motion:

> "...an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Yet even after the District Judge wrongfully relieved Defendants of their default in responding [R-696], such that they had 3-1/2 months in which to fashion their opposition, they wholly failed to meet the aforesaid clear and explicit requirement of Rule 56(e), reiterated in all the case law. Casella's 2-1/4 page affidavit [R-630] utterly failed to substantiate Defendants' Rule 3(g) denials [R-626]. As such, it presented

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[35] Plaintiff specifically reiterates and incorporates by reference on this appeal the arguments set forth in her Memorandum of Law [R-460] and in her Petition for a Writ of Certiorari [R-304].

no "genuine issue" for trial. Nor did Casella's affidavit in any way deny or dispute Plaintiff's documentary "Critique", referred to in her Rule 3(g) Statement [R-454], as establishing that Defendants' Answer was sham and in bad-faith. He, thereby, conceded Defendants' litigation misconduct by their Answer, as well as the documentary substantiation of the allegations of the Complaint. Indeed, Casella's affidavit entitled Plaintiff to Rule 56(g) sanctions since, as highlighted by her October 27, 1995 affidavit [R-737], it was in demonstrable bad faith: Casella circumscribing his testimonial presentation to the few non-probative, irrelevant paragraphs of his affidavit, when, in fact, he had direct, personal knowledge of the vast majority of the allegations of the Complaint and all the allegations relating to the unlawful and unconstitutional suspension of Plaintiff's license, delineated at ¶4 of her Rule 3(g) Statement, related to him [R-737-8], Warshay v. Guinness PLC, supra, at 640. Likewise, Defendants' misnomered "Memorandum of Law" [R-639], which cited no law and was devoted exclusively to the sanctions issue [See Point II, infra].

Defendants' complete failure to controvert Plaintiff's entitlement to summary judgment, factually or legally, entitled her to such relief as a matter of law. Their bad-faith opposition failed to show even "some metaphysical doubt as to the material facts" of her Complaint, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra. Consistent with the shared goals of Fed.R.Civ.P. 1 and the Judicial Improvements Act of 1990, Public Law 101-650, 104 Stat. 5089, enacting 28 USC 473, Jacobson v. Cohen, supra, 526, summary judgment to Plaintiff was mandated.

B. THE DISTRICT JUDGE WRONGFULLY GRANTED DEFENDANTS SUMMARY JUDGMENT, FOR WHICH THERE IS NOT A SCINTILLA OF EVIDENCE

Since Defendants did not move for summary judgment and, moreover, had disclaimed doing so by expressly reserving their right to so move "at a future time" [R-626; R-783, ln. 25], they did not identify any "material fact" as to which there was "no genuine issue". Rule 3(g) of

the General Rules of the Southern District explicitly states:

> "Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such statement constitutes grounds for denial of the motion."

Such General Rule advances the settled principle, reiterated by the Supreme Court decision in Celotex Corp. v. Catrett, supra, at 323:

> "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact."

From the record before the District Judge, he knew that without a sua sponte grant of summary judgment to Defendants, they would be unable to formulate a Rule 3(g) Statement to support a summary judgment motion and bear their "initial responsibility" of substantiating their claims. Plainly, Defendants had no legitimate defense to the Complaint, as evident by their fraud and misrepresentation in their dismissal motion and Answer. Such misconduct should have disentitled them from any award of summary judgment, even were they entitled to one, which they were not. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933). Yet considerations of Defendants' "unclean hands" nowhere appear in the Decision.

In granting Defendants summary judgment based on defenses of Rooker-Feldman, res judicata, immunity, and Eleventh Amendment, the Decision does not refer to Plaintiff's uncontroverted Memorandum of Law which showed those defenses to be inapplicable [R-470-486]. As demonstrated therein, such defenses were based purely on Mr. Weinstein's rewriting of the Complaint and misrepresentation of the very cases he cited.

The District Judge replicates Mr. Weinstein's misconduct by

similarly rewriting the Complaint to delete the material allegations vitiating those defenses and likewise misrepresents or omits the pertinent case law relative thereto. Thus, Points III, IV, and V of Plaintiff's Memorandum of Law [R-471-486] detailed that the allegations of the Complaint that Defendants acted without jurisdiction, without due process, in a biased, bad-faith, fraudulent manner, violative of non-discretionary clear and established law, and that she was deprived a full and fair opportunity to be heard precluded dismissal based on defenses of Rooker-Feldman, res judicata, and immunity[36]. The Decision does not deny these bed-rock legal principles -- wholly undisputed by Defendants [R-639]-- and only demonstrates their correctness by hop-scotching through the Complaint to obliterate virtually every specific allegation of Defendants' jurisdiction-less, due process-less, biased, bad-faith, retaliatory conduct, violative of clear and unambiguous requirements of New York's attorney disciplinary statute and the Second Department's own court rules[37]

Notably, unlike Defendants' dismissal motion which, at least when identifying Plaintiff's Causes of Action, acknowledged that Plaintiff' alleged she had been retaliated against "for exercising her First Amendment

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[36] Plaintiff's Point II [R-470-471] demonstrated the inapplicability of an Eleventh Amendment defense, particularly pointing out that money damages were available against state defendants sued in their personal capacities and that ¶¶9-10 of the Complaint [R-26-27] expressly identified Defendants' liability "in their personal capacities". Nevertheless, the Decision misrepresents the Complaint as seeking damages against Defendants in their official capacities [R-20] and ignores that the Eleventh Amendment does not bar injunctive and declaratory relief, as further argued in Plaintiff's Point II.

[37] The deliberateness with which the District Judge has done this may be seen from the fact that the specific violations and the retaliatory background to Defendants' actions are particularized not only in the paragraphs of the Complaint which the Decision selectively does not cite, but in the very paragraphs it does cite. Because many pages would be required to set forth, sentence-by-sentence, the gross and wholesale fashion in which the District Judge has literally rewritten the Complaint in granting Defendants summary dismissal, an Appendix comparing his recitation of the Complaint with what the Complaint actually says is annexed.

rights" and that Defendants had conspired to silence her "as a voice speaking out against judicial corruption by judges and lawyers in the Second Judicial Department of the Supreme Court of the State of New York" [R-147-8], the Decision does not even do that much. It obliterates every allegation from the Complaint relating to Defendants' retaliation against Plaintiff for her judicial whistle-blowing and the political context surrounding the events at issue. The Decision makes only a single isolated mention of free speech [R-11], whose inaccurate citation to the Complaint is bolstered by a reference to Plaintiff's Petition for a Writ of Certiorari [R-435-436].

The significance of this may be seen from the District Judge's decision in Grossman v. Schwarz, 678 F.Supp. 440 (1988), which makes plain that special considerations govern §1983 actions asserting free speech claims. This is reflected by this Circuit's decisions as well, Bernheim v. Litt, 79 F.3d 318 (2d Cir. 1996), Donahue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54 (2d Cir. 1987) ("Summary judgment is inappropriate where the allegation is that action was taken in retaliation for an exercise of constitutionally-protected freedoms", Id, at 59), Gagliardi v. Village of Pawling, supra, at 194-5 ("The rights to complain to public officials and to seek administrative and judicial relief are protected by the First Amendment"; "...the right 'to petition for a redress of grievances is among the precious of liberties safeguarded by the Bill of Rights'...and is 'intimately connected...with the other First Amendment rights of free speech and free press.'", quoting from United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967)). Plainly, Defendants' flagrant, unremitting violations of Plaintiff's fundamental due process and equal protection rights, as pleaded by the Complaint, support her allegations of retaliation. The Decision purposefully totally omits both the allegations of violations and of retaliation.

It must be emphasized that there is no evidence in the record rebutting the material allegations of the Complaint. None. This explains why the Decision fails to identify any proof by Defendants that would support summary judgment to them. Casella, who had first-hand, direct knowledge as to the majority of allegations of the Complaint, failed to make even a testimonial claim in his 2-1/4 page affidavit that Defendants had jurisdiction, complied with due process, that Plaintiff had a full and fair hearing before an improper tribunal, and that her federally-guaranteed rights were respected in the state forum.

Conspicuously, the Decision also never mentions Defendants' demonstratedly fraudulent Answer, which referred the court to state disciplinary documents not before it, and disingenuously deferred to the court for interpretation of New York's attorney disciplinary statute, the Second Department's rules, and New York Court of Appeals' decisions in Nuey and Russakoff. Yet, the District Judge fails to provide any interpretation of the jurisdictional and due process prerequisites of §691.4(l) -- the very rule under which Plaintiff was suspended -- and §691.13(b)(1) -- the very rule pursuant to which the October 18, 1990 Order was issued -- let alone point to any evidence showing that Defendants complied therewith, which they nowhere even alleged that they did and, by reason of their claimed deference to the court's interpretation, could not allege. These were the specifically identified Second Department rules which the Complaint challenged, as written as and as applied [R-24: ¶2; R-83-87], and which Plaintiff analyzed at length in Point IV of her incorporated-by-reference Petition for a Writ of Certiorari [R-338-342].

Also specifically challenged by the Complaint were Judiciary Law §90(2) and §691.4 [R-24: ¶2, R-86: ¶226], likewise analyzed by Plaintiff in Point IV of her Petition for a Writ of Certiorari [R-338-342]. Defendants' Answer expressly denied that the Second Department had general

disciplinary jurisdiction under Judiciary Law §90(2), as alleged at ¶19 of the Complaint [R-30], and deferred to the court for interpretation of that statutory provision [R-109: ¶12]. Their Answer also expressly denied that the Grievance Committee had general jurisdiction under §691.4(a), as alleged at ¶20 of the Complaint, and deferred to the court for interpretation of that rule provision [R-109: ¶13]. Only by misrepresenting the plain meaning of both those provisions has the District Judge been enabled to confer upon Defendants disciplinary jurisdiction they never asserted and expressly denied.

Firstly, the Decision misrepresents Judiciary Law §90(2) as conferring unqualified jurisdiction upon the Second Department to discipline attorneys [R-5]. For that proposition, which Defendants nowhere advanced, the Decision actually cites Plaintiff's ¶19 [R-30], which, as noted, Defendants' Answer denied. In fact, as reflected by Plaintiff's ¶19, Judiciary Law §90(2) contains the express statutory predicate for the Second Department's disciplinary jurisdiction to censure, suspend, or remove an attorney from practice: to wit, that the accused attorney be "guilty" of specified misconduct [R-351]. This is then further restricted by Judiciary Law §90(6) requiring that: "before an attorney or counselor-at-law is suspended or removed...a copy of the charges against him must be delivered to him personally..." [R-351][38]

The allegations of the Complaint -- to which Plaintiff swore and further substantiated with uncontroverted record references [R-201; R-275] -- are that she was suspended without findings, the express

[38] Indeed, §691.4(l) [R-533], the rule provision under which Plaintiff was suspended, expressly states:

> "The suspension shall be made upon the application of the Grievance Committee this court, after notice of such application has been given to the attorney pursuant to subdivision six of section 90 of the Judiciary Law." (§691.4(l)(2), emphasis added)

prerequisite for suspension under Judiciary Law §90(2) and without "charges", the express prerequisite under Judiciary Law §90(6) -- which, there being no "charges" were never personally delivered upon her as Judiciary Law §90(6) further expressly requires.

As to §691.4 et seq. [R-346-350], notwithstanding the innumerable allegations of Plaintiff's Complaint[39] alleging that the only circumstances under which the Grievance Committee could lawfully dispense with the jurisdictional and due process requirements of §691.4(e)(4) of pre-petition "written charges", a pre-petition "written hearing", "findings of fact" based on evidence from the stenographically-recorded hearing, "a majority vote of the full committee" for the recommending of charges, a "written report", with a "minority report", if any, filed with the court, as specified by §691.4(f), (g), (h), and (i), are "where the public interest demands prompt action and where the available facts show probable cause for such action", the Decision [R-6] truncates the express exigency requirement and "probable cause" determination from §691.4(e)(5) so as to falsely make it appear that there is no restriction upon the Grievance Committee to proceed thereunder and that it is simply the fifth among four other equally available options. Only by so doing can the District Judge conceal Defendants' flagrant and deliberate violations of Plaintiff's rights in the authorization and perpetuation of the three disciplinary proceedings against her, as particularized in the Complaint and substantiated in her summary judgment application. As Point IV of Plaintiff's Petition for a Writ of Certiorari pointed out [R-340], quoting Matter of Thalheim, 853 F.2d 383, 388 (5th Cir. 1988) "...it was the court that drafted these rules. The court wrote its own rules; it must abide by them."

The District Judge's failure to interpret Nuey and Russakoff,

[39] See Complaint [R-23] ¶¶42, 128, 129, 149-150, 152, 161, 168, 174.

whose interpretation Defendants also explicitly left to the court, reveals his recognition that those cases are dispositive and controlling as to Defendants' violation of Plaintiff's fundamental constitutional rights, as well as the facial unconstitutionality of the Second Department's interim suspension rule, §691.4(l). Plainly, interpretation of Russakoff was quite relevant to the District Judge's question to Mr. Weinstein at the October 27, 1995 argument [R-771]: "She said she was deprived of any hearing? Do the statutes provide for no hearing?"[40] The District Judge's misrepresentation of the very rule under which Plaintiff was suspended, plainly a pivotal material allegation of her Complaint, bespeaks his conscious knowledge that §691.4(l) is constitutionally infirm, as recognized by the New York Court of Appeals in Russakoff.

Clearly, where, as at bar, state court attorney disciplinary rules are facially unconstitutional and not based upon state statutory authority, as Russakoff and Nuey reveal, the declaratory judgment relief sought in Plaintiff's First Cause of Action, does not require review of any state court decisions in Plaintiff's case. All that is required is facial examination of the court rules and related statutory provisions. Notwithstanding the inapplicability of Rooker-Feldman, as detailed in Point III of Plaintiff's Memorandum of Law [R-471-476], the District Judge jettisoned his adjudicative duty vis-a-vis the unconstitutionality of New

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[40] As hereinabove noted, Plaintiff's allegation that she was suspended without a hearing is the only specific due process violation relative to her suspension identified by the Decision. The Decision conceals the egregiousness of the fact that Plaintiff had no pre-suspension hearing by almost making it appear in its recitation that she did not oppose or challenge Casella's May 8, 1990 and January 25, 1991 Orders to Show Cause for her suspension as violative of her constitutional rights until after she was suspended [R-7-8]. That this is not the case may be seen from the many specific material allegations of the Complaint reflecting that she vigorously contested both Orders to Show Cause. Indeed, the only paragraphs of Plaintiff's Rule 3(g) Statement [R-454] admitted by Defendants relate to Plaintiff's having challenged each of the aforesaid two Orders to Show Cause [R-626-7: ¶¶2, 4].

York's attorney disciplinary law, as written, by claiming, with boiler-plate ease, that it was "inextricably intertwined" and "would necessarily involve direct, or at a minimum indirect, review of the propriety of...state court decisions" [R-17]. This, notwithstanding Feldman makes clear that lower federal courts have subject matter jurisdiction over constitutional challenges to court promulgated rules governing attorneys generally, which it viewed as not judicial, but legislative in nature. The Complaint's First Cause of Action [R-83-87] specifically challenges the Second Department's disciplinary court rules as unauthorized substantive law-making.

Feldman distinguishes the Rooker doctrine and holds it inapplicable to state court decisions involving bar rules of general application. Obviously, a general challenge normally emerges from a specific case involving an aggrieved attorney or applicant for admission, without which state defendants would doubtless raise an objection based on standing. Moreover, Feldman makes clear that a prerequisite to federal lower court subject matter jurisdiction is that the federal constitutional questions have first been raised in the state courts so as to afford them a first opportunity to interpret the state law and rules alleged to conflict with federal constitutional rights. As recognized by the District Judge [R-15], Plaintiff exhausted every available remedy in the state forum for review of her constitutional challenge to the state attorney disciplinary law, as written and as applied, including a Petition for a Writ of Certiorari to the U.S. Supreme Court.

This Circuit has acknowledged the prevailing confusion as to the meaning of "inextricably intertwined" in its recent decision, Moccio v. NYS Office of Court Administration, 95 F.3d 195, 198 (2d Cir. 1996), stating:

> "the Supreme Court has provided us with little guidance in determining which claims are 'inextricably intertwined' with a

prior state court judgment and which are not...The result has been inconsistency in the lower federal courts faced with challenges based upon the Rooker-Feldman doctrine."

The extraordinary allegations of Plaintiff's Complaint provide this Circuit with a clear opportunity to explore and define the availability of federal redress when state courts utilize facially unconstitutional statutory and court rule provisions, which to the extent they provide due process safeguards, the state courts flout, for ulterior, politically-motivated reasons.

Moreover, it appears from the decisional law and texts dealing with the Rooker doctrine that there has been no recognition that at the time such doctrine was articulated in 1923, there was obligatory jurisdiction by the U.S. Supreme Court over decisions rendered by the highest state courts, holding valid a state law challenged as inconsistent with federal law, Stern, Gressman, Shapiro Supreme Court Practice, 6th Edition (1986), at 30, fn. 80. However, such obligatory jurisdiction was eliminated in 1925 as to "a final judgment...rendered or passed by the highest court of a state in which a decision could be had...where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution...or laws of the United States", Judiciary Act of 1925 (43 Stat. 936, 937). Plainly, from that time on the Rooker doctrine needed reformulation in light of the drastically changed circumstances as to the absolute right of review by the Supreme Court in such cases as involved state court decisions upholding state action as against asserted federal rights.

Moreover, today, the continued standard pretense that the U.S. Supreme Court is, in any practical sense, geared to review meritorious petitions for certiorari coming to it from highest state courts flies in the face of the statistical reality. In the 1994 Supreme Court term, when Plaintiff filed her Petition for a Writ of Certiorari [R-303], the Court

had over 8,000 cert. petitions on its docket and accepted only 77 cases for such discretionary review. See, Statistical Sheet No. 28 of the U.S. Supreme Court, dated June 28, 1995.

It is noteworthy that the District Judge uses Plaintiff's Article 78 constitututional challenge as a bar to her federal action, without adjudicating the central issue raised by Plaintiff as to the fundamental constitutional violation, reflected by her Complaint, that the Second Department was disqualified from adjudicating a proceeding to which they were a named party and had an interest. This glaringly contrasts with his decision in Rameau v. NYS Dept. of Health, 741 F.Supp. 68, 70 (1990), wherein the District Judge acknowledged:

> "...although a judgment in a prior Article 78 proceeding is not a bar to a subsequent federal civil rights action[41], the federal plaintiff is precluded from relitigating issues that were fully and fairly litigated..."

As detailed in Point II of Plaintiff's Petition for a Writ of Certiorari [R-331-334], the most fundamental component of due process, without which full and fair adjudication is impossible, is an impartial tribunal. This is so basic that the District Judge surely did not have to rely on the cases cited by Plaintiff for that self-evident proposition [R-332]. However, also identified therein [R-333], supported by the Second Department's own decision in Colin v. Appellate Division, First Dept., 3 A.D.2d 682, 159 N.Y.S.2d 99 (2nd Dept. 1957), citing Smith v. Whitney, 116 U.S. 167 (1886), is that there is no jurisdiction for judges in one

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[41] The District Judge includes a pertinent footnote on this point:

> "The doctrine of claim preclusion, which bars relitigation of causes of action, does not apply where the initial forum did not have the power to award the full measure of relief sought in the subsequent litigation. See Davidson v. Capuano, 792 F.2d 275, 278 (2d Cir. 1986). Since damages for civil rights violations are not recoverable in an Article 78 proceeding, a judgment resulting from such proceeding will not bar a subsequent federal action seeking that relief..."

Appellate Division to adjudicate Article 78 proceedings brought against judges of another Appellate Division because the historic genesis for such proceedings, codified by the common law writs of certiorari, mandamus, and prohibition, requires adjudication by a higher tribunal.

As pleaded in ¶178 of the Complaint [R-74], the Attorney General opposed transfer of Plaintiff's Article 78 proceeding from the Second Department and did so "without any legal authority". Defendants' Answer skipped over that material allegation [R-121], a fact specifically brought to their attention in Plaintiff's "Critique" [R-296], transmitted to the Attorney General's office on May 25, 1995 [R-178]. Defendants took no corrective steps. Consequently, their failure to deny that pivotal allegation can only be viewed as deliberate and must be deemed admitted under Fed.R.Civ.P. 8(d). Yet, just as Defendants cited no legal authority for an Article 78 proceeding to be adjudicated by the very judges whose unlawful and unconstitutional conduct is being challenged therein, so too the District Judge has provided no law and no interpretation permitting such monstrous subversion of the Article 78 remedy.

Thus may be seen that the District Judge's granting of summary judgment to Defendants rests on obliteration and misrepresentation of the material allegations of the Complaint, obliteration and misrepresentation of the explicit requirements of New York's attorney disciplinary law and the statutory provisions relating to Article 78, and upon absolutely no evidence whatever.

CONCLUSION

The Decision and Judgment appealed from should be reversed as a matter of law, with summary judgment as to liability granted to Plaintiff, with remand for assessment of damages, monetary penalties and sanctions against Defendants and their counsel, personally, including a

counsel fee award; Defendants should be enjoined from further enforcement of the June 14, 1991 "interim" Suspension Order and the judicial Defendants from all further action on any and all matters before them in which Plaintiff is involved, which should be transferred to another Judicial Department; the attorney disciplinary law of the State of New York and, in particular, Judiciary Law §90(2) and (10), as well as related court disciplinary rules, 22 NYCRR §691.4, §691.4(l)(1) and §691.13(b)(1), should be declared unconstitutional for reasons set forth herein and in Plaintiff's Petition for Writ of Certiorari to the U.S. Supreme Court [R-303]. All Defendants, their counsel, as well as the District Judge, should be referred for disciplinary and criminal action based upon their filing of false, fraudulent, and deceptive instruments, obstruction of justice, collusion, corruption, and other official misconduct.

White Plains, New York
January 10, 1997[42]

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[42] This date marks exactly six years to the day from Plaintiff's January 10, 1991 letter, referred to in ¶83 of the Complaint [R-47] as delineating to Casella the jurisdictional and due process infirmities of, as well as other material errors in, the Second Department's October 18, 1990 Order.