96-7805

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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-Appellees.

REPLY BRIEF

DORIS L. SASSOWER
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914-997-1677

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

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INTRODUCTORY STATEMENT

This Reply Brief[1] demonstrates the bad-faith and frivolous nature of Defendants' Appellees' Brief[2] and Plaintiff's entitlement to maximum sanctions under all applicable statutory and rule provisions, 28 U.S.C. §1927, Fed.R.Civ.P. Rule 11, F.R.A.P. Rules 31 and 38, as well as criminal and disciplinary referral of Defendants and their counsel, the New York State Attorney General, himself a Defendant. On this appeal, Defendants are represented by Assistant Attorney General Jay Weinstein, who defended them before the District Judge and whose flagrant, unremitting, and unadjudicated litigation misconduct is detailed in Plaintiff's Appellant's Brief, with record references -- most particularly, in her 18-page recitation of the "Course of the Proceedings before the District Court" (Br. 12-30) and in her Point II (Br. 38-50).

Such documented litigation misconduct before the District Judge, rising to the level of fraud upon the court, is entirely undenied and undisputed by Mr. Weinstein and is, in fact, indisputable. This includes: (a) his dismissal motion which knowingly misrepresented and obliterated the material pleaded allegations of the Complaint and controlling law; (b) his Answer which was false and in bad-faith in its responses to more than 150 of the Complaint's allegations; (c) his unsubstantiated opposition to Plaintiff's summary judgment application; (d) his consistently false and misleading letters and oral advocacy; and (e)

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[1] This Reply Brief is without prejudice to Appellant's position that Appellees' Brief is not properly before the Court for all the reasons set forth in her accompanying April 1, 1997 motion.

[2] Hereinafter referenced as "Op. Br." to indicate Appellees' Opposition Brief. Plaintiff's Appellant's Brief is herein abbreviated as "Br.", with "R-" designating the Record on Appeal.

his refusal to take corrective steps, when his misconduct was evidentiarily demonstrated to him.

Without more, the magnitude and extent of Mr. Weinstein's willful misconduct before the District Judge is dispositive of Plaintiff's absolute right to reversal, with severest sanctions against Defendants, their counsel, and against Mr. Weinstein personally. Consequently, Mr. Weinstein should have had the sense to slink into a dark corner, never to be heard from again -- particularly in view of his citation (Op. Br. 14) to Gentner v. Shulman, 55 F.3d 87 (2d Cir. 1995), albeit for other purposes. In that case, this Court stated (at 89):

> "A trial judge is required to take measures against unethical conduct occurring in connection with any proceeding before him. Musicus v. Westinghouse Elec. Corp, 621 F.2d 742, 744 (5th Cir. 1980). It is the duty and responsibility to disqualify counsel for unethical conduct prejudicial to counsel's adversary. Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975).

Instead, Mr. Weinstein, whose Brief also does not deny or dispute any of the facts detailed by Appellant as to the aberrant course of the proceedings before the District Judge and that his Decision is factually dishonest and legally insupportable in every material respect (Br. 31-75) -- likewise dispositive of her absolute right to reversal, with criminal and disciplinary referral of the District Judge -- proceeds to argue for its affirmance. In so doing, Mr. Weinstein ignores the facts, as documented by the Record and presented with controlling law in Appellant's Brief. Indeed, Mr. Weinstein nowhere even refers to the Brief. Nor does he identify or address a single one of her appellate arguments[3].

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[3] Mr. Weinstein's Brief refers only to Plaintiff's Record on Appeal, which he calls an "Appendix" (Op. Br. 2). Upon examination of the District Court docket, Plaintiff has learned that omitted from her Record on Appeal was the District Judge's so-ordered September 13, 1995 letter of Mr. Weinstein [R-711], which was never sent to her and of whose existence she was unaware. That letter -- and Plaintiff's

As hereinafter shown, Mr. Weinstein repeats on this appeal the identical pattern of his misconduct before the District Judge: falsifying, obfuscating, and omitting the material allegations of the Complaint, the nature and content of the submissions before the District Judge, and the controlling law relative thereto to mislead and deceive the Court.

Such appellate misconduct by Mr. Weinstein, making a mockery of the ABA Model Rules of Professional Conduct: Rule 3.1 "Meritorious Claims and Contentions" and Rule 3.3 "Candor Toward the Tribunal", is all the more egregious when committed by a government attorney, particularly in a case involving readily-verifiable corruption by state officials, including high-ranking state judges. Yet, Mr. Weinstein's appellate misconduct is not his alone, but is also chargeable to his superiors and the Attorney General. They were on notice both before and after Appellant filed her Brief that there was no legitimate defense to this appeal and that the Attorney General's duty was not only not to oppose the appeal, but to affirmatively join in it, as well as to undertake a Rule 60(b)(3) motion to vacate for "fraud..., misrepresentation, and other misconduct" of Defendants by their counsel -- their own Assistant Attorney General Weinstein.

Appellant gave such notice at the November 8, 1996 Pre-Argument Conference, which Mr. Weinstein failed and refused to attend, with the Attorney General's office claiming he was not handling the appeal and

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response to it -- is described at pp. 19-20 of her Brief. It is unknown whether the District Judge's so-ordering of Mr. Weinstein's letter on September 19, 1995 was before or after Plaintiff telephoned the District Judge's Clerk that morning to apprise the Court that her September 18, 1995 opposition letter [R-712] was en route. However, the hostile and intimidating response of the Clerk, as recounted by Plaintiff's September 19, 1995 letter to the District Judge [R-728], should be seen in the context of his so-ordering Mr. Weinstein's September 13, 1995 letter. As reflected by the transcript of the proceedings on September 26, 1996, the District Judge made no mention of his so-ordering Mr. Weinstein's letter, notwithstanding that letter was discussed and handed up to him [R-682].

sending in his stead an assistant attorney general who knew nothing about the case. Appellant reiterated that notice in a January 14, 1997 letter to Attorney General Vacco, a copy of which she thereafter provided to the Chief of the Attorney General's Litigation Bureau. Notice was also encompassed in Appellant's two applications for sanctions against Mr. Weinstein and the Attorney General's office for subverting the appellate case management process, whose salutary purpose is to narrow, if not eliminate, the issues on appeal. The Attorney General simply turned his back on his duty to ensure the integrity of his office's conduct in these federal proceedings -- much as his predecessor turned his back when his office subverted the integrity of Appellant's state court Article 78 proceeding by its fraudulent defense [R-70-83: ¶¶166-170, 173-178, 182-191, 195-196, 198-209. As the Complaint reflects [R-27: ¶10], it is the Attorney General's misconduct in the Article 78 proceeding which has resulted in his being named a party defendant herein.

It would seem obvious that the fact that the Attorney General is himself a party defendant is a factor preventing his office from professionally and ethically conducting itself at every stage of these federal proceedings: (1) before the District Judge; (2) in the appellate case management phase before Staff Counsel; (3) and now before this Court. Yet, Mr. Weinstein and the Attorney General's office have consistently refused to confront the issue of the propriety of the Attorney General's representing the Defendants herein, notwithstanding the Attorney General and his Assistants would be called as necessary witnesses to events relating to its defense of Appellant's Article 78 proceedings. As cited in Ceramco, Inc. v. Lee Pharmaceuticals, supra, at 270, Canon 5 of the Code of Professional Responsibility, DR 5-101(B) states:

"A lawyer shall not accept employment in contemplated or

pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness..."

The four enumerated exceptions to DR 5-101(B) are inapplicable. This includes DR 5-101(B)(4) relating to the hardship created by the refusal because of "the distinctive value of the lawyer or his firm as counsel". As the record herein overwhelmingly demonstrates, the only "distinctive value" of the Attorney General's representation of Defendants has been his readiness -- and that of his staff -- at every juncture to engage in outright fraud, misrepresentation, and other misconduct -- with impunity.

ARGUMENT

A. MR. WEINSTEIN'S FALSE AND MISLEADING "PRELIMINARY STATEMENT"

Mr. Weinstein's "Preliminary Statement" (Op. Br. 1-2) does not identify that Defendants, sued in their official, as well as individual capacities, are being defended in both those capacities by the Attorney General's office[4]. This is a significant omission because in Mr. Weinstein's Point III-A (Op. Br. 20-23) on the Eleventh Amendment, he falsely makes it appear, much as he had in his dismissal motion [R-149-151; cf., R-470-471], that Defendants are being sued in their official capacities alone -- which is not the case. Such obliteration, likewise reflected by the District Judge's Decision [R-20], is echoed by the third of Mr. Weinstein's "Questions Presented for Review" (Op. Br. 3).

Mr. Weinstein then repeats the Judgment's disposition as denying Plaintiff's "cross-motions" for a preliminary injunction, summary judgment, and reargument -- even though Appellant's Brief meticulously detailed what the Record documentarily establishes, that no "cross-motions"

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[4] The Attorney General has not shown the authority by which he is representing Defendants herein in either capacity.

were ever made by Plaintiff, who sought summary judgment by way of the conversion authorized by Rule 12(c) [R-168(b), Br. 61-62], moved, by Order to Show Cause, for a Preliminary Injunction [R-488, Br. 50-56], and, by Notice of Motion, sought reargument, reconsideration, and renewal of the District Judge's denial of recusal [R-743, Br. 29].

Conspicuously, at the same time as Mr. Weinstein perpetuates the District Judge's fabrication that Plaintiff made "cross-motions", he is careful to omit the Judgment's simultaneous reference to Defendants' non-existent "motion for summary judgment" [R-2]. Indeed, nowhere in his Brief does Mr. Weinstein identify anything about the mechanics by which summary judgment was granted to Defendants. As detailed in Appellant's Brief (Br. 58-59, 64-65), and undenied by Mr. Weinstein, the District Judge converted, sua sponte, and without notice, his dismissal motion to one for summary judgment in Defendants' favor -- based on a misrepresentation of the record as to "voluminous affidavits", which do not exist as to Defendants -- and in the face of Mr. Weinstein's disclaimer of any intention of moving for summary judgment [R-783, ln. 25]. This is over and apart from the record before the District Judge showing that Mr. Weinstein's dismissal motion, Answer, and his oral advocacy thereon -- were fraudulent and sanctionable (Br. 38-50).

B. MR. WEINSTEIN'S FALSE AND MISLEADING "COUNTER-STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION"

Mr. Weinstein's "Counter-Statement" (Op. Br. 2)omits from his recitation of the statutory and constitutional provisions by which Plaintiff's Complaint invoked federal subject matter jurisdiction 42 U.S.C. §1988 and the Sixth and Eighth Amendments of the Constitution of the United States. This, notwithstanding Appellant's "Jurisdictional Statement" (Br.

1) cites them, with an accompanying record reference to the Complaint [R-27].

Considering the pertinent allegations of the Complaint that the Second Department is not a fair and impartial tribunal and that its Order suspending Plaintiff's law license, issued in a protracted and suspect time frame, was without written charges, without findings, without reasons, and without a pre- or post-suspension hearing -- all of which allegations Mr. Weinstein also deletes from his Brief -- the Sixth Amendment guarantees are particularly relevant in the context of the U.S. Supreme Court's designation of attorney disciplinary proceedings as "quasi-criminal", In re Ruffalo, 390 U.S. 544, 551 (1968).

Likewise, the Eighth Amendment prohibition against "cruel and unusual punishments" is especially germane to the Complaint's First Cause of Action challenging the constitutionality of 22 NYCRR §691.4(l), the Second Department court rule under which Plaintiff was suspended, which permits the draconian penalty of "interim" suspension of an attorney's license based on a "failure to comply", where such failure it is not in bad-faith or deliberate, as in Plaintiff's case [R-84, 86-87] and where, further, she contested the aforesaid accusation, barring invocation of the rule, by its express terms (See fn. 10, infra). Elsewhere in his Brief (Op. Br. 4-5), Mr. Weinstein also misrepresents the court rule under which Plaintiff has been suspended as 22 NYCRR §691.13(b)(1) -- repeating a pivotal misrepresentation of the Decision (R-7), so identified in Appellant's Brief (Br. 56).

Additionally, Mr. Weinstein, in reciting that Plaintiff "Appeals from the judgment, dated May 24, 1996, dismissing the complaint", inserts what is not reflected by the Judgment [R-2-3], to wit, "The federal district court lacked subject matter jurisdiction to hear plaintiff's

claims based on Rooker-Feldman and collateral estoppel[5]" (Op. Br. 2). This conclusory insertion is designed to mislead this Court, inasmuch as Mr. Weinstein well knows that Rooker-Feldman and collateral estoppel require the existence of predicate facts, here absent. Those facts are: a valid state court order, with subject matter and personal jurisdiction over the parties and a full hearing, with a judgment responsive to the issues. Such requirements were prominently discussed in Plaintiff's Memorandum of Law in opposition to Mr. Weinstein's dismissal motion and in support of her summary judgment application [R-472-476], quoting from Rooker v. Fidelity Trust Co., 263 U.S. at 413, 415 (1923), with citation to other decisional law of the U.S. Supreme Court and the federal courts, Allen v. McCurry, 462 U.S. 90, 95 (1980), Haring v. Prosise, 462 U.S. 306, 313 (1983), Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), vacated on other grounds, 91 L.Ed.2d 56, cited with approval by Stone v. Williams, 766 F. Supp. 158, 162 (S.D.N.Y. 1991), aff'd., 970 F.2d 1043 (1992), cert denied, 124 L.Ed.2d 243. Kremer v. Chemical Construction Corp., 456 U.S. 461, 480 (1982). The applicability of such prerequisites[6] were undenied and undisputed by Mr. Weinstein before the District Judge and, in turn, by the District Judge in his Decision.

On appeal, Mr. Weinstein again does not challenge their applicability, albeit Appellant's Brief highlighted their significance (Br. 65-67). Instead, his Point I on Rooker-Feldman (Op. Br. 13-16) argues

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[5] Nowhere in the Decision does the word "collateral estoppel" appear, but, rather res judicata [R-5, 17-18].

[6] See also Ritter v. Ross, 992 F.2d 750, 752 (7th Cir. 1993), cert. denied, 510 U.S. 1046 (1994) cited in Moccio v. New York State Office of Court Administration, 95 F.3d 195, 198 (2d Cir. 1996).

without reference to them[7]. As to his Point II on res judicata/collateral estoppel (Op. Br. 16-20), Mr. Weinstein, while purportedly recognizing the requirement of "a full and fair opportunity to litigate", argues -- without any legal authority for what constitutes a "full and fair opportunity to litigate" in "quasi-criminal" attorney disciplinary proceedings[8] -- that Plaintiff was afforded "a full and fair opportunity" -- a finding nowhere made by the District Judge and overwhelmingly rebutted by the uncontroverted record. Indeed, the District Judge's Decision fails to identify any of the prerequisites for invocation of either Rooker-Feldman or res judicata [R-14-18] -- or the minimum due process standards governing attorney disciplinary proceedings, without which an attorney's federally-guaranteed constitutional rights are violated by the state, as they blatantly were in the case at bar.

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[7] The inapplicability of Rooker-Feldman to Plaintiff's case means that Plaintiff does not have to avail herself of a "general challenge exception". Needless to say, however, Mr. Weinstein's boiler-plate claim in two conclusory sentences at Point I of his Brief (Op. Br. 15-16) that "plaintiff's challenge to New York state disciplinary statutes, and the rules and regulations governing attorneys, do not fall within the general-challenge exception" ignores Plaintiff's analysis and specific arguments on the subject (Br. 71-74).

[8] See, Plaintiff's incorporated by reference cert petition, "Reasons for Granting the Writ" [R-326-329], as to the confusion existing, including in this Circuit, as to what due process is required in "quasi-criminal" attorney disciplinary proceedings, as well as for a transcript excerpt showing Defendants' rejection of such standard in favor of one that is civil [R-407]. See also, the pertinent case of Matter of Thalheim, 853 F.2d 383, 388 (5th Cir. 1988), quoted in Plaintiff's cert petition [R-340]

> "Attorney..suspension cases are quasi-criminal in character...Accordingly, the court's rules are to be read strictly, resolving any ambiguity in favor of the person charged. Moreover, the same principle of construction follows from the fact that it was the court that drafted these rules. The court wrote its own rules; it must abide by them."

C. **MR. WEINSTEIN'S FALSE AND MISLEADING "QUESTIONS PRESENTED FOR REVIEW"**

The first four of Mr. Weinstein's "Questions Presented for Review" (Op. Br. 3) are not properly before the Court absent adjudication of the fifth question, "Did the district judge properly deny plaintiff's motion for recusal?".

However, Mr. Weinstein's Brief (Op. Br. 26-27)not only fails to answer that question in the context of Plaintiff's specific factual and legal showing in Point I of her Brief (Br. 31-37) -- instead relying on a repetition of the District Judge's rebutted claims -- but it obscures the over-arching and broader recusal issue, presented by Plaintiff's "Issues Presented for Review". Phrased by Plaintiff and documented by the entirety of her Appellant's Brief, the issue is: "As evidenced from the course of the proceedings and the subject Decision, should the District Judge have recused himself for bias?"

As hereinabove set forth, Mr. Weinstein's Brief fails to deny or dispute any aspect of Plaintiff's documented recitation as to the aberrant course of the proceedings before the District Judge (Br. 12-31) and the factually fabricated and legally insupportable nature of his Decision (Br. 31-75), which it thereby concedes. This obviates any need to address his first four questions, which, in view of the posture of the case before the District Judge, as demonstrated by Appellant's Brief, could not properly be ruled upon in Defendants' favor.

D. **MR. WEINSTEIN'S FALSE AND MISLEADING "STATEMENT OF THE CASE"**

Mr. Weinstein's Brief does not identify what his "Statement of the Case" (Op. Br. 3-12) is. In fact, its sub-headings "A" through "D" (Op. Br. 3-10) are none other than a verbatim regurgitation of the Decision's "Background" section [R-5-12], which he reformats with minor

changes. Mr. Weinstein does this notwithstanding he does not deny or dispute the documentary showing in Plaintiff's Brief (Br. 65-67, fn. 37), including by her Appendix contained therein, that the Decision's "Background" [R-5-12], like his dismissal motion (Br. 14-15; R-127), had hop-scotched through the Complaint so as to delete all allegations of Defendants' jurisdiction-less, law-less, fraudulent, biased, and retaliatory conduct. Indeed the express purpose of the Appendix was to demonstrate, line-by-line, the deliberateness with which the Decision had sheared from the Complaint those pivotal allegations vitiating pleading defenses based on Rooker-Feldman, res judicata, immunity and Eleventh Amendment.

Thus, Mr. Weinstein's "Statement of the Case", relying on the District Judge's dishonest "Background" section, obliterates **ALL** the following pivotal allegations of the Complaint, highlighted at 5-11 of Appellant's Brief under the heading "The Verified Complaint", and whose legal significance is developed in its ensuing pages:

> (1) that the Second Department had a pre-existing bias against Plaintiff, reflected by its transfer to the First Department of a prior disciplinary proceeding it had authorized against her. The First Department dismissed that proceeding, giving Plaintiff leave to seek sanctions against her prosecutors in the Second Department. This resulted in the Second Department, thereafter, refusing to transfer any matters involving Plaintiff and targeting her for disciplinary prosecution (Br. 5-6);
>
> (2) that the Second Department was further motivated by ulterior, political considerations in authorizing disciplinary prosecutions against Plaintiff and in suspending her license: forcing her to stop her judicial whistle-blowing activities and her Election Law challenge to the political manipulation of state judgeships by the major parties, which she was engaged in when it suspended her (Br. 5-8, 67);
>
> (3) that the Second Department's authorization of bogus disciplinary proceedings against Plaintiff and its fraudulent suspension of her license violated express jurisdictional and due process requirements of 22 NYCRR §691.4, et seq. and

Judiciary Law §90, which it concealed by misusing the confidentiality provision of Judiciary Law §90 (Br. 6);

(4) that the Second Department's June 14, 1991 "interim" Order suspending Plaintiff's license was without written charges, without reasons, and without findings, and that, by reason thereof, it was without jurisdiction to issue and perpetuate such Order, which it nonetheless did, without affording Plaintiff either a pre- or post-suspension hearing (Br. 5);

(5) that the Second Department was required to immediately vacate its finding-less suspension of Plaintiff's license under controlling law of the New York Court of Appeals: Matter of Nuey, 61 N.Y.2d 513 (1984) [R-528], reiterated in Matter of Russakoff, 79 N.Y.2d 520 (1992) [R-529]; wherein the New York Court of Appeals recognized, respectively, that there is no statutory authority for interim suspension orders and that 22 NYCRR §691.4(l) (the rule under which Plaintiff was suspended) is constitutionally infirm in failing to provide for a prompt post-suspension hearing (Br. 8, 9);

(6) that all the Second Department's orders denying Plaintiff's post-suspension vacatur motions were without reasons -- notwithstanding her a fortiori showing of entitlement based on Nuey and Russakoff and by reason of Casella's fraud -- and likewise, its orders denying Plaintiff leave to appeal to the New York Court of Appeals and other relief were without reasons (Br. 8-9);

(7) that Casella blocked appellate review by the New York Court of Appeals of the Second Department's Suspension Order by his fraudulent claim that the unrelated February 6, 1990 disciplinary petition was an "underlying" proceeding" to the Suspension Order -- which fraudulent claim he had used to procure the suspension (Br. 9, 7);

(8) that Defendants subverted Plaintiff's Article 78 proceeding, in which she was suing the Second Department, by unlawfully opposing transfer to another Judicial Department and permitting the Second Department to collusively decide its own case -- which it was without jurisdiction to do (Br. 10, 74-75);

(9) that the Second Department's dismissal of Plaintiff's Article 78 proceeding relied on the fraudulent claim of its attorney, the New York State Attorney General, that she was not entitled to Article 78 relief because her jurisdictional challenge could be addressed in the disciplinary proceeding -- which Defendants knew to be false (Br.10);

(10) that subsequent to the Second Department's dismissal of Plaintiff's Article 78 proceeding, the judicial Defendants continued their refusal to address Plaintiff's jurisdictional challenges in the disciplinary proceedings, much as they had prior thereto (Br. 10).

Additionally, Mr. Weinstein's Brief (Op. Br. 4), in identical fashion to the Decision's "Background", deceitfully continues to foster the misimpression that there is some connection between the February 6, 1990 disciplinary petition and the June 14, 1991 Suspension Order. This is precisely what Mr. Weinstein had done on his dismissal motion and in his oral advocacy -- a fact over and again highlighted by Plaintiff's Brief, which noted the purpose served by the District Judge's failure to address such misconduct:

> "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 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 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."

As Plaintiff pointed out in opposing Mr. Weinstein's dismissal motion [R-463-465] as well as in her Appellant's Brief (Br. 43-49, 69), the reason for concealing and misrepresenting the fact that the Suspension Order was unrelated to the factually and legally baseless February 6, 1990 disciplinary petition was because to do otherwise would expose that Defendants had acted wholly without jurisdiction in suspending Plaintiff and had perpetrated a knowing and deliberate fraud in so doing. This would destroy their Rooker-Feldman, res judicata, and immunity defenses -- a legal argument undenied by Mr. Weinstein before the District Judge and now again on the instant appeal.

Mr. Weinstein's Brief (Op. Br. 5) also repeats the explicitly

rebutted claim from the Decision's "Background" [R-7] that Plaintiff was suspended under 22 NYCRR §691.13(b)(1). It does this notwithstanding Appellant's Brief (Br. 56) expressly pointed out such error in the Decision, highlighting that Plaintiff's Order to Show Cause for a Preliminary Injunction/TRO [R-494, ¶8; R-500, ¶10] made very clear that the Suspension Order was issued under 22 NYCRR §691.4(l) -- a fact further reflected by the face of the Suspension Order itself, annexed to the Order to Show Cause [R-514], much as it was also annexed to the Complaint [R-96]. Indeed, Plaintiff's Brief (Br. 56) had suggested that the reason the District Judge misrepresented the very rule under which Plaintiff was suspended was to avoid having to confront the constitutional infirmity of 22 NYCRR §691.4(l), recognized in Russakoff [R-531], citing Barry v. Barchi, 443 U.S. 55, 66-68 (1979), Gershenfeld v. Justices of Supreme Court, 641 F. Supp. 1419 (E.D. Pa. 1986), based on that rule's failure to provide "interimly" suspended attorneys with a prompt post-suspension hearing. In identical fashion to the Decision [R-8], Mr. Weinstein (Op. Br. 7) obscures the significance of Russakoff.

Further, notwithstanding the Complaint [R-24, ¶3] alleged that the Suspension Order was "unconditional" -- an indisputable fact also reflected on the face of the Order [R-96] and reiterated in the Brief (Br. 5), Mr. Weinstein repeats the District Judge's false claim [R-7] that Plaintiff's suspension was "pending her compliance" with the October 18, 1990 order directing her medical examination. The falsity of such claim was detailed at page 3 of Appellant's Appendix to her Brief, in the same paragraph that highlighted the falsity of the District Judge's misstatement as to the court rule under which Plaintiff was suspended.

Additionally, Mr. Weinstein's Brief recites (Op. Br. 7-8), much as the District Judge did [R-11], that the Suspension Order became "final"

when the New York State Court of Appeals denied review of Plaintiff's Article 78 proceeding. For such proposition, it, like the District Judge, cross-references the first page of Plaintiff's cert petition and includes a footnote that is verbatim identical to footnote 2 of the District Judge [R-11]. Yet, the first page of Plaintiff's cert petition [R-314] clearly states that the order that became "final" upon the New York's Court of Appeals' denial of review of the Second Department's dismissal of Plaintiff's Article 78 proceeding was the Second Department order dismissing the Article 78 proceeding. There is no mention whatever of the Suspension Order. Nor do any other pages of Plaintiff's cert petition assert that the Suspension Order became final. The June 14, 1991 Order was and remains a non-final and unconditional "interim" order.

E. MR. WEINSTEIN'S TELLING DEVIATIONS FROM THE DECISION'S "BACKGROUND"

1. Mr. Weinstein Omits Any Presentation, Let Alone Discussion of New York's Attorney Disciplinary Law and the Constitutional Issues Raised:

Notwithstanding Mr. Weinstein "Statement of the Case" repeats the District Judge's false and misleading "Background" section of his Decision insofar as it purports to recite the factual allegations of the Complaint, it deletes the District Judge's prefatory paraphrase [R-5-6] of Judiciary Law §90(2) and 22 NYCRR §691.4, et seq. [R-346-352] -- which Appellant's Brief also exposed as false and misleading (Br. 69-71).

To be sure, Mr. Weinstein's "Statement of the Case", by its cross-references to the Record on Appeal, implicitly purports to track the allegations of the Complaint. Yet, it omits all the Complaint's allegations interpreting the explicit jurisdictional and due process requirements of Judiciary Law §90 and 22 NYCRR §691.4, et seq., violated by the judicial and Grievance Committee Defendants, and the significance

of Nuey [R-528] and Russakoff [R-529][9]. Nor does Mr. Weinstein's "Statement" provide its own interpretation. Likewise omitted are all the Complaint's allegations detailing the basis for Plaintiff's general challenge to the constitutionality of New York's attorney disciplinary law -- including the fact that the court-promulgated rules are not judicial acts, but legislative in nature, District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), and that 22 NYCRR §691.4(l) is statutoriy unauthorized, and is, on its face, unconstitutional (See Br. 71-73).

Mr. Weinstein's failure to provide any discussion of New York's attorney disciplinary law as part of his "Statement of the Case" (Op. Br. 3-12), let alone integrate it into his distortion of the allegations of the Complaint, reflects that he cannot do so without conceding that it is unconstitutional, as written and as applied to Plaintiff. This replicates his failure before the District Judge, to whom he deferred for interpretation of the New York state statute, the Second Department court rules, and Nuey and Russakoff (Br. 14, 15, 55-56, 68, 70-71). As Appellant's Brief pointed out, such deference is in palpable bad-faith: Defendants are charged with the duty to enforce New York's attorney disciplinary law and the court rules at issue were promulgated by the Second Department. Plainly, they know how to interpret the state law and their assertion of deference to the federal court precludes them from arguing that they have complied with their requirements.

In fact, neither before the District Judge nor on this appeal, do Defendants even claim to have complied with the requirements of New York's attorney disciplinary law. Nor have they shown that it satisfies

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[9] Plaintiff's opposition to Mr. Weinstein's dismissal motion [R-483-485] argued that the "clearly established" requirements of New York's attorney disciplinary law vitiate a "qualified" immunity defense.

the three-part test for evaluating the constitutionality of procedures affecting liberty and property interests, as articulated by U.S. Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), reiterated in Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994), or the "the minimum procedural requirements of the Fourteenth Amendment's Due process Clause in order to qualify for the full faith and credit guaranteed by federal law." Kremer, supra, 456 U.S. at 481. Kremer, as well as Allen v. McCurry, supra, are cited by Mr. Weinstein (Op. Br. 16) -- but for propositions other than due process.

2. Mr. Weinstein's Other Legally Significant Departures from the Decision's "Background"

Mr. Weinstein's other departures from the District Judge's "Background" are of telling significance. They reinforce the unconstitutionality of New York's attorney disciplinary law, as particularized in Plaintiff's cert petition [R-326-342] and supported by this Court's decision in Valmonte v. Bane, supra. Thus, Mr. Weinstein modifies the District Judge's characterization that "Sassower refused to comply with the October 18, 1990 order" [R-7] -- which Appellant's Appendix (at 2) showed was not only factually unsupported by the Complaint, but explicitly denied by its allegations -- to the milder "She failed to comply with that order" (Op. Br. 4). With such change, Mr. Weinstein erodes an element critical to the District Judge's Decision and highlights Plaintiff's allegation in her Complaint [R-86], reinforced in her cert petition [R-341], that 22 NYCRR §691.4(l) is unconstitutional in that it "contains no requirement of wilfulness or mala fides in connection with the act(s) constituting a basis for interim suspension." [R-341].

Secondly, as noted by footnote 40 of Appellant's Brief (Br.

71), the Decision's "Background" [R-6-7] concealed the egregiousness of the fact that the Second Department suspended Plaintiff without a pre-suspension hearing, which 22 NYCRR §691.4(l) also does not require, by omitting from its recitation those allegations of the Complaint that she had vigorously contested Casella's May 8, 1990 Order to Show Cause for her medical examination, as well as his January 25, 1991 Order to Show Cause for her immediate suspension for failure to comply with the October 18, 1990 Order. Appellant's Brief pointed out that these were the only two paragraphs of her Rule 3(g) Statement [R-545] admitted by Defendants' Statement in Opposition [R-626][10].

Thus, Mr. Weinstein's "Statement of the Case" (Op. Br. 4-5) inserts the following two sentences: "Plaintiff filed a cross-motion to dismiss in opposition to the Grievance Committee's [May 8, 1990] application (A.211-213, 373-374)." and "On January 28, 1991, plaintiff filed a show cause order of her own in opposition to the Grievance Committee's application and for further relief (A.217-219, 366-367)". The reason he does this becomes obvious from his Point II argument on res judicata/collateral estoppel(Op. Br. 19-20) where, without the slightest legal authority, he puts forward the claim that Plaintiff had a "full and fair opportunity to litigate" her suspension. It would appear that Mr. Weinstein takes the view that Plaintiff, having controverted the basis for her suspension, on papers -- itself precluding invocation of the rule (See fn. 10, supra) -- was not entitled to either a pre- or post-suspension hearing. Such grotesque view, for which Mr. Weinstein provides no legal

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[10] This concession is fatal and dispositive. The explicit provisions of 22 NYCRR §691.4(l) [R-349] are inapplicable unless the accused attorney (I) has defaulted; (ii) "made a substantial admission under oath", or (iii) there is "other uncontroverted evidence of professional misconduct".

authority, is belied by Russakoff [R-531], citing Barry v. Barchi, supra, and Gershenfeld v. Justices of Supreme Court, supra, whose significance Mr. Weinstein, here as on his dismissal motion, does not address, let alone distinguish.

F. MR. WEINSTEIN'S NON-EXISTENT "COURSE OF THE PROCEEDINGS BEFORE THE DISTRICT JUDGE"

Following his subheading "E", "Sassower's District Court Action"(Op. Br. 10), summarizing the relief sought by Plaintiff in her already misrepresented Complaint, Mr. Weinstein makes the quantum leap to subheading "F", "The District Court Decision" (Op. Br. 11), which mentions only the relief the District Judge granted to Defendants. Nowhere in or between his "E" and "F" subheadings (Op. Br. 10-12) does Mr. Weinstein discuss the "course of the proceedings before the District Judge".

Mr. Weinstein's failure to craft a recitation of what took place before the District Judge is a concession that he cannot devise any presentation that would enable this Court to justify, procedurally, the District Judge's Decision. Indeed, Mr. Weinstein not only fails to construct a factual recitation, but fails to deny or dispute any of the facts detailed in Plaintiff's "Course of the Proceedings Before the District Judge" (Br. 12-30), reinforced with law at Points I-V of her Brief (Br. 31-75), in support of the over-arching issue she presented for review: the District Judge's disqualification for bias.

In that regard, of the five sub-issues presented by Plaintiff in her "Issues Presented for Review" -- all of which relate to the course of the proceedings before the District Judge, demonstrating a pattern of pervasive bias -- Mr. Weinstein's Brief (Op. Br. 26) addresses only the District Judge's denial of Plaintiff's Order to Show Cause for its recusal,

which it identifies only as a motion, and his denial of her motion for reconsideration.

Mr. Weinstein asserts that Plaintiff's recusal motion was "without any factual support", and "factually unsupported" (Op. Br. 26-27) -- a claim which even the District Judge never made [R-14] and whose flagrant untruth is belied by that motion [R-645]. A summary of the content of Plaintiff's recusal Order to Show Cause, as well as her reargument motion was set forth at Point I of Plaintiff's Brief (Br. 34-35). Such summary was provided to demonstrate the falsity of the District Judge's mischaracterizations of those motions in his Decision -- mischaracterizations which Mr. Weinstein blithely repeats virtually verbatim in the face of Plaintiff's exhaustive refutation of the District Judge's wrongful and pervasive bias which those motions document.

Likewise, Mr. Weinstein replicates (Op. Br. 27) the District Judge's false characterization that Plaintiff's recusal motion was "untimely" and that its assertion of judicial bias was nothing more than a "dissatisfaction with the court's rulings", rather than addressing any of Plaintiff's legal arguments in her Point I (Br. 31-38), showing its timeliness and sufficiency by analysis of cases, including the very ones Mr. Weinstein cites, without discussion, in his Appellees' Brief, Liteky v. United States, 510 U.S. 540 (1994), Apple v. Jewish Hospital and Medical Center, 829 F.2d 326 (2d Cir. 1987). Indeed, In Re International Business Machines Corp., 45 F.3d 641, 644 (2nd Cir. 1995), included by Mr. Weinstein for its citation to Liteky, makes observations as to the "extrajudicial source" doctrine/factor and that "judicial rulings alone can warrant recusal" which reinforce the analysis in Plaintiff's Brief (Br. 32-33).

G. MR. WEINSTEIN FAILS TO SUBSTANTIATE THE BASIS FOR AFFIRMANCE OF THE DECISION BY THE *DE NOVO* "STANDARD FOR REVIEW" HIS BRIEF ARTICULATES

In recognizing the de novo standard applicable to this Court's review of the District Judge's grant of summary judgment, Mr. Weinstein should have recognized that unless he could refute the facts and law presented by Appellant's Brief showing the Decision to be procedurally and substantively unsupported, insupportable, and knowingly dishonest, it was frivolous to oppose her appeal.

It is an abomination for Mr. Weinstein to pretend that summary judgment to Defendants can be affirmed on appeal, where he does not deny that it was granted sua sponte, without notice and opportunity to be heard. The clear language of Rule 12(c) and the controlling case law presented by Appellant at Point IV of her Brief (Br. 57-59)-- all unassailed by Mr. Weinstein -- show that the District Judge's without notice sua sponte conversion of Mr. Weinstein's dismissal motion to one for summary judgment in Defendants' favor cannot stand for that reason alone. This is over and apart from the fact that it cannot stand because the District Judge based his conversion on unidentified "voluminous affidavits", non-existent as to Defendants, and that such dismissal motion had been demonstrated by Plaintiff to be fraudulent and sanctionable -- together with his Answer and oral advocacy thereon -- also undenied by Mr. Weinstein's Brief.

Moreover, in conceding that "summary judgment should be granted when, viewing all the evidence in a light most favorable to the nonmoving party, there is no genuine issue of fact" (Op. Br. 13), Mr. Weinstein was obligated to address evidence. This he does not do. Appellant's Point V-A (Br. 61-64) particularized the evidence in the record and demonstrated that her legal and factual entitlement to summary judgment was completely

uncontroverted by Defendants[11]. Yet, Mr. Weinstein fails to confront such evidentiary and legal issues in any way. Likewise, he fails to confront those of Appellant's Point V-B (at 64-75), wherein she demonstrated that there was "not a scintilla of evidence" to support summary judgment to Defendants.

Appellant's Point V-B (at 64-75) argued that the specific allegations of her Complaint as to Defendants' jurisdiction-less, law-less, fraudulent, and retaliatory conduct, vitiated pleading defenses of Rooker-Feldman, res judicata, and immunity on a dismissal motion, and that summary judgment could not granted to them absent evidence that Defendants had jurisdiction, had 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. Yet, Mr. Weinstein does not deny or dispute that Defendants presented no such evidence -- not even a testimonial claim by Casella, the only Defendant to put in an affidavit, whose 2-1/4 page affidavit [R-630] Plaintiff made the basis of a sanctions application [R-734].

Consequently, it is in complete bad faith for Mr. Weinstein to make argument as to Rooker-Feldman, res judicata, and immunity defenses in his Points I-III (Op. Br. 13-26) for which there is no evidence in the record to rebut the allegations of Plaintiff's Complaint of jurisdiction-less, law-less, fraudulent, and retaliatory conduct -- which allegations his Appellees' Brief obliterates -- and no evidence rebutting Plaintiff's truly "voluminous" testimonial and documentary showing in support of her summary judgment application based on such constitutionally-tortious and

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[11] The evidentiary significance of a verified complaint -- such as Plaintiff's [R-95; R-172: ¶19; R-455: ¶2] -- is reflected by this Court's decision in Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995).

criminally-corrupt conduct by the state Defendants.

H. MR. WEINSTEIN'S "ARGUMENT" IS BASED ON DELIBERATE MISREPRESENTATION OF THE COMPLAINT AND DISREGARD OF THE RECORD BEFORE THE DISTRICT JUDGE

Mr. Weinstein's "Argument" section of his Brief follows his usual and customary tactic of misrepresenting the Complaint and the Record and ignoring all of Appellant's legal arguments in asserting his Rooker-Feldman, res judicata/collateral estoppel, immunity, and Eleventh Amendment defenses. This includes, once again, ignoring Appellant's uncontroverted Memorandum of Law in opposition to Mr. Weinstein's dismissal motion and in support of her summary judgment application as to the complete inapplicability of Rooker-Feldman, res judicata/collateral estoppel [R-471-476], immunity [R-478-486], and Eleventh Amendment [R-470-471] to the facts of this case, which facts he has obliterated by his re-write.

Rather than repeating the uncontroverted legal arguments presented in her aforesaid Memorandum of Law [R-468-486], Plaintiff incorporates them herein by reference and refers the Court to them. This leaves more room to focus on the specific factual misrepresentations repeated by Mr. Weinstein and upon which he deceitfully builds his legal argument.

1. On Immunity:

Mr. Weinstein repeats, verbatim, in his Point III-B on immunity (Op. Br. 24-25), the fraudulent claim he had made in arguing immunity in his dismissal motion that:

> "there is no indication in the complaint that these [judicial] defendants were proceeding in the clear absence of all jurisdiction." [R-158, emphasis added].

Mr. Weinstein does this notwithstanding Plaintiff's Memorandum of Law in opposition to his dismissal motion and in support of her summary judgment

motion demonstrated that the above representation was a "flagrant falsification of the Complaint" [R-479] and her Appellant's Brief (Br. 15) highlighted that specific falsification in its summarization of his dismissal motion (Br. 15). Indeed, it was to underscore the brazenness of Mr. Weinstein's aforesaid quoted statement that Appellant's Brief (Br. 5) actually underlined the paragraphs of her Complaint which explicitly alleged the Second Department's "clear absence of all jurisdiction".

Nor does Mr. Weinstein show more respect for Defendants' own Answer, which he submitted [R-126]. Although Defendants' Answer denied that the Second Department had general jurisdiction under Judiciary Law §90(2) [R-102, ¶12] -- a fact pointed up by Appellant's Brief (Br. 13, 69) -- Mr. Weinstein does not feel constrained from now claiming what he had denied before the District Judge, to wit, that Judiciary Law §90(2) gives "statutory authority to the Appellate Division to suspend any attorney engaged in professional misconduct from the practice of law...". In so doing, he replicates the District Judge's misrepresentation of Judiciary Law §90(2), pointed out in Appellant's Brief (Br. 69). Like the District Judge, he omits its express requirement that the accused attorney be "guilty" of such misconduct, as well as the further requirement of Judiciary Law §90(6) 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." Yet, there is no evidence in the record of any "guilty" finding -- and the Suspension Order, annexed to the Complaint [R-96], makes no finding of any kind. Nor is there any evidence in the record rebutting Plaintiff's sworn allegations that no written charges upon which her suspension was sought were delivered to her, let alone served upon her personally. This includes Casella's non-probative affidavit [R-630], which conspicuously does not deny or dispute the allegations of Plaintiff's

Complaint that the May 8, 1990 and January 25, 1991 Orders to Show Cause, seeking her suspension, were unsupported by any petition, setting forth charges, as required by 22 NYCRR §691.13(b)(1) and §691.4(l), respectively, and that no finding of Plaintiff's "guilt" was ever made[12]. Nor did Casella allege that the February 6, 1990 disciplinary petition was an "underlying" disciplinary proceeding to his aforesaid suspension motions.

As can be expected with Mr. Weinstein, his citation to Stump v. Sparkman, 435 U.S. 349 (1978), Bradley v. Fisher, 13 Wall 335 (1872), Pierson v. Ray, 386 U.S. 547 (1967), Klapper v. Guria, 582 N.Y.S.2d 892 (NY Sup. Ct. 1992) wholly ignores Appellant's presentation thereon in her Memorandum of Law [R-478-486].

2. **On the Eleventh Amendment:**

Mr. Weinstein also misrepresents the Complaint in his Point III-A on the Eleventh Amendment (Op. Br. 20). By his argument, he makes it appear that the Complaint does not sue the Defendants in both their individual and official capacities, but only in their official capacities. Thus, he states:

> "In the present case, plaintiff's complaint alleges that the defendants are being sued in their official capacities." (Op. Br. 21)
>
> "Here, it is evident from reading the complaint, that the plaintiff sued the defendants in their official capacities, and accordingly, the complaint was properly dismissed under the Eleventh Amendment." (Op. Br. 22); and
>
> "Here, it is clear that this action is against State officials acting in their various official capacities..." (Op. Br. 22)

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[12] Mr. Weinstein's Brief does not identify any evidence before the District Judge as to the Grievance Committee's jurisdiction, whose general jurisdiction under §691.4(a) he had denied in Defendants' Answer and does not identify any evidence that Attorney General Koppell was authorized to defend Defendants, his Answer [R-110] having actually denied that Attorney General Koppell had been "duly appointed" to office [R-31].

Such false claims by Mr. Weinstein not only fly in the face of the Complaint's allegations of Defendants' jurisdiction-less and lawless conduct, but of paragraphs 9 and 10 [R-26-27], which could not be more specific on the subject as to Defendants' liability. Indeed, paragraph 9 expressly states:

> "Insofar as this action seeks monetary damages for constitutional torts committed by the above-named Defendants, such relief is based on the fact that the suspension order in question did not arise out of any case or controversy pending before the Second Department, which, therefore, was acting in clear and complete absence of jurisdiction and outside its judicial functions. Liability is sought against such Defendants in their personal capacities, by reason of their actions, known to them to be outside the scope of their respective offices and in gross abuse of their public offices. By reason thereof, the financial burden of their defense is not sought to be imposed on the sovereign state of New York, but on Defendants personally." [R-26-27].

Such key paragraph was brought to Mr. Weinstein's attention in footnote 36 of Appellant's Brief (Br. 66), which further made plain that it had been previously placed under his nose in her Memorandum of Law in opposition to his dismissal motion and in support of her application for summary judgment [R-470-471].

3. <u>On Rooker-Feldman, Res Judicata/Collateral Estoppel</u>:

In his Point II on <u>res judicata</u>/collateral estoppel (Op. Br. 16), Mr. Weinstein finally concedes -- as he failed to do in his dismissal motion <u>and</u> as the District Judge failed to do in his Decision -- that these defenses cannot be invoked unless the party against whom preclusion is sought had "a full and fair opportunity to litigate". Mr. Weinstein does not identify that the Decision nowhere adjudicates the issue as to whether Plaintiff had "a full and fair opportunity to litigate", which adjudication

is also a prerequisite for invoking Rooker-Feldman[13]. To obscure such fact, Mr. Weinstein states:

> "In this case, plaintiff cannot possibly argue that she did not have a full and fair opportunity in state court to litigate her discipline and her suspension"

Such false claim that "plaintiff cannot possibly argue" disregards the innumerable allegations of the Complaint, sanitized by Mr. Weinstein and the District Judge, of judicial bias and vicious retaliation against Plaintiff in the state court system, specifically directed at her to punish her rightful exercise of First Amendment rights to expose judicial misconduct. The Complaint details a long litany of fraudulent, deliberately lawless orders by the Second Department, violative of explicit jurisdictional and due process requirements of Judiciary Law §90 and 22 NYCRR §691.4, et seq., as well as black-letter standards of adjudication, as a result of which, time after time, in motion after motion, Plaintiff sought its recusal because, demonstrably, it was not a fair and impartial tribunal.

The Complaint alleged that the Second Department not only wrongfully refused to recuse itself, but blocked independent review of its conduct, either by appeal or by Article 78. Plaintiff was thus deprived of any forum other than the biased, ulterior-motivated Second Department,

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[13] In Gentner v. Shulman, supra, at 89, -- cited by Mr. Weinstein (Op. Br. 14), but not for due process -- this Court indicates that the district judge held Rooker-Feldman to be inapplicable because "no hearing on the merits was held and the plaintiffs had no full or fair opportunity to present an argument to the judges...". This Court does not appear to disagree with the district judge's general proposition as to the requisite requirement of due process to Rooker-Feldman, but, rather, disagreed as to the specific due process required in that case where "the law was clear and the facts were undisputed". By contrast, in the case at bar, where the Second Department's Suspension Order was issued without affording Plaintiff a hearing, all facts were in dispute and the law, to the extent it is clear, was in Plaintiff's favor.

whose adjudications were not reasoned decisions, responsive to the issues raised in plaintiff's papers, but, as alleged in the Complaint, peremptory orders, setting forth no reasons at all. Copies of such reason-less orders were contained in Plaintiff's cert petition [R-373-377; 387-390; 392-402; 404-405]. Indeed, none of the orders -- not even the order dismissing Plaintiff's Article 78 proceeding made any finding as to Plaintiff's challenge to the Second Department's impartiality, jurisdiction, or compliance with explicit due process requirements.

Additionally, the Complaint's allegations showed that the ramifications of her challenge to the political manipulation of state judgeships reached the New York Court of Appeals, against two of whose members' nominations she had publicly testified. Evidence in the record [R-606] showed that the majority of its judges had been the beneficiaries of judicial cross-endorsements, challenged by Plaintiff. This is the context in which that Court refused to accept review of the Election Law case in which Plaintiff had challenged judicial cross-endorsements as unconstitutional and unlawful, refused to accept review of Plaintiff's numerous appeals for review of her charge-less, finding-less, reason-less, hearing-less "interim" suspension, although her case was, by far, a fortiori to Nuey and Russakoff [R-535-541], for which they had granted review of interim attorney suspension orders, and refused review of the ultimate of judicial perversions, the Second Department's refusal to recuse itself from Plaintiff's Article 78 proceeding against it.

This Court's decision in Colon v. Coughlin, 58 F.3d 865, 871 (2d Cir. 1995) reflects that without an impartial adjudicator, there can be no "full and fair opportunity to litigant". Likewise, its decision in Giakoumelos v. Coughlin, 88 F.3d 56 (2d Cir. 1996) -- cited by Mr.

Weinstein -- where this Court recognized that an Article 78 proceeding would have no preclusive effect where a party was denied a "full and fair opportunity to litigate" by reason of procedural deficiency, which "worked to his disadvantage" (at 60). Obviously, the Second Department's refusal to recuse itself from its own Article 78 proceeding is a profound procedural deficiency. Spencer v. Lapsley, 61 U.S. 264 (1858); In re Murchison, 349 U.S. 623 (1955); Canon 3(c) of the Code of Judicial Conduct; 103.3(c) of the Rules Governing Judicial Conduct; Colin v. Appellate Division, First Department, 3 A.D.2d 682, 159 N.Y.S.2d 99 (2nd Dept. 1957), citing Smith v. Whitney, 116 U.S. 167 (1986)..

Having excised the relevant allegations of Plaintiff's Complaint, Mr. Weinstein does not concern himself with such basic legal principles. Instead, Mr. Weinstein, who has no testimonial knowledge, advances two utterly frivolous examples of "why Plaintiff cannot possibly argue that she did not have a full and fair opportunity to litigate". As noted herein and pointed out in Appellant's Brief (Br. 68, 63-64), the record is devoid of any testimonial claim by Mr. Weinstein's clients, who have first-hand knowledge of the facts, that Plaintiff had "a full and fair opportunity to litigate".

(1) As to the disciplinary proceedings, Mr. Weinstein falsely contends that Plaintiff could have challenged them "in the underlying disciplinary proceedings, or by way of a motion to confirm, or reject a referee's report" (Op. Br. 19). In so doing, he adopts, virtually verbatim, the language of the Second Department's Order dismissing the Article 78 proceeding [R-363], when, as specifically alleged by the Complaint [R-75-81], and reiterated in Appellant's Brief (Br. 10), the Second Department's dismissal on such basis was an outright fraud and known

to be such by it. This was further confirmed by the fact, also alleged in the Complaint [R-78-81] that, thereafter the judicial Defendants persisted in their prior refusal to address Plaintiff's jurisdictional challenges. Indeed, graphically documenting the refusal of Casella, the Referee, and the Chairman of the Grievance Committee to address Plaintiff's jurisdictional objections relating to the February 6, 1990 petition in the context of the disciplinary proceedings are the transcript excerpts appearing in her cert petition to the Supreme Court [R-406-428], submitted in support of her summary judgment application. Additionally, as the uncontroverted Record shows [R-176], the Second Department, sua sponte, wrongfully stayed proceedings on the three disciplinary petitions, over Plaintiff's objections, pending her compliance with the October 18, 1990 medical examination order she was challenging, thereby creating a judicially-created stalemate. Thus, there will never be a referee's report as to those disciplinary proceedings, which could be made the subject of a motion to affirm or disaffirm. Moreover, such motion would have to be made to the biased Second Department, whose vicious and deliberately lawless conduct and that of its appointed Referee and Grievance Committee counsel the Complaints meticulously documents.

(2) As to the suspension, Mr. Weinstein takes the view that nothing more is required, Plaintiff having already had a "full and fair opportunity to litigate by reason of her filed opposition to Casella's May 8, 1990 and January 25, 1991 Orders to Show Cause, her subsequent motions, and her Article 78 proceeding.

In so doing, Mr. Weinstein again ignores the Complaint's particularized showing of virulent retaliatory bias by the Second Department -- making a travesty of motion practice brought before it -- and that the Second Department's unlawful refusal to recuse itself from her

Article 78 proceeding and the Attorney General's complicity and fraud destroyed Plaintiff's only possibility of independent review in the state court system of the Second Department's fraudulent, completely unlawful suspension of her license.

Indeed, as to the Article 78 proceeding, the Complaint alleged [R-81, ¶203] that the Attorney General blocked review by the New York Court of Appeals by repeating the fraudulent claim that Plaintiff had a remedy in the disciplinary proceeding and, therefore, was not entitled to Article 78 relief -- which he knew to be untrue. As shown by the Record [R-441-2] the Attorney General then repeated this to the U.S. Supreme Court in opposing Plaintiff's cert petition. He also claimed to the Supreme Court that the New York Court of Appeals' order denying review was "not on the merits" [R-442] -- while simultaneously in this §1983 action, Assistant Attorney General Weinstein was asserting, for purposes of his Defendants' judicata/collateral estoppel defense, that it was [R-452-453].

It is only for purposes of making his preclusion argument (Op. Br. 18), where Mr. Weinstein reproduces verbatim the opening page of Plaintiff's cert petition [R-304], that the heinous particulars of the unconstitutionality of New York's attorney disciplinary law, as written and as applied appear in his Brief. Nowhere else are they even identified by him, let alone discussed. Plainly, there can be no "full and fair opportunity to litigate" in the face of such particularized statement of egregious constitutional violations, which the record shows to be uncontroverted by Defendants.

The unethical manner in which the Attorney General represented the Defendants in the Article 78 proceeding is a flagrant abomination of all rules of law and standard. That Mr. Weinstein should argue that the dismissal of such Article 78 proceeding has any preclusive effect compounds

the Attorney General's assault on the rule of law and further defiles the office, which is constitutionally mandated to protect the public interest in governmental integrity.

CONCLUSION

The Judgment below must be reversed. Moreover, if the obligations of an attorney, as an "officer of the court" are to mean anything, severest monetary and disciplinary sanctions must be imposed upon Mr. Weinstein, the New York State Attorney General, and the mostly lawyer state Defendants. Appellees' opposing Brief is knowingly and deliberately false and misleading in every material respect. As such, it all the more entitles Appellant to the full relief sought by her Brief.

Dated: April 1, 1997
White Plains, New York

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