UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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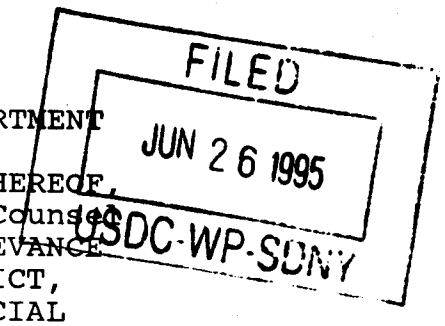
DORIS L. SASSOWER,

Plaintiff,

94 Civ. 4514 (JES)

-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.

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**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR DISMISSAL ON THE PLEADINGS AND IN SUPPORT OF SUMMARY JUDGMENT AND SANCTIONS IN PLAINTIFF'S FAVOR**

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## PRELIMINARY STATEMENT

To avoid needless duplication, Plaintiff respectfully refers the Court to the factual recitation in her Petition for Certiorari to the U.S. Supreme Court[1] (at pp. 3-13 thereof) in her Article 78 proceeding against Defendants, described at ¶¶166-170, 173-178, 182-184, 189-191, 195-209 of the Complaint.

As reflected therein and as alleged at ¶3 of the Complaint, the June 14, 1991 "interim" order suspending Plaintiff from the practice of law immediately, indefinitely, and unconditionally was rendered "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). Additionally, as alleged at ¶4, Plaintiff has been denied any post-suspension hearing as to the basis for her finding-less "interim" suspension and, as alleged at ¶¶117, 143, 145, 209, she has been denied all state court review, either by direct appeal or by Article 78.

Such "interim" suspension order is absolutely void, there being no jurisdiction under Judiciary Law §90 or otherwise to sustain such egregious deprivation of constitutional rights by an American court. By reason thereof and a continuum of bad-faith harassing prosecutions of Plaintiff violating her federally-protected constitutional rights (¶¶4, 7)--"totally

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[1] Per the Court's direction at the February 3, 1995 status conference, Plaintiff's Cert Petition is annexed as Exhibit "2A" to her accompanying Affidavit, together with her Reply Memorandum (Exhibit "2B") to Defendants' Opposing Memorandum (Exhibit "2C").

without redress in the state court system" (¶228)--Plaintiff states fully meritorious causes of action for §1983 relief, to which the pleadings entitle her as a matter of law. As shown by Plaintiff's accompanying Affidavit, the exhibits thereto, and her Rule 3(g) Statement, there is no genuine issue for trial, and Plaintiff is entitled to summary judgment in her favor.

## COUNTER-STATEMENT OF THE CASE

Defendants concede (Br. 2) that for purposes of their dismissal motion, the allegations of the Complaint are "assumed to be true". Since such pleaded allegations absolutely preclude dismissal of the Complaint, Defendants brazenly misrepresent their content.

Thus, in the very first sentence of their "Statement of the Case", Defendants purport that the Complaint claims that Plaintiff was suspended during the pendency of "an underlying disciplinary". Yet, at least ten (10) specific allegations of the Complaint allege that there was no "underlying disciplinary proceeding" to the suspension and that Defendants' pretense to the contrary is a knowing and deliberate fraud designed to conceal the lack of jurisdiction for the judicial Defendants' October 18, 1990 order directing Plaintiff's medical examination and their finding-less June 14, 1991 "interim" order suspending Plaintiff's license to practice law (¶¶67-69, 79(a)-(e), 83, 87-88, 99, 108-109, 158).

Defendants' deceit upon the Court as to the allegations of Plaintiff's Complaint then continues in the second paragraph

of their "Statement of the Case" (Br. 2-3), where they conceal the fact that the Complaint expressly alleges that no petition underlies either the October 18, 1990 order or the June 14, 1991 "interim" suspension order (Complaint, ¶¶67, 86). They further seek to mislead the Court by referring to those orders immediately upon reciting the existence of three disciplinary petitions against Plaintiff, which they fail to identify as completely separate, unrelated, and not underlying the October 18, 1990 and June 14, 1991 orders.

The constitutionally violative manner in which the judicial Defendants authorized the aforesaid three disciplinary petitions and issued and perpetuated the petition-less, finding-less, hearing-less June 14, 1991 "interim" suspension order is wholly omitted from their summarized "rewrite" of Plaintiff's Complaint. Such violations, meticulously particularized by the allegations of the Complaint[2], evince a "reign of terror" in which Defendants have knowingly and deliberately disregarded the rudimentary due process prerequisites to disciplinary jurisdiction, as set forth in the judicial Defendants' own published Rules Governing the Conduct of Attorneys, 22 NYCRR §691.4(e), (f),(g), (h), (i), §691.4(l), §691.13(b)(1), as well

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[2] As to the February 6, 1990 disciplinary petition: See ¶¶40-42, 55-60; As to the January 28, 1993 disciplinary petition: See ¶¶121-124, 131-133, 140-142, 146(b), 151-155; As to the March 25, 1993 disciplinary petition: ¶¶100-105, 125-130, 135-139, 146(c), 149-150, 160-162; As to the June 14, 1991 "interim" suspension order and the October 18, 1990 order directing a medical examination of Plaintiff: See ¶¶66-75, 79, 82-94.

as those embodied in New York's Judiciary Law §90, and controlling decisional law of New York's highest court, Matter of Nuey, 61 N.Y.2d 513 (1984); Matter of Russakoff, 79 A.D.2d 520 (1992).

Instead, Defendants, in the balance of their "Statement of the Case" (Br. 3-4), selectively cite only those allegations of the Complaint as would further their deliberately false and distorted presentation. Thus, they refer to the Complaint as "largely a compilation of her unsuccessful challenges to orders and decisions of defendant Second Department regarding prosecution of disciplinary petitions by defendant Grievance Committee and her 'interim" suspension from the practice of law'" (Br. 3) and attempt to portray the Plaintiff as just another disgruntled litigant, whose "dissatisfaction with the state court rulings does not provide a basis for constitutional challenge". (Br. 23).

As shown below, only by such deceit have Defendants been enabled to craft their dismissal motion, a motion which is the ultimate of "frivolous" motions.

## POINT I

### A. DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS IS PROCEDURALLY IMPROPER

Defendants' Notice of Motion, which seeks "an Order pursuant to FRCP 12(c)" does not move, as it is required to, "on the pleadings", but limits their motion to "the complaint"--notwithstanding the motion is post-Answer. Cf. FRCP 12(b).

By their Answer, Defendants deny, or deny knowledge or

information sufficient to form a belief, as to the crucial allegations of the Complaint. As the material facts are in dispute, albeit, as shown by Plaintiff's accompanying Affidavit, such denials are patently sham, false, and perjurious, the Court cannot arrive at a judgment on the pleadings alone. Therefore, Rule 12(c) relief is unavailable. Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 642 (2d Cir. 1988), Miranda v. Sullivan, 771 F.Supp. 50 (S.D.N.Y. 1991); DeSantis v. United States, 783 F. Supp. 165, 168 (S.D.N.Y. 1992).

As to relief based on lack of subject matter jurisdiction and failure to state a claim, requested in Defendants' Notice of Motion, Defendants concede (Br. 2) that all the allegations of the Complaint are assumed to be true. Such motion may not be granted unless it appears beyond all doubt that Plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1976); Falls River Realty v. City of Niagara Falls, 754 F.2d 49, 54 (2d Cir. 1983); La Mirada Products Co. v. Wassall PLC, 823 F.Supp. 138, 141 (S.D.N.Y. 1993).

**B. BY THEIR ANSWER, DEFENDANTS HAVE WAIVED ANY PLEADING OBJECTIONS**

Having already answered the Complaint, without having made a "Motion for More Definite Statement", Defendants have waived any objection that the Complaint is so "vague" and "conclusory" as not to be answerable. Rule 12 (e)(g).

C. DEFENDANTS' MOTION IS SUBSTANTIVELY BASELESS SINCE THE COMPLAINT MEETS ALL PLEADING REQUIREMENTS

Defendants' contention (Pt I, p. 7) that Plaintiff's Complaint contravenes Rule 8 (a)(1) and (2), quoting from this Court's decision in Levine v. County of Westchester, 828 F.Supp. 238, 241 (S.D.N.Y. 1993), is wholly without basis. That citation is completely irrelevant to this case, since there is no comparison between the "Third Amended Complaint" in Levine, described by this Court as a "virtually incomprehensible document" with "only conclusory, vague, and general factual allegations" and Plaintiff's Complaint. The allegations of Plaintiff's Complaint are specific and eminently clear and comprehensible. Over and again, the allegations refer to specific documents. As detailed in Plaintiff's accompanying Affidavit, all such documents are in Defendants' possession or readily available to them.

Where appropriate to show Defendants' disregard of the law as knowing and deliberate, Plaintiff's allegations cite controlling statutory and decisional law, as well as specific provisions of the judicial Defendants' own published rules, which the Defendant public officers are accused of intentionally violating for their own ulterior, illegitimate purposes.

Defendants' objection (Point I, p. 7) as to the length of the pleading and the number of its allegations is frivolous. There is no page or paragraph limitation in Rule 8. Matrix Inc. v. Trainor, 1994 U.S. Dist. Lexis 9378. The standard by which a complaint is to be measured on this motion is one of

specificity, designed to give defendants "fair notice to enable them to answer and prepare for trial", Levine, supra, at 241.

Obviously, a plaintiff is not to be penalized where, due to the extent and nature of the constitutional violations committed by defendants, the complaint is necessarily lengthy. In the case at bar, Defendants' constitutional violations of Plaintiff's rights are not isolated ones, but part of a vicious and sadistic "ongoing 'vendetta'"(¶5), with a long history and a pattern of harassment ranging over a period of many years.

The decision in Matrix, Inc., supra, further shows the legal baselessness of Defendants' pleading objection at Point VII. The "threshold standard of specificity", to which Defendants allude (Br. 24), required detailed elucidation in the Complaint, which is essential not only for the conspiracy claims (¶¶26, 246-248), but for the fraud allegations as well--same being required by Rule 9(b), as noted by that decision.

Thus, as to the "interim" suspension of Plaintiff's license, alleged at ¶3 of the Complaint to be "fraudulent", the Complaint particularizes the modus operandi by which Defendants accomplished such unlawful suspension (¶¶66-75, 79-94), and, thereafter, perpetuated it (¶¶99, 107-110, 134, 143, 148, 159, 165).

Plaintiff's Complaint articulates at least four distinct bases of federal constitutional rights deprivation, each specifically linked to the state Defendants' wrongful actions "under color of state law", i.e.:

(a) Violation of Plaintiff's First Amendment rights by prosecuting multiple knowingly baseless and fabricated disciplinary proceedings against her and procuring a fraudulent suspension of her license in retaliation against her for activities exposing and challenging political manipulation of judicial elections (¶¶1, 3, 7, 98, 118, 137, 206, 228, 238, 248). Dombrowski v. Pfister, 380 U.S. 479 (1965). The state may not infringe upon attorneys' First Amendment rights in the guise of regulating professional misconduct[3]. Retaliatory prosecution brought for that purpose is actionable under 42 U.S.C §1983 and the First Amendment[4].

(b) Violation of Plaintiff's Fourteenth Amendment substantive and procedural due process rights by prosecuting multiple baseless and fabricated disciplinary proceedings and procuring a fraudulent suspension of her license (See, inter alia, cases cited in fn. 2). An indefinite "interim" suspension with no hearing is a gross violation of due process[5];

(c) Violation of Plaintiff's Fourteenth Amendment equal protection rights by: (i) denying Plaintiff those procedural rights mandated by New York State law and afforded other disciplined attorneys (¶¶62, 71-3, 94, 159); (ii) issuing and perpetuating a findingless "interim" order of suspension, despite New York's highest court having ruled such invalid in the case of other attorneys (¶¶94, 134, 143-5, 148, 159, 165, 211); and (iii) affording appellate rights to "finally", but not "interimly" suspended attorneys, despite such distinction being illusory (¶¶219-220).

(d) Violation of Plaintiff's Fourteenth Amendment

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[3] E.g., CBS, Inc. v. F.C.C., 453 U.S. 367, 396 (1981); In re Primus, 436 U.S.412 (1978); N.A.A.C.P. v. Button, 371 U.S. 415, 429-30, 439 (1963); Johnson v. Avery, 393 U.S. 483, 490 (1969); Bigelow v. Virginia, 421 U.S. 809, 326 (1975).

[4] E.g., Haynesworth v. Miller, 820 F.2d 1245, 1255 (D.C. Cir. 1987); Fitzgerald v. Peek, 636 F.2d 943, 944-45 (5th Cir.), cert. denied, 452 U.S. 916 (1981); Norwell v. City of Cincinnati, Ohio, 414 U.S. 14, 16 (1973); Lewellyn v. Raff, 843 F.2d 1103, 1110 (8th Cir. 1988).

[5] Bell v. Burson, 402 U.S. 535, 539 (1971); Barry v. Barchi, 443 U.S. 55, 65 (1979); Gershenfeld v. Justices of the Supreme Court of Pennsylvania, 641 F. Supp. 1419 (E.D. Pa. 1986).

rights by Defendant Koppell's aiding and abetting Defendants in subverting Plaintiff's state remedy under CPLR Article 78[6] (¶¶10, 26, 178, 196, 200-208).

Thus, even without benefit of the liberal construction accorded federal civil pleadings under Rule 8(f), particularly complaints in "civil rights actions", Haines v. Kerner, 404 U.S. 519, 520 (1972), recognized by Defendants themselves (Br. 22), Plaintiff has more than met the applicable pleading standards.

## POINT II

## THE ELEVENTH AMENDMENT DOES NOT BAR THIS ACTION

Defendants' Point II contention that the Eleventh Amendment bars Plaintiff's action is exposed as frivolous by Will v. Michigan Department of State Police, 491 U.S. 58 (1989), which Defendants twice cite (Br. 9, 17). Such case acknowledges the well-settled law that even in their official capacity, state judicial and prosecutorial officials are subject to injunctive and declaratory relief:

> ...a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' Kentucky v. Graham, 473 U.S. 159, at 167, n. 14...; Ex parte Young, 209 U.S. 123, 159-160...454...."

Will, supra, 70, fn. 10. See also, Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151 (1972).

In this action, the individual justices of the Appellate Division, Second Department, the members of the Grievance Committee for the Ninth Judicial District", its [now

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[6] Cf. Herz v. Degnan, 648 F.2d 201 (3rd Cir. 1981).

former] Chairman, its Chief Counsel, the special referee, and the [now former] Attorney General are each sued in their "official and personal capacities".

Consequently, and as so alleged at ¶8 of Complaint, the Eleventh Amendment does not bar Plaintiff's right to injunctive relief--request for which is acknowledged by Defendants (Br. 2, 5). Moreover, an award of attorneys fees is not barred under the Eleventh Amendment. Pulliam v. Allen, 104 S.Ct. 1970 (1984).

As to compensatory and punitive damages, Farid v. Smith, 850 F.2d 917, 921 (2nd Cir. 1988), cited by Defendants (Point II, p. 9), makes clear their liability:

> "The eleventh amendment bars recovery against an employee who is sued in his official capacity, but does not protect him from personal liability if he is sued in his 'individual' or 'personal' capacity. [Kentucky v.] Graham, 473 U.S. at 166-67, 105 S.Ct. at 33105-06."

See, also Cohen v. Bane, 853 F.Supp. 620 (E.D.N.Y. 1994), cited by Defendants (Br. 19), citing Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974). Most recently, in Hafer v. Melo, 502 U.S. 21, 30-31 (1991), the Court stated:

> "...the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under §1983."

Consequently, and as so alleged at ¶9 of the Complaint, Defendants can be held personally liable for monetary damages for their bad-faith and intentionally harassing conduct.

## POINT III

**THIS COURT HAS SUBJECT MATTER JURISDICTION OF THIS ACTION, WHICH IS NOT BARRED BY ROOKER-FELDMAN OR COLLATERAL ESTOPPEL**

In urging that the Rooker-Feldman Doctrine and collateral estoppel bar this action (Br. Pts III and VI), Defendants have deliberately withheld from the Court the well-settled law that such defenses are inapplicable where, as here, there are allegations that the state court proceedings were biased and did not comport with due process. Thus, in Rooker v. Fidelity Trust Co., 263 U.S. at 413, 415 (1923), the Supreme Court upheld the dismissal of the lower court, stating:

> "It affirmatively appears that the circuit court had jurisdiction of both the subject-matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs";

In Allen v. McCurry, 449 U.S. 90, 95 (1980), also relied on by Defendants, our highest Court expressly articulated the bedrock guide to any purported invocation of an estoppel bar:

> "But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case",

quoted also in Haring v Prosise, 462 U.S. 306, 313 (1983). See, also 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:

> "However, Rooker made clear that the only constitutional questions arising from a state proceeding on which the Supreme Court considered itself to be the final arbiter, were those that 'actually arose in the cause' in which a full hearing was held and where the judgment was responsive to the issues.

> 265 U.S. at 415. Otherwise, if Rooker were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, Rooker would swallow 'the full and fair opportunity to litigate' limitation to res judicata clearly established elsewhere by the Supreme Court...", at 1472.

At bar, the state proceedings did not result in any adjudication on the merits. No "full hearing was had" and the orders affirmed were in no way "responsive to the issues". Plainly, the state litigation was not "adequate in relation to the Constitution's Due Process Clause." Kremer v. Chemical Construction Corp., 456 U.S. 461, 482 (1982). Such adequacy is particularly compelled in the area of attorney discipline, which the Supreme Court has held to be "adversary proceedings of a quasi-criminal nature". In Re Ruffalo, 390 U.S. 544, 550 (1968). An attorney is entitled to an opportunity to be heard, including confrontation and cross-examination of "those whose word deprives [the] person of his livelihood", Willner v. Committee on Character and Fitness, 373 U.S. 96 at 104-105 (1963), a most valued property and liberty right.

The most fundamental component of due process is "a fair trial in a fair tribunal", Withrow v. Larkin, 421 U.S. 35, 46 (1975), citing In re Murchison, 349 U.S. 133, 136 (1955); Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

The gravamen of the Complaint, clearly and unmistakably stated in innumerable specific factual allegations, is the absolute and complete denial of Plaintiff's due process rights, beginning with the absence of a fair and impartial

tribunal in the first instance (¶¶5-7, 62, 71-72, 137, 172, 190) and culminating in the ultimate travesty of judicial disqualification: the refusal of the judicial Defendants to recuse themselves from Plaintiff's Article 78 proceeding against them (¶¶166-7, 170, 172, 176, 178, 184*, 198, 209).

Defendants' bias is, as alleged in the Complaint, manifested in the total absence of facts or law to support the June 14, 1991 petition-less, finding-less "interim" suspension of Plaintiff's license, the barrage of "bogus" disciplinary prosecutions commenced against her, and the September 20, 1993 order dismissing her Article 78 proceeding (¶¶205, 182-3)--all of which the Complaint alleges to be the product of "fraud and collusion" on the part of the Defendants (¶¶3, 134, 189-90, 196, 182, 188, 200, 205, 208).

The specific pleaded allegations of "official lawlessness" by Defendants make it sanctionable for them to raise Rooker-Feldman and collateral estoppel defenses as a basis for a motion for judgment on the pleadings. Fraud alone pierces a collateral estoppel defense, Cornell v. Williams, 20 Wall 250 (1874), cited in Windsor v. McVeigh, 93 U.S. 274, 283 (1876).

Contrary to Defendants' presentation, the jurisdiction of this Court is not being invoked to correct the state court's orders for errors of law or fact, but to vacate such fraudulent orders as unconstitutional because the judicial and other Defendants have, individually and in concert, knowingly and deliberately abandoned our most basic constitutional standards to

such a degree that there is no jurisdiction at all, resulting in a succession of absolutely void orders.

In both Rooker and Feldman, our highest Court did not find that the orders in question were void for lack of due process or that they had to be vacated as jurisdictional nullities. On the contrary, in both cases, the Supreme Court, by its affirmances, recognized that there was jurisdiction in the lower courts. Similarly, in Tang v. Appellate Division of New York Supreme Court, First Department, 487 F.2d 138, 143 (2d Cir. 1973), cited twice by Defendants (Br. 10, 11), this Circuit's affirmance of the district court's dismissal of a §1983 claim followed its review of the proceedings of the case, wherein it concluded: "There is no question but that the state court had jurisdiction of the person and subject matter here involved."

By contrast, in the case at bar, as the Complaint alleges, the judicial Defendants had neither personal nor subject matter jurisdiction when they issued the June 14, 1991 "interim" suspension order, and there has never been any state court adjudication responsive to those issues. Indeed, there is no "finding" of jurisdiction. Likewise, as to the dismissal of Plaintiff's Article 78 proceeding, the judicial Defendants were without subject matter jurisdiction to render the September 20, 1993 order of dismissal. Such order of dismissal is a nullity since, by the judicial Defendants' own decisional law, they were "without jurisdiction to grant the relief requested", Colin v. Appellate Division of Supreme Court, 159 N.Y.S.2d 99 (1957).

Against such pleaded facts and law, the Rooker-Feldman and collateral estoppel defenses are patently inapt.

## POINT IV

### THE ABSTENTION DOCTRINE IS INAPPLICABLE SINCE THE PLEADED FACTS BRING THIS CASE WITHIN THE EXCEPTIONS AND THE PREREQUISITES THERETO ARE WHOLLY ABSENT

Defendants' attempt to seek dismissal on grounds of abstention is deceitful and in bad faith. All Defendants' cited cases, when compared with the Complaint, show that the abstention doctrine is wholly inapplicable. The pleaded allegations not only state facts bringing this case squarely within "long-established" exceptions, Younger v. Harris, 401 U.S. 37, 50 (1971), but show that the "three prerequisites" for abstention, cited by Defendants, have not been met.

Indeed, in arguing the applicability of abstention to this action--which Defendants accomplish in three quick sentences (Br. 14)--they confine themselves to the "state court proceedings concerning the prosecution of three disciplinary petitions against plaintiff". They make no reference whatever to the June 14, 1991 "interim" suspension order, which, as shown by the allegations of the Complaint, is completely separate from and unrelated to those disciplinary proceedings. In such fashion they conceal the fundamental fact that there is no pending state court proceeding to which the suspension relates and that the "interim" suspension is free-standing.

Additionally undisclosed by Defendants is the fact that the three disciplinary petitions have themselves been

stayed by the judicial Defendants, sua sponte, and over Plaintiff's objections, until Plaintiff complies with the October 18, 1990 order[7]. Thus, the judicial Defendants have created a "stalemate", blocking prospective state adjudication of those separate and unrelated disciplinary proceedings. Additionally, and as alleged in the Complaint, Plaintiff has been totally precluded from raising her constitutional objections in those proceedings (¶¶187-191, 201-2).

As to the allegations of the Complaint bringing it within the "long-established" exceptions to the abstention doctrine, these specifically include: bias on the part of the state adjudicators (¶¶5-6, 62, 71-2, 98, 105, 137, 167, 190, 198, 208); bad-faith and Dombrowski-type harassment through multiple baseless disciplinary prosecutions (¶¶1, 3-7, fn. 2 herein); irreparable injury and loss: (¶¶7, 240-245, 248, 251); denial of opportunity to litigate the federal issues in state court (144-5, 198-9); and a flagrantly unconstitutional statutory scheme (¶¶211-234).

Relative to the "flagrantly and patently unconstitutional" statutory scheme, Defendants pretend that Plaintiff's challenge is no different than that "raised and rejected" in Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y. 1975) and Maddox v. Mollen. However, neither those cases, nor any others relied on by Defendants, involved an "interim" suspension

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[7] See ¶79 of the Complaint delineating that the October 18, 1990 is "not a lawful order, being erroneous in at least seven material respects".

of an attorney's license, which, as pointed out by the Complaint (¶211, 219-220), is not even statutorily authorized[8]. As discussed in Plaintiff's Cert Petition (pp. 16-8, 28), the court rule §691.4(l) under which Plaintiff was suspended is on its face unconstitutional.

Indeed, Defendants' cited cases did not involve any professional discipline imposed without any hearing or findings--as at bar--or a constitutional challenge to court-created disciplinary rules, unsupported by a statute (¶¶211-217).

An analysis of Mildner and its lack of precedential value in resolving the issues raised herein as to the unconstitutionality of New York's attorney disciplinary scheme, which the powerful dissenting opinion of Judge Jack Weinstein makes clear, is set forth in Plaintiff's Cert Petition (at pp. 13-15, 18-21, 28). Such Cert Petition, together with Plaintiff's Reply Memorandum and all the cases cited therein, are incorporated herein by reference.

## POINT V

### DEFENDANTS ARE NOT IMMUNE FROM PLAINTIFF'S DAMAGE CLAIMS

The only immunity argued by Defendants is from damages, not from suit.

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[8] Cf. Herz v. Degnan, supra, fn.6, where the Third Circuit Appeals Court rejected, with rebuke, an Attorney-General's attempt to cause the revocation of a professional license in a manner, as in the case at bar, "not in compliance with the governing statute, either substantively or procedurally", at 208.

A. DEFENDANTS HAVE NO ABSOLUTE JUDICIAL OR QUASI-JUDICIAL IMMUNITY:

All the cases cited by Defendants to support their absolute immunity defense acknowledge that such immunity protects judges only "from liability for damages for acts committed within their judicial jurisdiction" (emphasis added). This limitation appears in the very language quoted by Defendants from Pierson v. Ray, 386 U.S. 547, 554-5 (1967). Indeed, Defendants concede (Br. 16), citing Stump v. Sparkman, 435 U.S.349, 355-56 (1978), that there is no such immunity when a judge proceeds in the "clear absence of all jurisdiction".

Defendants' attempt to seek dismissal on grounds of absolute judicial immunity is, therefore, sanctionable since over and again, the Complaint alleges that the judicial Defendants acted "without any jurisdiction whatsoever" (¶3); "without jurisdiction and beyond the scope of its judicial function" (¶4); "in clear and complete absence of jurisdiction and outside its judicial function" (¶9). Such allegations are, thereafter, particularized to describe the judicial Defendants' jurisdiction-less June 14, 1991 "interim" order suspending Plaintiff's license, as well as the continuum of jurisdictionless, malicious disciplinary proceedings it authorized against her (See, citations at fn. 2 herein).

Consequently, in advancing their absolute judicial immunity defense, Defendants have resorted to flagrant falsification of the Complaint, disingenuously asserting:

> "There is no indication in the complaint that...defendants were proceeding in the clear absence of all jurisdiction. Accordingly, plaintiff's claim for damages against them is barred." (Br. 16).

The case at bar fits within the Stump v. Sparkman, supra, analysis as to the facts establishing a "clear absence of all jurisdiction". In Stump, the Supreme Court held that a judge who had approved a mother's ex parte petition to sterilize her minor daughter, without any notice to her, without a hearing, and without appointment of a guardian ad litem, had not acted in "clear absence of all jurisdiction" because he had general jurisdiction. The Court then stated (at 358) as follows:

> "But in our view, it is more significant that there is no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump...We agree with the District Court, it appearing that neither by statute nor by case law has the broad jurisdiction granted to the circuit courts of Indiana been circumscribed to foreclose consideration of a petition for authorization of a minor's sterilization." (emphasis added)

By contrast with Stump, New York's appellate divisions are not courts of general jurisdiction and their original jurisdiction is extremely limited. "More significant", both New York's statutory and decisional law, as identified in Plaintiff's Complaint, proscribe the type of suspension of Plaintiff's license as here at bar.

New York's Judiciary Law §90(2) confers original jurisdiction over attorney discipline matters on the appellate divisions, giving them authority to disbar, suspend, or censure. As pointed out at ¶211 of the Complaint, there is no statutory

authority for an interim suspension order, a fact expressly recognized by New York's highest court in Matter of Nuey, 61 N.Y.2d 513 (1984):

> "...the Appellate Divisions...have no authority under subdivision 2 of section 90 of the Judiciary Law to issue an order which purports to suspend an attorney pending determination of charges under consideration before a Departmental Disciplinary Committee."

As the Court of Appeals specifically ruled in Nuey, supra, 515, "a finding by the court that an attorney 'is guilty'...is a prerequisite to interference with the attorney's right to practice his or her profession" (¶94). Prior to such interference, Judiciary Law §90(6) requires that "a copy of the charges" must be personally served upon the attorney, who "must be allowed an opportunity of being heard in his own defense".

Such are the explicit prerequisites under New York law, without which the appellate division has no jurisdiction to remove or suspend an attorney from practice. Nevertheless, and, as alleged at ¶3 of the Complaint, when the judicial Defendants issued the June 14, 1991 "interim" suspension order, they did so "without notice of formal charges, without a hearing, without a finding of probable cause, or any other findings, administrative or judicial..."

These factual allegations, particularized throughout the Complaint, overcome any defense based on judicial immunity since they irrefutably demonstrate the "clear absence of all jurisdiction".

Additionally, and as pointed out by Justice Powell in

his dissenting opinion in Stump, supra, the rationale of the immunity doctrine as enunciated in the seminal case of Bradley v. Fisher, 13 Wall 335, 20 L.Ed. 646 (1872), was that "the judicial system itself provided other means for protecting individual rights", at p. 1111. It was, therefore, Justice Powell's view that:

> "where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the Bradley doctrine is inoperative. See Pierson v. Ray, supra, 386 U.S., at 554, 87 S.Ct., at 1213, 1218.[9]

As reflected by the allegations of the Complaint (¶¶143, 178, 183-4, 203), the judicial Defendants have repeatedly denied Plaintiff's requests for leave to appeal and, when she sought Article 78 review of their jurisdiction-less conduct, refused to recuse themselves and then, as respondents therein, opposed review by New York's Court of Appeals of their self-interested September 20, 1993 order in which they granted themselves dismissal of the Article 78 proceeding to which they were parties (¶¶166, 170, 176, 178, 182-4, 198-209).

As to the co-Defendants, other than Defendant Koppell, who seek to cloak themselves with the protection of the absolute judicial immunity, such defense fails. The allegations of the Complaint (¶¶67, 70, 74, 86, 104-5, 132-3, 136) contend that the Grievance Committee Defendants did not perform any adjudicative

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9 "In both Bradley and Pierson any errors committed by the judges involved were open to correction on appeal." [fn 2 of Justice Powell's dissent]

function, but that Defendant Casella acted ultra vires and in their name, without the requisite adjudication by those Defendants to support prosecution by him. The absence of a petition supporting Defendant Casella's May 8, 1990 motion for a medical examination of Plaintiff (¶67), as well as his January 25, 1991 motion for Plaintiff's suspension for her alleged "failure to comply" with the October 18, 1990 order (¶86), highlights that there was no adjudication by them on which Defendant Casella's actions were predicated.

Moreover, these Defendants, as well as the Defendant Referee, by opposing and obstructing appellate review (¶¶108-110) and perverting independent review under Article 78 so as to prevent their jurisdictionless-conduct from being exposed (¶¶170, 178, 203), have further forfeited such defense.

Indeed, in the context of Plaintiff's Article 78 proceeding, there is no judicial immunity for the Defendants, who were therein sued as respondents and not acting in any judicial capacity (¶166). As respondents, they permitted their attorney, the Attorney General, to subvert the Article 78 mechanism and the judicial process in order to conceal their jurisdictionless and unconstitutional conduct (¶¶168-170, 173-178, 198-209).

B. DEFENDANTS HAVE NO QUALIFIED IMMUNITY:

As shown by Harlow v. Fitzgerald, 457 U.S. 800 (1982), twice cited by Defendants (Br. 18), it is well-settled that violations of "clearly-established" law preclude a qualified immunity defense. As the Harlow Court recognized, qualified

immunity protects only discretionary functions of officials, not their performance or non-performance of duties enjoined by law. This is shown by the full quote from Harlow, only a portion of which Defendant has quoted:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.", Harlow, supra, at 818. (emphasis added).

Throughout her Complaint, Plaintiff alleges multitudinous specific violations by Defendants of "'clearly-established' statutory or constitutional rights" in connection with the June 14, 1991 "interim" suspension, the continuum of disciplinary proceedings commenced without compliance with due process prerequisites (¶¶40-42, 55-60, 149-155; 160-162), and the knowing and deliberate subversion of the Article 78 remedy by Defendants (¶¶168-170, 173-178, 183-4, 196, 198-200, 202-208).

The aforesaid misconduct involved no discretion on Defendants' part. The facts pleaded by the Complaint showed not only that the "interim" suspension order contravened clearly established case law of the state's highest court in Matter of Nuey, supra, (¶94), and, thereafter, and in Matter of Russakoff, supra, (¶134), both of which held that an interim suspension order without findings must be vacated, but that Plaintiff repeatedly brought such controlling law to the attention of Defendants (inter alia, ¶¶107, 134, 144, 147, 159, 190), who, nonetheless, maliciously and invidiously, perpetuated such

unlawful and unconstitutional order, further denying her a post-suspension hearing as to the basis for the suspension (¶¶4, 147, 159). Against such pleaded facts, establishing bad faith by Defendant Grievance Committee, as a matter of law, there could be no qualified immunity defense.

It is to escape the resultant liability for their official misconduct that Defendants, here again, resort to deliberate falsification and deceit in misrepresenting the content of the pleaded allegations of the Complaint, this time by claiming (Br. 18) that:

> "...plaintiff has not alleged, nor can she show, that defendants' alleged actions are inconsistent with law or that defendants' conduct has, in any way, violated plaintiff's 'clearly established statutory or constitutional rights of which a reasonable person would have known.", citing Harlow v. Fitzgerald, at 818.

C. DEFENDANTS HAVE NO ABSOLUTE PROSECUTORIAL IMMUNITY:

There is no absolute prosecutorial immunity for the Grievance Committee Defendants. A disciplinary prosecution not predicated on a petition setting forth the charges for which a disciplinary order is being sought is akin to a criminal prosecution of a felony not initiated by a grand jury indictment. Such act by a public prosecutor is plainly beyond his jurisdiction, outside the scope of his duties, and not within the purview of any immunity defense. Without the requisite instrument to bring on a prosecution, there is no "discretion" on the part of a prosecutor to indict or not to indict, to charge or not to charge. Thus, the case of Klapper v. Guria, 153 Misc. 2d

726, 730 (N.Y. Co. 1992), cited by Defendants (Br. 17), is totally inapt, where there was "full compliance" by the Grievance Committee Defendants with "governing statutes and regulations in investigating and prosecuting the alleged acts of misconduct".

As to Defendant Oliver Koppell, the former Attorney General, the sole basis upon which Defendants seek to have claims against him dismissed is that he is protected by "absolute prosecutorial immunity" (Br. 18-19). Such defense is specious. None of the claims against Defendant Koppell rest on his prosecutorial function, but strictly on his role as counsel to Defendants when Plaintiff brought an Article 78 proceeding against them for their official misconduct under state law. This is expressly articulated at ¶¶10, 26-27, and particularized at ¶¶196, 200, 202-9 of the Complaint.

Unless the duties arise out of the prosecutorial function, the immunity defense does not apply. See, Mitchell v. Forsyth, 472 U.S. 511, 521 (1985) (holding that the Attorney General is absolutely immune from liability for performance of prosecutorial, but not his investigative duties).

## CONCLUSION

For all the foregoing reasons, Defendants' motion should be denied in all respects, with costs and Rule 11 sanctions, an award of attorneys' fees, and such other relief as may be just and proper, including summary judgment in favor of the Plaintiff, as Rule 12(c) specifically authorizes.

White Plains, New York
June 23, 1995

Respectfully submitted,

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