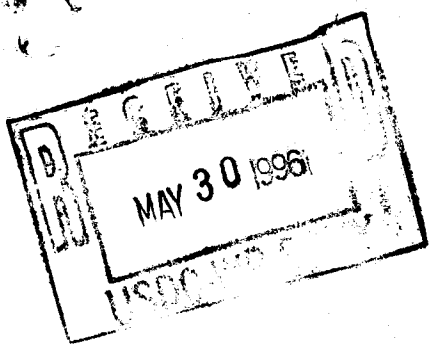

May 30, 1996

George Lange, III, Clerk
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, New York 10007

RE: Judicial Misconduct Complaint: Docket No. 96-8511

Dear Mr. Lange:

Pursuant to Rule 5 of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers under 28 U.S.C. §372(c), we hereby petition the Judicial Council of the Second Circuit for review of the April 11, 1996 Order of Acting Chief Judge Amalya Kearse, dismissing our judicial misconduct complaint against Chief Judge Jon O. Newman. This petition is timely, pursuant to your May 15, 1996 letter, responding to ours dated May 10, 1996. It is also as "short" a statement as was possible--considering the massive "error" reflected by Judge Kearse's dismissal Order.

As hereinafter shown, Judge Kearse's Order rests on bald misrepresentation of the justiciability of "merits related" complaints under §372(c), on bald misrepresentation that the instant complaint is "unsupported"--a ground for dismissal not authorized by the statute--and on omission of salient allegations of *ex parte* conduct, recognized by this Circuit as justiciable under §372(c).

Such dismissal Order also disregards the recommendation of the National Commission on Judicial Discipline and Removal (Exhibit "A", pp. 108-9)--endorsed by the Judicial Conference (Exhibit "B", p. 28) based on the recommendation of its Committee to Review Circuit Council Conduct and Disability Orders (Exhibit "C":Report, pp. 22-24; Addendum, pp. 6-8)--which calls for reasoned, non-conclusory dismissals. This is consistent with the Commentary on Rule 4 of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability (Exhibit "D": p. 20), stating that the "statutory purposes" of §372(c) are best served when the Chief Judge's orders disposing of complaints are "relatively expansive."

Additionally, Judge Kearse's Order disregards the National Commission's recommendation (Exhibit "A", p. 109)--likewise endorsed by the Judicial Conference (Exhibit "B", p. 28), based on the recommendation of its Review Committee (Exhibit "C", pp. 24-26)--that the Circuits resolve the substantive ambiguity of §372(c) by creating a body of interpretative precedent.

As herein below shown, ours is a complaint upon which interpretive precedent is properly built. Upon information and belief, the only "precedential" published decision of this Circuit relating to §372(c) complaints in the 16 years since the statute was enacted by Congress is entitled *In re Sassower*, 20 F.3rd 42 (1994), (Exhibit "E")--relating to George Sassower, our judicial whistle-blowing family member.

JUDGE KEARSE MISREPRESENTS THE JUSTICIABILITY OF MERITS-RELATED COMPLAINTS:

Judge Kearse repeatedly rests dismissal on a claim that §372(c)--the 1980 Act--"does not apply to matters 'directly related to the merits or decisional ruling" (at p. 4; see also p. 5). This is a misrepresentation of what §372(c) actually says.

§372(c)(3)(A)(ii)--which Judge Kearse cites (at p. 4) for the proposition that "The Act does not apply to matters 'directly related to the merits of a decision or procedural ruling'"-- in fact reads as follows:

> (3) "After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, *may*-- (A) dismiss the complaint, if he finds it to be...(ii) directly related to the merits of a decision or procedural ruling" (emphasis added).

Since §372(c)(3)(A)(ii) is *discretionary*, compliance with the recommendation that dismissal orders be reasoned and non-conclusory required Judge Kearse to specify the basis for her discretionary dismissal of the complaint as "merits-related". Judge Kearse does not do this except for the boiler-plate claim that §372(c) "may not be used to obtain relief available through normal adjudication". This assertion is not only inapplicable to the instant complaint, but a misstatement of the elementary principles of judicial misconduct, embodied in what little caselaw there is for §372(c).

The earliest caselaw for §372(c)--and the model upon which the congressional statute was drawn--derives from the administrative complaint procedures established in November 1978 by the Judicial Council of the Ninth Circuit.

The emerging succession of Ninth Circuit cases, beginning with *In re Judicial Misconduct*, 593 F.2d 881 (1979), all stand for the same proposition: administrative disciplinary review is not properly invoked where there is an available appellate remedy "absent any suggestion of corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office." (*Id.*, 881). See also *In re Judicial Misconduct*, 595 F.2d 517 (9th Cir. 1979); *In re Judicial Misconduct*, 613 F.2d 768 (9th Cir. 1980), *In re Judicial Misconduct*, 685 F.2d 1227 (9th Cir. 1982).

In other words, there are two circumstances under which disciplinary review under §372(c) is proper: (1) where there is no appellate remedy; and (2) where a complaint involves allegations such as bad-faith conduct and corruption--in which case it does not matter whether an appellate remedy exists.

Our misconduct complaint meets both standards for disciplinary review. As reflected by paragraph 2 of our complaint and substantiated by the documents submitted therewith, *no* relief through normal adjudication has been available. A Circuit Court order, such as that authored by Judge Newman, is

not reviewable, as of right--and our exhaustive attempts to obtain discretionary review were unavailing. This complaint, therefore, is readily distinguished from the above Ninth Circuit dismissal orders, which do not recite any attempts having been made by the complainants to obtain judicial review. For the same reason, our complaint is distinguishable from *In re Judicial Misconduct*, 691 F.2d 924 (9th Cir. 1982)--cited by Judge Kearse in her dismissal Order (at p. 4)--where there is no recitation of the complainant having sought to avail himself of procedures for judicial review. By contrast, Judge Kearse's Order includes, under the heading "Background", the following recitation:

> "Complainants unsuccessfully sought further review. In August 1992, the Second Circuit denied their petition for a rehearing in banc, and in April and June, 1993, the United States Supreme Court denied Complainants' petition for a writ of certiorari and petition for rehearing." (at p. 2).

Conspicuously, Judge Kearse does not relate her "Background" recitation to the "Disposition" section of her Order (pp. 3-5). Her "Disposition" totally ignores the significance of the fact that the record presented herein establishes the unavailability of relief through "normal adjudication. Indeed, her Order does not demonstrate the availability of a judicial remedy--which is what a reasoned, non-conclusory Order is supposed to do. Nor does it even baldly assert that such remedy exists for us.

Yet, as hereinabove set forth, the existence of a judicial remedy has no bearing on a complaint--such as this--rooted in allegations of corrupt, ulteriorly-motivated, bad-faith, judicial conduct. In the section of her dismissal Order entitled "Allegations" (pp. 2-3), Judge Kearse summarizes our complaint as follows:

> "Complainants accuse the Judge of 'corruptly' using his position as presiding judge for 'ulterior, retaliatory purposes.' They contend that he knowingly authored a false decision 'for the sole purpose of defaming and financially injuring [Complainants], who were the immediate family of a judicial 'whistle-blower'.' They claim that the Judge is biased against their family member for making 'fiercely antagonistic' charges against the judiciary and that the alleged bias determined the ruling in their case...They insist that the decision is contrary to 'dispositive' facts and controlling law and attribute the result to the Judge's 'unabashed retaliation and lawlessness."

In re Charge of Judicial Misconduct, 685 F.2d 1226 (9th Cir. 1982)--relied on by Judge Kearse in her Order--not only supports the justiciability of our complaint, but anticipates just such a complaint. Its pertinent discussion reads as follows:

> "We need not reject the possibility of an exceptional case developing where the nature and extent of the legal errors are so egregious that an inference of judicial misconduct might arise, but that would be a rare case, and it has not occurred here. We note, moreover, that there is neither an assertion nor evidence that the judge acted with

improper motive..."[1] at 1227.

As hereinabove quoted from Judge Kearse's "Allegations" section of her dismissal Order (pp. 2-3), our complaint asserted Judge Newman's "improper motive", as well as the egregiousness of his decision. Indeed, the complaint is detailed and specific in both respects, as well as substantiated by documentary proof and record references.

It may be noted that *Duckworth v. Department of Navy*, 974 F.2d 1140 (9th Cir. 1992)--the other case cited (at p. 4) by Judge Kearse--misrepresents *In re Charge of Judicial Misconduct*, 685 F.2d 1226 (9th Cir.). *Duckworth* quotes from that case, but omits the above-quoted analytic discussion of the justiciability of complaints based on bad-faith conduct, including rulings which are palpably egregious. Additionally, *Duckworth* misrepresents §372(c) as requiring dismissal of merits-related complaints when, as hereinabove shown, that is *not* the case at all.

On that subject, the "merits related" dismissal in *Duckworth* further relies on the Ninth Circuit's "Misconduct Rule 4(c)(2)", at 1141. Judge Kearse replicates this in her dismissal Order by referring to this Circuit's "Local Rule 4(c)(2)" as authority to dismiss our complaint as "merits-related" (at pp. 4, 5).

In fact, those Circuit rules--derived from Rule 4(c)(2) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability--cannot serve as authority. They are violative of §372(c) and must be stricken as unlawful. Those Rules cannot properly--as they purport to--make mandatory dismissal of "merits-related complaints" when, as hereinabove quoted, the §372(c)(A)(ii) statute explicitly makes such ground for dismissal *discretionary*.

JUDGE KEARSE MISREPRESENTS OUR COMPLAINT AS UNSUPPORTED--WHICH IS NOT A STATUTORY GROUND FOR DISMISSAL

Judge Kearse combines her "merits related" dismissal of our complaint with a bald claim that our "charge of bias or prejudice is unsupported" (at p. 4).

Conspicuously, Judge Kearse does not identify what she means by unsupported: whether she is contending that we offered no factual specificity or documentary proof to support our charge of bias and prejudice or that, upon her investigation and inquiry of the specific facts alleged and the documents proffered, our charges were not substantiated. Thus, here too, Judge Kearse's Order fails to be reasoned and non-conclusory--as is required. However, irrespective of what Judge Kearse means by "unsupported", any such claim by her to that effect is demonstrably false.

---

[1] Such standard accords with the National Commission's recommendation regarding the justiciability of §372(c) complaints alleging delay (Exhibit "A", pp. 93-95).

Examination of our complaint shows that we provided factual specificity as to both the source and manifestation of our supposedly "unsupported" bias claim--as well as substantiating documentary proof.

As to its source, the enmity between the Circuit and George Sassower, which Judge Kearse refers to in her "Allegations" section (at p. 2), she does not address, let alone refute, the substantiating evidence we presented. This included two articles published in the *New York Law Journal*, annexed to our complaint as Exhibits "A-1" and "A-2", confirmatory of this Circuit's view of Mr. Sassower as a "vexatious litigant" and "vexatious repeat filer" of judicial misconduct complaints. Nor does she deny the accuracy of our statement that "the docket numbers, captions, and allegations of Mr. Sassower's lawsuits and judicial misconduct complaints against Second Circuit judges...are known to the Circuit or readily accessible by it." (at p. 2).

That Judge Kearse is familiar with such matters may be seen from her membership on the Judicial Council of the Second Circuit which issued (per Jon Newman) *In re Sassower* (Exhibit "E"), reported in the second of the *Law Journal* articles annexed to the complaint (Exhibit "A-2"). Indeed, four months before dismissing our complaint, Judge Kearse repeatedly invoked *In re Sassower* when, acting for the Judicial Council, following the recusal of Chief Judge Newman, she issued an Opinion and Order in *In re Eric Spiegelman*, 95-8538 (Exhibit "F")..

Nor does Judge Kearse address, or in any way refute, the four documents we supplied with the complaint--our Petition to the Second Circuit for Rehearing *En Banc*, and our three submissions to the U.S. Supreme Court: our Petition for a Writ of Certiorari, our Petition for Rehearing, and our Supplemental Petition for Rehearing. Each of those documents contained meticulous record references and legal authority showing Judge Newman's decision to be factually false, fraudulent, and legally insupportable. Indeed, as the complaint pointed out (at pp. 2-3), Judge Newman's decision is aberrant *on its face.*

In two other places in her dismissal Order, Judge Kearse also asserts that our charges are unsupported--likewise in combination with a boiler-plate claim that they are "merits related". Examination of her brief discussion highlights how contrived and dishonest her examples are.

(1) In the same paragraph in which she states that our "charges of bias or prejudice are unsupported", Judge Kearse contends that our claim that Judge Newman was bent on causing us financial injury is "refuted by the decision" (at p. 4). This is because, according to her, the decision "expressly" states that the sanctions imposed on Elena Sassower were to be "reconsidered in light of her limited resources"[2]. That Judge Kearse's argument as spurious is exposed by the decision itself. *On its face*, it keeps intact the aggregate $100,000 sanctions award, simply making Doris

---

[2] Judge Newman's modification of Judge Goettel's decision on such ground was entirely *sua sponte* and irrelevant. No objection based on financial inability was made by us--since the issue on appeal, as it was before Judge Goettel, was the complete absence of any evidence in the record of misconduct by us (Complaint, at p.3).

Sassower liable for whatever was not assessable against Elena Sassower--without any hearing whatever.

Conspicuously, Judge Kearse neither alludes to, nor refutes, the specific proof, cited in our complaint, in support of our allegation that Judge Newman was "bent on causing financial injury" to us--namely, that the $100,000 monetary sanction against us represented " a 'windfall' double payment to fully-insured defendants, who had no standing to seek a counsel/fee sanctions award and--as subsequently proven--no intention to reimburse the insurer" (at p. 2). A sanction award under such circumstances is an anathema--over and beyond the fact that there was *no* evidentiary support for any finding of litigation misconduct by us (at p. 3), but, rather, massive, *uncontroverted* evidence of fraud and misconduct by defendants (fn 4, p. 3).

(2) In the following paragraph (at p. 4), Judge Kearse rejects as "unsupported" our contentions relating to Judge Newman's inclusion of a "provocatively-titled" *Law Journal* article--which she makes appear as the basis upon which we characterized the decision as "malicious".

According to Judge Kearse, "Judge Newman (and the panel) determined" that the information contained in the article as to Doris Sassower's unsuccessful attempt to appeal her suspension had bearing on the appeal which "focussed on sanctions for Complainants' litigation conduct." (at pp. 4-5).

Yet, if there was no litigation misconduct by us--which is what our complaint argued (at p. 4) and demonstrated by record references--such *Law Journal* article was not relevant and gratuitously inserted for its prejudicial value. Indeed, our complaint stated:

> "As highlighted by pp. 7-8, 10-11 of plaintiffs' Petition for Rehearing *En Banc*, and pp. 20-1, 22-3 of their Cert Petition, Doris Sassower's status at the bar was irrelevant to the sanctions issue since, as established by the record, there was no sanctionable conduct by her or excess proceedings for which she was responsible." (at p. 4, emphasis in the original).

Since Judge Kearse's Order does *not* address the pivotal issue of whether there is any evidentiary support in the record of sanctionable conduct by us--which she rejects as "merits related"--she cannot accept the relevance of a *Law Journal* article, which our complaint contended was inserted to foster the misimpression that the federal court was not the first to sanction Doris Sassower--which was not the case at all.

Judge Kearse also ignores the fact--as alleged by our complaint--that the pretext for Judge Newman's citation to the *Law Journal* was stated by the decision itself, to wit, that Doris Sassower's "current status" at the bar was in "some doubt". Yet, our complaint not only points out that the *ex parte*, *dehors* the record article was nearly a year old as of the date of Judge Newman's decision, but that more "current" information as to Doris Sassower's status was already in the record before the court--having been injected by Judge Newman himself. In pertinent part, the complaint states:

> "Indeed, 'current' information as to [Doris Sassower's] status in both the state and federal courts was provided directly to Judge Newman on February 28, 1992, at the oral argument of plaintiff's appeal, when he interrupted plaintiffs to inquire of Doris Sassower on that subject. Such completely irrelevant and embarrassing inquiry, in a crowded courtroom, may have been recorded by the court. If so, the recording would substantiate that Judge Newman's courtroom inquiry provided him with more 'current' information than the September 11, 1991 *New York Law Journal article, published five months before the oral argument and nearly a year before his* August 13, 1992 decision." (at p. 4, emphasis in the original).

Conspicuously, Judge Kearse, who nowhere identifies whether she actually interviewed Judge Newman or the other panel members, or otherwise required a response from them, does *not* identify whether such courtroom recording exists. This contrasts with her Order in *In re Judicial Misconduct* 95-8528 (Exhibit "G", p. 4), where Judge Kearse specified "review of the audiotape of the oral argument." Nor did Judge Kearse inquire of us whether we had any witnesses who could corroborate our assertion as to what took place at the February 28, 1992 hearing.

Under this Court's local rules, Rule 4(b) governs Judge Kearse's inquiry. In pertinent part, it reads:

> **Inquiry by chief judge.** In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining...whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may request the judge or magistrate whose conduct is complained of to file a written response to the complaint. The chief judge may also communicate orally or in writing with the complainant, the judge, or magistrate whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any matter that is reasonably in dispute."

It must be noted that §372(c) does not, in fact, provide a statutory basis for the Chief Judge to dismiss complaints as unsupported. The closest statutory ground is "frivolous"[3]. Rather, it is by this Court's Local Rule 4(c)(3)--adopted from the Illustrative Rules--that the definition of "frivolous"

---

[3] Judge Kearse has dismissed (at p. 5) as "frivolous" our suspicion that Judge Newman was involved behind-the-scenes in the Southern District's suspension of Doris Sassower's law license, based on her assertion of how these suspensions are handled "as a routine matter". By that reasoning, as a "routine matter", an appeal--such as *Sassower v. Field*--showing, by an uncontroverted record, no factual support for the lower court's sanction award, had to be reversed. Certainly, under the extraordinary circumstances set forth in our complaint, there is nothing "frivolous" in surmising that the same hand responsible for the wholly violative and fraudulent decision in *Sassower v. Field* was at work in effecting the wholly violative suspension decision.

has been expanded to specify, "a term that includes making charges that are wholly unsupported."

However, it is difficult, if not impossible, to understand how Local Rule 4(c)(3) can be reconciled with Local Rule 4(b), proscribing the Chief Judge from making "findings of fact about any matter reasonably in dispute."[4]. Such confusion is unresolved and unaddressed by the National Commission on Judicial Discipline and Removal--except to the extent that it recognized that §372(c) does not expressly authorize even a "limited inquiry" by the Chief Judge[5]. That being the case, it would appear that even were this complaint "unsupported"--which it demonstrably is not--Judge Kearse has no authority to dismiss it on that ground.

JUDGE KEARSE OMITS JUSTICIABLE ALLEGATIONS OF *EX PARTE* JUDICIAL CONDUCT:

Judge Kearse omits from her Order those allegations of our complaint (at p. 4) that rested on Judge Newman's incorporation in his decision of the *ex parte*, *dehors* the record, false and defamatory matter contained in Judge Goettel's decision, identified as such and objected to by us on appeal. Nor does she identify that the "provocatively-titled" *Law Journal* article about Doris Sassower's unsuccessful appeal of her suspension, cited in Judge Newman's decision, was *ex parte*, *dehors* the record.

That *ex parte* contacts constitute misconduct and are treated as justiciable under §372(c) by this Circuit may be seen from dismissal orders issued by Judge Newman himself.

In *In re Charge of Judicial Misconduct*, 94-8544 (Exhibit "H", p. 3), Judge Newman quotes "in pertinent part" Canon 3A(4) of the Code of Judicial Conduct, including:

> "A judge should...neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding."

The justiciability of complaints alleging *ex parte* judicial conduct, is reflected by *In re Charge of Judicial Misconduct*, 94-8547 (Exhibit "I"). Chief Judge Newman did not dismiss that complaint, resting on *ex parte* allegations, as outside scope of §372(c). Rather, he dismissed it after inquiry--which he--unlike Judge Kearse--identified. That inquiry included interviews not only with the judge, but with two individuals, having direct personal knowledge. Likewise, in *In re Charge of Judicial Misconduct* 94-8558 (Exhibit "J"), the justiciability of allegations of *ex parte* conduct, is reflected by Judge Newman's inquiry of the judge as to what had transpired.

---

[4] *See* Commentary to Illustrative Rule 4 (Exhibit "D", p. 18)

[5] *See* Exhibit "A": pp. 97-98, 102; also, Research Papers of the National Commission, Vol. I, pp. 513.

Indeed, the research papers of the National Commission on Judicial Discipline and Removal further substantiate the justiciability of complaints of *ex parte* contact (Exhibit "A", p. 93; also Research Papers, Vol. I, pp. 518, 528).

CONCLUSION

As hereinabove demonstrated, this detailed and documented complaint is fully justiciable. This includes our allegation (at p. 2)--dismissed by Judge Kearse as "merits related" (at p. 5)--that this Circuit's imprimatur on Judge Newman's egregious decision, by its denial of our Petition for Rehearing *En Banc*, reflects its bias against us, born of our family relationship to George Sassower.

Judge Kearse's claim that "The Act does not provide for transfer of a bias complaint to another circuit" (at p. 5) is disingenuous. The Act does *not* preclude transfer--and recusal and transfer is always appropriate where judges are unable or unwilling to act impartially or where there is an "appearance of impropriety"--as here. This is reflected by the Commentary to Illustrative Rule 18 on "Disqualification"--a Rule adopted by this Circuit:

> "...we have concluded that the appearance of justice is best served by adherence to traditional principles that matters should be decided by disinterested judges. ...If a quorum of the judicial council cannot be obtained to act on a petition for review of a chief judge's order, there is no evident statutory vehicle for assigning the matter to another body, but we believe it would be appropriate to do so. Among other alternatives, the council might ask the judicial council of another circuit or the Judicial Conference Committee to Review Judicial Conduct and Disability Orders..."

Plainly, judges who allied themselves with Judge Newman's unprecedented decision when it was brought before them as part of the "normal" adjudicative process will be loathe to objectively evaluate it in the context of a disciplinary complaint against him.

Moreover, the fact that Judge Newman is now this Circuit's Chief Judge, superior to the judges on the Circuit Council--who are, if not dependent upon him, then his long-time colleagues and friends--would not lead any objective person to believe that it could dispassionately review his conduct.

It is submitted that Judge Kearse's dismissal of this complaint is so dishonest--factually and legally--as to demonstrate the kind of cover-up that can be expected from a subordinate and colleague. Indeed, the public would not anticipate that Judge Kearse would repay Judge Newman's public championing of her--as reflected by his October 10, 1991 Op-Ed piece in *The New York Times* (Exhibit "K")--by appointing a committee to investigate a complaint of misconduct by him.

This is no ordinary complaint. The allegations of corrupt use of judicial office--substantiated as they are by the documents submitted with the complaint and by the file in *Sassower v. Field*--represent criminal conduct, warranting impeachment and removal. As such, should this Council not take steps

to ensure the justiciability of those allegations--improperly rejected by Judge Kearse as "merits-related"--we request that it make the referral reflected by the National Commission's recommendation:

> "that a chief judge or circuit council dismissing for lack of jurisdiction non-frivolous allegations of criminal conduct by a federal judge bring those allegations, if serious and credible, to the attention of federal and state criminal authorities and of the House Judiciary Committee." (Exhibit "A", p. 97)

This recommendation was approved by the Judicial Conference (Exhibit "B", p. 30), based on the recommendation of its Review Committee (Exhibit "C", p. 8, 45-47).

ELENA RUTH SASSOWER
16 Lake Street, Apt. 2C
White Plains, New York 10603

DORIS L. SASSOWER
283 Soundview Avenue
White Plains, New York 10606

cc: House Judiciary Committee
Subcommittee on Courts and Intellectual Property
U.S. Department of Justice
Public Integrity Section, Criminal Division
Administrative Office of the United States Courts
Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts
Congresswoman Nita Lowey