SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner-Appellant,

-against-

The Commission on Judicial Conduct,

Respondent-Respondent.

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Index No.: 108251/2011

REPLY AFFIRMATION

DAVID GODOSKY, an attorney duly licensed to practice law in the State of New York, states the following under the penalties of perjury:

I am a member of the law firm of Godosky & Gentile, attorneys for petitioner-appellant, The Honorable Lee L. Holzman ("Petitioner"), in the above-captioned matter. I am fully familiar with the facts and circumstances of this case based upon a review of the file maintained by my office.

I submit the within reply affirmation in support of the instant application to request a stay of any proceedings by the Respondent pending determination of this appeal.

We assume the Court's familiarity with the papers submitted and proceed to address the points raised by Respondent in its opposition papers.

The Submission of an "Affirmation" in Opposition to the Motion is Improper and Must be Disregarded by this Court.

CPLR §2106 authorizes an attorney to submit an affirmation in lieu of an affidavit in most situations. However, "even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action" (Slavenburg Corp. v. Opus Apparel, 53 N.Y.2d 799, 901 [1981]. See also LaRusso v. Katz, 30 A.D.3d 240, 240-44, [1st Dept. 2006]. When a party to the action submits an affirmation instead of an affidavit, its contents must be disregarded. Pisacreta v. Joseph A. Minniti, P.C., 265 A.D.2d 540, 540-41 [2nd Dept. 1999].

While the underlying proceeding is a matter being prosecuted by the Commission on Judicial Conduct, the instant matter is an Article 78 proceeding **against** the Commission on Judicial Conduct ("Respondent"). Respondent, in this proceeding, is represented by the Attorney General of the State of New York. The opposition papers submitted to this Court have the "legal back" of Eric T. Schneiderman's office. In fact, during the Article 78 proceeding, Mr. Schneiderman's office repeatedly insisted that all notices and communication come through the Attorney General's office and not to their "client", the Commission on Judicial Conduct. Accordingly, CPLR §2106 does not allow the submission by a party in affirmation form, even if that affirmant is an attorney. The affirmations of Mr. Robert Tembeckjian, Administrator and Counsel

to the Commission and Mr. Mark Levine, Deputy Administrator, must be rejected as improper.

In the event this Court does consider Respondent's papers in their improper form, we will address the substantive arguments.

The Balancing of the Equities Weigh in Favor of Petitioner

Respondent continues to implore this Court, as it did the court below, to elevate its "right" to prosecute Petitioner above the very real constitutional concerns implicated by placing Petitioner in the position of defending his actions concerning Michael Lippman before Mr. Lippman, the criminal actor, is called to account and while he asserts his Fifth Amendment rights. Respondent urges this Court to simply let Respondent get it done, never mind about getting it done right. Respondent essentially argues that if they were to lose jurisdiction over Petitioner by virtue of his retirement this would be an unimaginable harm, but to prosecute the sitting Surrogate's Judge of Bronx County after 23 years on the bench without allowing him the benefit of the testimony and evidence from the criminal investigation and trial that led to Mr. Lippman's indictment, somehow this does not rise to the level of true "prejudice".

We respectfully submit that, ultimately, the analysis cannot rest upon the age of Petitioner or the potential loss of jurisdiction - a court must determine whether the due process

concerns are valid or not.

That Respondent highlights the age of Petitioner and retirement from the bench at the end of 2012 is a tacit acknowledgement that if Petitioner was, in fact, years away from retirement, Respondent would wait for the developed record after the Lippman criminal trial and the availability of the criminal defendant.

Petitioner Has a Strong Likelihood of Success on the Merits

Respondent attempts to minimize the importance of Michael Lippman and his actions with respect to the charges being pursued against Petitioner rather than confront the issue that Mr. Lippman's unavailability truly and unquestionably impedes Petitioner's constitutional right to mount a defense.

A cursory review of the Complaint (see, Petitioner's Affirmation in Support, annexed as part of Exhibit "B") is more than enough to easily demonstrate the central and material role Mr. Lippman's conduct and the criminal investigation play in the disciplinary proceeding. In fact, the Complaint is little more than a re-hashing of charges leveled against Mr. Lippman with only the modifier of a "failure to supervise" to differentiate the claims brought against Judge Holzman.

In the thirty-three (33) substantive paragraphs following Charge I on page (2) of the Complaint, "Michael Lippman" or

"Counsel to the Public Administrator" is mentioned twenty-three (23) times. Most significantly, in the criminal indictment, Michael Lippman himself is specifically charged with engaging in a systematic pattern of fraud and deception upon the court, in which he was undoubtedly aided by the former Public Administrator. The evidence at the criminal trial will certainly reveal the method in which Michael Lippman committed these acts and how he did so in such a manner so as to conceal them from Petitioner. Whether by and through the documents and evidence garnered in a multi-year, multi-agency investigation (to which Petitioner is not privy at this time) or through the testimony of Michael Lippman (who presently is unavailable by his assertion of his constitutional Fifth Amendment rights), the acts that Petitioner is accused of not knowing about or not acting upon will only be fully revealed at the criminal trial and upon its completion.

Respondent's tactic of minimizing the need for Mr. Lippman's testimony does not alter the fact that his testimony is "critical and necessary" to Petitioner's defense. See Britt v. Int'l Bus Servs., 255 A.D.2d 143 [1st Dept. 1998].

Exceptions to the General Rule Requiring Exhaustion are Present Here

Respondent's argument that it is a "well-settled" rule that Petitioner must exhaust all available remedies before obtaining judicial review, flatly ignores the fact that Petitioner has

exhausted the remedies for review of the constitutional issues raised herein by filing a motion with the Commission which did render a final decision.

Respondent's argument that Petitioner is sufficiently afforded the legal right to a review by the Court of Appeals ignores the irreparable nature of the constitutional violations of the proceeding itself, and thus the need for the Article 78 Petition for the stay to ameliorate those violations. Accordingly, its argument must fail; fortunately, it is also well-settled that the general rule carves out exceptions clearly applicable to this matter in its present posture.

In fact, this case is precisely the type where the exceptions to the general rule are applicable. See Martinez 2001 v. New York City Campaign Fin. Bd., 36 A.D.3d 544, 548 [1st Dept. 2007] ("the exhaustion rule is not inflexible and is subject to certain exceptions... [t]he rule need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, when resort to an administrative remedy would be futile **or when its pursuit would cause irreparable injury**")(emphasis added); Amorosano-Lepore v. Grant, 899 N.Y.S.2d 57 [N.Y. Sup. Ct. 2007], aff'd, 56 A.D.3d 663 [2nd Dept. 2008] ("[I]t is well recognized that the exhaustion of administrative remedies is not required where the

agency's action is challenged as unconstitutional"); Love v. Grand Temple Daughters, I. B. P. O. E. of W., 37 A.D.2d 363, 365 [1st Dept. 1971] ("It is axiomatic that while the courts will not entertain an application to overrule the determination of an organization until all remedies available to the petitioner have been exhausted, it is equally clear that useless or unavailing procedures need not be followed.")

That Mr. Lippman will Assert the Fifth Amendment is not Based on Conjecture

Respondent states that Petitioner's claim is not ripe for review, premised on its argument that it is too speculative to assert that Mr. Lippman will in fact plead the Fifth and that any unanswered question posed of Mr. Lippman would even be relevant. Respondent's argument ignores the fact that Mr. Lippman has already asserted by affidavit that he will in fact plead the Fifth, and Respondent's mention of Mr. Lippman twenty-three times in the Complaint clearly evidences that any testimony unavailable to Petitioner severely compromises his ability to mount a defense. Moreover, as the court held in Britt v. Int'l Bus Servs., 255 A.D.2d 143 [1st Dept. 1998], a stay is appropriate when critical and necessary testimony of a non-party undermines the ability of the party to competently mount its defense.

In addition, Respondent cites to Figueroa v. Figueroa, 160

A.D.2d 390 [1st Dept. 1990] in support of its position that a witness cannot exercise its Fifth Amendment right in advance. However, the court's reasoning in Figueroa actually supports Respondent's position that he will be prejudiced if a stay is not granted. In that case, the Appellate Division held that a witness could not prematurely assert the privilege against self-incrimination because the missing testimony compromised the respondent's right to mount a defense. The court stated that a "respondent brought before the court … must be afforded a hearing conducted in accordance with due process, including the opportunity to present witnesses in rebuttal to the evidence introduced by petitioner." Figueroa, 160 A.D.2d at 391.

Additionally, in Britt, decided by this Court 8 years after Figueroa, the First Department reversed the lower court and granted a stay of the proceedings on the representation by counsel that the witness in question intended to invoke his right against self-incrimination due to pending and related criminal charges. Here, Michael Lippman himself (as well as counsel) submitted an affidavit asserting that he will absolutely avail himself of his Fifth Amendment rights if called as a witness in the disciplinary hearing.

Failure to Stay the Proceeding is a Constitutional Violation Causing Irreparable Harm

Respondent's argument that Petitioner faces no irreparable injury from being subjected to a disciplinary hearing, again, refers to the general rule while not accounting for a constitutionally infirm proceeding. Respondent's reliance upon Galin v. Chassin, 217 A.D.2d 446, 447 [1st Dept. 1995] is inapplicable as the plaintiff in Galin was seeking to enjoin the Office of Professional Misconduct from "ever commencing any hearings or imposing any disciplinary action" against him. The constitutional concerns present here were not implicated in Galin which was premised on the claim that the charges were initiated in bad faith and to harass the plaintiff. Furthermore, the relief demanded here is limited in time and scope.

Indeed, as the other case cited by Respondent states, a challenge is available when there is a "claim of unconstitutional action." Newfield Cent. Sch. Dist. v. New York State Div. of Human Rights, 66 A.D.3d 1314, 1316 [3rd Dept. 2009].

The prejudice and irreparable harm to Petitioner is manifest. Even if a reviewing court were to determine subsequent to a hearing and, perhaps, sanction, that Petitioner was denied this fundamental right, there will simply be no way to undo the irreparable harm to Petitioner and his reputation. Going forward

at this time, before the appeal can be heard, presents the very real risk of a determination of misconduct against Petitioner and removal from the bench followed closely by an acquittal for Michael Lippman - clearly a bell that could never be "un-rung".

The Commission is at Fault for Delaying the Proceedings, Not Petitioner

Respondent asserts that Petitioner's application is merely seeking delay of the proceedings. Not only is this accusation wholly unfounded, it is a truly shocking statement in light of the outrageous delay by Respondent in bringing these charges. In fact, while Respondent chastises Petitioner for a purported "delay" of months, Respondent began its own investigation concerning Petitioner before August 5, 2008 (the issuing date of the Administrator's Complaint, annexed hereto as Exhibit "A"). It took Respondent **twenty-eight months** after the Administrator's Complaint for Respondent to serve the Formal Written Complaint on Petitioner on January 4, 2011. By rule, Petitioner's motion to dismiss or stay the proceedings was filed with the Commission within 30 days of service of the Complaint; less than four months after the Commission's decision on the motion to dismiss, Petitioner filed the Article 78 Petition - yet Respondent incredibly assails Petitioner for delay.

Respondent's reason for dawdling, even while it labored under the belief that Petitioner's term expired in 2011, is uncertain;

one could surmise it might be to cry out for an "expedited hearing" and truncate Petitioner's time to prepare a defense. Had Respondent not proceeded at its own leisurely pace in its 2 1/2 year investigation, the instant application could have been brought in 2009 and decided well in advance of a potential "loss of jurisdiction". Given the undisputed timeline and Respondent's inarguable delay, that Respondent would cast aspersions upon Petitioner by asserting that the present application - which seeks to secure constitutional safeguards before defending the disciplinary charges at a hearing where Petitioner's career and reputation are at stake - is a mere delay tactic, is nothing less than shameful.

We previously noted that Respondent was amenable to commencing the disciplinary hearing in May of 2011 even when Respondent believed that it would lose jurisdiction over Petitioner at the end of this year - giving Respondent approximately 6 months to complete the proceeding (Petitioner's Affirmation in Support, p. 8). Respondent has asserted that, based upon its communications with the attorneys in the criminal matter, the case against Michael Lippman will commence in January of 2012. Petitioner has already stated that the appeal will be perfected by November 3, 2011. Hence, the stay of the proceedings until a decision on the appeal is rendered will almost certainly

afford Respondent more time than it previously stated it would need to complete the proceedings. Respondent's argument that the "May of the year the judge is off the bench" timeline is no longer applicable simply does not pass the red-face test. Mr. Tembeckjian affirms that having the Hearing expanded from five days to eleven days would not allow for completion of proceedings, even if the Hearing was completed almost one year before the judge's retirement (Tembeckjian Affirmation, ¶41).[1]

While six-months was originally sufficient time to complete the proceedings, now, when weighed against the stay application, Respondent asserts that the hearing and the proceedings will take a substantially longer time and Respondent could not possibly be expected to complete its work in almost twice the amount of time it had originally sought and agreed to. Further, Respondent's scheduling argument should only be reached if a court is willing to abridge the rights of the accused and allow a purported and newly-minted "schedule issue" to trump the constitutional rights of the accused - an invitation we strongly urge this Court to decline.

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[1] We also note that the additional hearing days were scheduled merely to have all parties and counsel available **in case additional days were needed.** Staff Counsel to the Commission, Brenda Correa, assumed that these additional days would not be necessary. At the hearing Ms. Correa was asked by the Referee "Are you planning on going, if we needed to, going over into next week? I was not." Ms. Correa answered in concurrence with the Referee "No. I was not." (Transcript of Hearing in the Matter of Lee L. Holzman, p. 12, annexed hereto as Exhibit "B").

Petitioner's Refusal to Stipulate to the Admission of Court Records Without Any Foundation is Not Frivolous

Respondent's assertion that Petitioner is engaging in "dilatory tactics" based upon Petitioner's refusal to stipulate to the admission of court records at the hearing is even more ludicrous than Respondent's accusation of delay after waiting over two (2) years to file its complaint. At the hearing, Respondent has sought to offer into evidence various Surrogate's Court files in purported support of the various charges. Respondent asserts that since these are certified court records, stipulation into evidence is "the customary practice in these proceedings" (Tembeckjian Affirmation, p. 14, footnote "3"). Respondent cites Petitioner's refusal to stipulate as adding "many days" to the hearing and is an "indication of (Petitioner's) true aim (of) delay".

In addressing this feigned issue, we first note that all of the cases being offered into evidence are, of course, matters handled by Michael Lippman, either personally or as Counsel to the Public Administrator and contains hundreds of pages of documents authored by Michael Lippman - but somehow Petitioner's right to mount a competent defense is not irreparably harmed by the unavailability of this witness and the body of evidence gathered in the investigation which culminated in his indictment.

Furthermore, while Mr. Tembeckjian relies upon the previously

unknown basis for the admission of documentary evidence – "the customary practice in these proceedings" - and cites our disinclination to "just go along" as evidence of dilatory tactics – the Referee, Hon. Felice K. Shea, was similarly perplexed by the Commission's offer of 85 case files into evidence prior to any testimony or witnesses in support thereof.

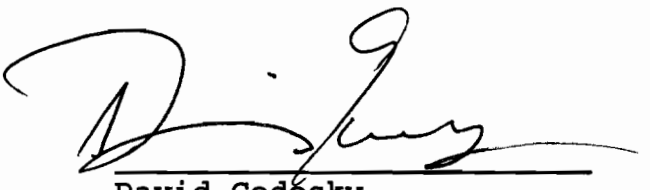
Staff Counsel Brenda Correa did, indeed, in the first few minutes of the hearing (in fact, at page 4 of the transcript) offer 85 court files into evidence. Judge Shea, initially believing that Ms. Correa simply wished to have the cases marked for identification, stated "This is all satisfactory with me." When counsel for Petitioner objected, Judge Shea commented "Well, I think Ms. Correa is just asking to have them marked." Ms. Correa responded "No. I'm seeking to admit them into evidence as well." Now aware of the offer, Judge Shea responded as follows: "Oh. Well, I can't do that now. We'll mark them for identification. **I have to have some basis for having them in evidence**" (emphasis added). Judge Shea continued "I know, but they have to be relevant at the hearing and when I hear some kind of evidence that you need them I'll rule….I don't know at this point because I haven't heard the evidence" (Ex. "B", pp.4-5).

Perhaps Respondent finds the Referee's adherence to the rules of evidence to be "dilatory" as well.

We do not view the constitutional concerns of due process, the right to a competent defense and proper evidentiary foundations to be but mere speed bumps on the road to a Determination by the Commission. These are not "tactics" nor gamesmanship, but rather the simple notion that Petitioner is entitled to the very same process and fairness given to any other jurist, of any age, or any other accused, in whatever forum. That Respondent finds this all to be terribly inconvenient should be of no moment, certainly not in light of the fact that it was Respondent's initial, considerable delay that placed the instant application into 2011.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the within motion should be granted, that the Court issue a stay of any proceedings by the Commission, including the scheduled hearing, pending determination of this appeal and that this Court should issue any other relief it deems just and equitable.

Dated: **New York, New York**
October 12, 2011



David Godosky

EXHIBIT A

ADMINISTRATOR'S COMPLAINT

In the Matter of: Lee L. Holzman
Surrogate
Bronx County

Complaint # 2008/N-719

Statutory Authorization

This complaint is filed at the direction of the State Commission on Judicial Conduct in compliance with Section 44, subdivision 2, of the Judiciary Law and is intended to serve as the basis for an investigation. In accordance with Section 44, subdivision 3, in the event that the above named judge is required to appear before the Commission or any of its members or staff, this complaint will be served at the time the judge is notified in writing of the required appearance.

This complaint is not an accusatory instrument. It provides a basis to commence an investigation. Thus, a judge under investigation may be required to reply to other allegations in addition to those set forth below.

Complaint

The Surrogate allegedly approved $1.9 million in legal fees to the Counsel for the Public Administrator without requiring submission of statutorily required affidavits of legal services.

The Surrogate also allegedly failed to supervise his present and previous Public Administrators, who invested more than $20 million in estate assets in high-risk auction-rate securities that have since been frozen. Heirs have been paid out $900,000 by New York City, which must wait for the securities to become liquid again.

Other heirs have allegedly been waiting more than a decade for the Surrogate to close their cases and distribute their inheritances.

The Surrogate further allegedly awarded more than $400,000 in fees to attorneys and accountants who are politically or professionally associated to the judge and his family, including one that provided office space to the judge's daughter.

Robert H. Tembeckjian, Administrator

New York, New York
Date Signed: August 5, 2008

Authorized at the Meeting of July 31, 2008

EXHIBIT B

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding Pursuant :
to Section 44, subdivision 4, of the
Judiciary Law in Relation to :

LEE L. HOLZMAN :

a Judge of the Surrogate's Court, Bronx County :
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61 Broadway, 12th Floor
New York, New York 10006

September 12, 2011
10:26 A.M.

Before:

HON. FELICE K. SHEA
Referee

Present:

For the Commission

BRENDA CORREA, ESQ.
Staff Attorney

MARK H. LEVINE, ESQ.
Deputy Administrator

FRANK V. DEBIASE
Investigator

For the Respondent

DAVID M. GODOSKY, ESQ.
Attorney for Respondent
Godosky & Gentile PC
61 Broadway
New York, New York 10006

AlsoPresent:

HON. LEE L. HOLZMAN
Respondent

MICHAEL FOLEY, ESQ.
Attorney for Witness
175 Main Street
White Plains, New York 10601

MIGUEL MAISONET
Senior Clerk and FTR Operator

INDEX OF WITNESSES

For the Commission

	Direct	Cross	Redirect	Recross
Esther Rodriguez	19	--	--	--

For the Respondent

	Direct	Cross	Redirect	Recross

THE REFEREE: Ready to proceed? Proceed.

MS. CORREA: Yes.

MR. GODOSKY: Yeah. Sure.

THE REFEREE: I'd like you to note your appearances please.

MS. CORREA: Brenda Correa for Commission counsel.

MR. LEVINE: Mark Levine for Commission counsel.

MR. GODOSKY: David Godosky, Godosky & Gentile for the Respondent, Lee Holzman.

THE RESPONDENT: Lee Holzman.

THE REFEREE: How do you do?

THE RESPONDENT: Good, thank you.

THE REFEREE: I would like to put on the record before we start that I'm acquainted with one of your witnesses. You may already know this, but I worked in the same office 40 something years ago with Michael Lippman when we were both Legal Aid lawyers many, many years ago. I have no personal relationship with him, but we were in the same office. The only other time I saw him was in a waiting room

during the Feinberg hearing because he was going to be called as a witness, but he wasn't. But we greeted each other. I also know Mr. Godosky because he was a candidate for the Judiciary and I was on the Mayor's Advisory Committee on the Judiciary and I'm also acquainted with many members of the Commission because I was on the Commission back in the 80's for 10 years and some of the people who were there are still there. So, I don't have a personal relationship with any of these people, but we know each other. I also know Mr. Godosky's father. He tried cases in front of me when I sat in the Civil Term in the Supreme Court. So, if you have questions about any of this, I'll be glad to answer them. But I just want the record to show that I know these people and it's, I guess, a reflection of the fact that although New York City is big, the bar is small and I've been around a long time. Okay, if that's everything, are we going to have opening statements?

MS. CORREA: No. I don't think we were --

MR. GODOSKY: I don't think we --

MS. CORREA: We hadn't intended on doing opening statements.

THE REFEREE: No --

MR. GODOSKY: -- No, that's right, your Honor --

THE REFEREE: -- Then you can call your first witness --

MR. GODOSKY: -- But, we do have something --

THE REFEREE: Oh, well, anything else that you want to put on the record or any motions and limiting or any --

MS. CORREA: -- Yes --

THE REFEREE: -- any preliminary things?

MS. CORREA: Yes, judge. We do have some preliminary matters. First, Judge, I also would like to hand up our witness list.

THE REFEREE: Thank you. Does Mr. Godosky have it?

MS. CORREA: Here Mr. Godosky.

THE REFEREE: Have you pre-marked exhibits?

MS. CORREA: We have pre-marked some of our exhibits and that goes to my next

issue, judge. We have 85 court files which we would like to mark into evidence and admit into evidence under CPLR 4540 out of certified court records just for -- in terms of making it more efficient, we wanted to admit them into evidence and then have them marked by our secretary and so, you'll have a copy of all 85 in case we'll be using them throughout the trial. So they are easily used by you, we can put a cart by you and we are going to the same for Mr. Godosky so he can use anything that we are referring to in evidence.

THE REFEREE: This is all satisfactory with me.

MR. GODOSKY: We would be objecting to the whole sale entry into evidence of all of those files.

THE REFEREE: Well, I think that Ms. Correa is just asking to have them marked. Are you asking --

MS. CORREA: -- No. I'm seeking to admit them into evidence as well.

THE REFEREE: Oh. Well, I can't do that now. We'll mark them for identification. I have to have some basis for having them in evidence.

MS. CORREA: Well they're court files, your Honor that are all on the schedules of the Formal Written Complaint. All 85 of them are referenced in your Formal Written Complaint in Schedules A through E.

THE REFEREE: I know, but they have to be relevant at the hearing and when I hear some kind of evidence that you need them I'll rule. I don't know if you need -- The other issue is, of course, 85 is a lot of papers and it's possible that some of them are repetitious and that you might not need them all and that we could stipulate to a representative group. I don't know at this point because I haven't heard the evidence.

MS. CORREA: Okay. Well, we can re-visit the issue then when the witnesses testify.

THE REFEREE: Yeah, but I would like them pre-marked. I don't want to keep interrupting the hearing.

MS. CORREA: Well, the only difficulty in pre-marking them is if -- you know, we won't really know until they're in, but we can --

THE REFEREE: But that's not a difficulty because if you don't put in some of them then, we'll just skip the numbers.

MS. CORREA: Okay, we can do that.

THE REFEREE: It's more efficient to have them pre-marked than it is to interrupt the testimony with that kind of mechanical thing.

MS. CORREA: We can -- We can have that done --

THE REFEREE: Yeah. I would prefer that

MS. CORREA: Yes. Okay.

MR. GODOSKY: Your Honor, if there is something else you want to --

MS. CORREA: Well, the next issue is our objections to some of the evidence that we've been handed -- some of the evidence that we've been handed on -- prospective evidence that we we've been handed out on Friday.

THE REFEREE: Alright. Well, when the time comes that it's offered please note your objection.

MS. CORREA: Sure.

THE REFEREE: But it's premature to do that before we hear the evidence.

MS. CORREA: Oh, and the other thing we -- I put outside the -- Mr. Godosky, deal with the next issue.

MR. GODOSKY: Sure. Just written here today because we informed them orally that my client is waiving confidentiality in these proceedings, so we wrote that out at the request of the Commission also.

THE REFEREE: Alright.

MR. GODOSKY: I mean I have that here. We can mark it as a court exhibit whenever it is convenient or --

THE REFEREE: Is there anything I should know about that?

MR. GODOSKY: No. Not really. I just re-informed them and Mr. Levine said that the rules required it to be in writing so we wrote it out and the Judge executed the document.

THE REFEREE: Very good. We'll put that in the record. We'll mark that if you want Respondent A.

MR. GODOSKY: Fine. Maybe not Respondent A because we have pre-marked our exhibits.

THE REFEREE: Oh, you have. Any letter you want to give it is alright.

MR. GODOSKY: (Unintelligible)

THE REFEREE: I'm glad you did. I

mean that's really the efficient way to do it when we have so many documents.

MR. GODOSKY: I have a bench book for you and it goes A through –

THE REFEREE: My only problem is going to be is worrying about carrying it.

MR. GODOSKY: Yeah. You can probably leave it here and then when -- if the time comes, we'll make it in a more convenient format.

THE REFEREE: We'll worry about it when we have to.

MR. GODOSKY: Yeah --

THE REFEREE: -- So what letter is that going to be?

MR. GODOSKY: Uh --

THE REFEREE: Look in your book and what's the last letter there?

MR. GODOSKY: Let's see. It look likes we go through "V" with the --

THE REFEREE: "V" like in Victor?

MR. GODOSKY: I'm just trying to see how --

THE REFEREE: -- And I note that there is someone else in the room. Is he from your

office?

MR. LEVINE: Yes. He put his appearance on the record.

MR. DEBIASE: Frank DeBiase, Investigator with the Commission.

THE REFEREE: How do you do?

MR. DEBIASE: Good morning.

MR. GODOSKY: Yes. We can mark this Respondent W.

THE REFEREE: Okay.

MR. GODOSKY: As to one other matter -- with the other matters are you done?

UNKNOWN: Yeah.

MR. GODOSKY: With respect to the first witness that you had indicated you had some familiarity with Mr. Lippman.

THE REFEREE: Uh-huh.

MR. GODOSKY: To the extent that your Honor is familiar with certain proceedings that are going on that will be testified to in this matter --

THE REFEREE: Well, I know that he is under indictment. That's on the record already.

MR. GODOSKY: Correct. He has been subpoenaed pursuant to the subpoena that your

Honor executed.

THE REFEREE: I know. That's why I know he's going to be a witness.

MR. GODOSKY: Well, that's the other point. He has executed an affidavit that was provided to us by his counsel indicating, and I'll just read what he says that, "I am electing to and will assert my Constitutional rights to remain silent, not answer questions under the Fifth Amendment to the United States Constitution and under the relevant provisions of the Constitution of the State of New York."

THE REFEREE: I know, but this is not how -- this -- he has to appear and assert his waiver on the witness stand. I'm not accepting that.

MR. GODOSKY: Okay. I just wanted to clear that up.

THE REFEREE: Yeah, but you're going to call him anyway, I assume.

MR. GODOSKY: Counsel asked me to make the presentation of the Affidavit if that would be -- if that would suffice, if not then I'll --

THE REFEREE: It's not going to suffice

for me. Does it suffice for you?

MS. CORREA: It does not suffice for us.

THE REFEREE: I think both sides are planning to call him. Am I wrong?

MS. CORREA: No. We are not planning on calling.

THE REFEREE: Oh. Well, it doesn't -- It's not legally sufficient --

MS. CORREA: No.

THE REFEREE: -- And unless there's a stipulation --

MS. CORREA: -- Absolutely not.

THE REFEREE: No. You can, if you want, offer that at some point, but, he has to assert his Fifth Amendment right on the witness stand, under oath, with regard to a specific question. I -- that's not sufficient.

MR. GODOSKY: And with respect to scheduling, is that something you want to do at this point or later on?

THE REFEREE: Well, we've set aside this whole week and unfortunately we're starting a little late, but I'm not going to take a taxi any other day because the city is all tied up because of 9/11. There are check points all over Lower

Manhattan and that's what made me late, but we should be able to work a full day or week as far as I'm concerned. Is there any problem with that?

MR. GODOSKY: This week most likely not except for Wednesday the Surrogate does have -- he is the only sitting Surrogate in Bronx County. He does have a calendar that day of approximately 100 cases. He can be here in the afternoon --

THE REFEREE: -- Well, we're not going to be able to do that and I -- first it is going to be difficult getting everybody together after this week is over. I mean we didn't talk about any further time. Are you planning on going, if we needed to, going over into next week? I was not.

MS. CORREA: No. I was not.

MR. GODOSKY: Well --

THE REFEREE: -- So we will have to re-schedule if we don't get finished and because I want to get finished, I would be very reluctant to adjourn for any day at all. I mean I think the inconvenience to the people in the Bronx --

MR. GODOSKY: Yeah. Right. Okay. I understand, your Honor. Well, we do have after

Index No. *Year 20*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of
The Honorable **LEE L. HOLZMAN**

Petitioner-Appellant,

-against-

The Commission on Judicial Conduct,

Respondent-Respondent

REPLY AFFIRMATION

LAW OFFICES
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Attorney for

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(212) 742-9700

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: ..... Signature .....

Print Signer's Name.....

Service of a copy of the within *is hereby admitted.*

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon.* *, one of the judges of the within-named Court, at* *on* *20* *, at* *M.*

Dated:

LAW OFFICES
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