SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU
PRESENT THE HON. GEORGE R. PECK, J.S.C.

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Index Number

601000/2016

BEECHWOOD POB LLC

Plaintiff,

-against-

RICHARD A. BRUMMEL AND GHENYA B. GRANT

Defendants.

AFFIDAVIT IN OPPOSITION TO ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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STATE OF NEW YORK, COUNTY OF NASSAU SS:

RICHARD A. BRUMMEL, residing at 15 Laurel Lane, East Hills, N.Y. 11577, being duly sworn, deposes and states that I am familiar with the facts and circumstances set forth herein except where they are stated upon information and belief and those I believe to be true, and I make this affidavit in opposition to the Plaintiff's motion for injunctive relief:

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Preliminary Statement

1. Plaintiffs Beechwood POB and Town of Oyster Bay argue that the time and effort spent defending a series of motions to intervene has been not an inconvenience but a violation of court rules. And based on that claim, seek to enjoin and sanction Defendant.

2. But the truth is documented in each motion at issue by both Proposed-Intervenors, Richard A. Brummel and Pamela A. Sylvester: each motion had a clear and proper purpose, and the parties had a reasonable, good-faith belief in their case and the propriety -- indeed necessity -- of their actions.

3. Furthermore the courts made no decision on the several related motions during the time they were being quickly filed -- in a logically connected sequence -- during what was at the time believed to be an inflexible but unknown statute-of-limitations deadline to file a notice of appeal[1]. There was thus no frivolous intent to 'relitigate' a settled issue.

4. To find otherwise is to sanction diligent litigation undertaken over a very brief period of time by public-spirited parties for a very clear public (and private) purpose. Aggressive advocacy is a core tenet of the legal system, and it should not be confused with impropriety, as Plaintiff seek to do in this case[2].

5. Every motion made to this Court was argued prior to the disclosure that a settlement had been reached and so-ordered. Those made to the Appellate Division were based on the prior, timely motions, or were valid in their own right based on case-law[3].

[1]Initial pleadings were filed assuming there was no way to avoid the thirty (30) day statute of limitations for filing a notice of claim after the original Petitioners were served with the judgement (see CPLR § 5513).

[2]The courts have said as much: "To be sure, public policy mandates free access to the courts and zealous advocacy is an essential component of our legal system (Board of Educ. v Farmingdale Classroom Teachers Assn., 38 N.Y.2d 397, 404; Burt v Smith, 181 N.Y. 1)...." Sassower v. Signorelli 99 AD 2d 358 (Second Dep't, 1984) at 359. This case, one in which sanctions were imposed for endlessly excessive litigation, was cited by Plaintiff Beechwood in its Memorandum of Law, and discussed below for its complete inapplicability to the present matter.

[3]One motion, not part of the cases brought by the two Plaintiff's, was filed separate from the appeals taken

6. The several motions made to the appellate court -- appealing this Court's actions or otherwise -- are beyond the jurisdiction of this Court to sanction for several reasons: (i) the motions have not been put in evidence by the Plaintiffs, and no specific arguments as to their content have been made. Furthermore, (ii) motions made to the appellate court are properly judged by that Court, not this Court. And (iii) to date, affiant is aware of no such application made to that Court by the plaintiff.

7. But in the interest of completeness each appellate motion will be defended here.

8. Defendant Brummel was indeed involved in the overall effort to have the judgement in this case appealed, and while not responsible for the pleadings filed by an attorney on behalf of allied Proposed-Intervenor Pamela A. Sylvester, those pleadings will nevertheless be defended herein.

9. Plaintiffs Beechwood and Town of Oyster Bay repeatedly assert that both Proposed-Intervenors knowingly lacked standing. But in each case, the facts and law are either arguable or clearly supportive of standing -- as shown in each pleading -- and thus there have been no violations of the Rules of the Chief Administrative Judge (22 NYCRR 130-1.1) with respect to frivolous litigation.

10. Proposed-Intervenor Brummel asserted his use and enjoyment of the land at issue over a period of more than a year, Proposed-Intervenor Sylvester asserted her residence of thirty (30) plus years, her use and enjoyment, and her view. The claim that Proposed-Intervenor Sylvester lacked standing for allegedly failing to participate in the administrative process relies on an 'interpretation' of the law that is absolutely false, as extensively argued in the motions here at issue, and further discussed below.

related to motions filed in this Court, and seeks intervention on the appellate court's own authority, but based on the good-faith prompt efforts to intervene earlier.

11. Plaintiffs Beechwood POB and Town of Oyster Bay claim any intervention cannot be timely under the 'relation-back' rule. But that interpretation of the law was also firmly refuted in the motions here at issue.

12. The number of motions made is also a matter claimed by the Plaintiffs to be facially suspect. There were two motions by Proposed-Intervenor Brummel to this Court and one by Proposed-Intervenor Sylvester. And there were two motions filed by each with the Appellate Division. (Proposed-Intervenor Sylvester filed one motion and withdrew it after Defendant Grant was denied access to Proposed-Intervenor Brummel, who accompanied her to the Court to assist in the presentation).

13. But each motion had a proper purpose, was not undertaken to harass Plaintiff or delay the case, and none of them were frivolous as a matter of law or intent, which should have been absolutely clear to the Plaintiffs.

14. As will be documented below, the facts of the matter at hand bears no resemblance to those described in case-law cited by the Plaintiffs as supporting a finding of frivolity. Those cases describe blatant and egregious behavior, pleadings that make no sense, long-durations, and extreme quantities of papers -- or they speak only in general terms offering no basis for comparison.

15. Plaintiffs may indeed have been 'vexed' by the motion practice seeking to have the matter placed before the Appellate Division for review, after the case was not only decided in their favor but was induced by them to be stipulated as free from any appeal.

16. But the actions of Defendant Brummel (as well as of the attorney representing Proposed-Intervenor Sylvester) have been just and proper, and should not -- and cannot justly -- be found otherwise by this Court.

17. It bears noting that the Plaintiff Town of Oyster Bay in its pleading utilizes extremely overheated and prejudicial rhetoric in describing Proposed-Intervenor Brummel and his actions. It is hoped the Court will see past the injudicious tone and recognize it for theatrics unsupported by hard evidence, as will be demonstrated herein.

18. Insofar as either Plaintiff Beechwood POB or Town of Oyster Bay seeks to have any further motions filed, with or without permission of the Court, or seeks to enjoin any support or assistance to others, the relief would be overbroad and affect questions of statutory or civil rights (freedom of speech or association, among others) and should be denied.

Facts: Pleadings of Proposed-Intervenor Brummel

19. Proposed-Intervenor Brummel filed two motions to intervene with this Court -- an original and an amended one -- almost as soon as it became evident to him that there was a significant risk the Petitioners would not appeal the Court's adverse judgement in the special proceeding he had organized and assisted them in preparing.

20. Notably both motions came prior to the time the settlement of the original Petitioners was even publicized -- as it initially was on January 15, 2016 by the Plaintiffs in opposition to the motion to intervene at the Appellate Division conference on that date.

21. The two motions filed, one of January 7th and one on January 14th, were essentially identical except for the fact that the second sought to amend the first to include a fuller, substituted pleading as required by CPLR 1014.

22. In each motion, Proposed-Intervenor Brummel described the facts of his regular use and

enjoyment of the lands at issue -- which began during his advocacy for their protection, and the law that sustained standing based thereon (Exhibit 1 Brummel Amended Affidavit in Support of Order to Show Cause to Intervene, hereafter "Brummel Amended Affidavit", ¶¶ 7 *ff.*, without exhibits; Brummel Memorandum of Law in Support of Motion, pp. 2-3).

23. The motions were presented clear statements of fact and reasonable interpretations of the laws of standing, as established by the Court of Appeals, and of intervention as established by statute and case-law.

24. The motions were supported by multiple exhibits documenting the issues raised, and in the case of the amended affidavit accompanied by the original Article 78 Petition proposed for use as the required intervention pleading.

25. Both motions, filed by order to show cause, were left unsigned by the Court.

26. The Court made a signed notation on the first unsigned order to show cause that the matter was already decided and the Proposed-Intervenor Brummel had "insufficient basis for standing", and a signed notation on the second unsigned order to show cause refers only to the matter having been already decided.

27. Movant believed the contrary however and felt the Appellate Division would agree, and he subsequently appealed. In neither case did the Court formally rule on the merits or find the motions frivolous or otherwise abusive.

28. On January 15th, Proposed-Intervenor Brummel and the attorney for Proposed-Intervenor Sylvester appeared together at the Appellate Division to argue their respective motions to intervene, and conferenced with Plaintiffs and a Deputy Clerk of the Court.

29. The appellate motions were made by order to show cause, seeking immediate intervenor status, due to the fear that a deadline for filing the notice of appeal would expire.

30. That first appellate motion by Proposed-Intervenor Brummel was thoroughly argued regarding the laws of standing and intervention (Exhibit 2, Brummel Affidavit in Support of Motion to Intervene, hereafter "Brummel Appellate Motion I", without exhibits).

31. The twelve (12) page motion includes five (5) exhibits, among which are the underlying papers submitted to this Court with exhibits. The motion addressed standing (*id.*, ¶ ¶ 9 *ff.*); the basis for the appeal sought (*id.*, ¶ ¶ 36 *ff.*); the laws regarding intervention (*id.*, ¶ ¶ 41 *ff.*); and the amendment to add a pleading to the motion to intervene before the original trial court (*id.*, ¶ ¶ 51 *ff.*).

32. The motion was accompanied by a memorandum of law -- an exhibit, utilizing that filed with the motion before the trial court.

33. The Appellate Division did not sign to order to show cause, following a conference with a Deputy Clerk at which the Plaintiffs Beechwood POB and Town of Oyster Bay disclosed publicly, apparently for the first time, the existence of the settlement and argued it made the matter moot.

34. The settlement was shown only briefly to Proposed-Intervenor Brummel and the attorney for Proposed-Intervenor Sylvester.

35. While the Proposed-Intervenors attempted to refute the claim of mootness, they were largely unprepared to argue as it is an esoteric point of law, and they only learned of it when it was disclosed during the appearance at the Appellate Division -- despite having given the Plaintiffs at least twenty-four (24) hour notice of the hearing.

36. The abrupt disclosure of the settlement was so vague -- the physical copy presented was not even signed, upon information and belief -- that it did not even become clear to the Proposed-Intervenors that their filings with this Court had actually preceded the settlement,

and should therefore have been unaffected by it even under the strictest interpretation of the case law[4].

37. Because the erroneous assertions of mootness appeared to have swayed the appellate Court, which declined to sign the order to show cause, Proposed-Intervenor Brummel returned to the Appellate Division on January 25th, and the attorney for Proposed-Intervenor Sylvester returned on February 1st, to re-argue the matter.

38. The follow-up motions extensively explored standing, relation-back, and how the case-law concerning intervention supported their applications -- the settlement notwithstanding.

39. Proposed-Intervenor Brummel's affidavit was twenty-two (22) pages long and accompanied by twelve (12) exhibits. The affidavit was also accompanied by an eighteen (18) page memorandum of law (Exhibit 3 and Exhibit 4, Brummel Affidavit in Support of Motion to Reargue Motion to Intervene and To Intervene on Court's Own Authority, hereinafter "Brummel Appellate Motion II"; Memorandum of Law, hereinafter "Brummel Appellate Memorandum of Law", respectively).

40. The Brummel Appellate Memorandum of Law extensively addressed the question of mootness based on the settlement and refuted that it precluded intervention in this case, based on the circumstances of this case (*id.*, pp. 4 *ff.*).

41. Despite the extensive argument Proposed-Intervenor Brummel presented, the Court declined to sign the order to show cause. The Court did not reach the merits of the motion, issuing no statement at the time and stating in a decision of February 4th: "...[T]he appeal is dismissed, without costs or disbursements, on the ground that the order is not appealable as

[4]The case Breslin Realty Development v. Shaw, 91 A.D.3d 804 (Second Dep't, 2012), discussed below, appears on its face to preclude intervention when motions are filed after settlement -- though not before; however, as discussed below, higher authority does not agree and the case itself applies only in specific circumstances of delay etc. that would not apply in the present case.

of right and leave to appeal has not been granted (see CPLR 5701)" (Slip Opinion 2016 NY Slip Op 63217 (U)) (Plaintiff Beechwood POB Affidavit in Support of Motion for Temporary Restraining Order etc., Exhibit F).

42. No further motion has been submitted by Proposed-Intervenor Brummel.

43. In no case did the Appellate Division find any of the motions by Proposed-Intervenor Brummel or Proposed-Intervenor Sylvester frivolous, nor were costs or disbursements imposed in any of them.

44. It is hoped the final motion will be heard by the full appellate panel and judged on the merits to allow a fair and open review of the Court's judgement, and that is the sole purpose and aim of the efforts by both Proposed-Intervenors in the case.

45. At no time was there any divergence from the law and fact in the motions submitted.

Facts: Pleadings of Proposed-Intervenor Sylvester

46. Proposed-Intervenor Brummel is not per se responsible for the pleadings of his allied Proposed-Intervenor but inasmuch as the arguments of Plaintiffs Beechwood POB and Town of Oyster Bay repeatedly reference the supposedly excessive number of motions filed, and inasmuch as Proposed-Intervenor Brummel was certainly aware of them and supported them, Proposed-Intervenor Brummel is comfortable defending them too, to be complete.

47. Proposed-Intervenor Sylvester applied to this Court once to intervene in this matter, for the purpose of taking an appeal, on January 13, 2016 (Affirmation in Support of Motion to Intervene, hereinafter "Sylvester Supreme Court Motion").

48. Her motion was made approximately four weeks after the Court's judgement was

entered dismissing the Article 78 Petition by her neighbors, and about two weeks after the judgement was served, upon information and belief.

49. It was not until two days after that motion was made that Proposed-Intervenor Sylvester was first informed that a settlement had been reached and so-ordered by the original Petitioners that precluded only the original Petitioners from appealing the Court's judgement.

50. The motion to intervene was supported by a fourteen (14) page affirmation with ten (10) exhibits, including an affidavit from the Proposed-Intervenor Sylvester describing the facts of her residence, use of the lands at issue, and the injuries she would suffer from the development.

51. The affirmation discussed the facts justifying intervention; cited the statutes upon which the application was based; and discussed case-law substantiating the Movant's standing, and her invocation of the 'relation-back' rule (CPLR 203(f)) allowing the motion to be judged timely.

52. It also made clear that the purpose of intervention was to permit an appeal to be taken of the judgement at issue (Supreme Court Motion Sylvester, ¶ 32).

53. The order to show cause bringing the motion was not signed by this Court, which notated on the papers that the order to show cause was not the correct vehicle to bring the motion.

54. Due to the time constraints believed at that time to necessitate a prompt filing of a Notice of Appeal, two days later, on January 15th, Proposed-Intervenor Sylvester sought relief from the appellate division to obtain leave to intervene, appealing this Court's failure to grant the relief sought.

55. The first appellate motion of Proposed-Intervenor Sylvester, filed on January 15th,

closely followed the arguments of the motion to this Court (Exhibit 5, Sylvester Affirmation in Support of Motion to Intervene, hereafter "Sylvester Appellate Motion I", without exhibits).

56. At the time, the Plaintiffs Beechwood POB and Town of Oyster Bay argued before a Deputy Clerk of the appellate division that the settlement -- only then disclosed, and so-ordered the same day -- precluded intervention because the matter was rendered moot.

57. The appellate court declined to sign the order to show cause.

58. The second motion of Proposed-Intervenor Sylvester to the Appellate Division sought to re-argue the prior motion and to justify the proposed intervention notwithstanding the settlement (Exhibit 6 Affirmation in Support of Motion to Re-argue, hereafter "Sylvester Appellate Motion IIA", ¶¶ 71 *ff.*) .

59. That motion extensively discussed case law which does appear to permit intervention after a settlement (*id.,* ¶¶ 71 *ff.*).

60. The motion also discussed the timeline of the motions to intervene in this case in the context of Breslin Realty Development v. Shaw, 91 A.D.3d 804 (Second Dep't, 2012), a decision addressing the timeliness and circumstances of intervention in the context of a settlement.

61. It was shown that even where intervention might be precluded after a settlement, in the present case the motion to intervene in fact did precede the settlement (*id.*, ¶¶ 78 *ff.*).

62. The motion was however withdrawn, as noted above, due to unexpected restrictions imposed on counsel to argue it[5].

[5]As noted, counsel for Proposed-Intervenor Sylvester was unexpectedly barred from even consulting with Proposed-Intervenor Brummel, who accompanied her, during the conference, despite the fact Proposed-Intervenor Brummel had extensive and unique knowledge of the case, having been involved from its inception.

63. The appellate motion was re-filed by Notice of Motion on February 19th, presenting substantially the same argument but exclusively seeking leave of the Appellate Division itself to intervene and appeal, as provided by law[6] (Exhibit 7 Affirmation in Support of Motion to Intervene on the Court's Own Authority, hereafter "Sylvester Appellate Motion IIB").

Legal Issues Regarding the Settlement and Intervention

64. This Court has already had before it the legal arguments raised in the three motions submitted to it with respect to 'standing' and the 'relation-back' rule, among other questions the case raises.

65. The new legal argument raised of necessity before the Appellate Division after the settlement was disclosed on January 15th addressed the settlement and its (lack of) impact on the right to intervene in the present case given its specific circumstances.

66. As noted above, the motion of Proposed-Intervenor Brummel of January 25th was accompanied by a memorandum of law that addressed the question of mootness based on the settlement, refuting the claim that the settlement precluded intervention. Proposed-Intervenor Brummel's argument was based on the law and the circumstances of the case, e.g. the promptness of the motions and the fact they preceded the settlement (Exhibit 3, Brummel Appellate Motion II, pp. 4 *ff.*).

67. The Sylvester Appellate Motions IIA and IIB extensively addressed the issue of mootness and demonstrated that the case law supports intervention. Breslin, *id.* was shown

[6]See Auerbach v. Bennett, 47 N.Y.2d 619 (1979), at 628: "The Appellate Division was vested with all the power of Supreme Court to grant the motion for intervention...."(Sylvester Appellate Motion IIB, p. 1)

to be inapplicable if the order to show cause filed before this Court was considered a motion preceding the settlement. And even if the unsigned order to show cause was held not to qualify as such a timely motion, a comparison with other case-law supporting post-settlement intervention was found to support it.

68. Case-law was cited as follows (Sylvester Appellate Motion IIB, ¶¶ 98*ff.*):

> "'Petitioners and respondents in the instant case commenced settlement negotiations in December 1995, ultimately agreeing to the same settlement terms as the NYSHFA case....Upon discovering that they would not be included in the settlement, proposed intervenors moved on December 15, 1995 to intervene in the case.
> ....
> Pursuant to CPLR 7802 (d), a court may allow other interested persons to intervene in a special proceeding. This provision grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013....Permission to intervene in an article 78 proceeding may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal.'
>
> Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 N.Y.2d 716 (1998) at 719-20 (emphasis added, internal quotations and citations omitted) (where a group of health care facilities were denied the right to intervene due to a statute of limitations finding, and were held ineligible to assert the 'relation-back' rule, notwithstanding that they could otherwise have intervened even after a settlement)

69. "The Third Department held that intervention, for the purposes of appealing, is permissible after a settlement, applying in two cases the ruling of Matter of Greater N.Y. Health Care Facilities, *id.*:

> 'Intervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal (see Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, 91 NY2d 716, 720 [1998]; Matter of Tennessee Gas Pipeline Co. v Town of Chatham Bd. of Assessors, 239 AD2d 831, 832 [1997]). While the district would not be directly bound by a judgment, as it was neither served with process nor was it a party to the court proceeding....Under the unusual circumstances of this case, we find that the district should have been permitted to intervene at the time of its motion for the purpose of taking an appeal.'

Matter of Romeo v. NYS Dept. of Educ., 39 AD 3d 916 (Third Dep't, 2007) at 917-18 (emphasis added, internal quotations and citations omitted)(where a school district was permitted to intervene after judgement in a matter wherein a resident sought by Article 78 to overturn an administrative determination of state agency sustaining the district's denial of residency)

70. "The Third Department similarly held in a separate case, also citing Matter of Greater N.Y. Health Care Facilities Assn., *id.*:

'The executed stipulation of settlement resolving the underlying CPLR article 78 proceeding was entered and 'so ordered' by Supreme Court in June 1999. Although defendant could have attempted to intervene at that point in time for purposes of pursuing an appeal (see Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono, supra at 720), he failed to do so....'

Town of Crown Pt. v Cummings, 300 AD2d 873 (Third Dep't, 2002) at 874 (emphasis added) (where the Court affirmed the lower court ruling denying a party the right untimely to retroactively challenge a settlement that affected his real property located along a Town road)."

71. The Sylvester motions also discussed the Second Department's holding in Breslin, *id.,* in terms of the circumstances of the case, the language of the decision, and the authorities cited for support, showing that Movant's motions were timely indeed based on (i) the promptness of the motions to intervene by Proposed-Intervenor Sylvester, and (ii) the defensible earlier reliance by Proposed-Intervenor Sylvester on the expectation that the Petitioners would adequately defend her interests.

72. The pleadings demonstrated that the circumstances of the case govern its timeliness under Breslin (Exhibit 3, Sylvester Appellate Motion IIB, ¶ ¶ 104 *ff.*), and they cited, for instance, the holding by the Court of Appeals that a delay in filing can be excusable (*id.* ¶ 102):

"...[I]t was not until [plaintiff's] decision not to appeal...that the inadequacy of [plaintiff's] representation of [proposed intervenor] became apparent [therefore] [proposed intervenor] cannot be faulted for not theretofore having sought intervention ....."

Auerbach v. Bennett, 47 NY 2d 619 (1979) at 628-29 (emphasis added)(where the Court permitted one shareholder to intervene in a shareholder derivative action brought by a second shareholder when the second shareholder failed to appeal the dismissal of the case, which occurred before the proposed intervenor's motion to intervene)

73. The motions also showed that under case-law the 'relation-back' rule (CPLR § 203 (f)) was supported by the circumstances in the case (*id.*, ¶ 168):

"Adding additional petitioners would not have resulted in surprise or prejudice to the respondents, who had prior knowledge of the claims and an opportunity to prepare a proper defense. Moreover, the cross motion, among other things, for leave to amend the petition was not barred by the applicable statute of limitations. The amendment relates back to the original petition, since the substance of the claims are virtually identical, the relief sought is essentially the same, and the new petitioners, like the original petitioners, are residents of the respondent Town of Shelter Island (see CPLR 203 [f]; Fulgum v Town of Cortlandt Manor, 19 AD3d at 444; Key Intl. Mfg. v Morse/Diesel, Inc., 142 AD2d 448, 458 [1988]; see also Bellini v Gersalle Realty Corp., 120 AD2d 345, 347 [1986])."

Matter of Shelter Island Association v. Zoning Board of Appeals of Town of Shelter Island, 57 AD 3d 907 (Second Dep't, 2008) at 908-909 (emphasis added) (where in a matter involving permission to add tenants to a facility, the Court found that the matter was properly dismissed because neither the original petitioners nor the proposed new petitioners had standing, although the Court agreed that the new petitioners could otherwise have been added, were they found to have standing)

74. Thus the legal bases of the motions were well-substantiated and in no way violated the rules of the court regarding frivolous litigation.

Argument: The Litigation Was Not Frivolous Per Se

75. Plaintiff Beechwood POB's and Town of Oyster Bay's applications for injunctive relief are predicated on the assertion that the conduct of the Proposed-Intervenors was frivolous: without legal merit, or intended to harass etc., or undertaken to delay the proceedings etc., as

provided as follows:

> "For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the (1) circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."
>
> Rules of the Chief Administrator of the Courts *§* 130-1.1(c) / 22 NYCRR 130-1.1 (c) (emphasis added)

76. Such a finding of frivolousness cannot be substantiated with respect to the motions to intervene submitted by neither Proposed-Intervenor Brummel nor Proposed-Intervenor Sylvester to this Court, or to the appellate division. (As noted in the preliminary remarks, the motions to the appellate division are believed not properly before this Court, but in the interest of completeness are defended herein.)

77. The motions themselves were based on statute and case-law as outlined in the motions themselves, as demonstrated herein.

78. Furthermore their purpose was clearly in the service of the Movants' interests to intervene and appeal, not to 'harass' the Plaintiffs or others, nor to delay the resolution of matter -- except insofar as just and proper appellate review was sought.

79. Finally, neither this Court nor the Appellate Division formally ruled on the merits of

any of the motions, so there was no re-litigation of settled matters -- but only an urgent effort to have the matter adjudicated.

80. While it is true this Court made a notation on the first order to show cause to the effect that Proposed-Intervenor Brummel did not have standing and that the matter had already been concluded by the Court's judgement of December 15, 2015, and on the second amended order to show cause that the matter was already decided, Proposed-Intervenor Brummel presented convincing facts and case-law to refute those opinions, which warranted appellate review.

81. Furthermore, this Court's findings in the judgment of December 15, 2015 with respect to the original Petitioners' standing and other matters raised substantial question as to whether the Court was accurately applying various laws related to the matter and could be unquestioningly relied on, as discussed in the 'basis for the appeal' raised in Exhibit 1, Brummel Amended Affidavit ¶ ¶ 34 *ff.*

82. In Proposed-Intervenor Brummel's two motions before this Court, standing was specifically substantiated based on the use and enjoyment that the Proposed-Intervenor had regularly partaken of on the lands in question in the period leading up to and after he had organized the legal challenge (Brummel Affidavit, ¶¶ 7 *ff.*).

83. In Proposed-Intervenor Sylvester's one motion before this Court, standing was established by distance to from the project to the home of the the Proposed-Intervenor Sylvester (Sylvester Motion to Intervene, ¶ 13, e.g.) and her usage of the lands at issue (*id.*, ¶ 20, e.g.) and her views from her home (*id.*, ¶ 18, e.g.). The relevant case law was cited.

84. Plaintiffs' repeated yet irrefutably erroneous claim that standing 'must' be denied due to Proposed-Intervenor Sylvester's alleged lack of participation in the administrative process

was also fully addressed, and fully refuted (*id.,*¶ ¶ 22 *ff.*).

85. With respect to standing, the motion clearly and convincingly argued that (i) Issues raised by the Petitioners and the Proposed-Intervenor Sylvester had been raised by others in the administrative process, making them firmly subject to adjudication[7]; and (ii) Even where issues are not raised earlier, in matters related to the State Environmental Quality Review Act ("SEQRA"), as in the present case, the issues still are subject to judicial review[8].

86. The affirmation for Proposed-Intervenor Sylvester also substantiated that intervention was timely based on the 'relation-back' doctrine, CPLR *§* 203(f) (*id.,* ¶ ¶ 39 *ff.*). It showed that there was a lack of prejudice to the Respondents due to the fact the special proceeding was concluded, and that the case law supported application of the doctrine in similar cases involving nearby residents[9].

87. Once again, this Court did not deny the motion but stated that the order to show cause was not the proper vehicle for it, in a signed notation on the unsigned order to show cause. Thus the Court did not even address the legal and factual issues presented, let alone rule on them. The same can be said of the motions before the Appellate Division.

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[7]In her affirmation, the attorney for Proposed-Intervenor Sylvester cited Matter of Shepherd v. Maddaloni, 103 A.D.3d 901 (Second Dep't, 2013), at 905: "Contrary to the contention of the Village respondents and the Maddalonis, the Shepherds are not precluded from challenging the site plan approval on the ground that they did not actively participate in the administrative proceeding. The objections to the Planning Board's determination that they raise in this matter were specifically advanced by an attorney representing the three other petitioners/plaintiffs during the administrative proceeding...." (Sylvester Supreme Court Motion,¶23, emphasis added).

[8]The affirmation also cited Committee to Stop Airport Expansion v. Wilkinson, 2012 NY Slip Op 31914 (Supreme Court, Suffolk County, 2012, Jones, J.): ""It is well settled that the doctrine of exhaustion of administrative remedies does not foreclose judicial review of SEQRA issues (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 503 NYS2d 298 [1986])." (*id.*,¶25).

[9]Matter of Shelter Island Association v. Zoning Board of Appeals of Town of Shelter Island, 57 AD 3d 907 (Second Dep't, 2008) at 908-909, cited in ¶ 39 of the affirmation before this Court.

Argument: There Is No Evidence of Deliberately Vexatious Litigation or Re-litigation

88. Plaintiffs submit no direct evidence that Proposed-Intervenors deliberately used the judicial process for an untoward purpose as defined by 22 NYCRR 103-1.1.

89. In fact the recitation of the Proposed-Intervenor Brummel's Facebook postings in support of Plaintiff Beechwood POB's Affidavit in Support (e.g. Exhibit A, Verified Complaint, pp. 7 *ff.*) actually supports the opposite conclusion. As cited, the extensive postings describe earnest, good-faith, logical legal plans intended to intervene and appeal in order to reverse what was repeatedly described as an erroneous decision on the law. In all the analysis and quotation there is not one statement that the litigation is intended to harass or delay. The discussion is notably open and frank.

90. Plaintiff Beechwood misleadingly cites one quotation from the Facebook postings that asserts the Courts play a "game" in their adjudicating (Beechwood Affidavit in Support, Exhibit A, ¶22): "True this is a 'game' with the courts because they don't always play it straight." In contrast to the tortured meaning ascribed by Plaintiff Beechwood POB, the statement was intended to state that in Proposed-Intervenor Brummel's experience the Courts appear to improperly take into account political, social, economic, governmental or other considerations, while reaching decisions that may not strictly comport with the law. It is not an uncommon opinion of those dealing with the legal system.

91. Plaintiff Beechwood POB distorts the statement from its facial meaning to suggest that to Proposed-Intervenor Brummel the litigation itself was a 'game' -- suggesting some improper motive in the effort being undertaken. But clearly that purported meaning was false and self-serving.

92. Plaintiffs make at best a circumstantial argument that because their own interpretation of various legal provisions militates against the proposed intervention, and because the courts failed to sign the orders to show cause presented to them, therefore the purpose of the applications must be designed to harass or delay. But that argument cannot be supported.

93. In fact the sequence of motions has been logical and the legal bases have been clearly articulated in each motion. The purpose of each was clear: to obtain leave to intervene in order to appeal, not to harass or vex.

94. Furthermore the issues were not settled and repeatedly re-litigated. In no case was a formal adverse decision rendered on the orders to show cause, but only a failure to sign the order to show cause. The decisions ultimately rendered on the "notices of claim" (Plaintiff Beechwood POB Affidavit in Support, Exhibit F) were apparently technical ruling on the failure to have sought leave to appeal orders in an Article 78 proceeding, although the decisions related to the judgement of December 15, 2015 are puzzling and unclear[10].

95. Seeking a final decision on the merits, a final motion on behalf of Proposed-Intervenor Sylvester, seeking permission to intervene for the purpose of taking an appeal, and based exclusively on the Court's own authority, was filed with the Appellate Division by notice of motion on February 19th (Exhibit 7).

96. It is not disputed that taken together there were a number of motions filed by the two Proposed-Intervenors at the trial court (three) and appellate (four) level, and some of them were delayed from the time they were noticed for. (They were delayed for logistical reasons -- not from malice -- and there were profuse apologies to the opposing counsel when that occurred).

[10]The decision (2016 NY Slip Op 63515(U)) states that "no appeal lies from a decision" -- but the Article 78 ruling is a judgement (CPLR §7806), which is appealable as of right (CPLR § 5701).

97. But those facts do not make the motions frivolous, harassing, or designed to delay the resolution of the matter. As described above, each motion was filed for a specific purpose and had a reasonable basis in law and in process.

98. The Proposed-Intervenors were acting under a stringent deadline because they had initially subscribed to the legal theory that their notices of appeal needed to be filed under the same deadline as applied to the original Petitioners -- meaning within thirty (30) days of service of the judgement, which was entered December 16, 2015.

99. Without any certain way to determine when the judgement was in fact served on all five (5) original Petitioners, the Proposed-Intervenors initially assumed that leave to intervene must be granted by about January 16, 2015 to assure a timely notice of appeal.

100. Thus the series of motions and the pressed deadlines, and rushed completions, occurred during the period of January 7 - 15, when most of the motions were presented to this Court (three (3)) and the Appellate Division (two (2)).

101. That was the period when the primary delays complained on by Plaintiffs Beechwood POB and Town of Oyster Bay primarily occurred.

102. Eventually, Proposed-Intervenors found enough authority for the legal theory that the court granting intervention could also grant an extended period for the notice of appeal[11], and for that reason Proposed-Intervenors filed additional motions after the presumed deadline for the original Petitioners expired.

---

[11] "...[W]e find that the district should have been permitted to intervene at the time of its motion for the purpose of taking an appeal.

....

Accordingly, the district may intervene as an appellant on the appeal from the January 6, 2006 judgment provided that it files a notice of appeal within 30 days following entry of this Court's order."

Matter of Romeo v. NYS Dept. of Educ., 39 AD 3d 916 (Third Dep't, 2007), at 918 (emphasis added, internal quotations and citations omitted) (Exhibit 3, Sylvester Appellate Motion IIB,¶209)

103. So the delays in arriving in court -- with the extensive sets of pleadings and exhibits -- were caused by the extremely rushed deadlines initially believed by the Proposed-Intervenors to be applicable, and the need to work on tight deadlines on notice to the Respondents under Uniform Court Rules § 202.7

104. Plaintiffs' pleadings dwell on the time element of the delays as a matter of vexation, but clearly the conduct of the Proposed-Intervenors was innocent, not deliberate or calculated or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1(c)(2)).

Argument: Dismissal of Notices of Appeal Did Not Create Awareness of Lack of Merit

105. Plaintiff Beechwood asserts that the dismissal of the notices of appeal by the Appellate Division put the Proposed-Intervenors on notice that their motions were without merit (Beechwood Affirmation, ¶ 21).

106. Not only were Proposed-Intervenors unaware of the Court's 'decisions' -- on notices of appeal -- until they read them in the Beechwood exhibit, but the 'decisions' occurred well after all the motions at issue had been filed. None of the decisions were even served on the Proposed-Intervenors. Furthermore they did not create 'settled law' with respect to the merits of the motions, but only the formats thereof.

107. Three notices of appeal regarding orders to show cause submitted to but not signed by this Court were dismissed "on the ground that the order is not appealable as of right...." and such right was not granted on the court's own motion or otherwise (Plaintiff Beechwood POB Affidavit in Support, Exhibit F).

108. There was no finding that the appeals were frivolous or other such characterization of the motions.

109. In fact it is common practice for the appellate courts to convert motions no appealable of right to applications for leave to appeal and to grant them. In this case they did not do so, but there was no description of the merits of the case.

110. Two notices of appeal regarding the Court's judgement of December 15, 2015, cite the case Schicchi v. J.A. Green Construction, 100 A.D.2d 509 (Second Dep't, 1984) as denying any appeal from a decision (*id.*).

111. Inasmuch as the CPLR clearly gives a party the right to appeal a "final or interlocutory judgement" (CPLR § 5701) the citation and the ruling itself is a matter of some confusion.

112. In any event none of those rulings found the any basis for costs or disbursements either.

113. Again, none of the decisions cited went to the merits of the motions, thus they do not have a *res judicata* or collateral estoppel effect with respect to the merits of Proposed-Intervenors' motions to intervene in order to appeal.

114. The holdings of the Court are technical holdings at best, apparently requiring that the Proposed-Intervenors seek 'leave' to appeal in the context of the motions.

Cases Cited by Plaintiffs Regarding "Frivolousness" Are All Inapposite

115. Plaintiff Beechwood POB cites eleven (11) cases in its Memorandum of Law that it claims provide the Court authority and guidance to sustain the argument to enjoin the Proposed-Intervenors. Plaintiff Town of Oyster Bay cites four (4) cases, two (2) of them

identical to those cited by Plaintiff Beechwood POB.

116. An examination of each case reveals, to the contrary, that none provides relevant guidance because they are either too vague or, in most cases, the circumstances in the cases cited are so blatant and egregious -- typically a plethora of facially bizarre litigation over long periods of time -- that they bear no actual resemblance to the facts of the present matter.

117. There is no dispute that the courts have authority to address frivolous litigation, as stated in the various decisions cited. But the cases cited do nothing to support the proposition that the motions submitted in this case, which were focused, time-limited, and facially defensible, for the legitimate purpose of obtaining appellate, review meet the definition of frivolousness, which they clearly do not.

118. The entire exercise of the case citations by the Plaintiffs is so bereft of materiality that it is as if an obtuse rookie policeman came upon a scuffle between school-children and began citing the penal law for riot and attempted murder. In fact, though, Plaintiffs engage a deliberate and calculated distortion tending to mislead the Court.

119. Plaintiff Town of Oyster Bay cites two (2) of the (completely inapplicable) cases also cited by Plaintiff Beechwood POB among its eleven (11) cited cases, and Plaintiff Town of Oyster Bay adds two cases that are so vague and conclusory as to what conduct met the definition of frivolous litigation that they are of no service in determining the issues for this Court. An analysis of each case follows.

120. The first case cited in Plaintiff Beechwood POB's Memorandum of Law, Lipin v. Hunt, 573 F. Supp. 2d 836 (Dist. Court, SD New York, 2008), involves the Court issuing sanctions based on an entirely incomparable factual situation, where a litigant in an estate matter had over years engaged in "an enormous number of pleadings" of dubious if not

bizarre character, for example:

> "In addition to her involvement in estate proceedings in Maine and Sweden, Ms. Lipin has now filed six separate actions based on her alleged ownership of this property and/or actions taken by various persons in connection with the administration of her father's estate, the disposition of estate property....
> ....
> Ms. Lipin has filed in this Court an enormous number of pleadings and other papers almost all of which have been frivolous, duplicative of other filings and interposed for purposes of preventing and delaying this Court from reaching the merits of the matters before it.
> In an effort to obstruct a fair and orderly administration of the estate, Ms. Lipin filed numerous actions and appeals undertaken without good faith and abusive of the courts and other parties.
> ....
> Ms. Lipin's latest set of motions, as well as the Allegaert action, appear not to have been brought in good faith, but rather as part of Ms. Lipin's practice of suing and/or moving to disqualify judges and opposing counsel following adverse rulings."
>
> Lipin, *id.,* internal quotations and citations omitted

121. In the present cased, by contrast, there have been a small series of connected motions filed for a clear purpose, without any prior history of the type cited in Lipin. The case is clearly inapposite as are its prescriptions for judicial case-management.

122. The second case cited by Plaintiff Beechwood POB, Naclerio v. Naclerio, 132 AD 3d 679 (Second Dep't, 2015) is highly abbreviated and simply sustains the trial Court's decision to require prior approval -- without indicating the specific circumstances that led to the decision. It is thus not at all instructive here.

123. The third case cited by Plaintiff Beechwood POB, Breytman v. Olinville Realty, 2012 N.Y. Slip Op. 06572 (Second Dep't, 2012) is another decision that sustains the lower court's decision to require leave to file further motions yet provides no indication of the facts that justified such a course of action.

124. However the apparent underlying case, Breytman v. Olinville Realty, 2011 NY Slip

Op 51611 (Supreme Court, Kings County, 2011, Lewis, J.) recites an almost comically excessive pattern of litigation over an apartment, illustrated by the following excerpts:

> "With a contoured [sic] procedural history of claims, counterclaims, motions, cross-motions and appeals, the instant action arose out of an incident which occurred while Mr. Breytman was a tenant in an apartment complex owned by defendant Olinville Realty LLC (the defendant).
> ....
> ...Mr. Breytman commenced the instant action by filing a summons and a complaint. He amended the complaint on November 5, 2006 naming 35 defendants. Among other things, Mr. Breytman made numerous claims most of which sounded in a claim of a breach of warranty of habitability. The amended complaint was dismissed in its entirety. Mr. Breytman appealed. The Appellate Division, Second Department, affirmed the ruling as to all other claims but reinstated only The plaintiff's claim for personal injury.
> ...
> Mr. Breytman now brings two separate motions simultaneously seeking different and unrelated forms of relief. In the first motion, Mr. Breytman seeks to dismiss the notice of entry for an order that was erroneously dated and entered in a wrong court. In the second motion, he seeks to amend his amended complaint to add new causes of action, and to add new the defendants to the action.
>
> ....The defendant asserts that the plaintiff's first motion is moot insofar as the defendant has since rectified the error regarding the filing of the notice of entry....
>
> With regard to Mr. Breytman's second motion, the defendants state that Alexander Breytman did, in fact, already amend his initial complaint to add new defendants and causes of action, which were dismissed. The defendant notes that Mr. Breytman now seeks to add the same claims of false arrest and malicious prosecution....
> ... The defendant further notes that Mr. Breytman made these exact claims against the same defendants in a previous action in New York County under index No. 402940/04 and that both the City and the Non-City defendants filed for summary judgment."

Breytman, *id.*

125. Once again, as in Lipin, *id.*, there is no similarity between the facts of the case -- the evidently bizarre and tortured history of an aggrieved tenant -- and the present series of motions by two separate parties to two separate levels of the judiciary on a narrow and defined set of claims and issues.

126. The next case cited Plaintiff Beechwood POB, Dimery v. Ulster Sav. Bank, 2011 NY Slip Op 2345 (Second Dep't, 2011) similarly includes no specifics regarding the improper conduct the courts found warranted court permission for further motions, and thus fails to show any authority for the present matter.

127. The next case cited by Plaintiff Beechwood POB, Ram v. Hershowitz, 76 AD 3d 1022 (Second Dep't, 2010) describes a succession of separate actions that were denied on the merits, and bear no resemblance to the present matter for that reason, and also because they were adjudicated all the way to the Court of Appeals -- not, as in the present case, a limited series of related motions brought by order to show cause that were simply not signed. As stated by the Court:

> "...[T]he petitioner has instituted several proceedings and actions in the Supreme Court against Miriam Hershowitz (hereinafter Hershowitz), the widow of the judgment debtor, in connection with a money judgment filed on June 10, 1999, in the Civil Court of the City of New York, Kings County. In each such proceeding or action, the petitioner alleged the same underlying transaction and facts, seeking to enforce the money judgment against personal and/or real property owned solely by Hershowitz. Orders dismissing two such proceedings were affirmed by this Court on appeals (see Matter of Fontani v Hershowitz, 12 AD3d 672 [2004]; Fontani v Hershowitz, 12 AD3d 636).
>
> Subsequent to those appeals, the petitioner commenced another enforcement proceeding in the Supreme Court, resulting in an order dated March 9, 2009, denying the petition and dismissing the proceeding on the merits...."
>
> Ram, *id.*

128. The next case cited by Plaintiff Beechwood POB, Gorelik v. Gorelik, 71 AD 3d 729 (Second Dep't, 2010), speaks vaguely of "numerous requests in several other motions for the same relief" but offers no details, so that there is no actual comparison that may be made with the present matter.

129. The next case cited by Plaintiff Beechwood POB, Molinari v. Tuthill, 59 AD 3d 722

(Second Dep't, 2009), contained three specific grounds upon which the motions related to parental rights were held to create a pattern of frivolity: the matter was decided on the merits and *res judicata* attached; the days claimed for visitation were factually erroneous; and the mother's move was within a distance exempted from revised visitation plans.

130. In the present matter there has been no determination on the merits of the motions to intervene, and the factual (and legal) bases for the motions have therefore not been deemed in error, as in the case cited.

131. Furthermore while the trial court found that the motions were "motivated by spite or ill" (Molinari, *id.*, at 723), there is no basis for this Court to make such a finding -- that the motions have been made absent good-faith based on the extensive factual and legal justifications buttressing each motion.

132. The next case cited by Plaintiff Beechwood POB, Manwani v. Manwani, 286 AD 2d 767 (Second Dep't, 2001), involved twenty-seven (27) applications in family court over the same adjudicated claims:

> "The Family Court properly denied the wife's objections and confirmed the Hearing Examiner's order denying her petition for an upward modification of spousal support. The instant petition is the 27th such petition filed by the wife since the parties separated in 1988. The prior petitions were denied for lack of proof, and this petition was an improper attempt by the wife to relitigate these prior orders, without any proof of a change in circumstances since the preceding order (see, Family Ct Act § 412; Domestic Relations Law § 236 [B] [9] [b])....
>
> The petitioner has brought multiple applications for upward modification of support that are based on speculation and lack any evidentiary substantiation. She has followed the dismissal of each petition with another seeking the same relief based on the same allegations bereft of support. This tactic has harassed her elderly former spouse and abused the judicial system...."
>
> Manwani, *id.*

133. Clearly the several motions in the present matter brought urgently to obtain leave to

intervene to appeal a matter of broad public interest bear no material relation to the matter in Manwani, *id.*, despite its citation by the Plaintiff. The matter has not been adjudicated as in Manwani, and there have been no determinations as in Manwani. Further the entirety of the circumstances of the case -- the duration and the type of case -- are not comparable.

134. The next case, cited by both Plaintiffs, Sassower v. Signorelli, 99 AD 2d 358 (Second Dep't, 1984), again involves blatantly excessive massive litigation -- based on actual rulings over an extended period of time -- bearing no resemblance to the present matter:

> "This appeal is the latest in a series of frivolous and repetitious claims, motions, petitions, collateral proceedings and appeals arising from the rulings of the defendant, the Surrogate of Suffolk County, which required plaintiff George Sassower to account for his activities as a fiduciary. We affirm the order insofar as appealed from, and utilize the opportunity to caution these plaintiffs, as well as others, that this court will not tolerate the use of the legal system as a tool of harassment."
>
> Sassower, *id.* at 358-9

135. The Court in Sassower held that where the malevolence was clear -- and in the case the sanctioned individual persisted in suing the Surrogate even when the Court had determined he was immune in his official capacity -- the sanction was warranted:

> "...[W]hen, as here, a litigant is abusing the judicial process by hagriding individuals solely out of ill will or spite, equity may enjoin such vexatious litigation."
>
> Sassower, *id.*, at 359 (internal quotations and citations omitted)

136. But in the present case no evidence has been presented bearing similarity to what the case cited determined. Clearly the case bears no resemblance to the present matter and is improperly cited for authority.

137. The next case cited by Plaintiff Beechwood POB, Matter of Wagner, 114 AD 3d 1235

(Fourth Dep't, 2014), involves prior permission of a surrogate for further motions due to egregious actions of the plaintiff, to wit:

> "Here, despite numerous adverse determinations and repeated warnings by the Surrogate and, more recently, by this Court (Matter of Aarismaa v Bender, 108 AD3d 1203, 1205 [2013]), petitioner continues to file frivolous and largely incomprehensible applications based on his erroneous beliefs that issue was never joined and that a note of issue must be filed before a summary judgment motion may be made and granted. We therefore conclude that the Surrogate properly enjoined petitioner from continuing to use the legal system to harass respondent, to deplete the assets of the estate, and to waste the time of the Surrogate and this Court."
>
> Matter of Wagner, *id.*, at 1237 (internal quotations and citations omitted)

138. Filing "incomprehensible applications" based on complete misunderstanding of statute, as in the case cited, bears no resemblance to the present case, and its citation by Plaintiff Beechwood POB is clearly inapposite.

139. The final case cited by Plaintiff Beechwood POB, which is also cited by Plaintiff Town of Oyster Bay, Muka v. NYS Bar Assn., 120 Misc. 2d 897 (Supreme Court, Tompkins County, 1983, Zeller, J.) is a frankly abusive citation by the Plaintiffs. It is a notorious case of a severely unbalanced litigant whose legal filings bear absolutely no similarity to the present case, and offer no justifiable guidance to the Court. Its purpose can only be prejudicial

140. The litigation is found to be a years-long series of baseless 'conspiracy' allegations aimed against the entire judiciary, among others, outlined in part by the Court as follows:

> "The amended complaint essentially is based upon a conspiracy theory. Paragraph 4 alleges defendant New York State Bar Association on or before March 27, 1975 became 'a member of a conspiracy for the purpose of impeding, hindering, obstructing, and defeating, by way of false and malicious criminal prosecution ***** with purposeful intent to deny citizen Betty O. Muka the equal protection of the Penal Law ***** the common law, and the federal law ***** and the provisions of the United States Constitution and the New York State

> Constitution'. Paragraph 5 alleges the State Bar Association conspired with one or more of over 140 listed persons and entities, including Richard J. Bartlett, City of Binghamton, County of Chemung, Louis Greenblott, J. Clarence Herlihy, Ithaca Teachers Association [etc.]....The complaint continues for several pages reciting various grievances and concludes by demanding judgment of $20,000,000,000.
> ....
> I have been a defendant in prior lawsuits brought by Mrs. Muka, I am named as a conspirator in this action, and I am a member of the New York State Bar Association. Under normal circumstances I would recuse myself from this case. But the circumstances here are unusual. Mrs. Muka has either sued or accused of crime all Supreme Court Justices of the Sixth Judicial District...."
>
> Muka, *id.*

141. Plaintiff Beechwood POB cites the legal holdings in Muka case regarding the duty of the court to protect the court and opposing parties, etc. (Plaintiff Beechwood POB Memorandum of Law, p. 6) -- as if the case bore any resemblance to the present matter.

142. As noted, Plaintiff Town of Oyster Bay cited the cases Sassower (*id.*) and Muka (*id.*) which as discussed above were bizarre cases of extremes that bear no resemblance to the present case. Plaintiff Town of Oyster Bay also cited the following cases, which were on the other hand too vague to supply the Court any actual guidance:

143. The case In Re Marion C.W. v. JPMorgan Chase, 2016 NY Slip Op 00203 [135 AD3d 777], (Second Dep't, 2016) the decision states:

> "Here, the court properly determined that the petitioners forfeited the right to free access to the courts by abusing the judicial process with repeated motions seeking to relitigate matters previously decided against them, and, therefore, required them to obtain leave of the court before filing further motions or commencing new proceedings...."
>
> (*id.*)

144. Given the extreme extent of motions and actions etc. described in all the prior 'frivolousness' cases cited that contained any specificity of the facts involved, it is impossible to justifiably surmise from the language of In Re Marion C.W. the number of "repeated

motions" (*id.*) the court is referring to. Thus the case cannot offer any guidance to the Court on adjudicating the present matter.

145. In any event the appellate court's ruling in In Re Marion C.W. is readily distinguishable. The ruling cites the re-litigation of matters that were "previously decided against them" (*id*., emphasis added). But in the present case, none of the orders to show cause were signed, and none were therefore decided one way or another.

146. (Inasmuch as the applications to intervene have yet to be adjudicated on the merits, Proposed-Intervenor Sylvester filed on February 19th the ultimate motion to intervene by notice of motion to assure that a decision would be rendered. The prior motions by order to show cause were filed in that manner only because it was believed that the deadline for the notice of appeal was rigid, and time was of the essence -- as indicated in each of the "emergency" affirmations that accompanied the motions thus moved.)

147. The only other case cited by Plaintiff Town of Oyster Bay is Lammers v. Lammers, 235 AD 2d 286 (First Dep't, 1997), which offers no guidance whatsoever as to the character of frivolous litigation. It is a highly abbreviated one-hundred (100) word decision consisting of two sentences that simply refer to "numerous frivolous motions" in sustaining a sanction. Clearly there is nothing gained from the case's inclusion, except a deliberately prejudicial impact.

148. Thus it is evident that the various cases cited by both Plaintiffs for authority to persuade this Court to enjoin the Proposed-Intervenors are either wholly inapposite to the present circumstances, or so vague that there is no way they can reasonably provide this Court any guidance.

149. The crux of the matter is that in fact there are no cases for frivolous and sanction-

worthy conduct that resemble the present case, because the handful of motions submitted on tight deadlines to the trial court and Appellate Division were simply not frivolous as the courts have defined them.

150. Thus the cases cited by the Plaintiffs actually argue against a finding of frivolousness, because the excess that they illustrate, where they supply facts at all, is clearly in a different class from the rational and responsible litigation undertaken in the present case for the entirely reasonable aim of obtaining appellate review of a matter of wide public interest and specific individual harms.

Conclusions

151. The logical, if admittedly rushed, sequence of motions in this matter filed in this Court and at the Appellate Division were not frivolous because each was based on reasonable legal theories which had not yet been adjudicated. The motions were filed only to achieve a reasonable lawful purpose: to obtain leave to intervene in order to have the judgement in a matter of significant public concern and widespread environmental impact be reviewed by the Appellate Division.

152. Such a proper goal was not only openly posted and extensively argued on an open Facebook web-page, but was downloaded and documented by one of the Plaintiffs, Beechwood POB in its Affidavit in Support, and cited by the other Plaintiff.

153. Both Proposed-Intervenor Brummel and Proposed-Intervenor Sylvester made out strong cases for standing. They both reasonably asserted the 'relation-back' rule; they demonstrated how the rules governing intervention under the CPLR favored them; they

showed how an appeal would likely be successful; in pleadings filed after the settlement was disclosed, they argued based on case-law how the motion was still timely; and they performed each step on proper notice to all parties.

154. In no way were the motions designed to harass or vex, nor was their aim to delay the resolution of the matter -- except for the unquestionably legitimate purpose of obtaining appellate review.

155. Proposed-Intervenor Brummel spent large sums of his own money -- draining savings and a holiday gift -- as well as dozens of hours of time working to assure the environment was properly protected in this matter by having it fully reviewed by the courts. His efforts were documented not only on Facebook but in the local newspaper. There was no gain and no mystery as to his motivation: it was purely an exercise of civic responsibility. As a non-attorney, his legal efforts were arduous and extensive, but followed the law at all times.

156. For the foregoing reasons it should be clear that the litigation in which Defendant Brummel participated was not frivolous, and the temporary restraining order should be vacated, and a preliminary injunction denied.

157. Further, Defendant respectfully requests the Court to grant such other and further relief, including costs and disbursements, as to the Court seems just and proper.

Nassau County, N.Y.
March 7, 2016

_____

RICHARD A. BRUMMEL, Intervenor *pro se*
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N.Y. 11577
Tel. (516) 238-1646
Email: rxbrummel@gmail.com

Sworn before me this _____ day of March, 2016

_____
NOTARY PUBLIC

Exhibits

(Note: All motions are without exhibits)

Exhibit 1 Brummel Supreme Court Motion to Intervene (Amended)
Exhibit 2 Brummel Appellate Motion I
Exhibit 3 Brummel Appellate Motion II
Exhibit 4 Brummel Appellate Memorandum of Law
Exhibit 5 Sylvester Appellate Motion I
Exhibit 6 Sylvester Appellate Motion IIA
Exhibit 7 Sylvester Appellate Motion IIB