SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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TOWN OF OYSTER BAY,

Plaintiff-Respondent,

- against -

RICHARD A. BRUMMEL,

Defendant-Appellant.

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Appellate Division Docket No.:
2016-05215
Nassau Supreme Ct. Index No.:
600968 / 2016

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-APPELLANT'S AFFIDAVIT IN SUPPORT OF MOTION TO VACATE OR MODIFY PRELIMINARY INJUNCTION

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Preliminary Remarks

In this matter the preliminary injunction was issued because the trial Court improperly held Movant to be a 'recalcitrant' litigant who refused to accept adverse outcomes of several motions he filed -- along with an allied party he collaborated with -- seeking to intervene in a matter wherein the original litigants, his erstwhile 'teammates', decided to abandon their right to appeal an adverse decision, in exchange for a small concession that ignored the massive environmental damage to result in the absence of a more favorable outcome.

The Plaintiff on whose behalf the injunction was issued painted Movant as almost purely a litigious 'anarchist' who abandoned reason and simply litigated unendingly in the face of sure defeat. Although the factual recitation of the case history in the accompanying affidavit painstakingly rebuts that erroneous and self-serving portrayal, the trial Court has in essence accepted its premises, and erroneously interpreted the law in service of that rendition of the case

To wit the Court has held[1] that (1) Movant lacked standing to sue, (2) Movant refused to accept settled determinations made inevitable by his lack of standing, and that (3) the efforts to intervene were further rendered futile and thus vexatious by the Court's termination of the case with prejudice when it so-ordered a settlement, notwithstanding the prior application to intervene it returned unsigned, evidently with barely a glance.

Each of the assertions on which the preliminary injunction is predicated are erroneous.

The affidavit has thoroughly addressed the fiction that Movant alone filed the various motions at issue, and that the adverse outcomes they encountered were legally dispositive; in fact three appellate motions filed by the two intervenors failed only for their lacking appealable papers, and as noted in the affidavit, such a paper was withheld by the Court and the Plaintiff and

[1]See Exhibit 1 of accompanying affidavit.

its ally until after injunctions were in place against the proposed intervenors.

(The final appellate motion failed for unclear reasons that may or may not have been dispositive, and in any event no motions were filed afterward, thus there was no 'recalcitrance'.

The trial Court has demonstrated by its actions a peculiar bias to dispose of the underlying case painlessly, including by applying a test of standing against the original Petitioners that has been thoroughly discredited (see Footnote 2).

Evidence noted in the affidavit showed the Court becoming increasingly committed to its desired outcome for the case, particularly by denying intervention for increasingly odd reasons at the very time the Plaintiff was accelerating efforts to conclude the settlement.

The law has not been treated well in this case, and the injunction at issue has been imposed not to enforce the law but to frustrate proper efforts to do no more than seek warranted appellate review. It should therefore be vacated or modified so as to permit Movant and the allied party to take the next steps to intervene and appeal.

The following discussion will show that Movant's actions have been just and lawful, and that the preliminary injunction was thus not warranted.

Movant's Actions Were Not 'Frivolous' By Any Standard in the Case Law

The case law defining frivolous practice in this State reflects a class of litigation and litigant that bears no relation to Movant or to his undertakings in this or any other case. Movant's two motions to the trial Court and two to the Second Department were reasonable and logical legal undertaking designed solely and urgently to achieve a wholly lawful aim: to obtain appellate review of a questionable decision.

That the orders to show cause for intervention were returned unsigned by the trial Court may be explained by the Court's simple opposition to any disturbance of its preferred 'settlement' of

the underlying matter, as argued in the accompanying affidavit. As noted the Court appended handwritten notes advising Movant that the decision of the Court was 'final' -- even before any settlement -- which was a peculiar assertion. The Court also judged that Movant lacked 'standing', but this trial Court has ruled that every complaining party lacked standing, both the five original Petitioners, and Movant and the allied intervenor, who lived within less than five hundred feet of the lands at issue for over thirty years, much as the Petitioners did[2].

That this Court returned two orders to show cause unsigned may have been related to the absence of an appealable paper, or the customary deference to the discretion of the trial Court. The dismissal of notices of appeal that Movant filed were non-prejudicial, stating only that leave to appeal was not granted, or that the paper appealed was not appealable.

Cases raised by the Plaintiffs Town of Oyster Bay and Beechwood POB LLC were shown to be wholly inapposite, though a fair survey of frivolous practice in this State. The argument was presented as follows.

To be noted is the discussion of In Re Marion C.W. v. JPMorgan Chase, 2016 NY Slip Op 00203 [135 AD3d 777], (Second Dep't, 2016), a case highlighted by the trial Court in its decision (Exhibit 1, p.2). The case as cited by the Court does not state the number of motions made which were determined 'excessive'.

However a search of the case online reveals an extended saga of litigation over attorney fees extending over a number of years, as evidenced by the related case five years earlier Matter of Marion C.W. v Lisa K. 2011 NY Slip Op 03627 (Second Dep't, 2011) .

[2]The Court did not state why Movant lacked standing, but it did state that all the others parties failed the test because they had not raised the issues they raised before the Court earlier before the Town Board. That holding was repeatedly rebutted by the Petitioners and the intervenors, in part based on this Court's holding in Matter of Shepherd v. Maddaloni, 103 AD 3d 901 (Second Dep't, 2013) at 905, where this Court ruled that issues raised by others are fully ripe for legal challenge. It is a consistent position of the courts, and the Court of Appeals has gone further to argue that exhaustion of administrative remedies is not applicable to Article 78 special proceedings brought under the State Environmental Quality Review Act (SEQRA) -- see Jackson v. UDC, 67 NY2d 400 (1986), at 427.

Clearly the extended period and narrow focus of the cited case is not comparable with the present matter. But decisively, the Second Department holding in 2016 finds the frivolous character of the conduct related to recalcitrance in relitigating "matters previously decided against them" (*id.*). In the present case, as has been noted, none of the four motions filed by Movant were decided against him, rather there was only a refusal to sign orders to show cause on either highly questionable grounds (with respect to the trial Court) or unspecified grounds that ultimately appeared to be remediable technical issues (with respect to the Second Department).

As discussed in the recitation of facts in the accompanying affidavit, the dismissals of the notices of appeal appeared to codify the reasons for this Court's refusals to sign the orders to show cause. Those reasons were (1) the remediable technical issue of lacking an appealable paper and (2) the Court's declining to grant leave to appeal. The latter ground was apparently retracted by the Court (Exhibit 31), and subsumed by the ground that the paper was not appealable. Indeed it appears the Court went out of its way to narrow the ground for its dismissal (*id.*) to a thoroughly non-prejudicial ground - making the later 'dismissal' of the allied intervenor's motion on notice even more peculiar (Exhibit 32).

In sum the motions of Movant and his aid of the allied intervenor were not relitigating matter "decided against them" as those in Marion (*id.*) and thus the case was not apposite, in contrast to the Court's heavy reliance on it.

A survey of the 'frivolous cases' in general further demonstrates the inapplicability to Movant and his actions of the sanctions rules, 22 NYCRR 103-1.1.

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.

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.

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.

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.

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.

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
> 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.

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.

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.

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 [contorted] 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.*
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.

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.

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.*

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.

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.

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.

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.

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.*

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.

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

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)

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.

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)
> 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.

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

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.*

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.

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:

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.*)

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.

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.

(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.)

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.

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.

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.

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.

Movant Had Standing To Sue

Movant clearly showed the law gave him standing to sue as well as eligibility to invoke the relation-back rule (CPLR Rule 203(f)) after the four-month period for an Article 78 special proceeding challenge expired.

Movant showed the Court he had used and enjoyed the lands at issue regularly, for an extended period of time, and that he could invoke the relation-back rule because it did not prejudice the Respondents, inasmuch as they had full notice of his claims that were comparable with those of the Petitioners.

As for environmental standing Movant presented the case to this Court in a prior submission related to the underlying matter:

"Proposed-Intervenor detailed in his various affidavits to this Court and the trial Court the factual basis for his environmental standing to maintain the special proceeding.

It bears repeating that the Court of Appeals has stated emphatically once again that the rules for standing are not meant to be applied in such a way that judicial review is frustrated, as it has been more than once. Thus:

> "We held in Society of Plastics that in land use matters . . . the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large. Applying that test in Matter of Save the Pine Bush, Inc. v Common Council of City of Albany, this Court held that petitioners, who alleged repeated, not rare or isolated use of the Pine Barrens recreation area, had demonstrated standing by showing that the threatened harm of which petitioners complain will affect them differently from the public at large.
> .....
> This Court recognized in Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation that standing rules should not be heavy-handed, and declared that we are reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review."

> Matter of Sierra Club v Village of Painted Post, 2015 NY Slip Op 08452 (2015) (emphasis added, internal quotations and citations omitted) (where a single individual's assertion of adverse impact from noise was held adequate to allow the courts to review a project that would increase train traffic, notwithstanding the fact that many others might also assert the same type of direct impact)

In the present matter, the trial Court did in fact deny the original Petitioners standing, even though they lived adjacent to and regularly visited the project Site.

The trial Court ignored precedent cited in the Memorandum of Law in Reply, and held that standing could be denied because the original Petitioners had not themselves testified regarding the SEQRA issues they raised in the special proceeding.

The trial Court ignored the fact that since others had testified to the same issues the matters were fully ripe for review by this Court's decision in Shepherd v. Maddaloni, 103 AD 3d 901 (Second Dep't, 2013) at 905; or that even the absence of such testimony was held not to be a bar to review because matter of public policy demanded such review by the courts: Jackson v. UDC, 67 NY2d 400 (1986), at 427.

This case is thus one directly implicated in the Sierra Club decision, and may thus become an example of how the appellate courts will assure that standing is not wielded as a cudgel to deny citizens their day in court over environmental issues they have voluntarily and in some cases heroically decided to pursue."

(Exhibit 18, pp. 14-15)

Movant also presented the argument for use of the 'relation-back' rule as follows:

"The right to intervene an Article 78 proceeding in order to appeal may be predicated simply the court's discretion and on the party's eligibility to avail itself of the "relation-back" rule (CPLR 203 (f), as noted in [Greater New York Health Care Facilities Association v. DeBuono, 91 N.Y.

2d 716 (1998)].

The Court notes that the standard for intervention is lower in an Article 78 than in CPLR 1013:

> "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 in an action...."
>
> Greater New York Health Care Facilities, *id.,* at 720

But when a statute of limitations issue arises -- as it does in the present matter -- then the issue arises of which parties are eligible to invoke the relation-back rule:

> "...[W]here the proposed intervenor's claim would be barred by the Statute of Limitations, the question arises whether its claim may properly be related back to the filing date of the petition.
> .....
> We conclude that a party may be permitted to intervene and to relate its claim back if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence. Also, the proposed intervenor and the original petitioner must be so closely related that the original petitioner's claim would have given the respondent notice of the proposed intervenor's specific claim so that the imposition of the additional claim would not prejudice the respondent."
>
> Greater New York Health Care Facilities, *id*. at 720-21 (emphasis added)

In Greater New York Health Care Facilities, the hospitals were found not to be eligible for the "relation back" because as each hospital has a different 'reimbursement rate' thus "Permitting intervention in these circumstances would expose respondents to additional liability from entirely separate claimants whose claims were otherwise time barred" at (*id.,* 721).

In the present matter however, the sustaining of relation back presents no such new liabilities to the Respondents.

In the first place, the same "transactions" are at issue, namely the SEQRA review and the

zoning votes arising from it. Before the trial Court the proposed Intervenors Brummel and Sylvester sought only to adopt the extant Article 78 petition as a pleading and thus adopt the selfsame challenges to the SEQRA review and zoning changes.

As to the nature of the parties and the notice the Respondents would have had as to their "claims", the issue is simply environmental-standing to maintain the Article 78 proceeding. While the new and old parties are not identical, their standing to assert a violation of SEQRA is based on similar circumstances: the use and enjoyment of the project site or residence adjacent to it, or both.

It may be argued that Proposed-Intervenor's use was certainly different from the residents, who both lived across from the site and also used the site much more intensively over a far longer period. But the issue is how the difference would prejudice the respondents.

This Court has made clear the limitations imposed by the relation-back doctrine are meant only to prevent prejudice to the Respondents not to create excessive impediments to the Intervenor:

> "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)

As for the nature of the parties and their relation to the original ones, the Court has made clear that the measure is practical one of "effect" not a simple doctrinaire criterion:

> "We do not suggest that an entirely separate plaintiff may be joined in a pending action, in order to assert an otherwise time-barred claim pursuant to the relation-back provisions of CPLR 203 (e) where to do so would increase the measure of liability to which the defendants are exposed. Thus, the respondents may have a viable Statute of Limitations defense to the extent that [the new plaintiff] attempts, at trial, to prove damages which it may have suffered independently of the damages suffered by [the original plaintiff]."
>
> Key Intl. Mfg v. Morse/Diesel, 142 AD 2d 448 (Second Dep't, 1988) at 459 (internal quotations and citations omitted, emphasis added)(where the court reversed a dismissal on summary judgment and permitted a related corporate entity to be added as a plaintiff in a matter involving defective building construction, claims for economic damage, and issues relating to the enforcement of contracts by a third party beneficiary)

In this type of special proceeding there are no damages to be awarded, no specific injury to be analyzed. Either the Petitioners possess environmental-standing or they do not, and thus the special proceeding may be heard and decided on the merits or not.

Inasmuch as the special proceeding has been heard on the merits, and the record of it is closed, the only issue is whether the trial Court's decision shall be appealed for review by this Court (or subject to a motion to renew based on the Town Supervisor's reported public admission of the flawed SEQRA review).

Thus there is no additional "liability" or "prejudice" to the Respondents from from the standpoint of the relation-back rule.

There may be an additional burden on them from the complete operation of the legal process -- by appellate review -- but that operation is the right of the affected parties, not an improper imposition on them.

Nothing evident in the case presented by the Respondents was predicated on the forbearance of the Petitioners to take an appeal, which matter was evidently unresolved until almost a month after the issuance of the decision and order, and contingent on the cancellation of several buildings, as provided in the purported settlement signed on January 13, 2016.

The fact that Brummel's standing is different in some way from the residents' standing does not give rise to any different outcome assuming each has (or lacks) standing: the remedy if it is imposed is the same, and depends not on the degree or nature of standing , if it exists, but on the nature of the SEQR violations.

Thus, the Respondents are not prejudiced by any difference between the parties, and the relation back can be sustained.

Furthermore both Proposed-Intervenor and his allied Proposed-Intervenor possess the requisite 'interest' to intervene for the purpose of an appeal. Both intervenors have alleged a set of environmental injuries that would establish standing to sue under SEQRA.

As outlined above those types of injuries and interests are what the courts have sustained for intervention after judgement or settlement for the purpose of filing an appeal.

The Third Department has thus held that a neighbor could move to intervene for the purpose of appealing an Article 78 judgement that affected a road abutting his property, had the appeal been timely: Town of Crown Pt. v Cummings, *supra*, at 874, citing Greater New York Health Care Facilities, *supra*."

(Exhibit 18, pp. 10-14)

The Matter Was Not 'Moot'

The trial Court stated repeatedly that the matter was moot one it had so-ordered the Settlement and therefore Movant's efforts to intervene were futile and thus vexatious and recalcitrant.

But in truth both movant and the allied intervenor filed motions to intervene before the settlement was even signed, let alone so-ordered, but even if this were not the case, the law has clearly permitted intervention after a settlement.

This Court itself issued a 'strict' ruling on intervention after settlement in the case Breslin Realty Development v. Shaw, 91 A.D.3d 804 (Second Dep't, 2012), but as Movant and the attorney for the allied intervenor have repeatedly argued, that case did not over-rule the Court of Appeals holding in Greater New York Health Care Facilities (*id.*) but rather incorporated a 'rule of reason' weighing the "circumstances" (Breslin, at 804) measuring the promptness and good-faith of the intervening party. Such a rule would reward Movant and the allied intervenor for their alacrity, not disqualify them in the "circumstances" of the case (*id.*).

It has also been noted that Breslin applied to an 'action' whereas the underlying case in this matter was an Article 78 special proceeding, which the Court of Appeals has held to enjoy more 'liberal' standards for intervention.

The specific arguments rebutting the alleged mootness already presented this Court are as follows:

"The neighbor-intervenor in Exhibit 21 cited the Court of Appeals holding that an interested party could intervene in an Article 78 special proceeding even after a settlement to which it was not a signatory:

> "'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)"

(Exhibit 21 ¶¶98-103, *et seq.*)

Movant also cited Matter of Greater N.Y. Health Care Facilities Assn., *id.*, and subsequent Third Department cases citing it for authority, as did the neighbor-intervenor:

"'The executed stipulation of settlement resolving the underlying CPLR Article 78 proceeding as entered and 'so ordered' by Supreme Court in June 1999. Although defendant could have attempted to intervene at that time for purpose of pursuing an appeal (see Matter of Greater New York Health Care Facilities Assn v. DeBuono, *supra* at 7820) 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)"

Exhibit 18, Movant's Memorandum of Law, *id.*, pp. 5-6

Much may be made in error of this Court's ruling in Breslin Realty Corp. v Shaw 91 A.D.3d 804 (Second Dep't, 2012) in which this Court held that in the "circumstances" of that case (*id.* at 804) a party could not intervene after a settlement[3]. Properly understood, however, that decision should not invalidate any of the motions to intervene in this case, though it was explicitly relied on by Beechwood(**OLD BW AFF**, Affidavit in Support, ¶26(e)) and implicitly by the trial Court (Exhibit 2, Decision and Order on preliminary injunction, pp. 4-5)

[3]The case was referenced by plaintiff Beechwood POB in its affidavit in support of the preliminary injunction, p. 10 ¶26.

The holding in Breslin -- one turning on the discretionary term "timely" in CPLR Sections 1012 and 1013 -- was clearly distinguishable from the present case for three principal reasons:

(1) Both Movant and the neighbor-intervenor filed orders to show cause in advance of the Settlement being signed by all parties on January 14th, let alone its being so-ordered by the Court on January 15th (Exhibit 17 pp. 2-3 ¶7, p. 5 ¶22[4], p. 7 ¶34, etc.; Exhibit 21 Feb 19th motion, p. 8 ¶42, p. 15 ¶81, p. 16, ¶87, etc.)[5];

(2) The cases upon which Breslin is based make clear that the "circumstances" (*id.*, at 804) of the timing of an attempt to intervene with respect to a settlement are matters to be weighed by the court in finding whether the motions are "timely" under CPLR 1012 and 1013 (Exhibit 21 pp. 18 ¶¶97 *ff.*). The circumstances of the proposed interventions by Movant and the neighbor-intervenor clearly met the standards thus established (Exhibit 21 p. 23 ¶¶115 *ff.*); and

(3) Breslin dealt with an "action", not a special proceeding, and the Court of Appeals has specifically noted that the rules for intervention in a special proceeding are more "liberal", stating:

"...[T]he standard for permissive intervention under CPLR 7802 (d) is more liberal than that provided in CPLR 1013," Greater New York Health Care Facilities Association, *id.* at 720, (in a discussion of the use of the 'relation-back' provision in such a situation)(emphasis added)[6].

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[4]Note: The date the Settlement was finalized -- with signatures of all parties -- was January 14th, not January 13th, as incorrectly rendered in the affidavit as cited (Exhibit 21 p. 6).

[5]It may be argued that inasmuch as the Court declined to sign the orders to show cause, they cannot be 'counted' as having been filed in advance of the Settlement. But unlike a statutory statute of limitations, the requirement of 'timeliness' under CPLR 1012 and 1013, as applied by Breslin, *id.*, among other cases, is a matter in the discretion of the court, and the good-faith effort of the parties to file promptly is the key issue to be determined. Thus it was the good-faith prompt submission of the motions to intervene prior to the Settlement that should be credited, not the fact the orders to show cause were not signed. It is notable that the timing was fortuitous in any event, as the entire Settlement process was deliberately kept secret from the intervenors by the Petitioners, the Respondents, and indeed by the trial Court..

[6]The Court held that the 'relation-back' rule must first be judged applicable, as it is clearly met in the present case, before a party may be joined as an intervenor regardless of how compelling an interest they can demonstrate, *id.* at 720.

The collusive actions of the trial Court and Plaintiff to conclude a settlement without any intervenors or appeal should also bear on the issue of how "timely" the application were under the Breslin standard.

At the time Movant and the neighbor-intervenor originally argued against the applicability of Breslin they did not know the extent of the trial Court's involvement in the aggressive effort to push through the Settlement before the intervenors could succeed. In fact the circumstances were such that after having agreed to terms on December 7, 2015 (Exhibit 2, p. 4), the Settlement was ready to be signed by all three Respondents and the Petitioners on January 13 (*id.*) -- four (4) business days after Movant's application to intervene was filed. And once all parties signed, it was so-ordered the very next morning and immediately entered in the County Clerk's Office (Exhibit 40 -- final page[7]) -- albeit two days after the neighbor-intervenor filed her order to show cause which the trial Court, inexplicably at the time, refused to sign[8].

Movant and the neighbor-intervenor moved briskly and in a timely fashion[9], even according to the holding in Breslin. But the trial Court improperly handicapped their attempt -- even in ignorance of the secret settlement talks -- to comply. Good faith was unquestionably present, at least among the intervenors, thus conforming with a key element in the authority underlying Breslin.

Both movants in this matter noted that the cases cited in Breslin for authority to narrow the construction of 'timeliness' to intervene, as it did, demonstrated a type of negligence or 'free-rider' effect which Court evidently disapproved:

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[7]Nassau County Clerk recording page: "Recorded Date/Time: January 15, 2016 10:27:05 AM".

[8]As noted, the trial Court wrote in a short signed comment: "Jan 13/Refuse to sign/matter with regard to/ this petitioner is/ not properly brought/ by order to show cause/ GRP JSC", Exhibit 24, p.2.

[9]As noted the applicants feared the time limit to file a notice of appeal was ebbing, unaware at the time of authority for extending the notice of appeal deadline for new intervenors. See Footnote 20, *supra.*

"The common theme in Breslin Realty and the three cases it cites is that the motion to intervene becomes untimely where the circumstances establish a 'recklessness' or even 'free-loading' that colors as unreasonable whatever actual time-period has elapsed, measured from different points of any given case."

(Exhibit 21, Affirmation in Support of Motion to Intervene (Appellate) (Grant) ¶104)

For example, in one case cited the 'settlement negotiations' were ongoing and known to the proposed intervenors, who nonetheless waited. But in the present case, the post-decision settlement negotiations were done quickly and in utter secrecy:

"In the case cited in Breslin Realty most closely paralleling this action, the proposed intervenors were apparently aware[10] of potentially-adverse settlement negotiations for over one (1) year before they intervened, and a 'proposed stipulation of settlement' was reached in advance of their motion. This Court therefore held such a delay untimely:

> "'After extensive negotiations, the parties entered into a proposed stipulation of settlement in April 1987.....
> The proposed intervenors brought a motion pursuant to CPLR 1012 and 1013. These two provisions require that a 'timely motion' be made. Despite the fact that the proposed intervenors became aware of the events which were transpiring in connection with this action by mid-1986, they did not attempt to intervene in the action until more than a year later. This cannot be considered timely.'
>
> Rectory Realty Assocs., *id.*, at 737-8 (emphasis added)(where neighbors who were evidently aware of settlement negotiations between a developer and a municipality over an action related to rezoning ordinance were held untimely in their motion to intervene that was made just before a stipulation of settlement was to be filed with the court).[11]"

(Exhibit 21 ¶108)

The holding in Breslin applied to an action, governed by CPLR 1012 and 1013, whereas intervention in the underlying matter was subject to the more liberal rules of intervention

[10]The term used in the case is "the events which were transpiring," see case quoted *infra*.
[11]Rectory Realty Assoc. v Town of Southampton, 151 AD2d 737, 738 (Second Dep't, 1989).

governing Article 78 special proceedings per CPLR 7802(d). The Court of Appeals held that intervention in a special proceeding is to be permitted more freely:

> "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 in an action, which requires a showing that the proposed intervenor's 'claim or defense and the main action have a common question of law or fact.'"
>
> Matter of Greater N.Y. Health Care Facilities Assn., *id.*at 720 (emphasis added)

Breslin clarified and narrowed the conditions for intervention. The decision applied to an action, not a special proceeding however. But beyond that, whether it is applicable or not, it can readily be distinguished from the present matter, because here the attempted intervention occurred promptly -- actually, with high urgency -- before the settlement was either concluded or ordered, and well before the Decision and Order was itself settled.

Thus Movant and the neighbor-intervenor met all the requirements of standing and timeliness to qualify for intervention, and their several attempts to vindicate their rights should not have been held improper and sanctionable by the trial Court.

Accompanying affidavit in support of order to show cause, ¶¶248 *ff.*

Conclusions

Movant has not engaged in any frivolous practice in this case. His motion practice was well-informed, measured, and proper. Movant had standing to sue, understood the rights of the various parties to intervene, and acted in accord with his rights and the procedures established by the Civil Procedure Law and Rules.

The instant preliminary injunction can only be understood in the context of a Court that developed a proprietary interest in a case that could only be protected by 'freezing out'

challengers who would intervene and undertake an appeal. The Court became overly subservient to the interests of the Respondents in the Article 78 special proceeding, and very possibly adopted an improperly paternal attitude toward the *pro se* litigants before it. Both the Court and the litigants were in fact poisoned by the fictions peddled by the attorneys for the Respondents in order to demonize Movant, and the instant preliminary injunction is yet another unjust result.

There is considerable natural land still to be preserved at the site in question (Exhibits 42, 46) and by removing the constraints unjustly imposed this injunction -- and the concurrent one imposed far more recklessly on behalf of the developer (Exhibit 8) -- Movant can resume his effort to see the environmental laws perform their proper service.

Movant therefore respectfully requests this Court vacate the preliminary injunction at issue, or modify its terms such that Movant is not impeded from taking such steps as warranted to obtain appellate review of the underlying decision in this matter.

Nassau County, N.Y.
July 6, 2016

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