STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

LINDA S. JAMIESON,

a Justice of the Supreme Court, 9th
Judicial District, Westchester County.

REPLY MEMORANDUM BY COUNSEL TO THE COMMISSION

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PRELIMINARY STATEMENT

This Memorandum is respectfully submitted by Counsel to the Commission on Judicial Conduct ("Commission") in reply to Respondent's brief. Contrary to Respondent's contentions, the Referee's findings should be affirmed in their entirety and Respondent should be removed from office.

ARGUMENT

POINT I

THE REFEREE'S CREDIBILITY AND FACTUAL DETERMINATIONS ARE ENTITLED TO SUBSTANTIAL DEFERENCE, AND THE JUDICIAL MISCONDUCT DETAILED IN HIS REPORT SHOULD BE AFFIRMED IN ITS ENTIRETY.

The Referee determined that Respondent committed multiple acts of serious misconduct. Specifically, the Referee found that she intentionally failed to report a $50,000 cash loan on her financial disclosure forms for 13 years, which created the appearance of a deliberate effort to conceal a substantial loan to Nicholas Natrella, the son of a political ally. The Referee also found that when Respondent's attorney failed to secure repayment of the loan, she called Anne Penachio – knowing that Penachio knew she was a judge – to personally demand that Natrella sign a confession of judgment and omit her loan from his bankruptcy petition. Finally, the Referee determined that Respondent gave "implausible" and "contrived" explanations for failing to report the loan, and that she gave false testimony at the hearing – factors that aggravate Respondent's already-serious misconduct and underscore that the appropriate discipline is removal from office.

It is well-settled that a Referee's findings at a Commission hearing "may rest on credibility determinations." *Matter of Mogil,* 88 NY2d 749, 753 (1993); *see also Matter of Assini,* 94 NY2d 26, 29 (1999). Credibility assessments made by a Referee should be accorded due deference by the Commission (*see Matter of Going*, 97 NY2d 121, 124 [2001]), as the Referee is uniquely situated to view the witnesses, hear their testimony, and observe their demeanor firsthand. *See, e.g. Matter of Mulroy*, 94 NY2d 652, 656 (2000); *Matter of McGuire,* 2021 Ann Rep 131, 193-94 (Commn on Jud Conduct March 18, 2020). As trier of fact, the Referee is in the best position to "choose which evidence was to be credited, and when the evidence conflicted, which version was to be believed." *Matter of Jones*, 47 NY2d mmm, qqq (Ct on the Judiciary 1979). Those general standards are especially applicable in this case, where the Referee went out of his way to explain his credibility determinations, linking them directly to the witnesses' demeanor, and internal consistency – or lack thereof (*see* Ref Rep ¶¶87-88). Thus, contrary to Respondent's self-serving and wholly unsupported contention, the Referee was far better situated to assess the credibility of the hearing witnesses than the Commission, whose review is restricted to a cold transcript (*contra* Resp Br 43). The Referee's findings should thus be upheld in their entirety.

A. The Referee appropriately rejected Respondent's self-serving testimony that her 13-year failure to report the $50,000 cash loan to Natrella was inadvertent, reasonably determining that she acted intentionally in omitting the loan from her FDF filings.

Respondent admits that she failed to disclose a $50,000 cash loan to Nicholas Natrella on more than a decade's worth of FDFs (Resp Br 35). She maintains, however, that her conduct merits only a private letter of caution because she "acted carelessly and

foolishly" rather than with nefarious intent (Resp Br 35, 59-60). As a starting point, financial filing "lapses are not excused by negligence or inattention" because "even if inadvertent, [faulty filings] create the appearance that [the judge] was intentionally concealing [her] extra-judicial activity." *Matter of Ramich*, 2003 Ann Rep 154, 159 (Commn on Jud Conduct Dec. 27, 2002).

Contrary to Respondent's contentions (Resp Br 35-36, 42-52), the Referee reasonably rejected Respondent's testimony that she made an innocent mistake. The Referee appropriately concluded that the circumstances of the loan, taken together with Respondent's recurring failure to report it, supported the inference that Respondent intentionally concealed the loan on her FDFs (Ref Rep ¶¶83, 96).

As discussed in Commission Counsel's main brief, pp 23 to 28, the Referee relied on following factors in determining that the FDF omissions were intentional, rather than careless:

- Respondent made the loan in cash (which Natrella did not request), rather than by check or any other traceable form (Ref Rep ¶¶34, 69, 71);
- Respondent claimed that she did not withdraw the cash from a bank, but just happened to have $50,000 in a safe in her house (Ref Rep ¶¶41, 77);
- Respondent did not document the loan, apart from an unsecured promissory note, a copy of which was never provided to Natrella (Ref Rep ¶¶34-35, 41, 75-76, 83);
- All of Respondent's attempts to collect the debt from Natrella were made over the telephone, as opposed to in writing (Ref Rep ¶¶48, 50, 53-58, 81-82);
- Respondent specifically asked Natrella's attorney for a confession of judgment or to omit the debt from his bankruptcy petition (Ref Rep ¶¶57, 81-82);

- Respondent failed to report the loan not once or twice, but for 13 successive years (Ref Rep ¶¶38, 83); and

- Respondent made the loan to a family friend who also happened to be the son of a long-time political party chair that had supported her nomination to Supreme Court (Ref Rep ¶¶31-32, 34, 77, 83).

Those unusual and suspicious circumstances understandably prompted the Referee to find that Respondent knew the loan to Natrella was "improper" and "had the appearance of impropriety" (Ref Rep ¶72), and thus intentionally omitted it from 13 years' worth of FDFs (Ref Rep ¶83).

Respondent's attempts to undermine the Referee's findings (Resp Br 42-43) are unavailing. She broadly and incorrectly asserts that the Referee "did not, and could not, point to anything specific about the demeanor of [Respondent] or the witnesses that would impact upon the content of the testimony" (Resp Br 43). In fact, the Referee found that Respondent's demeanor during her testimony regarding her telephone conversation with Penachio was "equivocal," "inconsistent" and "contrived" and that she had "intentionally testified falsely" at the hearing (Ref Rep p 27, ¶87). Significant record evidence supports the Referee's findings in this regard. For instance:

- Respondent testified that she did not disclose the loan because it she "thought of it as a family loan," but simultaneously admitted that she knew that Nicholas Natrella was not a relative and that she saw the loan as a business "investment" (Ref Rep ¶¶69, 73; Jamieson: 398, 403, 472-73);

- Respondent claimed that she considered it a loan to family because it was "an investment in both [Natrella] and [Rende] and their business" (Ref Rep ¶¶69, 75; Jamieson: 398, 473), but Natrella testified that he did not intend to work with Rende and that Rende was "not a business partner" (Ref Rep ¶75; Natrella: 97-98);

- Respondent stated that she went on "auto-pilot" and "cut-and-paste" from one FDF to the next once the loan was "out of sight and out of mind," but she did not reconsider her FDF omission even after she attempted to collect the debt in 2014, granted a recusal motion based on the existence of the debt in May 2015, and filed other amendments to her FDFs in June 2015 (Ref Rep ¶78); and

- Respondent had 40 years of combined experience as an attorney and a judge, yet she claimed that she never reviewed Question 18 or consulted the FDF instructions over the 13-years-long period that she failed to report the loan (Ref Rep ¶¶70, 73; Jamieson: 404-05, 474).

Given those inconsistencies, the fact that the Referee discredited her testimony and found that she acted dishonestly with respect to the loan is unsurprising.

Respondent's arguments that the Commission should credit her testimony instead of the Referee's findings fare no better. Respondent's contention that she did not think to formalize the loan, ask for collateral, secure a lien, or ask Natrella for a business plan because she and Natrella were close friends (Resp Br 35, 48-51) makes little sense.

First, lending money to a friend and securing one's interest in a large loan are not mutually exclusive. Given the amount of money at stake, it is inconceivable Respondent would have handed over such a large sum of cash without taking steps to protect her interests, unless she had something to hide. Moreover, this was not some kind of emergency loan to help a family friend with medical bills or insurmountable debt; rather, it was – in Respondent's own words – an "investment" in Natrella and Rende's "business" (Jamieson: 398; *see* Ref Rep ¶¶69, 75), meaning she had every reason to protect her investment, just as if Natrella were a stranger. Further, as Respondent surely knew, start-up businesses are risky, and Natrella needed to use what must have been a large portion of the $50,000 to buy a van and equipment (Jamieson: 398). Friendly loan or not, the obvious step for Respondent would have been to record the loan and use that

tangible property as collateral or the subject of a lien. That Respondent did not do so supports the Referee's conclusion that intentionally tried to keep the loan a secret.

Respondent's claim that she had $50,000 in cash on hand because that was "her mother's practice from many years ago," and "a large portion of the cash came from her mother" (Resp Br 47) does not explain why she made the loan in cash, particularly when Natrella did not request it. Respondent's contention that Rende had a lawyer draft the promissory note and remembered giving Maureen Natrella a copy, which she claims undercuts the Referee's finding that Respondent acted to as to avoid a paper trail (Resp Br 49), is contradicted by Natrella's testimony that neither he nor his wife ever received a copy of the promissory note (Natrella: 70-71, 104-05, 113-14). The Referee was entitled to credit Natrella's testimony over Rende's (Ref Rep ¶¶35, 47, 76), particularly given the fact that Rende – as Respondent's longtime boyfriend – was hardly a disinterested witness. Lastly, Respondent criticizes the Referee's finding that she would have demanded payment in writing had the loan been above board, contending that "this misses the big picture" and would have been "unrealistic" (Resp Br 50). Yet Respondent does not explain what she means by this ludicrous conclusory assertion.

Finally, Respondent spends an outsized portion of her brief disputing the Referee's finding that she made the loan in consideration of the fact that Natrella's father was the political party operative who, three years earlier, had played a role in helping Respondent secure her judgeship (Resp Br 7, 44-52). That finding is largely beside the point. No matter what reasons she had for making the loan, Respondent committed serious misconduct by intentionally omitting the loan from 13 years' worth of FDFs and implicitly leveraging her judgeship while attempting to collect repayment. Although the

Referee found that the evidence strongly implied that Respondent made the loan because of the political connection between herself and the Natrella family, and then hid it to shield herself from the appearance of that impropriety (Ref Rep ¶¶77, 83, 96), Respondent's misconduct is established whether the Commission adopts that finding or not.[1]

B. In accordance with well-settled precedent, the Referee rightly determined that Respondent improperly leveraged the prestige of her office by calling Penachio and making demands about the debt after her attorney's efforts to secure repayment had failed, and the Referee reasonably discredited Respondent's testimony that she never discussed the loan with Penachio.

Respondent argues that Charge II of the Complaint should be dismissed because there is nothing improper about Respondent or any other judge "pursu[ing] a civil claim, with counsel, against a third party" or "asserting [her] rights in furtherance of a civil claim" (Resp Br 36-37). She further maintains that "her version of the Penachio Call was accurate," and that the Referee should not have credited Penachio's contrary account (Resp Br 52-55). Respondent's claims are meritless.

First, as discussed at length above, the Referee's findings of fact and credibility are entitled to substantial deference. *Going*, 97 NY2d at 124; *Mulroy*, 94 NY2d at 656; *McGuire,* 2021 Ann Rep at 193-94. Here, in particular, the Referee explained the basis for his acceptance of Penachio's testimony: Penachio's version of the call was "consistent, reasonable and logical" when viewed in the context of "other credible evidence," and she "simply recounted her conversations, matter-of-fact," with "clarity,"

[1] Because Respondent's motivation for hiding the loan is not an element of charge, her claim that Commission Counsel had the burden of proving "by a preponderance of the evidence that the loan was for a political favor" (Resp Br 48) is simply incorrect.

"sincerity," and no "motive to lie" (Ref Rep ¶88). In addition, the Referee found that the affirmation Penachio submitted years earlier in connection with the *Neilson* case corroborated her hearing testimony (Ref Rep ¶88). At the same time, the Referee found, Respondent's "demeanor" during a crucial portion of her testimony regarding the phone call was "equivocal," "inconsistent," "contrived" and "not convincing," and that she demonstrated an "intentional avoidance during questioning of the confession of judgment and Natrella's bankruptcy petition in her account of the call with Penachio" (Ref Rep ¶¶84, 87). Accordingly, the Referee weighed the testimony of each witness and articulated a sound basis for crediting Penachio's testimony over that of Respondent.[2]

Respondent also seeks dismissal of the charge on the law, even under the facts to which Penachio testified, asserting that the Commission and the Court of Appeals have only ever found a violation of Rule 100.2(C) where a judge "flaunts" or "proactively tout[s]" her judicial position to an individual "who did not otherwise know" of the judge's position (Resp Br 39-41, 62). Long-standing precedent proves otherwise.

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[2] In pressing her self-serving claim that Penachio was not credible, Respondent contends, without a shred of evidence, that Penachio moved for her recusal "to taint [Respondent] with the hope that it might taint her earlier adverse decision" in *Neilson* denying her co-counsel's motion to file a late answer (Resp Br 30). In fact, Penachio credibly testified that she handled "some of the motions" and that her co-counsel handled others, that her name did not appear as counsel on Respondent's order denying the motion to file a late answer, and that she had no recollection of that motion or of her co-counsel filing a motion to reargue Respondent's order (Penachio: 168-72, 191-93; Ex 39). Similarly, Respondent's suggestion that Penachio engaged in judge shopping by "mov[ing] for recusal four times before various judges" (Resp Br 32), is unsupported by any evidence and refuted by Penachio's testimony that she only sought the recusal of Respondent and the Referee appointed by Respondent (Penachio: 159-60). To the extent that Respondent repeatedly accuses Penachio of telling a "critical lie" in her recusal motion by stating that the *Neilson* matter had been "***in essence***, remanded to [Respondent] and reassigned to her" (Resp Br 31-32, 43-44, 52), her argument is based on semantics and not substance. Penachio's turn of phrase accurately described what occurred: the *Neilson* matter came back to Respondent after the Appellate Division decided the appeal (Ex 42).

The Court of Appeals made clear that a judge commits misconduct by "act[ing] in such a way that she appears to have used the prestige and authority of judicial office" to secure a personal benefit, "whether or not [she] acted deliberately and overtly" (*Matter of Sims*, 61 NY2d 349, 358 [1984]), and "even in the absence of . . . an overt assertion of judicial status and authority" (*Matter of Sullivan*, 2016 Ann Rep 209, 213 [Commn on Jud Conduct July 14, 2015]) (emphases added). Put differently, a judge violates the Rules whenever she acts in a manner that "could be 'perceived as one backed by the power and prestige of judicial office'" (*Matter of Ayres*, 30 NY3d 59, 66 [2017] quoting *Matter of Lonschein*, 50 NY2d 569, 572 [1980] [emphasis added]).

Judged by this precedent, Respondent should have recognized that her heavy-handed act of calling Penachio directly and attempting to collect the debt herself, after her attorney's failed attempt to do the same, conveyed the impression that she was using her judicial office to advance her own interest. It does not matter that Respondent did not explicitly reference or "flaunt" her judicial office when she spoke to Penachio, as Respondent "was aware that [Penachio] knew of [her] position and should have realized that [her] requests would be accorded greater weight . . . tha[n] they would have been had [Respondent] not been a judge." *Lonschein*, 50 NY2d at 573.

Contrary to Respondent's curious insistence that there is no Commission precedent for Charge II (Resp Br 39-41), the Commission has publicly disciplined judges for lending the prestige of judicial office to advance private interests in circumstances where the judge did not explicitly reference her title, but the person to whom the judge was speaking was aware of the judge's position. *See, e.g., Matter of Sullivan*, 2016 Ann Rep at 213 (judge censured for "acting as his son's advocate in two conversations with

law enforcement officials" who knew him to be a judge, even though he never mentioned his judicial title); *Matter of Clark*, 2007 Ann Rep 93, 96-97 (Commn on Jud Conduct March 27, 2006) (judge censured for *inter alia* accompanying his girlfriend to the sheriff's department to file a criminal complaint, where the judge "did not overtly assert his judicial status" but the deputy was aware of his judicial position); *Matter of Whelan*, 2002 Ann Rep 171, 171-72 (Commn on Jud Conduct, Dec. 27, 2001) (judge admonished for calling an attorney and attempting to negotiate a fee dispute on behalf of his wife, where the judge "did not explicitly invoke his judicial status" and "the attorney was aware of respondent's judicial position").

That is exactly what happened here. Respondent did not merely try to pursue a civil claim with the assistance of counsel, as she would now have the Commission believe (Resp Br 36-37). Rather, after her attorney was unable to talk Anne Penachio into giving Respondent what she wanted, Respondent personally called Penachio and – knowing that Penachio knew she was a judge – repeated the same demands her lawyer had already made. She insisted that she wanted her money, pressured Penachio for a confession of judgment, lectured Penachio about bankruptcy law, and told Penachio to omit her debt from Natrella's bankruptcy petition (Ref Rep ¶¶50-51, 53-59, 85, 88-89). Particularly under the circumstances here, knowing that Penachio knew she was a judge, Respondent should have "assiduously avoid[ed]" any contact with Penachio so as not to create "even the appearance of impropriety." *Lonschein*, 50 NY2d at 572. By instead intervening in the collection effort as she did, despite the fact that she had an attorney "pursuing a civil claim" on her behalf, Respondent used the prestige of her judicial office

to advance her own private interests, in violation of Rules 100.2(A), 100.2(C), and 100.4(A)(2).

Equally unavailing is Respondent's claim that if the Referee's determination is upheld, "a judge could never enforce a civil claim merely because the person is known to be a judge" (Resp Br 55). Respondent could have made a legitimate loan to Natrella and then engaged counsel to enforce her claim in any number of appropriate ways. Instead, she loaned him money under the table and then sought repayment in a manner that would not create a public record of either the loan or her collection effort (Jamieson: 422-23, 436, 517-18; Ref Rep ¶82). The facts of this case do nothing to substantiate Respondent's absurd doomsday scenario.

In an attempt to claim mitigation, Respondent maintains that the Referee improperly relied on Penachio's "subjective state of mind that she felt pressured" by her conversation with Respondent as the basis for finding that Respondent lent the prestige of her judicial office to advance her private interest (Resp Br 58). Clearly, Respondent misunderstands or is consciously avoiding the gravamen of the misconduct. The fact that Penachio felt pressured by or uncomfortable following her conversation with Respondent is not the basis for the charge; the basis for the charge is the phone call itself. Penachio's reaction to the call merely underscores the reasoning of *Lonschein* and *Sims*, as her discomfort echoes the very concerns voiced by the Court of Appeals in those cases.

* * *

In sum, the Referee's report should be upheld in its entirety and both counts of the Complaint should be sustained.

POINT II

RESPONDENT'S MISCONDUCT WARRANTS THE SANCTION OF REMOVAL FROM OFFICE.

In her brief, Respondent requests the sanction of a private letter of caution. That request, however, is premised on the Commission's acceptance of her assertions that her FDF omissions were inadvertent, and that she violated no Rules by calling Penachio and making demands about the Natrella debt. For the reasons outlined in the Referee's Report, Commission Counsel's main brief, and Point I *supra*, those assertions should be flatly rejected. Because Respondent knowingly filed fraudulent FDFs for 13 years, leveraged the prestige of her office to try to advance her own private interests, and testified falsely at the hearing before the Referee, she should be removed from office (*see* Commission Brief Point III).

Several points in Respondent's brief warrant attention with respect to sanction. First, Respondent contends that her conduct in filing faulty FDFs is less egregious than that of judges who have been publicly sanctioned for careless omissions from their own financial disclosure statements (Resp Br 59-61). However, those cases are easily distinguishable. Respondent's decades' long failure to report a sizeable loan on her FDFs is far more serious than *Matter of Alessandro*, *Matter of Eannace and Matter of Dier* (Resp Br 59-61),[3] which involved limited instances of FDF filings that were untimely or contained inaccuracies. Here, Respondent filed not one or two, but 13 FDFs that were incomplete and inaccurate. And unlike *Alessandro*, *Eannace* and *Dier*, here the direct

[3] *Matter of Alessandro*, 13 NY3d 238 (2009), *Matter of Eannace*, 2021 Ann Rep 93 (Commn on Jud Conduct Sept. 28, 2020) and *Matter of Dier*, 1996 Ann Rep 79 (Commn on Jud Conduct July 14, 1995).

and circumstantial evidence, together with Respondent's inability to provide a plausible explanation for her actions, overwhelmingly support a finding that Respondent's omission of the Natrella loan from her FDFs was deliberate.

Respondent cites *Matter of Alessandro* in particular for the proposition that "failing to disclose a financial transaction on a Disclosure Form may not be deliberate, particularly when there was no motive to do so" (Resp Br 35-36). That is true, but it does not help Respondent here. First, as discussed, Respondent did have a motive to conceal the debt on her FDFs: as the Referee found, the loan recipient was the son of a political leader who had helped Respondent secure her judgeship (Ref Rep ¶83). Moreover, the circumstances in *Alessandro* were far different. There, the Court found, *inter alia*, that a judge's omission of a note and mortgage on a loan made to his brother, which he co-signed, was unintentional where the omission covered only two FDFs for two years. *Alessandro*, 13 NY3d at 249. Here Respondent failed to report the $50,000 cash loan to Natrella, a non-relative, for 13 years on 13 FDFs. While one may accept that omissions for two years were unintentional, Respondent's omission of the loan for 13 years, despite numerous contemporaneous reminders of the debt, must reasonably be viewed as intentional (*see* pp 2-4, *supra*). In addition, in *Alessandro*, "even the Commission acknowledged that [the judge's] omissions constituted 'carelessness.'" *Id.* at 249. Here, in contrast, the Referee explicitly found that "[t]he entire body of evidence at the hearing does not support [Respondent's claim that] her omissions were careless" (Ref Rep ¶96). Thus, *Alessandro* does not support Respondent's bid for a lenient sanction.

Lastly, Respondent contends that her failure to disclose the Natrella debt on her FDFs did not "undermin[e] or circumvent[] the primary purpose of the disclosure

requirement" of financial disclosure statements (Resp Br 61), ostensibly because Natrella "was not a lawyer[,] and if he came before her as a litigant she would have to recuse herself" (Resp Br 13-14, 35, 61). Her narrow view of the law misses the point. The Ethics in Government Act, which implemented judicial financial disclosure requirements, was enacted "to promote public confidence in government, to prevent the use of public office to further private gain, and to preserve the integrity of governmental institutions."[4] *See also Forti v New York State Ethics Commission*, 75 NY2d 596, 604 (1990) (Ethics in Government Act created to "enhance public trust and confidence in our governmental institutions"). Disclosure and transparency are critical to the integrity of the judiciary, and vital to public confidence that judges are fair and independent. The public has a right to know the identity of those individuals indebted to the judge particularly where, as here, the debtor has political ties.

As the Commission has observed, "[i]t is unacceptable for a judge to provide information that is incomplete or inaccurate [on FDFs]; doing so deliberately is manifestly improper." *Matter of Joseph S. Alessandro*, 2010 Ann Rep 82, 96-97 (Commn on Jud Conduct Feb. 11, 2009), *aff'd* 13 NY3d 238 (2009). All told, Respondent's recurring omission of a $50,000 cash loan to the son of a political ally for 13 years was part of deliberate and ongoing pattern of deception to conceal the loan, conduct which by itself warrants a severe public sanction. That egregious misconduct is compounded by Respondent's inappropriate attempt to leverage her judgeship to secure repayment of the loan and/or the omission of the debt from Natrella's bankruptcy

[4] http://ww2.nycourts.gov/IP/ethics/aboutthecommission.shtml.

petition, as well as her decision to give false testimony at the hearing before the Referee. The totality of that misconduct, considered "in the aggregate," warrants the sanction of removal. *Matter of Miller*, 35 NY3d 484, 491 (2020); *Matter of O'Connor*, 32 NY3d 121, 128-29 (2018).

CONCLUSION

Counsel to the Commission respectfully requests that the Commission adopt the Referee's Report in full, find that Charges I and II of the Formal Written Complaint are sustained, and issue a determination recommending Respondent's removal from office.

Dated: November 22, 2021
New York, New York

Respectfully submitted,

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