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 in reply to Respondent's submission to the Referee.

Respondent concedes the conduct underlying Charge I of the Complaint and acknowledges that her failure to report the Natrella loan on her annual FDFs for over a decade constitutes judicial misconduct. Her claim that this failure resulted from mere carelessness and continued for so long because she went on "autopilot" does not mitigate the misconduct. In any event, the evidence suggests that her omissions were not careless, but were part of an intentional effort to conceal a substantial cash loan to the son of a political ally.

Respondent's argument concerning Charge II – that she did not violate the Rules by speaking with Natrella's bankruptcy attorney about the debt – ignores both credible testimony and well-established precedent. The Court of Appeals and the Commission have repeatedly found that even a simple request or inquiry by a judge, without explicit reference to judicial status, is improper if it creates the appearance that the judge is implicitly asserting the prestige and influence of office. That is precisely what happened here, when Respondent – who knew that Penachio knew she was a judge – personally called Penachio and made demands about the Natrella debt after her attorney tried but failed to navigate the matter on her behalf.

ARGUMENT

POINT I

RESPONDENT COMMITTED MISCONDUCT BY FAILING TO DISCLOSE THE NATRELLA DEBT ON HER FINANCIAL DISCLOSURE FORMS FOR MORE THAN A DECADE, AND THE CIRCUMSTANCES SURROUNDING THOSE OMISSIONS ARE NOT MITIGATING IN THE LEAST (Answering Respondents Brief, Point I).

Respondent admits that she failed to disclose the Natrella debt on more than a decade's worth of FDFs, but asks that the Referee's Report "include . . . the full context of this mistake" (Resp Br 28-29). Specifically, Respondent avers that she "acted carelessly and foolishly" in omitting the loan and had "no hidden agenda for not reporting it" (Resp Br 28). As an initial matter, that is no defense. Indeed, 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 his extra-judicial activity." *Matter of Ramich*, 2003 Ann Rep 154, 159 (Commn on Jud Conduct Dec 27, 2002); *see also Matter of Alessandro*, 13 NY3d 238, 249 (2009) (even inadvertent omissions from FDFs constitute misconduct and are "a serious matter").

In any event, the record evidence belies Respondent's claim of an innocent mistake. As discussed in Commission Counsel's main brief, Respondent:

- made a $50,000 loan to the son of a political ally who helped Respondent secure her Supreme Court seat;
- made the loan in cash from a safe in her home, rather than by check or any other traceable form, even though a cash loan had not been requested;
- did not document the loan aside from having Natrella sign an unsecured promissory note, and did not give Natrella a copy of the note;

- attempted to collect the debt from Natrella orally as opposed to in writing, which avoided any kind of paper trail;

- sought a confession of judgment from Natrella, which would have permitted Respondent to collect the debt without filing a lawsuit; and

- asked Natrella's attorney to omit the debt from his bankruptcy petition, which would have erased all evidence of the loan's existence.

(Comm Br 19-21). In the face of this evidence, Respondent's claim that she acted carelessly when she omitted the Natrella debt from her FDFs cannot be credited, and based on the overwhelming evidence, the Referee should find that she intentionally tried to conceal the loan.

Respondent's specific defense for her "mistake" in failing to disclose the loan on her FDFs is that Natrella was a "close family friend" (Resp Br 9-10, 29). That contention strains credulity. The plain language of Question 18 of each FDF required Respondent to list any debt owed to her in excess of $1,000 unless owed by a relative (Exs 1, 8-19), and Respondent – a sophisticated and well-educated professional, not to mention an experienced attorney and jurist (Jamieson: 384-94) – knew well that Natrella was not related to her (Jamieson: 475). Put bluntly, the simple and straightforward wording of Question 18 left no room for Respondent to make this kind of mistake.

Nor can Respondent seriously claim that one mistake turned into 13 because she went on "autopilot" and "cut and paste" her responses to her 2006 FDF into every one she filed thereafter, "without giving any thought to a loan" that was "out of sight and out of mind" (Resp Br 9, 29). For one thing, the evidence shows that the loan was very much on her mind in 2014, when she initiated collection efforts (Jamieson: 409-12, 414, 466, 548), and again in May 2015, when she granted a recusal motion based on the existence

of the debt (Exs 43, 44). And then, critically, in June 2015, Respondent amended her 2012 and 2013 FDFs to include investments and retirement accounts that she had not previously reported (Exs 12, 13, 20, 21). Given her recent reminders of the Natrella debt at that point, had Respondent truly made an inadvertent mistake in omitting the loan from her previous FDFs, she would have corrected them in June 2015 while filing other amended FDFs anyway.

Respondent cites *Matter of Alessandro* 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 29). That is true, but it does not help Respondent here. First, as discussed, Respondent did have a motive to conceal the debt: the loan recipient was the son of a political ally. 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. *Id.* at 249. Here Respondent failed to report the $50,000 cash loan to Natrella for 13 years on 13 FDFs. While one may accept that omissions for two years were unintentional, it strains credulity to make that argument as to 13 years of omissions as consequential as Respondent's.

All told, Respondent's failure to report a sizeable cash loan to the son of a political ally for more than a decade, despite numerous contemporaneous reminders of that debt, constitutes plain misconduct and evinces a clear intent to conceal.

POINT II

RESPONDENT IMPLICITY ASSERTED THE PRESTIGE OF HER JUDICIAL OFFICE BY TELEPHONING NATRELLA'S BANKRUPTCY LAWYER AND MAKING DEMANDS ABOUT THE DEBT (Answering Respondent's Brief Point II).

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 30, 32). That description, however, does not capture what actually happened in this case.

Respondent did not merely try to pursue a civil claim with the assistance of counsel. Rather, after her attorney's efforts to settle the Natrella debt had stalled, Respondent personally called Natrella's attorney, Anne Penachio, and – knowing that Penachio knew she was a judge – 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 (*see* Comm Br 12-13, 26-27). By intervening in the collection effort, 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).

In response to those allegations, Respondent contends that her call to Penachio did not constitute misconduct because: (1) a judge must intend or "attempt" to assert her office to violate 100.2(C), which she did not do here because she never "flaunted her position as a judge" (Resp Br 31-32); and (2) "there is no precedent from the Court of Appeals . . . or the Commission that supports the contention that under the circumstances

of this case [Respondent] improperly lent the prestige of her office for a private interest," as "[a]ll of these cases involve a judge proactively touting his or her judicial position, to a person(s) who did not otherwise know the respondent was a judge, for the purpose of avoiding the law or compelling the person to engage in conduct against the law" (Resp Br 33-34). Unambiguous precedent proves Respondent wrong on both scores. Respondent also claims that she and Penachio simply did not discuss the Natrella debt during the phone call, and that Penachio's allegations to the contrary – both at the hearing and in her *Neilson* recusal motion – were fabrications. Those claims are baseless.

A. Respondent's Phone Call to Penachio Violated the Rules.

As discussed in Commission Counsel's main brief (Comm Br 23-25), 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) (emphasis 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), "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], emphasis added).

Based on those standards, the Court of Appeals and the Commission have found that judges have improperly asserted the prestige of judicial office by:

- asking a city agency official why a friend's application for a business license had been delayed, even without "assert[ing] his judicial office," because the judge "was aware that [the agency official] knew of his

position and should have realized his requests would be accorded greater weight . . . tha[n] they would have been had [he] not been a judge." *Lonschein*, 50 NY2d at 573;

- "acting as his son's advocate in two conversations with law enforcement officials," even though the judge neither mentioned his judicial title nor explicitly asked for preferential treatment. *Matter of Sullivan*, 2016 Ann Rep at 213;

- accompanying a girlfriend to the sheriff's department to file a criminal complaint, "although [the judge] did not overtly assert his judicial status," because the deputy was aware of his judicial position and the judge's presence at the sheriff's station "might be interpreted as an implicit request for favorable treatment." *Matter of Clark*, 2007 Ann Rep 93, 96-97 (Commn on Jud Conduct Mar. 26, 2007); and

- sitting near relatives in court during a hearing for a relative, since the judge's "presence, in a small courtroom with other family members who were present to show support for the defendant, could reasonably convey the appearance of lending her judicial prestige to support the defendant and his family." *Matter of Thwaits*, 2003 Ann Rep 171, 174 (Commn on Jud Conduct Dec. 30, 2002).

Given this precedent, Respondent's insistence that a judge cannot violate Rule 100.2(C) without specifically attempting to assert the prestige of her office is plainly incorrect.

Respondent also maintains that "none of the reported cases even closely parallel" her case (Resp Br 35). As a starting point, the cases that come before the Commission are "by their very nature, *sui generis*" and a finding of misconduct is not "limited to those categories of cases that have formerly come before [the Commission]." *Matter of Blackburne,* 7 NY3d 213, 219-20 (2006). Thus, the fact that Respondent's conduct does not precisely mirror conduct the Commission has condemned in other cases is not evidence that her conduct here is permissible. In any event, the facts in *Matter of Whelan,* 2002 Ann Rep 171 (Commn on Jud Conduct, Dec. 27, 2001), closely mirror Respondent's conduct here.

In *Whelan,* a Supreme Court justice called an attorney and attempted to negotiate a fee dispute on behalf of his wife, a real estate agent "capable of negotiating on her own behalf." *Id.* at 172. The judge urged the attorney to have his clients pay an unpaid bill, suggested that the attorney's clients split the bill with his wife, and then warned the attorney that he had reviewed the matter and that the attorney's clients were obligated to pay the bill. *Id.* at 171-72. The Commission noted that "[a]lthough [the judge] did not explicitly invoke his judicial status, the attorney was aware of respondent's judicial position. . . ." *Id.* at 172. Notwithstanding that the judge did not "proactively tout[ ]" his judicial status (Resp Br 35), the Commission found that the judge violated Rule 100.2(C) and that "[h]is actions were inherently coercive and showed insensitivity to the special ethical obligations of judges." *Id.* at 172-73.

Here, as in *Whelan,* Respondent: (1) had a dispute over money owed to her; (2) called the debtor's attorney directly, despite the fact that she had counsel who was already working on her behalf to collect the debt; (3) knew that Penachio knew she was a judge; and (4) insisted that she get paid and lectured Penachio about the law. Thus, as in *Whelan,* Respondent committed misconduct by calling Penachio and making requests about the debt, even though she did not explicitly assert her judicial office during the conversation.

Relatedly, Respondent avers that she was denied notice and/or due process as to Charge II because there is "no case on point" (Resp Br 35). First, given the discussion above, that is simply wrong. In any event, it is well settled that "in the administrative forum, the charges need only be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges

against him and to allow for the preparation of an adequate defense[.]" *Matter of Block v Ambach,* 73 NY2d 323, 333 (1989); *see Matter of Steckmeyer v State Board of Professional Medical Conduct,* 295 AD2d 815, 817 (3d Dept 2002). Here, Charge II of the Complaint gave Respondent more than adequate notice that she committed misconduct by speaking with Penachio and requesting that her client sign a confession of judgment or omit her debt from his bankruptcy petition, when (1) Respondent's attorney had already called Penachio and made the same demands (Ref Ex A ¶¶ 14-16), and (2) Respondent was aware that Penachio knew her to be a judge (Ref Ex A ¶¶ 18-19). Respondent's suggestion that Commission Counsel was required to provide relevant case law to satisfy notice and/or due process requirements is absurd.

Finally, Respondent accuses "Commission Counsel [of] trying to make Ms. Penachio's alleged discomfort about the Penachio Call . . . a basis for arguing that Justice Jamieson lent the prestige of her office to make her feel uncomfortable" (Resp Br 20). Clearly, Respondent misunderstands or is consciously avoiding the gravamen of the misconduct. The fact that Penachio felt pressured by or uncomfortable following the phone call 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.

B. <u>Respondent's Attacks Upon Penachio's Credibility are Baseless.</u>

Respondent claims that, despite Penachio's sworn testimony before the Referee, she and Penachio did not discuss the Natrella debt during the phone call (Resp Br 18-19). For the reasons stated in Commission Counsel's main brief (*see* Comm Br 27-28), Penachio testified credibly about the phone conversations, and Respondent's self-serving

denials are unworthy of belief. In short, the recusal motion – made long before Respondent was even charged in this matter – is strongly corroborative, as it provided sworn documentation of the call's contents shortly after it occurred.

Knowing that the recusal motion is damning, Respondent spent much of her brief baselessly claiming that Penachio acted in bad faith when she moved for Respondent's recusal in *Neilson* (Resp Br 24-28). Respondent first argues, without a shred of evidence, that Penachio moved for Respondent's recusal for a "strategic purpose," such as rearguing Respondent's earlier decision in *Neilson* denying her client's motion to file a late answer (Resp Br 26). The record contains no evidence that Penachio ever filed or intended to file a motion to reargue that decision (*see* Penachio: 191-93). Respondent likewise suggests that Penachio engaged in judge shopping, alleging that she "moved for recusal fo[u]r times before various judges" (Resp Br 26-27). Again, there is no such evidence in the record; rather, when questioned by Respondent's attorney about the recusals, Penachio testified that two judges had recused themselves from *Neilson*, and that she sought the recusal of only Respondent and the Referee appointed by Respondent (Penachio: 159-60; Ex B). Finally, Respondent accuses Penachio of telling a "critical lie" in the recusal motion by stating that the *Neilson* matter had been "***in essence***, remanded to [Respondent] and reassigned to her" (Resp Br 27). This argument is based on semantics, not substance. Whatever the phrasing, the *Neilson* matter came back to Respondent after the Appellate Division decided the appeal, and Respondent signed an order appointing a Referee (Ex 42).

* * *

In sum, Respondent violated the Rules by personally calling Penachio and discussing the Natrella debt.

CONCLUSION

Counsel to the Commission respectfully requests that the Referee adopt the Proposed Findings of Facts and Conclusions of law and find that Charge I and Charge II of the Formal Written Complaint are sustained.

Dated: July 1, 2021
New York, New York

Respectfully submitted,

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