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Motion & reply brief attached

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND DEPARTMENT

TOWN OF MONTAUK, INC., APP. DIV. NO. 2005-10912

PETITIONER-APPELLANT,

-against-

HON. GEORGE E. PATAKI, ESQ., GOVERNOR OF THE STATE OF NEW YORK, and THE PEOPLE OF THE STATE OF NEW YORK MET IN ASSEMBLY, and THE TOWN BOARD GOV'R OF THE TOWN OF EAST HAMPTON, and THE TRUSTEES OF THE FREEHOLDERS AND COMMONALITY OF THE TOWN OF EAST HAMPTON, and THE SUFFOLK COUNTY WATER AUTHORITY, INC. and THE COUNTY OF SUFFOLK, and THE BROOKLYN HISTORICAL SOCIETY, INC. and 511 EQUITIES, INC.,and THE NATURE CONSERVANCY, INC.,

RESPONDENTS-RESPONDENTS.

---x

PLEASE TAKE NOTICE that upon the annexed Affirmation of Michael H. Sussman, Esq., dated November 24, 2006, petitioner-appellant will move this Honorable Court on December 12, 2006 at 10:00 a.m., or as soon as counsel may be heard, at 145 Monroe Place, Brooklyn, New York, for an Order permitting the late filing of the annexed Reply Brief.

Yours, etc.

Michael H. Sussman, Esq.

Counsel for Appellant

Law Offices of Michael H. Sussman
PO Box 1005
Goshen, New York 10924

Dated: November 27, 2006

To: All counsel of record

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND DEPARTMENT

TOWN OF MONTAUK, INC.,

APP. DIV. NO. 2005-10912

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CONSERVANCY, INC.,

RESPONDENTS-RESPONDENTS.

---x

STATE OF NEW YORK)
) ss:s.
COUNTY OF ORANGE)

MICHAEL H. SUSSMAN, an attorney duly admitted to practice law in the State of New York, hereby states and affirms under pains and penalties of perjury:

1. I am attorney for appellant in this matter, having been engaged by the Corporation to respond to briefs submitted in this Court by various

respondents.

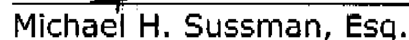
2. I was retained to submit responsive briefs on or about October 5, 2006. I have been otherwise engaged in several trials between October 5 and November 21, 2006, namely The Matter of Pasquale Coviello, (#389,2004)(Slobod, J.), Brown v. Junction Pool Commons, Inc., et al., 06 CIV 00856 (SDNY)(Brieant, J.) and Sala v. Warwick Central School District, et al. 06 CIV 8185 (S.D.N.Y.) (Robinson, J.) (trial on application for preliminary injunction) and have drafted briefs in the following appeals during that time period: Rolon v. Henneman, et al. [Brief in Chief for US Court of Appeals for the Second Circuit], Savoy, et al. v. City of Newburgh, et al. [Brief in Chief for US Court of Appeals for the Second Circuit], M.H. and J. H. On behalf of their minor son, A.H. v. Monroe-Woodbury Central School District [Appellees' Brief for US Court of Appeals for the Second Circuit], People v. Nepola [Brief in Chief for appellant for Appellate Term for the Ninth Judicial District], People v. Chrysler, [2nd Dep't][reply to motion to dismiss *coram nobis* petition] and responses to motions for summary judgment or to dismiss in the following federal civil rights cases: Bruce v. Town of Wallkill, et al. [SDNY, Robinson, J.], Lombardi v. Town of Deerpark, et al. [SDNY, McMahon, J.], Wesolowski v. Bockelman [NDNY, Kahn, J.] and in Cababes v. Brookview Homeowners' Association [Sup Ct., County of Orange, Owen, J.], to name some of the other matters in which I have been engaged during the preceding six weeks.

3. Accordingly, I was unable to draft the annexed brief until mid-November 2006. Moreover, the record in the instant case is voluminous, comprising an appendix my predecessor counsel filed of some 835 pages. Review of the same took several days and I drafted the annexed brief as soon as possible.

4. The annexed brief responds to arguments made by the Attorney General of the State of New York dated June 23, 2006 and the Town of East Hampton dated June 22, 2006.

5. I am aware that on July 4, 2006, appellant's predecessor counsel submitted a reply to these briefs, but, upon my review of said response and upon the request of petitioner/appellant, it is clear that certain arguments which should have been advanced therein were not. The annexed brief serves as a supplement to the previously filed reply brief and should be permitted as I believe it elucidates the issues before the Court and its filing will not prejudice any party.

WHEREFORE, the motion to late file as a supplemental brief the annexed brief should be granted in the discretion of the Court.



Michael H. Sussman, Esq.

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Dated: November 27, 2006

To: All counsel of record

TO BE ARGUED BY MICHAEL H. SUSSMAN, ESQ. [10 MINUTES]

SUPREME COURT OF THE STATE OF NEW YORK
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RESPONDENTS-RESPONDENTS.

PETITIONER'S REPLY TO BRIEFS FILED BY GOVERNOR AND BY TOWN OF EAST HAMPTON

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Suffolk County Index No. 04-27553

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INTRODUCTION

Appellant has not replied to the briefs submitted by appellees Pataki and the Town of Easthampton. On August 8, 2006, this Court denied grievant County of Suffolk's motion to dismiss this appeal. Appellant thereafter retained new counsel, the undersigned, to submit briefs responsive to the arguments made by the Governor and the Town of Easthampton.

I. **RESPONSE TO BRIEF SUBMITTED ON BEHALF OF APPELLEE PATAKI**

The Governor's brief commences with the claim that Article 78 is not the appropriate form for this action which seeks money damages. However, the Governor's brief admits that money damages may be incidental to the primary relief sought in an Article 78 proceeding. Here, this principle applies for the primary relief petitioner seeks is a declaration that the Town of Montauk has a separate juridical identity from the Town of Easthampton, as long recognized and never legally modified. From this claim arises and follows a claim for money damages owed for the collections made by the Town of Easthampton on the disputed lands.

Petitioner/appellant also specifically requests that the Court treat this Article 78 as a declaratory action, seeking a declaration that the Town of Montauk enjoys

independent juridical status from the Town of Easthampton and then the consequent relief of money damages to compensate for the unlawful collection and receipt of taxes and other monies deriving from the lands in the Town of Montauk and the taking and regulation of real property beyond the Town of Easthampton's rightful jurisdiction.

The Governor's brief claims that the Article 78 petition is not comprehensible. The best way to respond to this argument is to review the content and structure of the petition to demonstrate its comprehensibility. We undertake that task next, translating the petition into plain English. We have separated the analysis into the claims asserted in the Amended Petition.

1. Petitioner/appellant requests judicial re-affirmation of the 1851 order of Supreme Court Justice Morse who recognized the rights of certain persons as property owners in Montauk and rejected claims by the Town of Easthampton, or those trustees acting in its stead, to collect rents on these properties or otherwise to assert dominion over them and ordered return of these rents and taxes collected by the Trustees of the Town of Easthampton to those held to represent the lands of Montauk.

2. Petitioner/appellant next requests that Supreme Court order the State of New York to recognize the legitimacy of the Township of Montauk, as represented by the Town of Montauk, Inc., and order the Town of Easthampton, the County of

Suffolk and the State of New York to deliver those taxes due to the Town of Montauk to this representative entity.

3. Petitioner/appellant further prays that the Town of Easthampton, the County of Suffolk and the State of New York be ordered to deed any properties they own in Montauk to the Town of Montauk, Inc., as successor in interest to the Town of Montauk trustees.

4. Petitioner/appellant further requests that the court recognize the right of the Town of Montauk, Inc. to stand in the same status as any other Town government [under its 1686 and 2000 charters] and take by escheat lands within it which have been abandoned by whatever cause and without heirs.

5. To the extent that the Nature Conservancy or 511 Equities has deeds to pending lands in the Town of Montauk which were extended by one or another of the prior illegitimate governments, the Court should require an accounting by either agency of these holdings and allow the Town of Montauk, Inc. to challenge the bona fides of any such purchases, grants or gifts on the bases that these entities had notice that the Town of Montauk was a separate juridical entity and that those they were dealing with lacked the authority to alienate such lands. Prior governments have lacked the authority to possesses, issues deeds to or grant permits to develop lands in the Town of Montauk. Petitioners assert a lack of good

title to many parcels of land due to Indian/Proprietor rights or lack of privity of estate though Arthur W. Benson.

6. Petitioner seeks an order requiring the Governor to use his Executive Authority to remedy the derogation of rights worked in variance of Chapter 2 if the Laws of 1691; specifically, the petition challenges the State's right to transfer title to property [that was without good title] and which had actually escheated to the Town of Montauk, the State's filing of laws governing the Town of Montauk which had been filed by the purported governing authority, the Town of Easthampton.

7. The petition contains other details of trespasses over the lands of the Town of Montauk which have occurred without the consent of the Town of Montauk and which, petitioner claims, should be reversed or at least re-opened upon the recognition that these decisions were made in contravention of the right of the Town of Montauk to self-rule.

8. The petition makes like claims against the Suffolk County Water Authority, submitting that this body had acted in several ways in a manner injurious to the interests of the residents of the Town of Montauk without the consent or approval of the Montauk Trustee Corporation or its successor.

9. Likewise, the petition claims that the County of Suffolk, acting through

its legislature has ignored the will of the Town of Montauk and taken numerous actions affecting the property of and in the Town without gaining consent of those authorized to govern the Town.

10. Finally, the petition asserts that the Nature Conservancy, Inc. has taken numerous actions deleteriously affecting property in the Town of Montauk without conferral or approval by and from those duly authorized to govern the Town.

Rather than "largely incomprehensible," the petition groups like entities which, it claims, acting together for a period of more than 80 years, have ignored the charter provisions cited and governed the lands of the Town of Montauk as if they did not exist.

The petition seeks to enjoin and reverse these actions on the basis of clearly cited authority vesting the right to govern the Town of Montauk in a manner ignored and derogated by these actors. **See,** A-102, para. 2.

Instead of responding to the specific arguments petitioner has raised, the brief filed on behalf of Governor Pataki does not discuss the fundamental claims which petition raises, but claims instead that its allegations against the Governor are "entirely vague" and fail to specify how the Governor could remedy petitioner's grievances. [Brief at 9].

To the contrary, the petition makes quite clear that, as Governor and acting

on behalf of the State of New York, the Governor has violated clearly established law which reserved governance of the Town of Montauk to a form of self-rule which is incompatible with the dominance over that land which the Town of Easthampton, the County of Suffolk and the State of New York have exercised, including during his administration. Remedying this is as simple as recognizing the legitimacy of the Town of Montauk, Inc. and implementing a process which, by election, would allow the relevant territory to elect its own trustees and govern in a manner consistent with their will as set forth in 1686 and 2000 charters.

The Governor next claims that the claims asserted by the petition are untimely, barred by the doctrine of laches or the statute of limitations. Here, the failure to recognize the rightful claim by the Town of Montauk, Inc. is ongoing and that the named respondents are, purportedly, using and profiting from lands which they have no legal right to.

At issue is not the validity of a single transaction which could have been challenged more quickly after it occurred. What is at stake is the continued trammeling of the Town of Montauk's rights, despite efforts by petitioner to advise the governments involved during the last decade of the legitimate bases for its claims.

As in County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 229-30 (1985), the petitioner should be permitted to seek fair rental value damages for

violation of its possessory interests following the ancient and repeated dispossessions of which they complain. This right survives City Sherill v. Oneida Indian Nation, 125 S.Ct. 1478 (2005) as the Second Circuit recognized in Cayuga Indian Nation of New York, et al. v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 74 U.S.L.W. 3639 (U.S. May 15, 2006) (No. 06-982).

So, even if this Court were to deem it too disruptive of settled expectations to eject current governmental authority from their role, this is no basis for denying recoupment of damages to those representing the Town of Montauk. And, unlike the pleadings in Cayuga Nation which focused on the remedy of "ejectment," and was plainly "possessory" in nature, here, petitioners' damage claims arises from its contention that various governmental entities failed to recognize the juridical legitimacy of the Town of Montauk and thus engaged in or permitted numerous land transactions which derogated the interests of that unrecognized Town.

Moreover, unlike Oneida Indian Nation, supra., where the Second Circuit considered the delays in instituting action by an Indian tribe which was largely no longer occupying the land in question, here, once the Town of Montauk, Inc. was established and the rights of the Montauk residents discovered and uncovered, Town of Montauk, Inc. founder Ficalora moved promptly to assert the rights which predicate the instant case and thus no reasonable laches argument can be advanced.

Moreover, there is no claim here that large amounts of privately held land should be transferred from one to another party, merely, that state-owned land, including lands transferred to the State and to the Town of East Hampton, should pass to the Town of Montauk in recognition of its juridical viability.

II. RESPONSE TO BRIEF SUBMITTED ON BEHALF OF TOWN OF EASTHAMPTON

Turning to the lengthy brief filed on behalf of the Town of Easthampton, that defendant makes three essential arguments: plaintiff lacks standing to sue on behalf of the proprietary interest concededly recognized in the 1851 **Hedges** decision; the legislature created the Town of East Hampton and gave it authority over Montauk and plaintiff/appellant is barred by the statute of limitations from advancing this suit.

The Town of East Hampton recognizes the existence of the quasi-governmental trustees of its own Town and of Montauk. It claims that with the purchase by the Benson estate of their real property interest, the Montauk proprietors ceased to exist and, assuredly, this allowed either the Trustees of East Hampton or the East Hampton Town Board to control those affairs the Montauk proprietors previously handled. But, this logic is circular: the Town of East

Hampton concedes that Town Trustees in both the Town of East Hampton and the Town of Montauk existed and had jurisdiction - distinct from the Town of East Hampton Town Board. These Trustees "owned certain waters, underwater lands and beaches within the Town" [Brief at 4]. Their jurisdiction, the Town of East Hampton claims, does not "conflict with that of the East Hampton Town Board." This can be so only because the Town Board of East Hampton has respected the right of the Trustees to control the lands specified above.

Hedges established that the Montauk proprietors exercised rights similar to the Town of East Hampton Trustees over like lands in Montauk, preempting the Town of East Hampton Trustees from exercising dominion over their lands. While the Town of East Hampton claims that **Hedges only binds the Trustees from its Town**, it cannot take the position that its powers and jurisdiction overrides that of the Montauk Proprietors, but not those of the similarly-situated East Hampton trustees.

By conceding its respect for the jurisdiction of the East Hampton trustees, the Town of East Hampton Board concedes as well the jurisdiction of the Montauk proprietors. And, those proprietors, like their brothers in East Hampton, "own certain waters, underwater lands and beaches within the Town" and these could not

have been alienated except by dint of the actions of the Montauk proprietors or their successors.

The Town of East Hampton concedes that long after the State Legislature is somehow alleged to have incorporated it, the same body recognized the "Trustees of Montauk" as successors to the Proprietors and recognized the dominion of the "Trustees of Montauk" over the "undivided lands of Montauk." [Town Brief at 5].

While the Town of East Hampton would now like to characterize this dominion as "limited", it concedes, as it must, that the State Legislature recognized the Trustees' power to include "superintendence of the lands of Montauk". Plainly, the State Legislature did not believe this exercise of dominion was inconsistent with whatever powers it had given to the Town of East Hampton which inarguably spatially comprehended the same land.

Nor does citation to *Grinnell v. Baker*, et al. advance the Town of East Hampton's argument: in that case, the Court recognized the primacy of certain Indian tribe claims, not those of the Town of East Hampton, and those claims, in fact, derived from an agreement between the proprietors of Montauk and said Indian tribe [A-216]. These proprietors agreed to a division of land use with the Indian Tribe as well as to limitations on future land use, as well as barring the right

of such future use to certain "mulattoes". It is clear from this recitation that the Town of Easthampton was **not** controlling disposition of lands within its grant; rather, the proprietors of Montauk were. [A-217]. With regard to the retention of "police powers," it is quite doubtful that these were retained in practice by the Town of East Hampton for, as the *Grinnell* decision explicitly states: "both the said proprietors of Montauk, and the said tribe of Indians, in case any muster, mulatto, or stranger of foreign Indian should venture to come and live, or improve on the said land, should have free and full liberty, and *full power to prosecute all such offenders as trespassers, and send them off of the said land.*" [A-217]. [emphasis added].

The Town of Easthampton makes much of the fact that it was not a party to *Grinnell or Hedges*. But, juridically, this merely demonstrates that in no one's eyes did the Town have dominion over lands within the control of the Proprietors of Montauk; had the Town of East Hampton then had such a juridical interest, it would have surely been a necessary party in both these cases.

The sale of the lands to Arthur Benson does not change the fact that superintendence over the lands remained with the Proprietors of Montauk recognized by the State Legislature long after creation of the Town of

Easthampton. "The interests of the several proprietors would pass by their individual deeds of conveyance..." [A-758].

Indeed, the Town of Easthampton has pointed to nothing which has occurred since 1851 and the Hedges decision which materially alters the fact that, like the Trustees of Easthampton, the proprietors of Montauk have superintendence over the lands and waters of Montauk and that neither the Trustees of Easthampton nor the Easthampton Town Board have a grant of authority which alters than fact.

Understanding that the construct of state law contemplated both a Town of East Hampton, which comprehended the area known as Montauk, and a separate group of proprietors who exercised dominion over the lands and waters associated with Montauk, appellant set out to re-assert the identity of the Montauk proprietors in the late 1990's. So, he has litigated, often *pro se*, against the exploitation of lands which are part of MONTAUK, not within the jurisdiction of the Town of East Hampton for land use purposes.

Each prior suit, of which the Town of East Hampton complains, rested on Mr. Ficalora's well premised view, as explained above, that defendant Town had no authority to imperialize or aggrandize lands in Montauk, whether by escheat, eminent domain or any other contrivance. The current case culminates these

efforts, asserting the appellants' rights as the successors of the proprietors of Montauk whose juridical authority has never been extinguished nor transferred to the Town of Easthampton or to any other municipal corporation.

That Town of Montauk, Inc. is a construct does not defeat the claims appellant makes because those claims are prohibitory in nature, intended to end the over-reaching of the Town of Easthampton into the land use [and related] affairs delegated by law to the Proprietors/freeholders of Montauk.

Appellant Town of Easthampton takes an incoherent position here, claiming, despite **Hedges** and **Grinnell** that "it has governed land use in Montauk since 1788, a palpably false claim. Indeed, it was so uninvolved in such governance that no party nor the court deemed it a necessary party in **Grinnell** or **Hedges**.

As against the strong historical claims appellant advances, the Town of Easthampton can mount only technical arguments: it is conceded that Friends of Montauk, Inc. is a proxy, standing in for the "Trustees of Montauk" which the legislature recognized in 1852. See, East Hampton Brief at 5. That this organization experienced a long period of desuetude does not by itself detract from the legal rights it represents any more than the lengthy lapse between the first violation of Indian treaty rights and their assertion disallowed those finally laying

claim to that heritage from standing on the longstanding treaty commitments made to their forebears.

Applying this logic, appellant plainly has standing because the organization represents the interests of thousands who have a right to self-government on land use matters consistent with the tradition of the Trustees of the Town of Easthampton. Any denied self-government are harmed by those appropriating that power and authority from them. The litigation history which Easthampton outlines shows the dedication appellant has had to the key organizational purpose and appellant now has experienced counsel to represent its interests. Nor must individual members of the Montauk community appear in court to vindicate the organization's purpose. Thus, the appellant meets the requisites for standing and failure to comply with asserted state law requirements should not cloud the important purposes this appellant seeks to represent. Rudder v. Pataki, 93 N.Y.2d 273, 711 N.E.2d 978 (1999).

By appellee Town's argument, no person or entity could affect or impede its encroachment into the land use affairs of Montauk. The Court should not tolerate such a result and should recognize the legitimacy of the only organization which purports to act as the successor in interest to the proprietors and trustees of

Montauk which our legislature recognized, legitimatized and charged. It is the only organization established to recover, protect and improve Montauk proprietors' rights to the historic Benson reservation properties and roadways upheld by this Court in Breakers Motel, et al. v. Sun beach Montauk II, et. ano. (Suffolk 1994), modified, 224 A.D.2d 473 (1996), leave denied, 88 N.Y.2d 1016, leave denied, 90 N.Y.2d 810 (1997).

The Town claims that courts have recognized that the Proprietors and Trustees were subordinate to the Town, but this is false; while noting that Montauk is within the Town of East Hampton, the Hedges Court did not delegate to the Town any authority over land use. The Town was, in fact, a construct bereft of juridical significance and did not arrogate to itself land use powers over Montauk until the proprietors and trustees lapsed from their historic and delegated role. Appellant seeks now to reverse that history which itself disserves plain legislative purposes.

Nor does the Town's argument concerning the appellant's failure to incorporate under state law follow: if the appellant is the successor to a legislatively created entity, recognized by the Town's own brief, then it need not separately incorporate. As there is no other claimant/successor with which

appellant competes, this Court does violence to no interest of law or policy in recognizing its legitimacy and dealing with the merits of its claims.

Nor does it assist East Hampton to argue about how a local government is created: long after its creation, by its own admission, the State Legislature recognized the Trustees of Montauk and empowered them with authority like that the Town admits is still exercised by a like-named group in its own Town. Plainly, in so proceeding, the legislature intended to de-limit the Town of East Hampton's authority and subordinate it with respect to land and water use to those more organically related to the lands of Montauk.

Nor does Phillips v. Wickham, 1 Paige Ch. 590 (1829) defeat appellant's claims to successorship for that case does not define "proper persons" and appellant claims that the rightful successors to the 1879 trustees are persons similarly situated - seized of the same lands as the legislature intended to cover in its 1852 enactment. As the Town's own recitation shows, sale of the lands to Benson did not for long centralize control of the lands and had it, this simply would have passed control and superintendence of the 9000 acres to the single owner, not transferred his authority or that of the Trustees to the Town of East Hampton.

In this light, the Town of East Hampton's haughty effort to justify its "conquest" of control of the Montauk lands is unavailing. Claiming that the Town Trustees' authority was somehow trumped by Chapter 64 of the Laws of 1788 hardly explains how the Town arrogated rights and authorities over Montauk lands recognized by the State Legislature **in 1852.** And, as the Town is forced to admit, even that entity empowered pre-1788, its Trustees continue to regulate "the waters, lands underwater and adjacent beaches in East Hampton". Thus, the existence of the Town government has not dissolved the Trustees' significant role.

The Hedges decision, next discussed in the Town's brief at 27, did not have to "curtail the Town Board's powers precisely because the Town Board did not have authority to regulate the lands which were in dispute there. The trustees or proprietors had that authority and the Town Board lay no stake to its exercise in Hedges.

Turning next to the Town's statute of limitations argument, the Town's response is equally lame: if the Town continues to exercise unlawful powers, it should en enjoined from now doing so regardless of whether it has been doing the same thing for 216 years. The question is whether the Town continues to violate the law as set forth herein and, if so, whether an injunction need issue. That a

miscreant has been violating the law for years is no argument against injunction of current and future violations. The doctrine of continuing violations settles this and the Court cannot be moved to ignore impermissible conduct by its extent in years. The appellant's claims are constitutional in nature, not tort claims, and no notice of claim is required for such a claim. Nor is a notice of claim required for a claim for declaratory and injunctive relief, which are also sought here.

These arguments make plain that Ficalora and those he represents have serious, genuine claims and raise controversies which need resolution. These are not frivolous claims, however much implicated government entities would wish them away. Accordingly, no special leave or permit should be required for the assertion of these claims in any forum.

CONCLUSION

WHEREFORE, the appeal should be granted, the lower court decision should be vacated and this matter should be remanded for further proceedings.

Respectfully submitted,

S/ MICHAEL H. SUSSMAN

COUNSEL FOR PETITIONERS/APPELLANTS

LAW OFFICES OF MICHAEL H. SUSSMAN

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Dated: November 21, 2006

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached reply brief was prepared on a computer using Point 14 Times New Roman typeface, in double space, and that the total word count of the brief is 3,952.

S/____________________________
MICHAEL H. SUSSMAN