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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ELIOT SPITZER, Attorney General of the State of New York, on behalf of ultimate charitable beneficiaries,

Plaintiff,

- against,

MICHEL ROUX, JERRY CIRAULO, JOEL BUCHMAN, MAXIME COURY, JACQUES MARNIER-LAPOSTOLLE, and FRANCOIS de GASPERIS, individually and as Directors of The Grand Marnier Foundation,

Defendants.

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IAS Part ___

Index No. 01-405170

SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to appear in this action by serving an answer to the verified complaint on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, or within thirty days after completion of service where service is made in any other manner than by personal delivery within the state. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the verified complaint.

New York County is designated as the place of trial on the basis of the Attorney

General's offices at 120 Broadway, New York, New York.

Date: New York, New York
August 30, 2001

ELIOT SPITZER
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 416-8050

By
BARBARA L. QUINT
Assistant Attorney General
Charities Bureau

TO: Michel Roux
Jerry Ciraulo
Joel Buchman, Esq.
Maxime Coury
Jacques Marnier-Lapostolle
Francois de Gasperis

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ELIOT SPITZER, Attorney General of the State of New York, on behalf of ultimate charitable beneficiaries,	:	IAS Part ___
	:	Index No. 01-405170
Plaintiff,	:	**VERIFIED COMPLAINT**
- against,	:	
MICHEL ROUX, JERRY CIRAULO, JOEL BUCHMAN, MAXIME COURY, JACQUES MARNIER-LAPOSTOLLE, and FRANCOIS de GASPERIS, individually and as Directors of The Grand Marnier Foundation,	:	
Defendants.	:	

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ELIOT SPITZER, Attorney General of the State of New York (the "Attorney General"), on behalf of ultimate charitable beneficiaries, and on behalf of THE GRAND MARNIER FOUNDATION ("the Foundation"), a New York not-for-profit corporation, as and for his Verified Complaint, alleges pursuant to his authority under the Not-for-Profit Corporation Law ("N-PCL") and Article 8 of the Estates, Powers and Trusts Law ("EPTL") as follows:

INTRODUCTION

1. The Attorney General brings this action to hold defendants, officers and directors of the Foundation (the "Directors"), jointly and severally liable for violation of their fiduciary duties by paying themselves grossly excessive compensation for their service on the board of directors. The Attorney General also seeks to remove the Directors as directors and officers of the Foundation.

2. The Directors repeatedly breached their fiduciary duties of care and loyalty to the

Foundation, acting in their own interest at the expense of the Foundation's well-being. Year after year, they paid themselves, out of Foundation assets, salaries that were grossly excessive for directors of a grant-making foundation; in all, the Directors paid themselves more than $3,400,000 over a ten year period. As part of the compensation package, they established a pension plan under which the Foundation agreed to pay each Director, upon the termination of his service on the board and regardless of his age at that time, a so-called "retirement benefit" based on amounts accrued in each year of service on the board. When they terminated the pension plan, despite determining that "the economic interests of the Foundation would be better served if the retirement benefits conferred upon each of the present directors . . . were terminated as at January 1, 1996," the Directors voted to pay themselves their full retirement benefit immediately, even though their service on the board continued. As a result of these excessive compensation payments, the Foundation's holdings have significantly declined in value.

3. In bringing this action against the Directors, the Attorney General seeks judgment: (a) awarding money damages for all loss and waste of the Foundation's assets caused by the Directors' violation of the N-PCL and the Internal Revenue Code; (b) rescinding all transactions resulting in the Foundation's payments of excessive compensation to the Directors from 1990 through the current time; (c) granting judgment to the Foundation against the Directors jointly and severally for all such loss and waste of Foundation assets, with interest; (d) removing defendants as directors of the Foundation pursuant to N-PCL §§ 706 and 714; and (e) barring the Directors from receiving any compensation for services as an officer or director of any not-for-profit corporation.

PARTIES AND VENUE

4. Plaintiff Eliot Spitzer, Attorney General of the State of New York, is responsible for overseeing the activities of New York not-for-profit corporations and the conduct of their officers and directors pursuant to the Executive Law, N-PCL, EPTL and his common law parens patriae authority. The Attorney General maintains offices at 120 Broadway, New York, New York 10271, as well as at various locations throughout the State of New York. Therefore, venue is properly laid in New York County.

5. The Grand Marnier Foundation is a Type B charitable, New York not-for-profit corporation pursuant to N-PCL Section 201(b). On information and belief, it maintains a regular place of business at 80 Route 4 East, Paramus, New Jersey 07652. On information and belief, the Foundation also maintains an office in New York in care of Joel Buchman, Attorney at Law, 150 E. 58th Street, New York, New York 10155. The Foundation maintains a portion of its assets in New York State. The Foundation has no members.

6. Defendant Michel Roux ("Roux") was a Director of the Foundation, a New York corporation, at all times when the events that gave rise to the claims asserted in this lawsuit occurred.

7. Defendant Jerry Ciraulo ("Ciraulo") was a Director of the Foundation, a New York corporation, at all times when the events that gave rise to the claims asserted in this lawsuit occurred.

8. Defendant Joel Buchman ("Buchman") was a Director of the Foundation, a New York corporation, at all times when the events that gave rise to the claims asserted in this lawsuit occurred.

9. Defendant Maxime Coury ("Coury") was a Director of the Foundation, a New York corporation, at all times when the events that gave rise to the claims asserted in this lawsuit occurred.

10. Defendant Jacques Marnier-Lapostolle ("Marnier-Lapostolle") was a Director of the Foundation, a New York corporation, at all times when the events that gave rise to the claims asserted in this lawsuit occurred.

11. Defendant Francois De Gasperis ("De Gasperis") was a Director of the Foundation, a New York corporation, at all times when the events that gave rise to the claims asserted in this lawsuit occurred.

AUTHORITY OF THE ATTORNEY GENERAL

12. The Foundation is a "trustee" of a charitable trust within the meaning of EPTL § 8-1.4(a). Pursuant to Article 8 of the EPTL, the Attorney General is responsible for supervising the administration of charitable property in the State of New York by any individual, group of individuals, corporation, trust or other legal entity holding and administering property for charitable purposes. Section 8-1.4(m) of the EPTL authorizes the Attorney General to institute proceedings to insure the proper administration of charitable assets in this State.

13. Pursuant to N-PCL Sections 112(a)(7), 720(a) and 720(b), the Attorney General is authorized to bring an action to require the directors and officers of a New York not-for-profit corporation to account for the management of corporate assets and for transfers, loss, or waste of corporate assets in violation of their duties and to recover all resulting damages from such officers and directors.

14. N-PCL Sections 112(a)(4), 706(d) and 714(c) authorize the Attorney General to

bring an action to procure a judgment removing directors of a not-for-profit corporation for cause.

15. The Attorney General has common law parens patriae authority to protect the public interest in charitable property.

STATUTORY SCHEME

16. New York law requires all New York not-for-profit corporations that are "private foundations" under the Internal Revenue Code (the "Code") to comply with the rules governing private foundations under the federal tax law.

17. Section 406 of the N-PCL provides, in part, that a certificate of incorporation of every domestic corporation to which the N-PCL applies and which is a private foundation shall include a provision that the corporation shall not engage in any act of self-dealing that is subject to taxation pursuant to Section 4941 of the Code.

18. Section 4941(d) of the Code defines "self-dealing" to include "furnishing of . . . services . . . between a private foundation and a disqualified person," "payment of compensation . . . by a private foundation to a disqualified person" and "transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation." Section 4941(d)(2)(E) allows an exception for reasonable compensation by providing that

> . . . the payment of compensation (and the payment or reimbursement of expenses) by a private foundation to a disqualified person for personal services which are reasonable and necessary to carrying out the exempt purpose of the private foundation shall not be an act of self-dealing if the compensation (or payment or reimbursement) is not excessive[.]

19. Pursuant to N-PCL § 406, the Foundation's Certificate of Incorporation provides that "[i]n every taxable year in which the corporation is a private foundation as defined in Section

509 of the Internal Revenue Code of 1954 . . . (b) [t]he corporation shall not engage in any act or self-dealing which is subject to tax under section 4941 of the Code."

20. Thus, pursuant to N-PCL § 406 and the Foundation's Certificate of Incorporation, the Foundation was prohibited from paying its directors or officers any compensation other than reasonable compensation for personal services that were reasonable and necessary to carrying out the exempt purpose of the Foundation.

21. Under N-PCL § 717, directors and officers of a not-for-profit corporation are required to act with undivided loyalty toward the corporation. The fiduciary duty of loyalty strictly prohibits directors from exercising their corporate powers for their private or personal gain.

22. Pursuant to N-PCL Section 717(a), directors and officers of a corporation must discharge their duties in good faith with the diligence, care and skill of an ordinarily prudent person acting under the same circumstances;

23. Pursuant to N-PCL § 715, contracts and transactions between a corporation and one or more of its directors or officers, including the payment of compensation, must be disclosed to or known by the board, which must authorize any such contract or transaction without the vote of any interested board member. In the absence of the requisite disclosure and approval by disinterested directors, such contracts and transactions are voidable unless they were fair and reasonable to the corporation at the time the board authorized them.

24. Pursuant to N-PCL Sections 719(a)(1) and 515(b), directors of a corporation who vote for or concur in the distribution of the corporation's cash or property to members, directors or officers in excess of reasonable compensation for services rendered shall be jointly and

severally liable to the corporation for the benefit of its creditors or members or the ultimate beneficiaries of its activities to the extent of any resultant injury suffered by the corporation.

25. Pursuant to N-PCL Section 719(b), a director who is present at a board meeting at which an action specified in § 719(a) is taken is presumed to have concurred in the action unless the director's dissent is recorded in the minutes of the meeting, sent in writing before the end of the meeting to the person acting as secretary of the meeting or sent by registered mail to the secretary of the corporation. A director who is absent from a meeting is presumed to have concurred in actions taken at the meeting unless his dissent is either delivered to the secretary of the corporation by personal delivery or registered mail or otherwise caused to be filed with the minutes of the meeting within a reasonable time after learning of the action.

26. Sections 706 and 714 of the N-PCL authorize the Attorney General to seek removal of corporate officers and directors for cause.

27. Section 720 of the N-PCL authorizes an action by the Attorney General to compel one or more directors of a corporation to account for their official conduct.

FACTS

28. The Foundation was incorporated pursuant to the N-PCL by certificate of incorporation (the "Certificate of Incorporation") filed with the New York State Department of State on or about December 12, 1984. Pursuant to Article Third of the Certificate of Incorporation, the purposes of the Foundation are, inter alia,

> (1) To receive and maintain a fund or funds of real or personal property, or both and, subject to the restrictions and limitations hereinafter set forth, to use and apply the whole or any part of the income therefrom and the principal thereof exclusively for charitable, religious, scientific, testing for public safety, literary, or educational purposes either directly or by contributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue

Code of 1954 and its Regulations as they now exist or as they may hereafter be amended.

* * * *

To do any other act or thing incidental to or connected with the foregoing purposes or in advancement thereof, but not for the pecuniary profit or financial gain of its members, directors, or officers except as permitted under Article 5 of the Not-for-Profit-Corporation Law.

29. The Foundation is exempt from federal income tax under Section 501(c)(3) of the Code and is classified as a private foundation under section 509(a) thereof.

30. The Foundation's Certificate of Incorporation lists the initial directors of the Foundation as defendants Roux, Ciraulo and Buchman. Defendants Roux, Ciraulo and Buchman have remained Directors of the Foundation from 1984 to the present.

31. In or about 1990 the Foundation's board of directors was expanded from three to six and defendants Coury, Marnier-Lapostolle and de Gasperis became Directors of the Foundation.

32. Defendants Roux, Ciraulo, Buchman, Coury, Marnier-Lapostolle and de Gasperis have been directors of the Foundation at all times when the acts at issue in this proceeding were voted upon or concurred in.

33. The Foundation is registered with the Attorney General's Charities Bureau pursuant to Article 8 of the Estates, Powers and Trusts Law and has filed annual reports through 1999. No report has been filed for 2000; such report was due to be filed on June 30, 2001.

Excessive Compensation - Salary and Pension Benefits

34. Between 1990 and the present, each of the Directors has taken excessive compensation from the Foundation in the form of unreasonable salary and pension benefits.

35. The Foundation is a grant-making organization. The Foundation does not have any programs that it operates directly. The primary responsibilities of directors of a relatively small grant-making foundation, such as the Foundation, are monitoring the Foundation's investments, reviewing grant proposals to determine whether to fund them and meeting periodically to discuss their determinations.

36. To carry out its grant-making function, the Foundation employs a part-time assistant who reviews all grant proposals and selects the ones deemed to have promise. Thus, the Directors' fiduciary duties do not demand any time commitment that even begins to approach full-time employment. Indeed, as revealed by nationwide surveys, most individuals who render such services as directors of grant-making foundations do so as volunteers, without any monetary compensation, whether or not they are assisted by a foundation employee.

37. Nevertheless, during the period 1990 through the present, the six Directors have caused the Foundation to pay them compensation in excess of $3,400,000, consisting of annual salaries aggregating in excess of $2,680,000 and pension benefit plan funds aggregating in excess of $746,000. The annual compensation paid to the Directors is detailed in the following table:

COMPENSATION PAID TO DIRECTORS							
COMPENSATION BY YEAR (1992-1995 Consisting of Pension Accruals in Addition to Salary)	**DIRECTOR**						**TOTAL PAID TO ALL DIRECTORS BY YEAR**
	ROUX	CIRAULO	BUCHMAN	COURY	MARNIER-LAPOSTELLE	DeGASPERIS	
1990 TOTAL	33,000	33,000	33,000	33,000	33,000	18,000	183,000
1991 TOTAL	36,000	36,000	36,000	36,000	36,000	36,000	216,000
1992 TOTAL	57,750	57,750	57,750	57,750	57,750	57,750	346,500
1993 TOTAL	81,750	81,750	81,750	81,750	81,750	81,750	490,500
1994 TOTAL	94,768	94,768	94,768	94,768	94,768	94,768	568,608
1995 TOTAL	98,572	98,572	98,572	98,572	98,572	98,572	591,432
1996 TOTAL	60,000	60,000	60,000	60,000	60,000	60,000	360,000
1997 TOTAL	50,000	50,000	50,000	25,000	25,000	25,000	225,000
1998 TOTAL	50,000	50,000	50,000	25,000	25,000	25,000	225,000
1999 TOTAL	50,000	50,000	50,000	25,000	25,000	25,000	225,000
TOTAL[1]	611,840	611,840	611,840	536,840	536,840	521,840	3,431,040

38. From 1990 through 1999, defendants Roux, Ciraulo and Buchman each received in excess of $611,840, including at least $495,500 in salary and $116,340 in Pension Benefit Plan funds.

39. From 1990 through 1999, defendants Coury and Marnier-Lapostolle each received in excess of $536,840, including at least $420,500 in salary and $116,340 in Pension Benefit Plan funds.

40. From 1990 through 1999, defendant de Gasperis received in excess of $521,840, including at least $405,500 in salary and $116,340 in Pension Benefit Plan funds.

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[1] "Pension accruals" refers to amounts accrued annually for each Director. The amount distributed in 1996, $746,364, see Complaint ¶ 44, infra, included additional accrued interest not reflected in the chart above.

Creation of the Pension Plan

41. In April 1992, defendant Buchman proposed to the Directors that the Foundation adopt a pension plan for their benefit. In May 1992, defendants Roux, Ciraulo and Buchman adopted a Foundation resolution to establish a pension plan for the benefit of the Directors (the "Pension Benefit Plan"). Coury, Marnier-Lapostolle and De Gasperis voted for or concurred in establishment of such plan.

42. In 1992, each of the Directors entered into a retirement agreement (a "Retirement Agreement") with the Foundation, drafted by defendant Buchman, which provided, in part, that "[w]hereas, the Director is desirous of continuing to serve the Foundation as a member of its Board of Directors and to avail himself of the benefits offered by the Foundation; . . . the Foundation will establish and maintain on its books of account and financial records a separate memorandum account for the Director. . . to which it shall periodically credit such amounts as are hereinafter provided." Each Retirement Agreement contemplated that whenever a Director ceased to be a member of the Board of Directors, he would become entitled to receive the full amount accrued in his separate memorandum account. From 1990 to date, none of the Directors has ceased to be a member of the Board of Directors.

43. The board, at its July 26, 1995 meeting, noted that, as the meeting minutes reflect, "the economic interests of the Foundation would be better served if the retirement benefits conferred upon each of the present directors pursuant to each of the agreements on September 30, 1992 . . . were terminated as of January 1, 1996." The Directors subsequently voted to terminate the Pension Benefit Plan.

44. As of the termination of the Pension Benefit Plan, $698,040 in book entry amount

had been credited to the unfunded Pension Benefit Plan accounts. With interest added, a total of $746,364 had accrued in the Pension Benefit Plan, and was distributed to the Directors in equal distributions of $124,394.

45. Each of the Directors voted for or concurred in the payments to and distribution of the Pension Benefit Plan pursuant to the Retirement Agreements.

46. The Foundation has not provided to the Attorney General any annual filing subsequent to its 1999 annual report that would indicate compensation paid to the Directors after the close of 1999. The Attorney General here seeks recovery of all compensation paid to the Directors in 2000 and 2001 to the extent that it exceeded reasonable compensation.

The Foundation's Diminished Assets

47. The Foundation reported to the Attorney General that the fair market value of its assets was $11,275,720 at the end of 1990.

48. Between the end of 1990 and the end of 1999, the income that the Foundation reported, $7,993,417, exceeded the amount disbursed in grants, $6,501,978, by $1,491,439. Nevertheless, largely as a result of the excessive compensation that the Directors paid themselves, the Foundation's reported fund balance actually declined from $11,275,720 to $6,699,487, a total decline of $4,576,233.

CAUSES OF ACTION

AS AND FOR A FIRST CAUSE OF ACTION PURSUANT TO N-PCL 717, 719 and 720

49. The Attorney General repeats and realleges the allegations in paragraphs 1-48 above.

50. In voting for or concurring in payment of excessive salary and Pension Benefit Plan funds to each of the Directors, each Director breached his fiduciary obligations to the Foundation in violation of N-PCL § 717.

51. Pursuant to N-PCL §§ 719 and 720(b), the Directors should be held jointly and severally liable to the Foundation for all damages to the Foundation resulting from their breaches of their fiduciary duties to the Foundation in an amount to be determined at trial.

AS AND FOR A SECOND CAUSE OF ACTION
PURSUANT TO N-PCL §§ 406, 719 and 720

52. The Attorney General repeats and realleges the allegations in paragraphs 1-48 and 50-51 above.

53. Under N-PCL § 406 and the federal private foundation rules incorporated therein, defendant Directors are prohibited from causing the Foundation to pay themselves compensation in excess of reasonable compensation.

54. The Directors paid themselves excessive compensation out of the Foundation's assets in the form of salary and Pension Benefit Fund distributions.

55. In voting for or concurring in excessive compensation to each of the Directors, each director breached his obligations to the Foundation in violation of N-PCL § 406.

56. Pursuant to N-PCL §§ 719 and 720(b), the Directors should be held jointly and severally liable to the Foundation for all damages to the Foundation resulting from the payment to them of excessive salary and Pension Benefit Plan funds, plus interest, in an amount to be determined at trial.

AS AND FOR A THIRD CAUSE OF ACTION
PURSUANT TO N-PCL § 715

57. The Attorney General repeats and realleges the allegations in paragraphs 1-48, 50-51 and 53-56 above.

58. The payment of compensation to Directors was a self-dealing transaction subject to the requirements of N-PCL § 715 and, accordingly, was required to be approved by vote of disinterested directors.

59. Because the board voted on similar or identical compensation for all Directors, no Directors were disinterested. Thus, no approval by disinterested directors could have occurred, even if each Director purported to recuse himself from the decision as to his own compensation.

60. In the absence of approval by disinterested directors, all payment of compensation to the Directors is voidable under N-PCL § 715, unless it was fair and reasonable at the time it was approved by the board.

61. The Directors' compensation was not fair and reasonable at any of the times it was approved by the board.

62. All approvals of Directors' compensation should be voided, and all compensation should be repaid to the Foundation in recision.

AS AND FOR A FOURTH CAUSE OF ACTION
PURSUANT TO EPTL § 8-1.4(m)

63. The Attorney General repeats and realleges the allegations in paragraphs 1-48, 50-51, 53-56 and 58-62 above.

64. The Directors have failed to comply with EPTL § 8-1.4 and properly administer

the Foundation assets placed in their trust.

65. By engaging in the self-dealing conduct detailed in the First, Second and Third causes of action set forth herein, the Directors breached their fiduciary duties to the Foundation in violation of Article 8 of the EPTL, including their duty to avoid self-dealing pursuant to EPTL § 8-1.8(a)(2).

66. The Directors should be held jointly and severally liable for all damages to the Foundation resulting from such breach of duty.

AS AND FOR A FIFTH CAUSE OF ACTION
PURSUANT TO N-PCL §§ 706 AND 714

67. The Attorney General repeats and realleges the allegations in paragraphs 1-48, 50-51, 53-56, 58-62 and 64-66 above.

68. In voting themselves grossly excessive compensation, defendant Directors violated their fiduciary duties to the Foundation.

69. Because of their persistent breach of their fiduciary duties to the Foundation and pursuant to N-PCL §§ 706 and 714, defendants Roux, Ciraulo, Buchman, Coury, Marnier-LaPostolle and de Gasperis should be permanently removed for cause from their positions as directors and officers of the Foundation.

AS AND FOR A SIXTH CAUSE OF ACTION

70. The Attorney General repeats and realleges the allegations in paragraphs 1-48, 50-51, 53-56, 58-62, 64-66 and 68-69 above.

71. As an exemplary remedy, based on the Directors' repeated breach of their fiduciary duties by paying themselves grossly excessive compensation, the Directors should be barred from receiving any compensation for any service as a director or officer of any not-for-

profit corporation for a period to be established by the Court.

WHEREFORE, plaintiff Eliot Spitzer, as the representative of ultimate charitable beneficiaries and on behalf of the Foundation respectfully prays the Court for the following relief:

(a) directing defendants Roux, Ciraulo, Buchman, Coury, Marnier-Lapostolle and de Gasperis jointly and severally to pay to the Foundation damages in the form of excessive compensation, including interest, resulting from the violation of their duties in the management and disposition of Foundation assets and for loss and waste thereof, in an amount to be determined at trial;

(b) ordering rescission of the transactions involving the Foundation's excessive compensation payments to the Directors from 1990 through the current time.

(c) removing defendants Roux, Ciraulo, Buchman, Coury, Marnier-Lapostolle and de Gasperis, for cause, as stated above, as directors or officers of the Foundation and permanently enjoining each of them from serving as an officer or director of the Foundation;

(d) barring defendants Roux, Ciraulo, Buchman, Coury, Marnier-Lapostolle and de Gasperis from receiving any compensation for any service as an officer or director of any not-for-profit corporation;

(e) awarding the costs and disbursements of this proceeding to the Attorney General, including attorneys' fees, court costs and expenses; and

(e) granting such other and further relief as this Court deems just and proper.

Date: New York, New York
August 29, 2001

ELIOT SPITZER
Attorney General of the
State of New York
120 Broadway, 3rd Floor
New York, New York 10271
(212) 416-8407

By _____
Barbara L. Quint
Assistant Attorney General-in-Charge
Charities Bureau

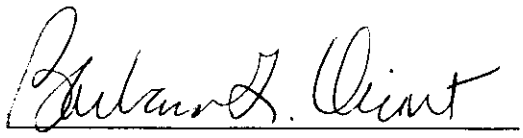
VERIFICATION

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

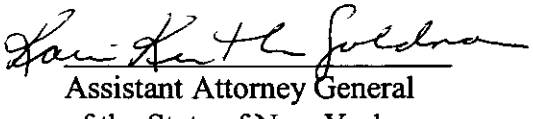
Barbara L. Quint, being duly sworn, deposes and says:

That she is an Assistant Attorney General of the State of New York, and is duly authorized to make this verification; and

That she has read the foregoing Verified Complaint and knows the contents thereof; that the same is true to her own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters she believes them to be true.



Sworn to before me this
29 day of August, 2001



Assistant Attorney General
of the State of New York