

MIRIAM E. ROCAH, as District Attorney of
Westchester County,

Petitioner,

- against -

MATTHEW J. COSTA, Judge of the New Rochelle
City Court, MICHAEL MOLINA, Defendant, and
GUSTAVO VILLAMARES SERRANO, Defendant,

Respondents.

VERIFIED ANSWER

Index No. 01356/2022

Respondent, Judge Matthew J. Costa (“Judge Costa”), by his attorneys Abrams Fensterman, LLP, answers the verified petition (“the petition”) of petitioner Miriam E. Rocah, as District Attorney of Westchester County (“the District Attorney”), as follows:

1. Admits the allegations contained in paragraph 1 of the petition to the extent that Miriam E. Rocah, Esq., as District Attorney of Westchester County, is the named petitioner in this proceeding.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Admits the allegations contained in paragraph 4 of the petition.
5. The allegations contained in paragraph 5 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.
6. The allegations contained in paragraph 6 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.
7. The allegations contained in paragraph 7 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.
8. Denies knowledge or information sufficient to form a belief as to the allegations

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contained in paragraph 8 of the petition, except admits that respondent Michael Molina was charged under New Rochelle City Court Docket Number CR-3495-21 with violating Vehicle and Traffic Law § 1192(3).

9. Denies the allegations contained in paragraph 9 of the petition, except admits that by decision and order dated January 14, 2022 respondent Judge Costa granted a motion by respondent Molina to preclude the testimony of a state trooper and respectfully refers the Court to the January 14, 2022 decision for an accurate statement of the facts and legal conclusions on which the decision and order were based.

10. Admits the allegations contained in paragraph 10 of the petition.

11. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11 of the petition, except admits that respondent Gustavo Villamares Serrano was charged under New Rochelle City Court Docket Number CR-5661-21 with violating Vehicle and Traffic Law §§ 1192(2) 1192(3), and 509(1).

12. Denies the allegations contained in paragraph 12 of the petition, except admits that by decision and order dated April 4, 2022 respondent Judge Costa granted a motion by respondent Serrano to preclude certain evidence at trial and respectfully refers the Court to the April 4, 2022 decision for an accurate statement of the facts and legal conclusions on which the decision and order were based.

13. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13 of the petition.

14. The allegations contained in paragraph 14 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.

15. The allegations contained in paragraph 15 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.

16. The allegations contained in paragraph 16 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.

17. The allegations contained in paragraph 17 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.

18. The allegations contained in paragraph 18 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.

19. The allegations contained in paragraph 19 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.

20. The allegations contained in paragraph 20 of the petition constitute legal conclusions to which no response is required; to the extent that a response is required, the allegations are denied.

STATEMENT OF PERTINENT FACTS

21. Judge Costa submits the following statement of pertinent facts pursuant to CPLR 7804(d).

A. Respondent Michael Molina's case.

22. On June 11, 2021, State Trooper Angelo Fortune pulled over respondent Michael

Molina ("Molina") in New Rochelle for driving without his headlights on. After Molina purportedly failed three field sobriety tests, Trooper Fortune arrested him and transported him to the State Police Barracks, where he refused a chemical breath test.

23. On July 2, 2021, after Molina entered a plea of not guilty to various charges, including driving while intoxicated, *see* Vehicle and Traffic Law § 1192(3), the case was adjourned to July 27, 2021 for the District Attorney to comply with her statutory discovery obligations.

24. On that date, the District Attorney failed to file a certificate of compliance and declare her readiness for trial. Judge Costa adjourned the case to August 10, 2021.

25. On July 28, 2021, the District Attorney provided Molina with various discovery materials, including a "Member Resume" for Trooper Fortune. The resume indicated, among other things, that Trooper Fortune had been the subject of two "founded" complaints resulting in disciplinary action against him, one of which stemmed from his unlawfully arresting someone for driving while intoxicated, which is the same crime for which he arrested Molina. The same day, the District Attorney filed a certificate of compliance and statement of readiness.

26. On August 10, 2021, Judge Costa adjourned the case to September 30, 2021 for pretrial hearings and for Molina to review the discovery provided by the District Attorney and to have the opportunity to file a motion objecting to the certificate of compliance.

27. On September 28, 2021, Molina moved for an order determining that the District Attorney's certificate of compliance and statement of readiness were invalid on the ground that the District Attorney failed to comply with the mandatory discovery requirements. Specifically, Molina argued, in pertinent part, that the District Attorney failed to disclose the entirety of Trooper Fortune's disciplinary file, in violation of CPL 245.20(1)(k)(iv), which requires the prosecution to turn over expeditiously all evidence that tends to impeach the credibility of a testifying prosecution

witness.

28. On November 5, 2021, prior to filing its opposition to Molina's motion, the District Attorney provided Molina with some of the necessary discovery regarding Trooper Fortune's disciplinary record that she had failed to turn over three months earlier—including documentation relating to the incident in which he unlawfully arrested someone for driving while intoxicated—when the certificate of compliance was filed.

29. On November 10, 2021, still prior to filing her opposition to Molina's motion, the District Attorney turned over more of the mandatory discovery regarding Trooper Fortune's disciplinary record that was not disclosed at the time of filing the initial certificate of compliance. The same day, the District Attorney filed another supplemental certificate of compliance and statement of readiness.

30. After the two supplemental disclosures, by affirmation dated November 11, 2021, the District Attorney opposed Molina's motion, arguing that the court should deny Molina's motion because she exercised due diligence and made a good faith effort to comply with her discovery obligations prior to the filing of its original certificate of compliance and that sanctions were inappropriate for the untimely disclosure of the impeachment material because the disclosure of that material, although belated, occurred prior to any hearing or trial.

31. In a reply affirmation dated December 1, 2021, Molina reiterated the argument that the District Attorney's three-month-late disclosure of impeachment material constituted a violation of CPL 245.20(1)(k)(iv) and further argued that his right to a speedy trial was prejudiced by the District Attorney's untimely disclosure because it delayed both the pretrial hearings and the filing of the instant motion.

32. In a written decision and order dated January 14, 2022, Judge Costa concluded that the

District Attorney was required by CPL 245.20(1)(k)(iv) to disclose to Molina all materials regarding Trooper Fortune's disciplinary record as soon as was practicable and that the District Attorney's failure to disclose those materials until November 10, 2021, three months after the filing of the initial certificate of compliance, was a belated disclosure in violation of the automatic discovery statute. Judge Costa also concluded that Molina had demonstrated, "under the totality of the circumstances," that he was "prejudiced" by the District Attorney's discovery violations. Accordingly, pursuant to his discretionary authority to impose appropriate discovery sanctions under "CPL 245.80," Judge Costa precluded the District Attorney from introducing the testimony of Trooper Fortune and any evidence procured by Trooper Fortune.

33. By notice of motion and affirmation dated February 22, 2022, the District Attorney moved for leave to reargue Judge Costa's decision.

34. On May 13, 2022, before Judge Costa had decided the District Attorney's pending motion for leave to reargue, the People successfully moved to stay all proceedings pending before Judge Costa regarding Molina's case, including the District Attorney's motion for leave to reargue.

B. Respondent Gustavo Villamares Serrano's case.

35. On October 1, 2021, respondent Gustavo Villamares Serrano ("Serrano") was involved in a motor vehicle accident in New Rochelle. Police responded to the scene and subjected Serrano to three field sobriety tests, including the horizontal gaze nystagmus test ("HGN test"), all of which he purportedly failed. After being arrested, Serrano submitted to a breath test, which a police officer administered using a "Datamaster" machine, revealing that Serrano's blood alcohol content was 0.16.

36. On November 22, 2021, after Serrano entered a plea of not guilty to several charges, including driving while intoxicated and per se driving while intoxicated, *see* Vehicle and Traffic

Law § 1192(2)-(3), the case was adjourned for the District Attorney to comply with the mandatory *discovery obligations*.

37. Beginning on November 24, 2021, the District Attorney began serving Serrano with discovery packages.

38. On December 6, 2021, Serrano served the District Attorney with a request for disclosure of the police training manuals for the administration of the HGN test and the operation of the Datamaster machine, used by the respective officers who conducted those tests on him, explaining that those materials were discoverable under CPL 245.20(1)(j), which requires the prosecution to disclose all information pertaining to any scientific tests relating to the criminal action.

39. On January 4, 2022, the District Attorney supplied Serrano with a discovery package. The package did not include the requested manuals regarding the HGN test and the Datamaster, but it purported to include the certification certificate for the officer who used the Datamaster to conduct the breath test on Serrano. The same day, the District Attorney filed a certificate of compliance and declared ready for trial.

40. On January 24, 2022, Serrano moved for an order determining that the District Attorney's certificate of compliance and statement of readiness were invalid on the ground that the District Attorney failed to comply with the mandatory discovery requirements. Specifically, Serrano argued that, by failing to notify him in writing that she would be withholding the requested manuals regarding the Datamaster and the HGN test and by failing to apply for leave to the court for a determination on the discoverability of those materials, the District Attorney had violated CPL 245.10(1)(a)(iv)(A) and 245.20(2). Serrano also argued that the District Attorney's failure to disclose those manuals constituted a violation of CPL 245.20(1)(j). Furthermore, Serrano argued

that, although the District Attorney's discovery package stated that the Datamaster operator's certification certificate had been supplied, the certificate was not provided, and the failure to provide that document constituted a violation of CPL 245.20(1)(s), which requires the prosecution to disclose the certification certificate held by the operator of a machine used to conduct a breath test. Serrano maintained that the District Attorney's failure to provide him with the referenced materials would deprive him of an adequate opportunity to effectively cross-examine—during pretrial hearings and trial—the officers who administered the tests.

41. By affirmation dated February 15, 2022, the District Attorney opposed Serrano's motion. The District Attorney argued that the court should deny Serrano's motion because the Datamaster operator's certification certificate was provided and because the requested manuals for the HGN test and the Datamaster were not discoverable under CPL 245.20. The District Attorney further argued that it should not be sanctioned because it exercised due diligence and made a good faith effort to comply with its discovery obligations prior to the filing of its original certificate of compliance.

42. In a reply affirmation dated March 1, 2022, Serrano reiterated the same arguments in his main motion papers regarding the District Attorney's failure to comply with the mandatory discovery obligations, dated September 28, 2021, including its supporting exhibits, is annexed to the petition as Exhibit 1.

43. In a written decision and order dated April 4, 2022, Judge Costa concluded that the disclosed item that the District Attorney claimed to be the Datamaster operator's certification certificate was not that document and that the District Attorney's failure to disclose the certificate constituted a violation of CPL 245.20(1)(s). Next, Judge Costa addressed the District Attorney's failure to disclose the training manuals for the Datamaster and the HGN test, and the District Attorney's claim that those materials were not discoverable. Judge Costa explained that disputes

regarding the discoverability of documents are governed by CPL 245.10 (1) (a) (iv) (A) and 245.20 (5) and that those provisions require the prosecution to notify the defendant of its belief that materials are not discoverable and seek leave of the court for a determination regarding the discoverability of those materials. Judge Costa concluded that the People's failure to pursue those statutorily prescribed procedural remedies amounted to a discovery violation. Judge Costa also concluded that Serrano had demonstrated, "under the totality of the circumstances," that he was "prejudiced" by the District Attorney's discovery violations. Accordingly, pursuant to his discretionary authority to impose appropriate discovery sanctions under "CPL 245.80," Judge Costa precluded the District Attorney from introducing any testimony regarding the chemical test and the HGN test.

RECORD OF PROCEEDINGS

44. Judge Costa submits the following record of the proceedings pursuant to CPLR 7804(e).

A. Molina's case.

45. Molina's motion to strike the District Attorney's COC for failing to comply with discovery obligations, dated September 28, 2021, including its supporting exhibits, is annexed to the petition as Exhibit 1.

46. The District Attorney's opposition to Molina's motion, dated November 11, 2021, including its supporting exhibits, is annexed to the petition as Exhibit 2.

47. Molina's reply, dated December 1, 2021, including its supporting exhibits, is annexed to the petition as Exhibit 3.

48. Judge Costa's decision and order on Molina's motion, dated January 14, 2022, is annexed to the petition as Exhibit 4.

49. The District Attorney's motion to reargue, dated February 22, 2022, is annexed to the petition as Exhibit 9.

50. Molina's opposition to the District Attorney's motion, dated March 11, 2022, including its supporting exhibits, is annexed to the petition as Exhibit 10.

51. The District Attorney's reply, dated March 18, 2022, is annexed to the petition as Exhibit 11.

B. Serrano's case.

52. Serrano's motion to strike the District Attorney's COC for failing to comply with discovery obligations, dated January 24, 2022, including its supporting exhibits, is annexed to the petition as Exhibit 5.

53. The District Attorney's opposition to Serrano's motion, dated February 15, 2022, is annexed to the petition as Exhibit 6.

54. Serrano's reply, dated March 1, 2022, including its supporting exhibits, is annexed to the petition as Exhibit 7.

55. Judge Costa's decision and order on Serrano's motion, dated April 4, 2022, is annexed to the petition as Exhibit 8.

DEFENSE AND OBJECTION IN POINT OF LAW

56. Judge Costa repeats and realleges each of the statements contained in paragraphs 1 through 43 of this verified answer.

57. Judge Costa refers this Court to his accompanying memorandum of law in support of the verified answer and in opposition to the petition, for a recitation of the governing law directing that the petition be denied and dismissed.

58. The District Attorney's claim for a writ of prohibition, seeking to enjoin Judge Costa

from enforcing those portions of the orders precluding the District Attorney from offering certain evidence in Molina's case and Serrano's case because of the District Attorney's failure to comply with the mandatory discovery obligations under CPL article 245, is not cognizable under CPLR article 78.

59. A writ of prohibition is an extraordinary remedy that is available only in the rare case where a court is acting or threatening to act either without jurisdiction or in excess of its authorized powers. *See Matter of Lee v. McKinney*, 7 N.Y.3d 561, 565 (2006); *Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988). In each case here, Judge Costa had jurisdiction over the discovery disputes and the statutory authority under CPL article 245 to sanction the District Attorney upon his conclusion that the District Attorney failed to comply with its discovery obligations and that the District Attorney's failure resulted in prejudice to the defendant. Exercising that authority in each case, Judge Costa concluded that the District Attorney's discovery violations prejudiced the defendant, and, in turn, issued a statutorily permitted sanction for the District Attorney's discovery noncompliance. Thus, because Judge Costa acted with jurisdiction and within his statutory authority, prohibition does not lie.

60. The District Attorney does not dispute that Judge Costa, in each case, had jurisdiction to pass on the discovery issues, had the statutory authority to issue sanctions for discovery violations that prejudiced the defendant, and expressly determined that the defendant in each case was prejudiced by her discovery violation. The District Attorney's sole basis for the petition is that she disagrees with Judge Costa's conclusion that the defendant in each case was prejudiced; in other words, the District Attorney argues that she is entitled to a writ of prohibition because Judge's Costa's prejudice determination in each case was wrong. This is precisely the type of claim of pretrial error for which a writ of prohibition is not an available remedy. *See Matter of Rush v.*

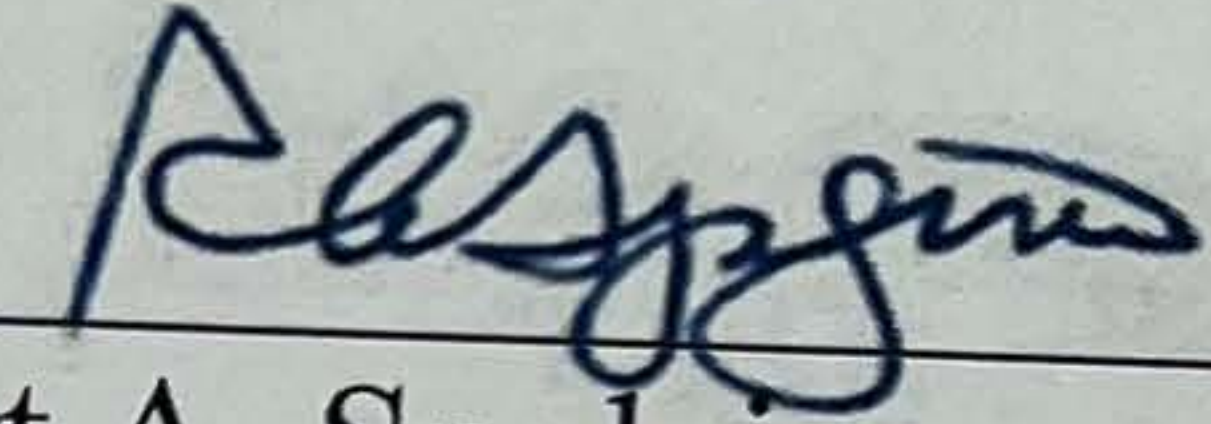
Mordue, 68 N.Y.2d 348, 353 (1986); *Matter of La Rocca v. Lane*, 37 N.Y.2d 575, 579 (1975);
Matter of Johnson v. Price, 28 A.D.3d 79, 81 (1st Dep't 2006).

WHEREFORE, for all of these reasons, and for the reasons set forth in the accompanying memorandum of law, Judge Costa requests that this Court deny the petition and grant him such other relief as this Court deems just and proper.

Dated: White Plains, New York
October 31, 2022

ABRAMS FENSTERMAN, LLP
Attorneys for Respondent Judge Matthew J. Costa

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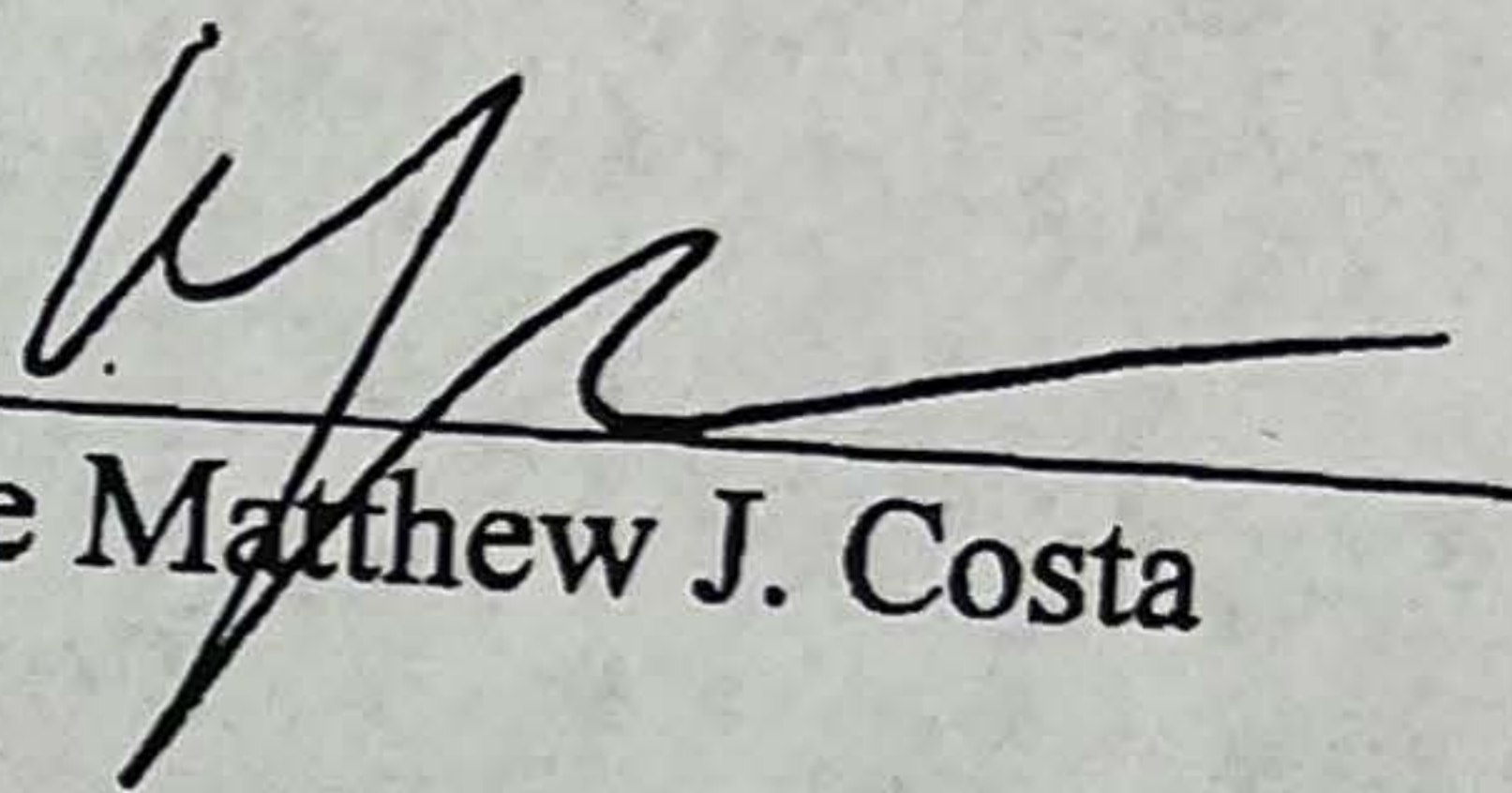
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VERIFICATION

JUDGE MATTHEW J. COSTA, being duly sworn, deposes and states as follows:

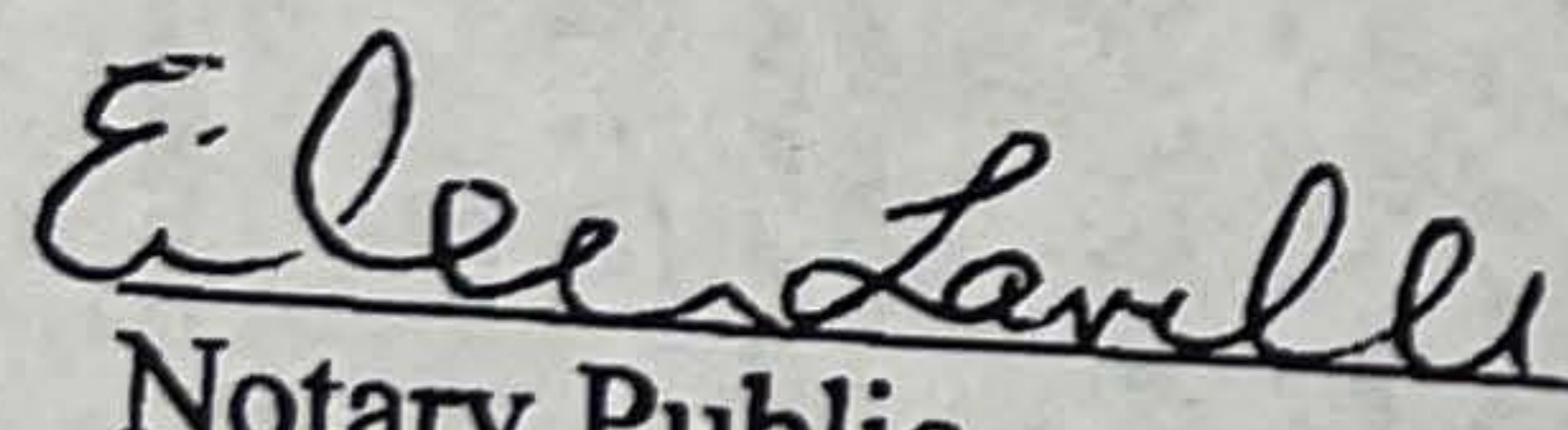
I am a Judge of the New Rochelle City Court and a respondent in this CPLR article 78 proceeding. I have read the attached verified answer and know the contents thereof and the facts contained therein to be true to my knowledge, except as to any portions of the verified answer that are stated to be on information and belief, and as to those, I believe them to be true.



Judge Matthew J. Costa

Dated: ~~New Rochelle~~ New York
October 31, 2022

Sworn to before me on this
31st day of October, 2022



Notary Public

EILEEN LAVELLE
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01LA6197308
Qualified in Westchester County
Commission Expires November 24, 2024