

EXHIBIT 7

EXHIBIT 3

EXHIBIT 4

EXHIBIT 5

EXHIBIT 6

CITY COURT: NEW ROCHELLE
COUNTY OF WESTCHESTER: STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, ^x

-against-

REPLY AFFIRMATION

DOCKET 3495-21

MICHAEL MOLINA,

Defendant. ^x

I, STEVEN EPSTEIN, an attorney duly admitted to practice law in the Courts of this State, affirm under penalty of perjury that the following statements are true:

1. I am an attorney associated with Barket Epstein Kearon Aldea & LoTurco, LLP, counsel to the Defendant, MICHAEL MOLINA, and I am familiar with the facts of this case and with the proceedings that have been had in the matter to date.
2. I make this Affirmation in further support of an application for an Order determining the People have not met their obligations pursuant to CPL §245.20 and pursuant to CPL § 30.30(5).
3. Unless otherwise specified, the information in this affirmation is based upon an inspection of the records in this case, upon communications between defense counsel and prosecutors, and upon information derived from relevant legal authorities.
4. The Defendant filed a motion dated September 28, 2021, objecting to the People's certificate of compliance pursuant to CPL §30.30(1)(b) and §170.30(e).
5. On September 30, 2021, this Court set a motion schedule requiring the People to file any opposition papers by October 28, 2021.
6. On October 22, 2021, and again October 25, 2021, ADA Phillip Mellea contacted Defendant's counsel by telephone to request a two-week extension of time to file opposition papers.

7. Since the Motion was for relief pursuant to CPL 30.30 and it was Defendant's position that the certificate of compliance was invalid and still had not been cured, defense counsel expressed a reluctance to grant the request but relented as a matter of professional courtesy on the condition that the People consent to one week of the extension being charged to the People for speedy trial calculations. ADA Mellea sent defense counsel a confirming e mail which is attached as Exhibit "A."

8. The People filed their opposition papers dated November 11, 2021.

9. The Defendant offers this Affirmation in reply to the People's Opposition papers.

10. What the People ignore entirely in their opposition papers yet concede implicitly and by virtue of not challenging Defendant's assertions in his motion is that the certificate of compliance filed on July 28, 2021, was improper, invalid and illusory.

11. Quite simply, C.P.L. §245.20(1)(k)(iv) required that the People, as a prerequisite to filing a certificate of compliance turn over "[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to... (iv) impeach the credibility of a testifying prosecution witness"

12. There is no dispute that it was not until November 10, 2021, that the People turned over what they now allege to be a completed set of voluminous documents that relate to evidence and information known to police that tends to impeach the credibility of Trooper Angelo Fortune. All of which as the Defendant's motion asserted should have been disclosed before filing a certificate of compliance. Thus, not controverted by the People is the essence of the motion itself, i.e., that the People failed to disclose to the defense as part of their initial discovery obligation all that was required by them *before* they could make a valid statement of trial readiness -- and there

is no cognizable basis under the current law by which the People's failure to meet their discovery obligations can be excused.

13. What should be most troubling to this Court is that no explanation for the People's failures, which have delayed these proceedings has even been offered other than the argument that any time-period after an invalid certificate is filed must not be charged to the People as motion practice. This argument if accepted would frustrate the very purpose of discovery reform which by tying it inextricably to speedy trial was meant to compel prosecutors to disclose that which must be disclosed under the law.

14. Moreover, if this interpretation were to be accepted by the Court there would be nothing to stop prosecutors from filing illusory certificates of compliance simply to stop the speedy trial clock from expiring and force Defendant's to file motions.

15. Critical to the analysis of these facts is that it must be presumed that the People either acted in bad faith when they filed the certificate of compliance or acted recklessly in utter disregard for their obligations under the statute. This presumption arises from the People's choice to remain silent as to any excuse for not complying with their discovery obligations and simply ask this Court to condone their actions and cloak them in the protections of motion practice which were only required by their own failures.

16. There is support for charging the People with such periods of time in similar cases where motions are necessitated by the conduct of the People and created an impediment to the proceedings advancing to trial. In *People v. McKenna*, 76 N.Y.2d 59, 555 N.E2d 911 (1990), the Court was faced with an analogous situation to the facts as presented here. The Defendant filed an Omnibus Motion which sought, among other things, the inspection of grand jury minutes. In

charging the People with all time during their delay in producing the grand jury minutes despite it being during the period of otherwise excludable motion practice the Court stated:

"...the People's concededly negligent failure to provide the Grand Jury minutes for five months after their statement of readiness was made mandates dismissal of the indictment under CPL 30.30. In contrast to the discovery delays considered in *Anderson*, the People's omission did not merely impair defendant's ability to proceed to trial. Rather, because the trial could simply not go forward until the CPL 210.30 motion was decided, the People's dilatory conduct in failing to provide the minutes necessary to that decision was a direct, and virtually insurmountable, impediment to the trial's very commencement (cf., *People v. Allen*, 66 N.Y.2d 529, 542, 498 N.Y.S.2d 119, 488 N.E.2d 1231 [dismissal not required under CPL 30.30, in part because undelivered Rosario material "was not due until after the jury had been sworn"]). As such, the prosecutorial failure here must be deemed to be one having a direct bearing on the People's readiness, since the People can hardly claim to be "ready" when they have not done all that is required of them to bring the case to the point where it may be tried."

McKenna, 76 N.Y.2d at 64; see also *People v Roscoe*, 210 AD2d 1003 (App Div. 4th Dept. 1994).

17. Just as in *McKenna* the People should not be made to benefit, and the Defendant's rights to a speedy trial prejudiced by the People's knowing and deliberate failure to do that which they must do by law, particularly when the People engage in dilatory conduct which created an impediment to the case advancing to trial absent the filing of this motion itself.

18. Another decision relevant to the Court's analysis is *People v. Otero*, 70 Misc.3d 526 (Albany City Ct. 2020). In *Otero*, the defendant argued that in light of the speedy trial reforms, none of the excludable time provisions under CPL 30.30 (4) and specifically 4 (b) – ever apply where the People's lack of readiness is due to lack of discovery compliance. The trial court rejected that contention as being contrary to legislative intent. However, the facts in *Otero* are

different in a significant respect. The court went on to determine that the People were entitled to exclude an adjourned period under Subdivision 4 (b) — the continuance consented to or requested by the defendant excludable time provision. 4 (b) entitles the People to exclusion of an adjournment requested or consented to by the defendant, irrespective of whether the continuance results in the delay at issue, under principles of estoppel or waiver. The delay in the present case “results from” or is caused by a particular fact or circumstance. One such excludable time provision is 4 (a), which allows for exclusion of time resulting from or caused by pretrial motions. That excludable time provision was not at issue in *Otero* as it is here. The Court in *Otero* correctly makes this point: “Many of the CPL § 30.30 exclusions, however, deal with delays that have no impact on the People’s ability to provide discovery. For example, delays relating to defense motion practice (CPL § 30.30[4][a]), joinder issues (CPL § 30.30[4][d]), and the out-of-jurisdiction detention of defendants (CPL § 30.30[4][e]).” Since the delay in this case did not result from the circumstance being asserted as the basis to exclude time (the pretrial motion), the “defense motion practice” had “no impact on the People’s ability to provide discovery” and thus should not trigger exclusion under CPL 30.30 (4) (a).

19. It is also particularly egregious for the People to request a two-week extension of time to file opposition papers, offer to accept one week of such an adjournment as chargeable time in a writing sent to this Court and now ask this Court to disregard that representation based simply on a cloak of protection, they now claim they are afforded by filing an invalid certificate of compliance. Such an application of discovery reform and its intended purposes cannot be manifest from these circumstances.

20. If this Court is inclined to exclude the period of time for motion practice pursuant to CPL 30.30(4)(a), we ask as an alternative remedy that the court impose a sanction under , CPL § 245.80 which governs sanctions for discovery violations, and permits a court to impose, in addition to the sanctions listed therein, "such other order as it deems just under the circumstances." (CPL § 245.80[2]). We ask that the Court as a sanction charge the People with the time occasioned by their failure to produce discovery which caused the delayed hearing and the filing of this motion. This is especially warranted in the case before the Court in which the People have offered no good faith basis for failing to produce discovery and it's deceptive statements made to counsel and the Court with occasioned by their request for an extension of time to file opposition papers.

21. Notwithstanding the sweeping statutory changes encompassed in Article 245, the well-established principle remains that statements of readiness, or "certificates of compliance" as they are now called, may become invalid due to changed circumstances or where representations of readiness are challenged as illusory. *See People v. Sibbles*, 22 N.Y.3d 1174, 1181 (Grafano J., concurring) (a statement of readiness may be considered illusory "where the People do not provide an explanation for the change in circumstances between the initial statement of readiness and the subsequent admission that the People were not ready to proceed" such that the prior statement of readiness did not accurately reflect the People's position.

22. In sum, the People filed a certificate of compliance prior to completing their obligations under CPL §245.20 the Defendant requests the Court enter an Order rejecting its certificate of compliance and statement of readiness, charge them with all time until they filed the subsequent certificate of readiness on November 9, 2021, and dismiss these charges pursuant to CPL §30.30.

Dated: Garden City, New York 11530
December 1, 2021

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

Respectfully submitted by:

AFFIDAVIT OF SERVICE

MICHAEL MOLFIA,



DOCKET 3493-31

Defendant

Steven Epstein, Esq.
Barket Epstein Kearon Aldea & LoTurco, LLP
666 Old Country Road, Suite 700
Garden City, New York 11530
(516) 745-1500

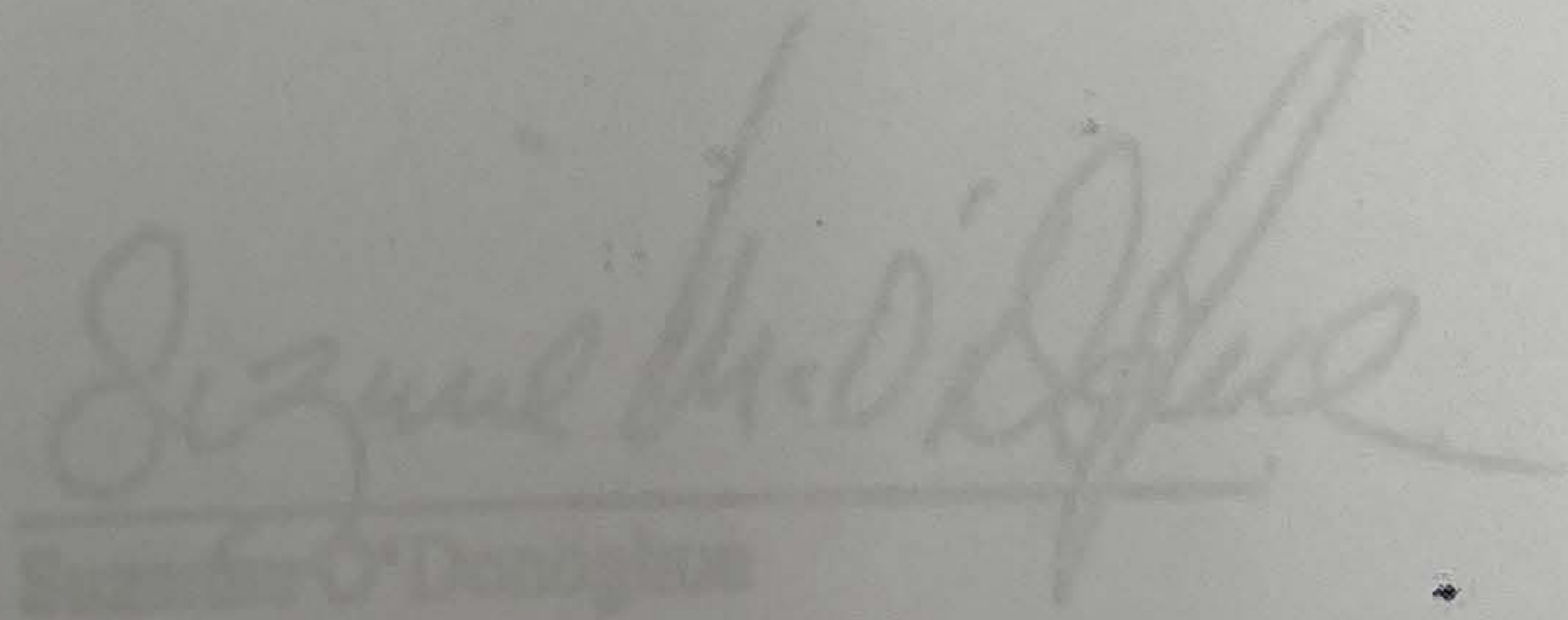
STATE OF NEW YORK)

COUNTY OF NASSAU)

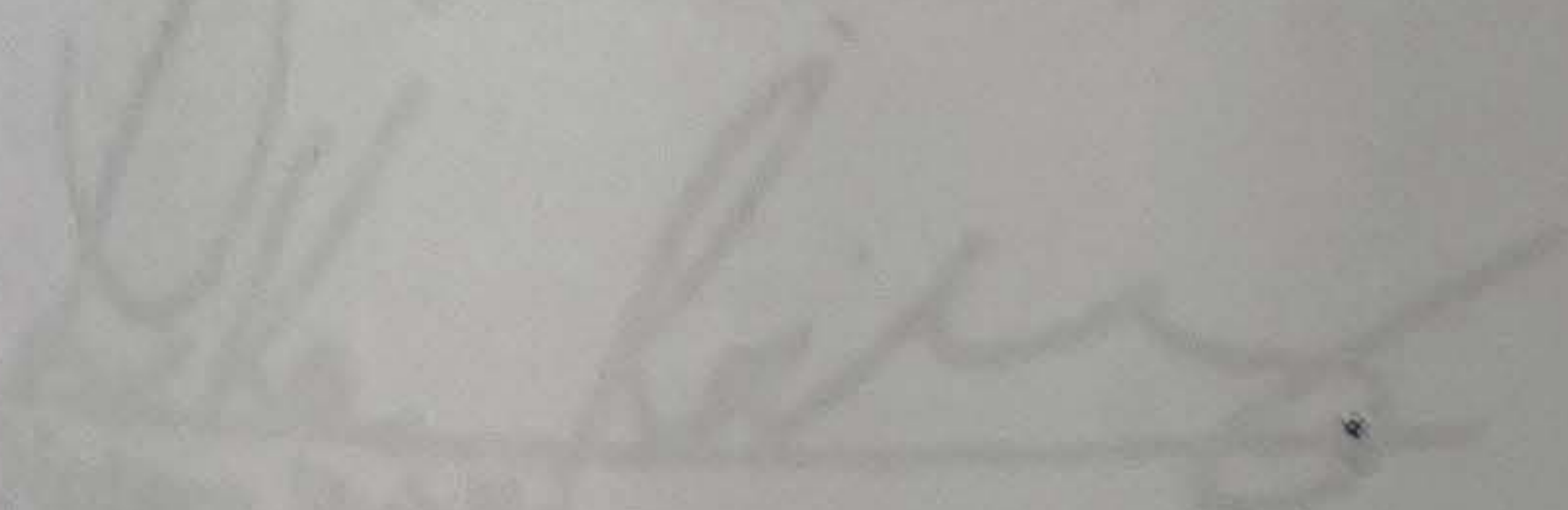
Suzanne O'Donoghue, being duly sworn, deposes and says, under the pains and penalties of perjury, the following is true:

1. I am over eighteen (18) years of age, not a party to the above-captioned case, and reside in Suffolk County, New York.
2. On December 1, 2021, I served a true copy of our REPLY AFFIRMATION IN FURTHER SUPPORT OF DEFENDANT'S OBJECTION TO CERTIFICATE OF COMPLIANCE PURSUANT TO CPL §39.30(1)(b) and §170.30(a), by depositing same in a prepaid properly addressed wrapper, in a post office or official depository of the United States Postal Service within the State of New York, addressed to the last known address of the addressee as follows:

ADA Philip Mollen
Westchester County District Attorney's Office
New Rochelle Branch
675 North Avenue, 2nd Floor
New Rochelle, NY 10801


Suzanne O'Donoghue

Subscribed and sworn to before me
this 1st day of December, 2021.


Notary Public

CITY COURT: NEW ROCHELLE
COUNTY OF WESTCHESTER: STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, ^x

-against-

AFFIDAVIT OF SERVICE

MICHAEL MOLINA,

Defendant.

DOCKET 3495-21

STATE OF NEW YORK) ^x

) ss:

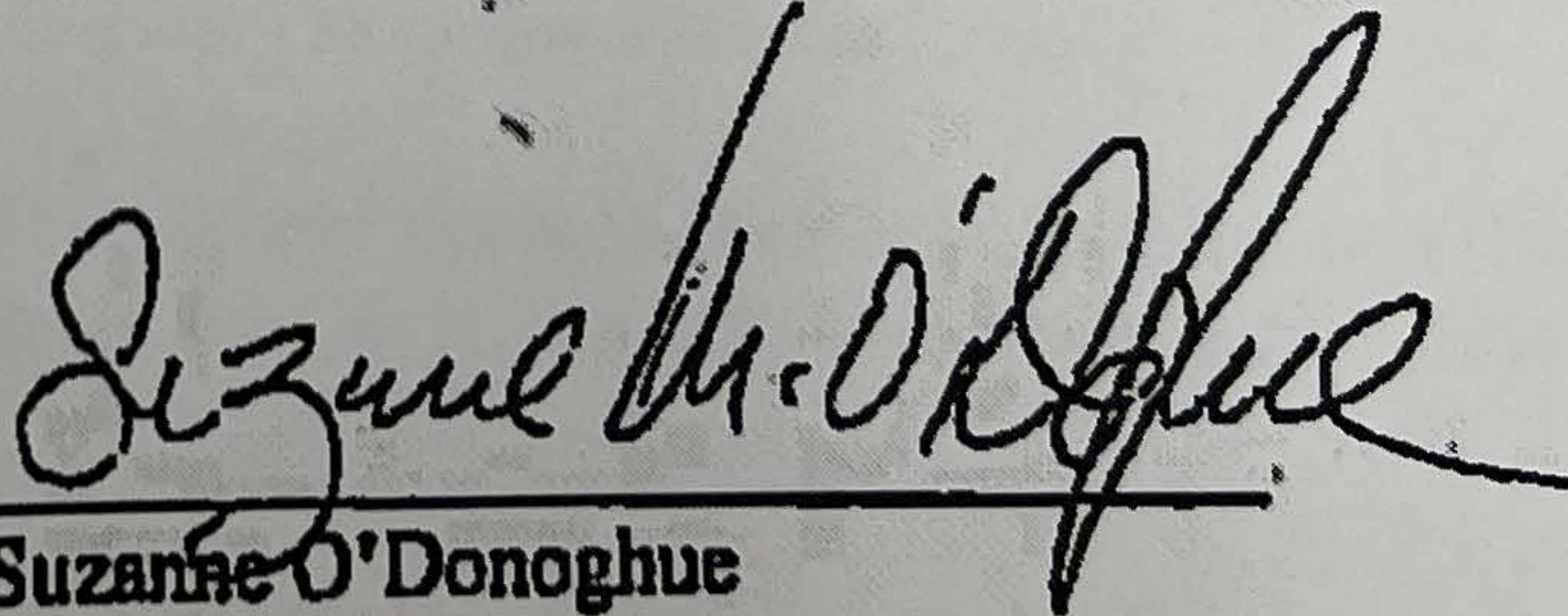
COUNTY OF NASSAU)

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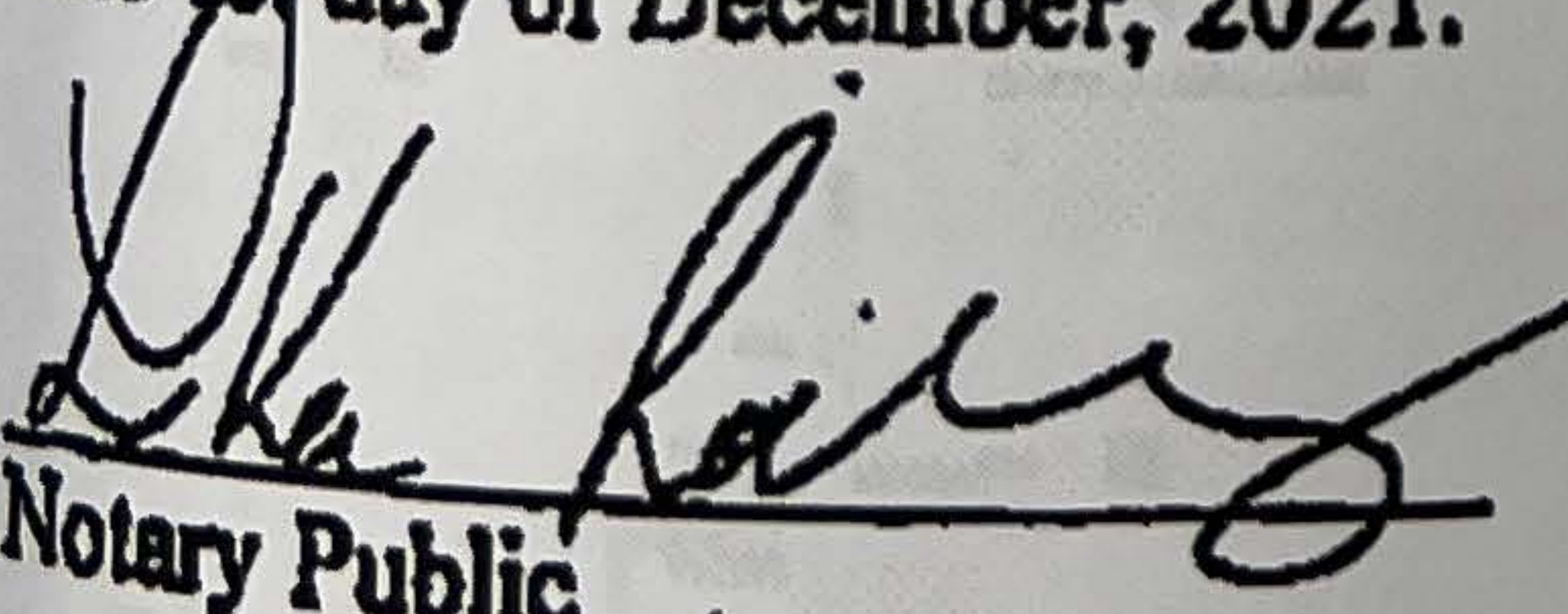
1. I am over eighteen (18) years of age, not a party to the above-captioned case, and reside in Suffolk County, New York.

2. On December 1, 2021, I served a true copy of our **REPLY AFFIRMATION IN FURTHER SUPPORT OF DEFENDANT'S OBJECTION TO CERTIFICATE OF COMPLIANCE PURSUANT TO CPL §30.30(1)(b) and §170.30(e)**, by depositing same in a postpaid properly addressed wrapper, in a post office or official depository of the United States Postal Service within the State of New York, addressed to the last known address of the addressee as follows:

ADA Philip Mellea
Westchester County District Attorney's Office
New Rochelle Branch
475 North Avenue, 2nd Floor
New Rochelle, NY 10801


Suzanne O'Donoghue

Subscribed and sworn to before me
this 1st day of December, 2021.


Notary Public

LENKA ROBRUSZ
NOTARY PUBLIC, State of New York
No. 01R09147482
Qualified in Suffolk County
Commission Expires June 6, 2022

EXHIBIT A

Philip Malina <Pmalina@westchesterda.net>
Wednesday, October 27, 2021 2:05 PM
Steven Epstein
Re: People v. Michael Molina CR-3495-21

Message sent to wrong email address.

Philip Malina | Assistant District Attorney
Criminal Courts & Grand Jury Division | New Rochelle City Court Branch
New Rochelle City Court Building
175 North Avenue, New Rochelle, NY 10801
Phone 914-813-5800 | Fax 914-813-5806
Pmalina@westchesterda.net
WestchesterDA.net

Philip Malina

Wednesday, October 27, 2021 1:54 PM

Philip Malina <Pmalina@westchesterda.net>; Noel Rivera <nrivera@nycourts.gov>; Josephine Barker <jbarker@barkeval.com>
Pmalina@westchesterda.net

New Rochelle ADA's <ADAs@westchesterda.net>; Karla Williams <KWilliams@westchesterda.net>

Re: People v. Michael Molina CR-3495-21

Dear Court:

It is noted that this matter was scheduled for People's response to the Defendant's motion today. On consent, the parties have agreed to adjourn the People's response for two weeks that being 11/11/2021. It should be further noted that the People will be charged with 7 days of the adjournment. The defendant will still have two weeks to reply to the People's response 11/25/2021 and the Court shall have 12/24/2021 to render their decision.

It is indicated that the date of which the defendant shall respond by and the date the Court may render a decision, may fall on a Holiday. Both of these dates are at the discretion of the Court. The only date which is definite in this regard is the 11/11/2021 date for the People to respond.

Thank you in advance,

Philip Malina

Philip Malina | Assistant District Attorney
Criminal Courts & Grand Jury Division | New Rochelle City Court Branch
New Rochelle City Court Building
175 North Avenue, New Rochelle, NY 10801
Phone 914-813-5800 | Fax 914-813-5806
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EXHIBIT A

EXHIBIT 5

EXHIBIT 6

EXHIBIT 4

Steven Epstein

From:
Sent:
To:
Subject:

Philip Mellea <PMellea@westchesterda.net>
Wednesday, October 27, 2021 2:05 PM
Steven Epstein
FW: Peple v. Michael Molina CR-3495-21

Sorry, originally sent to wrong email address.

Phil

Phillip Mellea | Assistant District Attorney
Criminal Courts & Grand Jury Division | New Rochelle City Court Branch
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pmellea@westchesterda.net
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From: Phillip Mellea
Sent: Wednesday, October 27, 2021 1:54 PM
To: Nikita Mebane <nmebane@nycourts.gov>; Noel Rivera <nrivera@nycourts.gov>; 'sepstein@barketein.com' <sepstein@barketein.com>
Cc: New Rochelle ADAs <attomevs@westchesterda.net>; Kerrie Williams <KWilliams@westchesterda.net>
Subject: People v. Michael Molina CR-3495-21

Good afternoon:

Please be advised that this matter was scheduled for People's response to the Defendant's motion today. On consent, the parties have agreed to adjourn the People's response for two weeks that being 11/11/2021. It should be further noted, that the People will be charged with 7 days of the adjournment. The defendant will still have two weeks to reply to the People's response 11/25/2021 and the Court shall have 12/24/2021 to render their decision.

Please understand that the date of which the defendant shall respond by and the date the Courts may render a decision, apparently fall on a Holiday. Both of these date are at the discretion of the Court. The only date which is definite in nature should be the 11/11/2021 date for the People to respond.

Thank you in advance,

Phil Mellea

Phillip Mellea | Assistant District Attorney
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CITY COURT NEW ROCHELLE
COUNTY OF WESTCHESTER STATE OF NEW YORK
THE PEOPLE OF THE STATE OF NEW YORK

against

MICHAEL MOLINA,

Defendant,

DOCKET 3495-21

REPLY/AFFIRMATION IN FURTHER SUPPORT OF DEFENDANT'S
OBJECTION TO CERTIFICATE OF COMPLIANCE
PURSUANT TO CPL §30.30 (d) (b) and §170.30 (c)

BARKET EPSTEIN KEARON ALDEA & LOTURCO, LLP

Attorneys for Defendant

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