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

CAMPAIGN FOR FISCAL EQUITY, INC., *et al.*,	:	
Plaintiffs,	:	Hon. Leland DeGrasse
vs.	:	Index No.: 111070/93
THE STATE OF NEW YORK, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CONTEMPT

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PRELIMINARY STATEMENT

The Report and Recommendations of the Judicial Referees ("Judicial Referees' Report") and the instant motion raise grave questions of constitutional law, public policy, and the educational future of over one million public school students. It is now almost five months since the State of New York defied a direct order of the Court of Appeals and failed to implement a constitutionally adequate remedy -- or even any attempt at a remedy -- that would comply with the specific mandates set forth by the Court of Appeals. Over one million school children have been denied at least a year of the resources to which they are entitled as a matter of constitutional law and as a matter of fundamental fairness and decency. This default and continuing constitutional violation cannot be allowed to continue any longer. The students cannot wait and the courts must protect the integrity of the rule of law.

The critical question before the Court now is what can and should be done to promptly cure the constitutional violation. By adopting the Judicial Referees' Report, the Court

will be identifying the specific actions that need to be taken at once by the Governor and the Legislature to implement a constitutionally adequate remedy. By finding the State in contempt and imposing meaningful daily fines, after a reasonable 90 day grace period, the Court will be applying a sanction that is likely to induce immediate compliance -- or failing that, will at least insure that the amount of resources identified as necessary by the Judicial Referees will begin to flow to New York City's public schools in the event of a continuing political impasse.

Plaintiffs are asking the Court to impose a daily fine in the amount of $4,164,000 should the Defendants have not adopted their own implementation plan within 90 days of the date of the court order. This figure represents 1/365th of the amount of Year 1 operational funding increase, plus the amortized cost for the first year of the capital facilities funds recommended by the Judicial Referees. Plaintiffs propose that the fine be paid to the New York City Department of Education to implement programs on behalf of the 1.1 million school children, in accordance with a valid comprehensive sound basic education plan which has been developed with substantial public input and which has been reviewed by the Commissioner of Education.

A long line of both federal and New York cases has found that monetary sanctions are not only appropriate punishments for contempt by governmental bodies, but are also effective tools in ensuring compliance with court orders. It is now over eleven years since this case was filed and almost five months since the compliance deadline established by the Court of Appeals. The Defendants clearly are in contempt, and it is both appropriate and necessary that the Court impose the reasonable sanctions Plaintiffs are requesting in order to finally end the irreparable educational injury that continues to be imposed on 1.1 million school children.

ARGUMENT

I. THE STATE OF NEW YORK SHOULD BE HELD IN CONTEMPT FOR FAILING TO COMPLY WITH THE COURT OF APPEALS' ORDER

A. This Court has the Power to Hold the State in Contempt

Pursuant to Section 753(A) of New York's Judiciary Law, a court has the power to punish a party in an action for civil contempt "by fine and imprisonment, or either, [for] a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action . . . may be defeated, impaired, impeded or prejudiced." N.Y. Jud. Law § 753(A) (2004). The Court of Appeals has specifically held that public officials can be held in civil contempt under this provision:

> To hold otherwise . . . would create an unwarranted precedential loophole and exception for public officials to escape appropriate public accountability in judicial forums for failure to comply with court orders. . . . Governmental entities and their agents should, like any other party, be held to compliance and sanctions for indifference, dereliction or defiance of judicial decrees.

McCain v. Dinkins, 639 N.E.2d 1132, 1139 (N.Y. 1994).

The Court of Appeals has set forth three factors that must be established in order to hold a party in contempt: (1) a lawful order, expressing an "unequivocal mandate" must be in effect; (2) it must appear with reasonable certainty that the order has been disobeyed and that the party must have had knowledge of the court's order; and (3) the failure to obey the court's order must result in prejudice to the right of the party in litigation. *McCormick v. Axelrod*, 453 N.E.2d 508, 512-13 (N.Y. 1983). It is no defense that the party subject to the order acted in good faith. *In the Matter of Bonnie H.*, 535 N.Y.S.2d 816, 817 (3d Dep't 1988); *lv. dismissed*, 540 N.E.2d 715 (N.Y. 1989).

In the instant case, it is beyond question that these elements have been satisfied: the Court of Appeals' order was an "unequivocal mandate"; the Referees have found that the order was disobeyed (indeed, the Defendants acknowledged that they failed to comply with the unequivocal order), and 1.1 million school children have been denied their constitutional right to the opportunity for a sound basic education for at least an entire school year because of Defendants' contemptuous behavior. Therefore, the factual showing regarding the elements necessary to establish a finding of contempt are overwhelming and compelling in this case.

B. The State Disobeyed the Unequivocal Order of the Court of Appeals

In its June 26, 2003, opinion in *CFE II*, the Court of Appeals ordered the State to:

1. "[A]scertain the actual cost of providing a sound basic education in New York City";

2. "Reform[] the current system of financing school funding and managing schools . . . [to ensure] that every school in New York City [has] the resources necessary for providing the opportunity for a sound basic education"; **and**

3. "[E]nsure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education."

CFE v. State, 801 N.E.2d 326, 348 (N.Y. 2003) ("*CFE II*").

The Judicial Referees specifically found that "all three of the Court's specific directives remain unfulfilled." Judicial Referees' Report, at 3. The Referees held that by the State's own admission, "legislative action has not been taken" with regard to the second and third elements of the Court of Appeals' order, namely, reforming the school funding and accountability systems. *Id.* at 12 n.8. The State claimed that it had fulfilled the Court of Appeals' first mandate in regard to determining the actual costs of providing a sound basic education because the Governor's Commission on Education Reform (the "Zarb Commission") had retained Standard and Poor's ("S&P") to conduct a costing out study. But the study conducted by S & P did not even purport to deal with one of the major costs that needed to be

assessed, i.e. facilities funding, and the Referees found that the State failed to provide any "evidence . . . concerning the aggregate cost of providing constitutionally adequate facilities in the New York City District." *Id* at 34.[1] Although S&P did conduct a costing out analysis concerning operational funding, the Referees found that the study and the manner in which it was interpreted and presented by the Defendants was flawed and did not satisfy the Court of Appeals' first directive. *Id.* at 14-24.

Recognizing that "enacting appropriate reforms naturally cannot be completed overnight", the Court of Appeals granted the State a full 13 months, until July 30, 2004, to compete the cost analysis and enact the necessary reforms. *CFE II,* 801 N.E.2d at 349. The State's conceded failure to enact any of the reforms by July 30, 2004 -- or to date, almost 17 months after the Court of Appeals' decision -- and its total default with respect to undertaking any analysis of the cost of providing constitutionally adequate facilities amounts to contemptuous behavior on its face. Indeed, even though defendants in education adequacy cases

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[1] The Referees concluded that the Court of Appeals "clearly included facilities-related issues" in its findings and, therefore, any effort to ensure a sound basic education for New York City schoolchildren must address the "glaring inadequacy of the New York City District's facilities." Judicial Referees' Report, at 33-34. The Referees further admonished that "the State therefore cannot, by refusing to squarely address facilities-related questions, avoid that critical issue." *Id.* at 34. Despite this clear mandate, the State refused to present any evidence regarding the cost of facilities necessary to ensure a sound basic education. In fact, the State presented no plan to bring school facilities in New York City to a constitutionally adequate level. Thus, the State has completely failed to comply with an integral part the Court of Appeals' directive to ascertain the cost of and enact reforms to ensure the opportunity of a sound basic education for children in these schools.

The Referees remarked that the State's failure to put forth any evidence regarding facilities "followed express warnings about the risk it faced of a *de facto* default judgment on this point. *Id.* at 34 n. 55. The Plaintiffs, by contrast, did put forth a proposal for capital expenditures. This proposal was accepted by the Referees after hearing all the testimony and reviewing the evidence submitted. The Referees recommended an order to provide New York City with no less than a total of $9.179 billion over five years for capital improvements. *Id.* at 5.

in some other states have at times failed to fully comply with court mandates, in virtually all of these cases, the state had taken some action and at least alleged compliance with the court decree. *See, e.g.*, *Hull v. Albrecht*, 950 P.2d 1141, 1142-46 (Ariz. 1997); *Horton v. Meskill*, 486 A.2d 1099, 1100-07 (Conn. 1985); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 77-78 (Wash. 1978).[2] The failure of the State of New York to enact any reforms whatsoever and to even attempt to determine the actual costs of adequate facilities is starkly inexcusable and compels a finding of contempt.

The State's assertion that it complied with the Court of Appeals' order with respect to determining the actual costs of educational operations was properly rejected by the Judicial Referees who found that the amount put forth by the State as adequate funding to satisfy the constitutional mandate, i.e. $1.93 billion per year, was grossly insufficient and unsupported by any reliable evidence. The evidence demonstrated that the State's figure was billions of dollars less than the conclusions of the three other cost estimates submitted to the court, and substantially less than the adequacy gap that would result from a proper utilization of the S&P methodology. The Referees further noted the State's $1.93 billion figure misunderstood and mis-cited the S&P Report upon which they purported to rely. As they explained:

> Although the State cites the S&P Study in support of its $1.93 billion figure, the text of the S&P Study expressly states that S& P "does not recommend any particular spending level." S&P Study at 2. The S& P Study further states that "[t]his study is meant to

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[2] Most states have, of course, promptly complied with constitutional mandates issued by their courts in education adequacy suits. *See, e.g., Brigham v. State*, 692 A.2d 384 (Vt. 1997) (state enacts extensive statewide funding reform four months after issuance of state Supreme Court decision); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989) (Kentucky Education Reform Act, which increased school funding, directed most of the increase to low-wealth schools, and radically transformed school governance throughout the state enacted within one year of state Supreme Court decision.); *McDuffy v. Secretary,* 615 N.E.2d 516 (Mass. 1993) (Massachusetts Education Reform Act implemented within one year of state Supreme Court decision).

> inform the [Zarb]Commission's deliberative process, not determine its outcome." S&P Study at 2.
>
> The S&P Study actually includes 16 different figures for the New York City operating resource gap, ranging from a low of $1.93 billion to a high of $7.28 billion, depending on the assumptions used in the calculation. S&P Study at 26. In addition, S&P included a web-based EdResource Calculator in its Study that allows the user to test other assumptions and obtain numerous other outcomes, including outcomes substantially above $7.28 billion.

Judicial Referees' Report, at 14 n.11.

The Referees specifically rejected the $1.93 billion cost figure put forward by the Defendants because of three fundamental flaws: (1) the use of a 50% cost reduction filter; (2) the use an improper per-pupil cost weighting; and (3) the use of an outdated regional cost adjustment index. The effect of these flawed premises was to reduce artificially the actual cost of a sound basic education in New York City. *Id.* at 15.

1. 50% Cost Reduction Filter

The State's costing-out analysis used a "successful school" method. After identifying the "successful schools" in New York State, the study eliminated from the analysis the top spending 50% of these schools, on the assumption that these higher spending schools were "inefficient." As noted by the Referees, the State put forth no empirical evidence to support the assumption that these schools were less efficient than the lower spending "successful schools." *Id.* at 16. In fact, the State's own School finance expert, Dr. Robert Palaich, admitted that no expert in educational finance has ever used the 50% reduction filter. *Id.* at 18 (citing Tr. 419-920). Indeed, Dr. Palaich testified that were he to employ the successful school methodology, he would not use a 50% cost reduction filter. *Id.* at 19 (citing Tr. 430).

2. Improper Weighting

Like the 50% cost reduction filter, the per-pupil weight adjustments used by the State improperly reduced the State's cost result. The evidence demonstrated that the 1.35 weight adjustment used by the State for low-income students, which account for more than 73% of New York City school children, was unsupported by any evidence of the cost of actually educating these students and was particularly inappropriate in light of the high concentration of low-income students in the City. In fact, Standard & Poor's stated unequivocally that these particular weightings were based on a review of national literature and not on New York State data. *Id.* at 20. By contrast, the Referees found that a weighting used by the Regents, who have "recognized expertise in providing educational services to disadvantaged students in New York State," was more appropriate for assessing the cost of a sound basic education in New York City. *Id.* at 21. That weighting was between 1.5 and 2.0. *Id.*[3] Thus, like the 50% cost reduction filter, the per-pupil weight adjustment used by the State was arbitrary and improperly lowered the total cost of a sound basic education in New York City.

3. Regional Cost Index

The Referees found that the State urged the use of an admittedly outdated index, but put forth no rationale as to why this outdated index should be used. *Id.* at 24. By contrast, the testimony of the Plaintiff's expert, Frank Mauro, revealed that the data used to formulate the six-year-old index was itself a decade old, and therefore was inappropriate to use in order to assess current regional differences. *Id.*

By failing to make any attempt to enact any funding or management reforms or to determine the costs of providing adequate facilities for New York City schools, and by putting

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[3] This weighting was also implicit in the AIR/MAP cost study submitted by the Plaintiffs. *Id.* at 21-22.

forward a fundamentally flawed analysis of the costs of school operations, the State clearly is in contempt of the Court of Appeals' unequivocal Order of June 26, 2003. These facts justify, and indeed, compel a finding of contempt.

C. The State's Failure to Comply with the Court of Appeals' Order Resulted in Severe Prejudice to the Plaintiffs

There is no question that the State's failure to obey the Court of Appeals' mandate has resulted in severe prejudice to the Plaintiffs, who represent the 1.1 million schoolchildren in New York City. The Court of Appeals has held that the opportunity for a sound basic education, as contemplated by the Education Article of the New York State Constitution, is essential for children to function productively as civic participants. The Court recognized that the State "over many years had consistently violated the Education Article of the Constitution" by depriving New York City schools of adequate funding. *CFE II,* 801 N.E.2d at 328. The Court of Appeals affirmed that the "systemic failure" by the State to provide adequate funding amounted to a violation of the constitutional right to a sound basic education. *Id.* at 336.

There can hardly be a more prejudicial action than the deprivation of a fundamental constitutional right. Under New York law, a constitutional right is so revered that even the threat of its deprivation is sufficient to warrant equitable action by a court, without the need to show actual injury. *Swinton v. Safir*, 720 N.E.2d 89, 93 (N.Y. 1999); *New York County Lawyer's Assn. v. State,* 763 N.Y.S.2d 397, 780 n.12 (N.Y. Sup.Ct. 2003). The U.S. Supreme Court has specifically held that deprivation of even a few days of schooling amounts to a substantial constitutional violation. *Goss v. Lopez*, 419 U.S. 565, 575-76 (1975) (10 day school suspensions trigger constitutional due process protections).

In the present case, New York City's school children will be deprived of at least a full year of the opportunity to a sound basic education by the Defendants' failure to comply

promptly with the Court of Appeals' order. For thousands of students, this injury may be fully irreparable, resulting in the loss of a high school diploma, the permanent and ongoing loss of job opportunities, and impairment of their ability to function productively as civic participants. Defendants' contemptuous behavior continues on a daily basis to impose severe injury to and prejudice on 1.1 million children in the City of New York.

II. A Fine Representing the Daily Cost of a Sound Basic Education in New York City Should be Imposed on The State

A. The Drastic Remedies Imposed by Courts in Other States

When confronted with non-compliance with direct judicial orders in fiscal equity or education adequacy cases, courts in other states have not hesitated to impose strong sanctions. Some have gone so far as to threaten or actually mandate the closing down of the entire state public school system until the unconstitutionality of the state's education finance system has been cured. This judicial action has generally compelled compliance by the executive and legislative branches in those states. For example, in May 1976, the New Jersey Supreme Court enjoined "every public officer" from "expending any funds for the support of any free public school" after July 1, 1976. *Robinson v. Cahill*, 358 A.2d 457, 459 (N.J. 1976). This injunction was issued after the state had failed to comply with an earlier order by enacting a facially valid school funding law but not funding it. *Id.* at 458. The court stated that this injunction "will not become effective if timely legislative action is taken." *Id.* at 459. One week after the injunction took effect, the legislature passed and the governor signed the law needed to fund the new education finance system. *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976).

Similarly, in Texas in 1988, the state district court declared the state education finance system unconstitutional and enjoined the state from expending funds under the unconstitutional system, effective in September 1989. The Texas Supreme Court affirmed the

decision but modified the trial court's judgment to stay the effect of its injunction until May 1990. *Edgewood Independent Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397-99 (Tex. 1989). This ruling led to subsequent enactments by the legislature, further guidance by the Supreme Court, and eventually a constitutional funding system. *See Edgewood Indep. Sch. Dist. v. Meno,* 917 S.W.2d 717, 750 (Tex. 1995).

Also instructive are the events which transpired in Arizona in 1997, where a state superior court set a deadline of June 30, 1998 for the state to adopt a constitutionally sound school capital finance system, and stated that if the state failed to do so, the court would prohibit the state from distributing money to school districts, effectively shutting down the schools. *See Hull v. Albrecht,* 960 P.2d 634, 636-39 (Ariz. 1998); *Hull v. Albrecht,* 950 P.2d 1141, 1142-43 (Ariz. 1997). The superior court's decision, which was summarily affirmed by the Arizona Supreme Court, including the deadline and threat of statewide school closure, had followed the state's failure to comply with the Arizona Supreme Court's order in *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, which declared the then-current funding system unconstitutional. 877 P.2d 806, 815 (Ariz. 1994). Subsequently, in June 1998, the Arizona Supreme Court extended the deadline by 60 days, and the legislature enacted a constitutionally acceptable funding system in July. *Hull v. Albrecht,* 960 P.2d 634 at 640; Order of Arizona Supreme Court, No. CV-98-0238-SA (Ariz. July 20, 1998) (dismissing the case based on the parties agreement that the new funding system complied with the court's order and met state constitutional requirements).

In the present case, Plaintiffs are not proposing -- at this time -- that the Court consider the drastic remedy of threatening to shut down all of the State's public schools until the State complies with the Court of Appeals' order. Rather, we are requesting that the Court impose the specific sanctions contemplated by Judiciary Law § 753 and § 773 and impose a

substantial fine to punish the Defendants for their civil contempt and to motivate them to comply with the courts' orders and cure their continuing contempt. We believe that this sanction, which is explicitly authorized under New York State law, and which has been effectively utilized by numerous state and federal courts, will be a sufficient and successful mechanism for inducing compliance in the present situation.

B. Daily Fines: a Moderate but Effective Sanction

New York's Judiciary Law § 773 provides that a fine may be imposed to punish civil contempts. Section 773 specifies that the amount of the fine should be "sufficient to indemnify the aggrieved party" for the "actual loss or injury [that] has been caused . . . by reason of the misconduct." N.Y. Jud. Law § 773 (2004). The injured parties in these proceedings are, of course, the 1.1 million school children who attend public school in the City of New York. To partially make them whole, a daily fine should be levied against the Defendants in an amount derived from the $1.41 billion the Judicial Referees have determined should be added to the DOE's operating budget for Year One, plus an additional $110 million representing the amortized cost of the first year's capital facilities expenditures recommended in the Report and Recommendation. Dividing this total amount of $1.52 billion by 365 results in a daily fine of $4,164,000. The penalty amount should be paid to the Department of Education of the City of New York ("DOE") to be expended on programs and services for the 1.1 million school children on whose behalf CFE has pursued this litigation, provided that DOE expends the money in accordance with a comprehensive sound basic education plan, which has: a) been developed in accordance with the enhanced accountability requirements, including proper public input,

recommended by the Referees and approved by the Court; and b) been reviewed by the Commissioner of Education.[4]

The New York Court of Appeals has held that compensation to an injured party is the central goal of civil contempt. *McCain*, 639 N.E.2d at 1137; *McCormick*, 453 N.E.2d at 512. Not only is a fine appropriate in civil contempt cases, it has been found to be one of the most effective tools to bring governmental bodies into compliance with court orders. The United States Supreme Court has recognized fines for contempt as effective tools to force compliance. Most notably, the City of Yonkers was held in contempt and subject to heavy fines, growing to $1 million dollars a day, for failing to vote on and implement a consent agreement to desegregate housing. *Spallone*, 493 U.S. 265, 272-73. The Supreme Court noted in this decision that previous contempt fines against the City of Yonkers had proved highly effective. When the city delayed the adoption of a 1987-1988 Housing Assistance Plan, the district court ordered the city to adopt the plan in two days and set a schedule of fines equal to those at issue in *Spallone*. The Court noted that on the same day that the court set the fine schedule, faced with the possibility of fines that would bankrupt the city, the city agreed to support the plan. *Spallone*, 493 U.S. at 277. *See also*, *Hutto v. Finney*, 437 U.S., 678, 691 (1978) ("If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of ensuring compliance.")

New York state courts have also found fines to be valuable means for enforcing compliance by governmental bodies of lawful court orders. In *McCain v. Dinkins*, the New York Court of Appeals upheld the right of a lower court to hold New York City and city officials in contempt for failing to obey court orders to house the homeless appropriately. 639 N.E.2d 1132

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[4] Consistent with the Referees' recommendation that Defendants be granted an additional 90 days to enact legislation and begin to implement the orders of the Court, Plaintiffs

(N.Y. 1994). A fine was imposed of $50 per family for the first night, and $100 per family for each additional night. The amount was meant to compensate the individuals who were forced to spend time in emergency assistance units. *Id.* at 1139. As a result of these contempt findings, the city was required to pay more than $6 million in fines. Tamia Perry, *In the Interest of Justice: The Impact of Court-Ordered Reform on the City of New York*, 42 N.Y.L. Sch. L. Rev. 1239, 1247 (1998).

Similarly, in *New York Coalition to End Lead Poisoning v. Giuliani*, 660 N.Y.S.2d 634 (N.Y. Sup. Ct. 1997), the City and the Commissioner of the Department of Housing, Preservation and Development were held in contempt for repeatedly violating an injunction regarding lead paint removal. The City was fined the monthly rate of each named and intervening plaintiff, to be accrued from the date of service of copy of settled order with notice of entry until the date the City was in compliance. *Id.* at 638. In *Higgins v. New York State Dep't of Corr. Servs.*, 655 N.Y.S.2d 308 (N.Y. Sup. Ct. 1997), *aff'd* 673 N.Y.S.2d 345 (4th Dep't 1998), the court held the State in contempt for failing to house inmates pursuant to a court order, and imposed a fine of $1,459,182, which represented the difference between the reimbursement by the state to the county and the actual cost of housing prisoners in the county jail for each liability day. *Id.* at 311. *See also, Jackson v. New York State Dep't of Corr. Servs.*, 570 N.Y.S.2d 91, 93 (2d Dep't, 1991) (affirming civil contempt order and imposition of fine totaling $329,380.99).

The Referees specifically found in their Report that "[t]he Court also clearly has the authority to enforce its orders through its contempt powers, and to impose sanctions for any such contempt, including fines." Judicial Referees' Report, at 54 n. 85 (citing *Hutto, supra,*

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suggest that the imposition of the requested fines should be stayed for 90 days from the

Spallone, supra, *McCain, supra*). The Referees also noted that by enforcing the mandate of the Court of Appeals, this Court will be "engaging in the most quintessential of judicial functions – protecting the constitutional rights of the citizenry." *Id.* at 54. Imposing this fine, in order to enforce compliance with the Court of Appeals' order, will give 1.1 million children the opportunity to become productive and responsible members of that citizenry.

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date of the issuance of this Court's order.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court hold the State of New York in contempt of the Court of Appeals' order, issued June 26, 2003, and impose a daily fine of $4,164,000. The imposition of this fine should be stayed for 90 days from this Court's order.

Dated: December 16, 2004
New York, New York

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