

APPENDIX A

STATE OF NEW YORK - DEPARTMENT OF MOTOR VEHICLES

6 Empire State Plaza Albany, New York 12228

Division of Safety and Business Hearings, Room 312

Fax: (518-473-8505)

SAFETY AND BUSINESS HEARING
BUREAU

in the matter of

[Redacted Name]

RESPONDENT

Case No. [Redacted]

NOTICE OF HEARING

Chemical Test Refusal

Date of Hearing: May 3, 2010

Time of Hearing: 10:45 a.m.

Place of Hearing:

NYS Dept. of Motor Vehicles
Div. of Safety & Business Hearings
19 Rector St., 2nd Fl., Rm. B
New York, NY 10006

YOU ARE HEREBY GIVEN NOTICE that a hearing will be held pursuant to Section 1194 of the New York State Vehicle and Traffic Law to investigate the alleged refusal of the above named respondent to submit to a chemical test for the purpose of determining the alcoholic and/or drug content of the respondent's blood on January 8, 2010 in New York County; and to determine whether respondent's license and/or driving privileges should be revoked. This chemical test inquiry is independent of the criminal court case charging you with DWI. Any revocation arising from a finding that you refused a chemical test is separate and distinct from the mandatory suspension or revocation imposed for a guilty finding from a criminal court. You may waive this chemical test refusal hearing and begin serving your revocation immediately by writing to the above address. Do not assume that a criminal plea or dismissal affects this inquiry.

YOUR PERSONAL APPEARANCE IS REQUIRED at this hearing. If you are hearing impaired, a translator will be available to you if you notify the Safety and Business Hearing in advance. Drivers involved must produce all their licenses and permits at the hearing. You are permitted to appear with counsel. You should be prepared to present all evidence and witnesses at the hearing. **If you do not personally attend the hearing, your absence will be considered your agreement to waive the hearing. This will result in immediate revocation of your license or driving privilege.**

Adjournments are not granted except for good cause based on all the circumstances. Requests for adjournments should be made to the Safety and Business Hearing Bureau, Department of Motor Vehicles, 6 Empire State Plaza Albany, N.Y. 12228 (Respondents, please refer to the enclosed information card on hearing procedures.) Contact the Bureau promptly. Do not assume an adjournment has been granted without specific confirmation. Should you require special accommodations such as a handicap-accessible hearing site, or if you are hearing-impaired, please notify the Safety and Business Hearing Bureau in advance. An interpreter for the hearing impaired will be provided at no charge. It is your responsibility to bring an English translator if needed. **In case of inclement weather such as a snow/ice storm please call Safety Hearing at (518) 474-1509 on morning of hearing to see if hearing is still on.**

RESPONDENT

Commissioner of Motor Vehicles

jmo

THE HEARING WILL START PROMPTLY

Date: 3/18/10

Case # 16-71436
Marc E. Berger Date 5/3/10
Administrative Law Judge (008)

[Redacted Signature]

STATE OF NEW YORK - DEPARTMENT OF MOTOR VEHICLES

6 Empire State Plaza, Albany, New York 12228

Division of Safety and Business Hearings, Room 312 Tel: (518-474-1509) Fax: (518-473-8505)

SAFETY AND BUSINESS HEARING
BUREAU

in the matter of

RESPONDENT

NOTICE OF HEARING

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YOUR PERSONAL APPEARANCE IS REQUIRED at this hearing. You are permitted to appear with counsel. You should be prepared to present all evidence at the hearing.

NOTICE TO THE ARRESTING OFFICER: YOUR FAILURE TO APPEAR AT THIS HEARING MAY RESULT IN THE CHARGES BEING DISMISSED. YOU ARE DIRECTED TO APPEAR AT THIS HEARING.

Adjournments are not granted except for good cause based on all the circumstances. Requests for adjournments should be made to the Safety and Business Hearing Bureau, Department of Motor Vehicles, 6 Empire State Plaza Albany, N.Y. 12228 (Respondents, please refer to the enclosed information card on hearing procedures.) Contact the Bureau promptly. Do not assume an adjournment has been granted without specific confirmation. Should you require special accommodations such as a handicap-accessible hearing site, or if you are hearing-impaired, please notify the Safety and Business Hearing Bureau in advance. An interpreter for the hearing impaired will be provided at no charge. It is your responsibility to bring an English translator if needed. **In case of inclement weather such as a snow/ice storm please call Safety Hearing at (518) 474-1509 on morning of hearing to see if hearing is still on.**

POLICE

Commissioner of Motor Vehicles

jmo

THE HEARING WILL START PROMPTLY

Date: 3/18/10

Attn: Roll Call
PO Rizzo #900605
NYPD- Hwy 1
Bronx River Parkway
Bronx, NY 10462



REPORT OF REFUSAL TO SUBMIT TO CHEMICAL TEST

(If a compulsory chemical test was administered pursuant to Section 1194(3) of the Vehicle and Traffic Law, do not complete this form.)

Arresting Officer: Keep green copy; give white and pink copies to the court at the arraignment; bring the yellow copy to the DMV Hearing.
Court: After the arraignment, keep the pink copy for court records. Send the white copy, along with a copy of the AA-137 "Notice of Temporary Suspension and Notice of Hearing", within 48 hours of the arraignment, to the Department of Motor Vehicles, Safety Hearing Bureau, Room 312, 6 Empire State Plaza, Albany, New York 12228.

D. Commissioner of Motor Vehicles

License # <u>10-71426</u> Name <u>Marie S. Berger</u> Date <u>8/13/10</u>		Number
[Redacted]		Zip Code

Vehicle Class (see definition on the back of the green copy)	<input type="checkbox"/> Commercial Motor Vehicle (CMV)	<input type="checkbox"/> HazMat	<input type="checkbox"/> All Others
State or Province of License	Date of Expiration	Class of License	Did a reportable accident occur? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

New York State County of MANHATTAN Town/City of: NYC

Arresting Officer RIZZO deposes and says that: On this 8 day of JANUARY in the year of 2010 at HENRY HUDSON PKWY @ 125 ST
(Specific Location)

He/she arrested the above operator on a charge of violating Section 1192 of the Vehicle and Traffic Law for (check applicable box):
 OPERATING WHILE IN AN INTOXICATED CONDITION OPERATING WHILE ABILITY IMPAIRED BY THE CONSUMPTION OF ALCOHOL
 OPERATING WHILE ABILITY IMPAIRED BY THE USE OF A DRUG OPERATING WHILE ABILITY IMPAIRED BY THE COMBINED INFLUENCE OF DRUGS OR OF ALCOHOL AND ANY DRUG(S)

SECTIONS A AND B MUST BE COMPLETED

SECTION A: and that he/she had reasonable grounds to make the arrest based on information indicating vehicle operation (such as accident involvement, observed traffic infraction, etc.) give details: DEFT WAS SPEEDING 70 MPH IN 50 MPH FOLLOWING OTHER VEHICLES TOO CLOSELY AND CHANGING LANES WITHOUT SIGNALING SEVERAL TIMES.

SECTION B: and impairment or intoxication (such as poor coordination, alcohol beverage odor, etc.) give details: DEFT HAD BLOOD SHOT EYES, SLOTTED SPEECH, WAS UNSTEADY ON HIS FEET AND HAD A STRONG ODOR OF ALCOHOLIC BREATH.

After being arrested, the operator was warned as follows:
Refusal to submit to a chemical test, or any portion thereof, will result in the immediate suspension and subsequent revocation of your license or operating privilege whether or not you are found guilty of the charge for which you are arrested. Your refusal to submit to a chemical test, or any portion thereof, can be introduced into evidence against you at any trial, proceeding or hearing resulting from this arrest.
After receiving this warning, the operator was asked to submit to a chemical test to determine the alcoholic and/or drug content of his/her blood. The operator refused to submit to a BLOOD URINE SALIVA BREATH test, and indicated his/hor refusal by:

NO!

(Conduct or words used by operator)

In the presence of PO RIZZO at 28th ST
(Officer giving warning and witnessing refusal, if not arresting officer) (Location of refusal)

No compulsory chemical test was administered pursuant to Section 1194(3) of the Vehicle and Traffic Law.

Time of Arrest 1:30 A.M.P.M. Section 1194 of the Vehicle and Traffic Law requires that the refusal must be within two hours of the arrest.
Time of Refusal 9:45 A.M.P.M.

Name and Rank of Arresting Officer <u>PO RIZZO</u>	
Police Agency <u>NYPD</u>	Telephone No.
Tax Registry Number (NYC Only) <u>900605</u>	Precinct No. <u>HV11</u>
Signature <u>[Signature]</u>	Date <u>118110</u>

Name and Rank of Officer Giving Warning & Witnessing Refusal (if not arresting officer)		
Police Agency	Telephone No.	
Police Agency Address (Include Number, Street and Zip)		
County	Tax Registry Number (NYC Only)	Precinct No.
Signature	Date	

FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE AS A CLASS "A" MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW

APPENDIX B



New York State Department of Motor Vehicles
ADMINISTRATIVE APPEAL FORM (AA-33A)
 VEHICLE AND TRAFFIC LAW ARTICLES 3-A and 12-A
 (THIS FORM IS NOT TO BE USED TO APPEAL TRAFFIC VIOLATION BUREAU TICKETS)

DMV USE ONLY

WHAT IS REQUIRED TO FILE AN APPEAL

You must send this **COMPLETED, SIGNED APPEAL FORM** (2 pages) and a **\$10 APPEAL FEE** to the DMV Appeals Board. Read this entire form carefully. Type or print all information clearly. You must state your reason for the appeal on page 2 of this form. You must pay a non-refundable **\$10 appeal fee for each CASE NUMBER you appeal. DO NOT SEND CASH.** Appeal fees must be paid by check or money order, payable to the "Commissioner of Motor Vehicles." Print your case number(s) on your check or money order. A \$35 penalty is charged for dishonored checks.

DEADLINE TO FILE AN APPEAL

You must send this **APPEAL FORM and the APPEAL FEE(S)** to the DMV Appeals Board **WITHIN SIXTY (60) DAYS OF THE DATE OF THE DEPARTMENT'S ORDER OF SUSPENSION/REVOCATION, DECISION LETTER, OR NOTICE.** If you file by mail, the USPS postmark will be used to determine if your appeal is timely. If the postmark is illegible, the date your appeal is received by the Board will determine timeliness. You should keep copies of your completed appeal form, appeal fee, and proof of mailing.

WHERE TO SEND AN APPEAL

Mail the appeal form and appeal fee(s) to:
DMV APPEALS BOARD
P.O. BOX 2935
ALBANY, NY 12220-0935

WHAT IS THE SUBJECT OF YOUR APPEAL (Check the appropriate box.)

- CHEMICAL TEST REFUSAL DMV HEARING HELD
- DENIAL OF APPLICATION FOR DRIVER LICENSE, CERTIFICATE OR PRIVILEGE NO DMV HEARING HELD
- FACILITY LICENSE OR CERTIFICATE, including INSPECTION STATION, INSPECTOR, DEALER, REPAIR SHOP DMV HEARING HELD
- FATAL ACCIDENT, PERSISTENT VIOLATOR, FALSE STATEMENT DMV HEARING HELD
- ALL OTHERS including OTHER DETERMINATIONS MADE WITHOUT A DMV HEARING

HEARING TRANSCRIPTS

If a hearing was held, the Appeals Board may review hearing testimony only if you order and pay for a transcript in a proper and timely manner. The Appeals Board will acknowledge receipt of your appeal form and fee with a letter that will direct you to send a transcript deposit to the designated Transcription company within 30 days of the date of the letter. The Appeals Board does not accept transcript payments. If you do not receive an acknowledgment letter, contact the Appeals Board at (518) 474-1052 or at the address above. The Appeals Board will not review hearing testimony unless all transcript payments are timely and complete.

IF A HEARING WAS HELD, check the appropriate box below:

- I WANT THE HEARING TESTIMONY REVIEWED BY THE BOARD. I UNDERSTAND THAT I AM REQUIRED TO PAY A TRANSCRIPT DEPOSIT TO THE TRANSCRIPTION COMPANY WITHIN 30 DAYS OF THE DATE OF THE LETTER ACKNOWLEDGING RECEIPT OF THIS APPEAL.
- I DO NOT WANT A TRANSCRIPT OF THE HEARING TO BE PRODUCED. I UNDERSTAND THAT THE BOARD WILL NOT REVIEW HEARING TESTIMONY.

REQUESTING A STAY

I REQUEST THAT THE FINE, SUSPENSION OR REVOCATION BE STAYED (STOPPED) PENDING THE OUTCOME OF THE APPEAL.
 Stays pending appeals are granted in the discretion of the Board (except for most Article 12-A appeals). The Appeals Board will not grant a stay unless the appeal fee is paid and valid reasons for the appeal and for needing the stay are provided on page 2 of this form. You will be notified whether your request for a stay has been granted or denied.

REQUIRED APPEAL INFORMATION

All correspondence for this appeal will be sent to the address(es) supplied on this appeal form. You must notify the Appeals Board in writing immediately of any change of address that occurs after this appeal is filed.

Last Name	First Name	M.I.	Type of Appeal (Chemical Test Refusal, License Denial, Inspection, Dealer, Repair Shop, etc.)
Date of Birth: MM / DD / YYYY	Sex <input type="checkbox"/> Male <input type="checkbox"/> Female		NYS Driver License Client ID Number
Corporate Name or DBA	Facility/Certificate Number		
Appeal Mailing Address (Street)			Case Number(s)
City	State	Zip Code	Date of Each Hearing
ATTORNEY FOR THIS APPEAL (if any)			Date of Decision/Order
Attorney Mailing Address (Street)			Hearing Location(s)
City	State	Zip Code	Administrative Law Judge

DMV USE ONLY	<input type="checkbox"/> \$10 APPEAL FEE(S) RECEIVED	<input type="checkbox"/> NO FEE RECEIVED	DATE: MM / DD / YYYY	STAY: _____
	<input type="checkbox"/> CHECK	<input type="checkbox"/> MONEY ORDER	<input type="checkbox"/> AMOUNT: \$ _____	



New York State Department of Motor Vehicles
ADMINISTRATIVE APPEAL FORM (AA-33A)

DMV USE ONLY

VEHICLE AND TRAFFIC LAW ARTICLES 3-A and 12-A

(THIS FORM IS NOT TO BE USED TO APPEAL TRAFFIC VIOLATION BUREAU TICKETS)

WHAT RECORDS ARE REVIEWED

Any exhibits submitted at the hearing will become part of the appeal record. The Appeals Board reviews the entire record created at the hearing. The Board will review a transcript of the hearing only if you order it and pay for it in a timely manner.

To receive copies of hearing exhibits for personal use, submit a **FREEDOM OF INFORMATION LAW (FOIL) request** to: DMV FOIL OFFICE, 6 Empire State Plaza, Albany, NY 12228. Information for obtaining DMV records and FOIL forms is available online at: www.dmv.ny.gov.

APPEAL ARGUMENTS

IN THE SPACE BELOW YOU MUST STATE IN DETAIL THE REASON(S) FOR THIS APPEAL and for needing a stay (if requested). PLEASE TYPE OR PRINT CLEARLY. Attach additional pages, if necessary, and write your name on every page. **Personal appearances and oral arguments are not permitted on appeal.** If a transcript is ordered, you will have 30 days to submit additional arguments from the date of the transcript invoice. After the 30-day period, your appeal will be reviewed and decided. You will receive written notification of the outcome of the appeal.

SIGN AND DATE YOUR APPEAL

I affirm under penalty of perjury that all of the information on this form and all supporting documents submitted with this appeal are true, and that no prior appeal has been filed in this matter.

Sign Here _____ Date _____

BE SURE THAT YOU:

- Pay the non-refundable appeal fee of \$10 **for EACH case** appealed. Enclose a check or money order payable to "Commissioner of Motor Vehicles".
- Submit your appeal form and appeal fee(s) to the Appeals Board **within 60 days of the date of your order or notice.**
- Provide **reasons for your appeal** on page two. If requesting a stay, provide **reasons for a stay request** on page two.
- Sign and date** your appeal form on page two.

APPENDIX C



NYS DEPARTMENT OF MOTOR VEHICLES

Appeals Board, 6 Empire State Plaza, Albany, New York 12228

DAVID J. SWARTS
Commissioner

TIMOTHY B. LENNON
Deputy Commissioner for Integrity

DEBORAH V. DUGAN
Chair

Date: June 4, 2010

Dear Appellant:

We have received your appeal form, appeal fee(s) and request for a transcript review. You must now order the transcript and submit a \$150 deposit to the Transcriber. This is the only request for payment of the transcript deposit. Please follow these instructions for ordering a transcript:

- Mail your transcript deposit of \$150 to the Transcriber, Associated Reporters, not to the Appeals Board. **The Transcriber will not accept a personal check.** Send a money order, bank check, certified check, or attorney's check, payable to "Associated Reporters Int'l Inc." to:
Associated Reporters Int'l Inc.
P.O. Box 165
Massena, NY 13662.
- **Associated Reporters must receive the transcript deposit within THIRTY (30) DAYS of the date of this letter.** The Board will not review the hearing testimony unless you properly make all transcript payments on time. Write the above-referenced case number on your deposit payment. Send a copy of this letter with your deposit to the Transcriber.
- Once all transcript payments are made in a timely manner, the Transcriber will send a copy of the transcript to you and the Appeals Board. **You must submit any final arguments in writing to the Appeals Board within 30 DAYS after the transcript has been sent to you, or they will not be considered.**

Transcription is \$3.19 per page. If the actual cost to prepare your transcript is more than \$150, the Transcriber will notify you to send additional payment; if the cost is less, you will get a refund. If you fail to pay for a transcript in a timely manner, all deposits are forfeited and may be retained by the Transcriber for work completed. If you have questions about your transcript order, contact Associated Reporters at the address above or call (315) 769-6429 or fax to (315) 769-0322.

A stay has been granted and will be issued separately.

**Appeals Board
Processing Unit**

MICHAEL F DAILEY ESQ
1 RIVERDALE AVE MAILBOX 11
BRONX NY 10463

APPENDIX D



STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
APPEALS BOARD
PO Box 2935
Albany, NY 12220-0935

DAVID J. SWARTS
Commissioner

TIMOTHY B. LENNON
Deputy Commissioner for Integrity

DEBORAH V. DUGAN
Chairman

Date: 12/31/2010

Re: NOTICE OF APPEAL DECISION

A [REDACTED] 54

C [REDACTED]

Dear Appellant:

The above-referenced Administrative Appeal was decided by the Appeals Board on the date indicated on the enclosed Decision of Appeal, pursuant to Article 3-A of the Vehicle and Traffic Law.

This is a final, administrative determination of the Department. Any further appeal should be addressed to the New York State Supreme Court pursuant to an Article 78 Proceeding under the Civil Practice Law and Rules.

Very truly yours,
Appeals Board
Processing Unit

Enc.:

MICHAEL F DAILEY, ESQ
1 RIVERDALE AVE MAILBOX 11
BRONX, NY 10463

APPENDIX E

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

Application of [REDACTED]

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

**DAVID J. SWARTS, New York State Commissioner
of Motor Vehicles, and**

**STATE OF NEW YORK, DEPARTMENT OF
MOTOR VEHICLES APPEALS BOARD**

Respondents.

PLEASE TAKE NOTICE, that upon the annexed Verified Petition of
dated *January 11, 2011*
MICHAEL F. DAILEY, ESQ., Attorney for Petitioner, the Affidavit of [REDACTED]
sworn to January 10th, 2011
[REDACTED] Petitioner, and the Exhibits attached hereto:

LET THE RESPONDENTS DAVID SWARTS and THE STATE OF NEW
YORK, DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD *or counsel appear and* SHOW

CAUSE BEFORE THIS COURT, at the New York State Supreme Court, located at 60 *Room 341*

Centre Street, New York, New York, on the ~~March~~ *21st* day of *March*

2011, at 9:30 o'clock in the forenoon of that date or as soon thereafter as counsel may be

heard, why an Order should not be made and entered pursuant to Article 78 of the Civil

Procedure Law and Rules:

1. Pursuant to CPLR §§7803(3) & (4), reversing and vacating Respondent's
November 30, 2010, Decision of Appeal in its entirety, but in particular

A.S. J. of the
of the State of New
County of
of
January 20th, 2011
Pr. O. PETER SHERWOOD
Hon. J.S.C.
Justice

**ORDER TO
SHOW CAUSE**

Index No.:

**HON. O. PETER SHERWOOD
J.S.C.**

OPS

NEW YORK
COUNTY CLERK'S OFFICE

JAN 20 2011

NOT COMPARED
WITH COPY FILE

that portion which affirmed a May 20, 2010, Finding by the Department of Motor Vehicles Safety Hearing Bureau which held:

- a) A police officer had reasonable grounds to believe that Petitioner was operating a motor vehicle in violation of Section 1192 of the Vehicle and Traffic Law;
 - b) A Police Officer made a lawful arrest of Petitioner;
 - c) A chemical test was offered to Petitioner in accordance with the rules and regulations of the Police force of which the arresting officer was a member.
2. Pursuant to CPLR §7803(3), reversing and vacating Respondent's November 30, 2010, Decision of Appeal in its entirety, but in particular that portion which held that "Appellant's argument relating to the officer's nonappearance despite being served with a subpoena is without merit. The record clearly establishes the appellant never requested an adjournment."
 3. Vacating Respondent's revocation of Petitioner's New York State driving privilege;
 4. Estopping Respondent from notifying Petitioner's residence state, that being the State of New Jersey, that Petitioner has unlawfully refused to submit to a chemical test, and/or that Petitioner's New York State driving privilege has been revoked;

5. Granting such other, further and incidental relief including, but not limited to, reasonable attorneys fees, the costs and disbursements of this action, and such other relief as this court may deem just and proper.

MEANWHILE, SUFFICIENT CAUSE THEREFORE APPEARING,

pursuant to CPLR § 7805, it is

ORDERED, that pursuant to CPLR §7804(c), Respondent provide the original record of this action to the Court and a copy to Petitioner, IN PARTICULAR, the video of Petitioner's coordination tests, and alleged chemical test refusal; *it is*

ORDERED, that pending the hearing ^{*of this motion*} and ~~determination of this~~ Petition, the one year revocation of Petitioner's privilege to drive in New York State, imposed and upheld by Respondents, be and is hereby **STAYED**; and it is further

ORDERED, that, on or before January 21, 2011, the attorney for Petitioner shall serve a copy of this Order and the papers upon which ^{*overnight delivery service Personal*} it is granted by ~~United States~~ ^{*Personal Service*} ~~Postal Service overnight Express Mail~~ upon:

1. Respondent **DAVID J. SWARTS**, Commissioner of Motor Vehicles at 6 Empire State Plaza Albany, NY, 12228;
2. Respondent **STATE OF NEW YORK, DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD** at 6 Empire State Plaza Albany, NY, 12228; and it is further

ORDERED, that, on or before January 21, 2011, the attorney for Petitioner shall also serve a copy of this Order and the papers upon which it is granted by ^{*Personal Service*} ~~United States Postal Service overnight Express Mail~~ upon **ERIC T. SCHNEIDERMAN**,

OPS
JL

OPS

OPS

OPS
New York State Attorney General, Regional Office at 120 Broadway, 24th Floor, New York, New York 10271; and it is further

such service having been accepted on 1/20/11

OPS
ORDERED, that Respondents must serve their opposition to this Verified Petition, if any on or before 10th day of ~~February~~ ^{March}, 2011; and

OPS
Petitioner must submit their reply, if any, on or before the 17th day of ~~February~~ ^{March}, 2011.

Dated: ~~Brooklyn~~ New York
January 9, 2011

Oral Argument
Directed

JSC

OPS

ENTER:
~~So Ordered,~~

O. P. Sherwood
Hon.

O. PETER SHERWOOD
J.S.C.

APPENDIX F

MICHAEL F. DAILEY
ATTORNEY AT LAW

One Riverdale Ave.
Suite 1
Bronx, New York 10463
Phone: (718) 543-0100
Fax : (718) 543-0014

445 Hamilton Avenue
Suite 405
White Plains, New York 10601
Phone: (914) 620-5621
e-mail: mdailey@daileylaw.net

January 9, 2011

Hon. DAVID J. SWARTS
Commissioner of Motor Vehicles
Empire State Plaza
Albany, NY, 12228

Re: [REDACTED]

Dear Hon. Swarts:

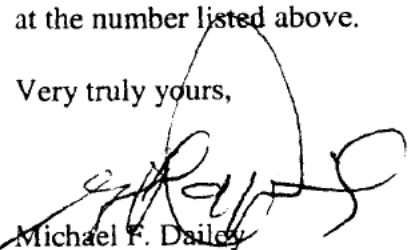
I represent I [REDACTED] On Wednesday, January 12, 2011, at 1:00 p.m. I will be filing an Article 78 by Order to Show Cause challenging the Department of Motor Vehicles' finding that Mr. F [REDACTED] VTL 1194 by his refusal to submit to a chemical test, and further arguing that the revocation of his NYS driving privileges imposed by DMV is arbitrary and capricious.

I will also be seeking a stay of the revocation of his NYS driving privileges pending a determination of the Article 78. Should you wish to oppose the stay, please have a representative of your office contact me on my cellular telephone at (914)620-5621, prior to 1:00 p.m. on Wednesday, January 12, 2011.

I have provided you with a courtesy copy of our moving papers absent exhibits. In light of the fact that the revocation of [REDACTED] driving [REDACTED] pending review by the NYSDMV Administrative Appeals Board, please [REDACTED] not opposing this stay. If I do not hear from you, I will assume that you [REDACTED] of opposition.

Should you wish to discuss this matter or have [REDACTED] n't hesitate to contact me at the number listed above.

Very truly yours,


Michael F. Dailey

MICHAEL F. DAILEY
ATTORNEY AT LAW

One Riverdale Ave.
Suite 1
Bronx, New York 10463
Phone: (718) 543-0100
Fax : (718) 543-0014

445 Hamilton Avenue
Suite 405
White Plains, New York 10601
Phone: (914) 620-5621
e-mail: mdailey@daileylaw.net

January 9, 2011

Hon. ERIC T. SCHNEIDERMAN
New York State Attorney General
Regional Office at 120 Broadway, 24th Floor
New York, New York 10271

Re: [REDACTED]

Dear Hon. Schneiderman:

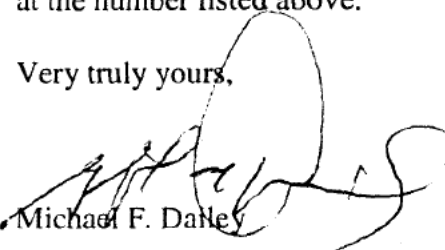
I represent [REDACTED] On Wednesday, January 12, 2011, at 1:00 p.m. I will be filing an Article 78 by Order to Show Cause challenging the Department of Motor Vehicles' finding that Mr. [REDACTED] violated VTL 1194 by his refusal to submit to a chemical test, and further arguing that the revocation of his NYS driving privileges imposed by DMV is arbitrary and capricious.

I will also be seeking a stay of the revocation of his NYS driving privileges pending a determination of the Article 78. Should you wish to oppose the stay, please have a representative of your office contact me on my cellular telephone at (914)620-5621, prior to 1:00 p.m. on Wednesday, January 12, 2011.

I have provided you with a courtesy copy of our moving papers absent exhibits. In light of the fact that the revocation of Mr. [REDACTED] driving privileges was stayed pending review by the NYSDMV Administrative Appeals Board, perhaps you would consider not opposing this stay. If I do not hear from you, I will assume that you are not taking a position of opposition.

Should you wish to discuss this matter or have any questions, please don't hesitate to contact me at the number listed above.

Very truly yours,


Michael F. Dailey

APPENDIX G

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

PRESENT: Wright
Justice

PART 62

[Redacted]

INDEX NO. [Redacted]

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

M/S DMV ABUSES AD

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Article 78 proceeding is transferred to the Appellate Division, First Department pursuant to CPLR 7804(g); and DMV shall stay the revocation of petitioner's privilege to drive in New York State pending a determination by the Appellate Division provided that if petitioner fails to timely perfect the transfer, the stay of the revocation of petitioner's privilege to drive in New York State will be automatically lifted.

Dated: 5/1/11

GEOFFREY D. WRIGHT
AJSC J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

APPENDIX H

INFORMATION SHEET FOR ARTICLE "78" TRANSFER

Attention: TO SUBPOENA RECORDS TO THE APPELLATE DIVISION YOU MUST SUBMIT THE FOLLOWING:

- ✓ (1) **Subpoena (B69)**
If you are an attorney you may sign the subpoena.
(Individual attorney's name must appear)
- If you are "Pro-Se" the subpoena must be so ordered by a judge.
- ✓ (2) **Fee: \$5.00**
- (3) **REQUIRED PAPERS:** (no backs necessary)
- ✓ ~~(a) 2 Pro-Argument Statements or~~ 5531 Statements *(see last 2 pages of this packet)*
- ✓ (b) 2 Statement of Attorney (attorney must sign each one)
- ✓ (c) 4 Certificates- - A statement listing all papers from the County Clerk's Office File that you wish to send to the Appellate Division.
- * The papers must be identified by the type of document and the date filed in the County Clerk's Office (not the date it was made)
 - Every document listed **must** be filed in the County Clerk in order to be on the certificate; if it is not filed it may not be included.
 - * **Original** order of transfer signed by the judge and filed in the County Clerk's Files **must** be listed first on your Certificate.
- (4) **48 Hour Notice:** You must allow for two business days between the time of service of your subpoena and when it should be delivered to the Appellate Division.

First, retrieve the file from the Record Room.

Second, put the papers you listed on your Certificates in the order they are listed.

Third, bring the file and all accompanying papers to the Certification Counter in Room *(on the 3rd floor of 60 Centre St.)*.

Your papers will then be checked for accuracy.

(5) **Subpoena Times:**

9:00 a.m. to 11:00 a.m.

1:30 p.m. to 2:30 p.m.

~~PLEASE NOTE - NO EXCEPTIONS WILL BE MADE TO THE ABOVE HOURS~~

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, First Department

-----X
Application of [REDACTED]

Petitioner-Appellant,

Index No. [REDACTED]

For a Judgment Pursuant to CPLR Article 78

**SUBPOENA DUCES
TECUM**

-against-

**DAVID J. SWARTS, New York State Commissioner
of Motor Vehicles, and**

**STATE OF NEW YORK, DEPARTMENT OF
MOTOR VEHICLES APPEALS BOARD**

Respondents.

-----X
THE PEOPLE OF THE STATE OF NEW YORK

**TO: County Clerk of New York County
New York County Courthouse
60 Centre Street, Room 300
New York, New York 10007**

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you appear at the date, time and place indicated below, and produce copies certified as business records the documents hereinafter designated:

A FULL SIZED AND LEGIBLE COPY DULY CERTIFIED AS A BUSINESS RECORD of the complete record of the above referenced Article 78 action.

Notice re: Date, Time and Place for Delivery: *October 31, 2011*

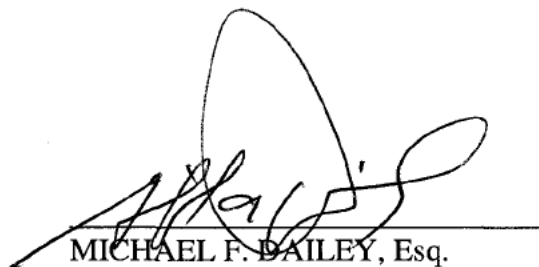
The records produced in response to this subpoena shall be delivered with all possible speed to the following address:

**New York State Supreme Court
Appellate Division, First Department
27 Madison Avenue
New York, NY 10010**

Notice re: Compliance with this Subpoena:

Any records delivered in compliance with this subpoena must include a certification compliant with §3122-1 of the Civil Procedure Law and Rules (CPLR) of New York State, certifying that said records were produced in compliance with §4518 of the Civil Procedure Law and Rules (CPLR) of New York State.

A copy of this subpoena must accompany any records delivered.

A handwritten signature in black ink, appearing to read 'Michael F. Bailey', is written over a horizontal line. The signature is stylized and cursive.

MICHAEL F. BAILEY, Esq.
Attorneys for Petitioner-Respondent
One Riverdale Avenue, Suite One, Box 11
Bronx, NY 10463
(Office) 718-543-0100
(Cellular) 914-620-5621

Statement Pursuant to CPLR 5531 [1]

Supreme Court of the State of New York
Appellate Division: First Department

Application of [REDACTED]

Petitioner,

For a Judgment Pursuant to CPLR Article 78,

-against-

DAVID J. SWARTS, New York State Commissioner of Motor Vehicles, and
STATE OF NEW YORK, DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD,
Respondent.

STATEMENT PURSUANT TO CPLR 5531

1. Supreme Court, New York County, Index No. 104256/11.
2. The full names of the original parties are the same; there has been no change.
3. Action commenced in Supreme Court, New York County.
4. Action was commenced by the filing of an Order to Show Cause dated April 2011 and Verified Petition dated April 8, 2011.
5. Nature of action: Article 78 Action.
6. This appeal is transferred from the Supreme Court, New York County, by Order of the Hon. Geoffrey D. Wright dated May 19, 2011.
7. Appeal is on the Record (reproduced) method.

STATEMENT OF ATTORNEY

The following exhibits, listed and described herein below are part of the record on appeal, were not filed with the Clerk of the Court, and are not included with the papers transmitted. (Exhibit is to be described, e.g., photograph, diagrams, letter dated July 7, 1992.)

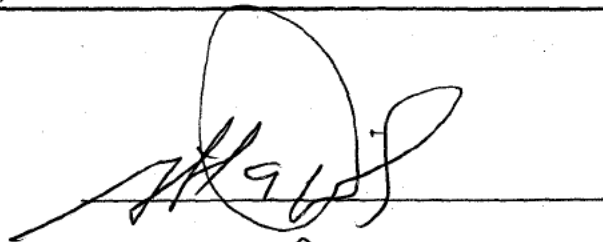
Plaintiff's 1.
2.
3.

Defendant's A.
B.
C.

These exhibits will be filed with the Clerk, Appellate Division, First Department, in accordance with Rule V, Sub. 1 (c) of the Rules of the Appellate Division, First Department Part 1.

If the above is not applicable, since no exhibits are missing from the record, enter below "Not Applicable".

NOT Applicable



Attorney For PETTOR



**SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, First Department**

-----X
Application of [REDACTED]

Petitioner-Appellant,

Index No. 1 [REDACTED]

For a Judgment Pursuant to CPLR Article 78

-against-

**DAVID J. SWARTS, New York State Commissioner
of Motor Vehicles, and**

**STATE OF NEW YORK, DEPARTMENT OF
MOTOR VEHICLES APPEALS BOARD**

Respondents.
-----X

CERTIFICATE

I, Norman Goodman, County Clerk and Clerk of the Supreme Court of New York County, do hereby certify that the following papers constitute the record on appeal from the order of Justice Geoffrey D. Wright, A.J.S.C., dated and filed in the County Clerk, New York County on May 24, 2011, in the above titled action.

1. Order transferring case to the Appellate Division, filed on May 24, 2011;
2. Order to Show Cause, filed April 8, 2011;
3. Verified Petition with exhibits numbered 1-7, filed April 8, 2011;

Exhibit 1: Administrative Appeals Board Determination, dated November 30, 2010;

Exhibit 2: Affidavit of [REDACTED], sworn to January 11, 2011;

Exhibit 3: Refusal Hearing Transcript, held on May 3, 2010;

Exhibit 4: Exhibit A to Refusal Hearing Transcript, Police Records;

Exhibit 5: Notice of Restoration issued June 1, 2010;

Exhibit 6: Exhibit 2 of Refusal Hearing Transcript, Report of Refusal to Submit to Chemical Test;

Exhibit 7: Letters from Michael F. Dailey to the Hon. David J. Swarts and Eric T. Schneiderman, dated January 9, 2011;

4. Verified Answer filed on May 5, 2011 with Exhibit lettered "A";

Exhibit A: Certified Administrative Record consisting of the following:

Notice of Temporary Suspension and Notice of Hearing;

Refusal Hearing Transcript, held on May 3, 2010, consisting of Exhibits 1-2, and A-G;

Exhibit 1: Notice of Hearing;

Exhibit 2: Report of Refusal to Submit to Chemical Test, dated January 8, 2010;

Exhibit A: Police Records;

Exhibit B: Map;

Exhibit C: Weather Printout;

Exhibit D: Petitioner's Criminal Record;

Exhibit E: Petitioner's Court Ordered Screening and Assessment;

Exhibit F: Voluntary Disclosure Form;

Exhibit G: Video;

Findings and Disposition – Chemical Test Refusal;

Appeal Form dated May 4, 2010;

Order of Suspension or Revocation effective May 3, 2010;

Letter from Michael F. Dailey to Appeals Processing Unit, dated May 24, 2010;

Notice of Restoration effective date June 1, 2010;

Letter from Appeals Board Processing Unit to Petitioner, dated December 31, 2010;

Administrative Appeals Board Determination dated November 30, 2010;

Order of Suspension or Revocation, Reinstated Order;

Abstract of Driving Record;

All the foregoing papers are transmitted herewith.

Dated: _____
New York, New York

Norman Goodman
County Clerk and Clerk of the Supreme
Court, New York County

MICHAEL F. DAILEY
ATTORNEY AT LAW

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445 Hamilton Avenue
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August 11, 2011

Hon. Norman Goodman
Office of the County Clerk
New York County
60 Centre Street
Room 161
New York, New York 10007

Re: [REDACTED] et. al., Index No. 104256/2011

Dear Sir,

On May 19, 2011, the Hon. Geoffrey D. Wright, ASCJ, signed an order transferring the above referenced Article 78 proceeding to the Appellate Division, First Department. Enclosed please find a copy of Judge Wright's order, and a Subpoena Duces Tecum.

In compliance with Judge Wright's order, and the Subpoena Duces Tecum, please transfer the entire record of said proceeding to the Clerk's Office of the Appellate Division, First Department, located 27 Madison Avenue, New York, New York 10010.

If you have any questions or concerns, I can be reached via the contact information provided in this letterhead, or via cellular phone at (914)620-5621.

Thank you in advance for your kind attention to this matter.

Very truly yours,


Michael F. Dailey
Attorney for Petitioner-Appellant

APPENDIX I

95 A.D.3d 439

(Cite as: 95 A.D.3d 439, 943 N.Y.S.2d 96)

C

████████████████████
 95 A.D.3d 439, 943 N.Y.S.2d 96
 NY,2012.

95 A.D.3d 439, 943 N.Y.S.2d 96, 2012 WL
 1537569, 2012 N.Y. Slip Op. 03514

In the Matter of ██████████ Petitioner

v

David J. Swarts, New York State Commissioner of
 Motor Vehicles, et al., Respondents.
 Supreme Court, Appellate Division, First Depart-
 ment, New York

May 3, 2012

CITE TITLE AS: Matter of ██████████

HEADNOTE

Motor Vehicles

Chemical Tests

Refusal to Submit to Chemical Test— Revoked
 Driver's License Reinstated—Videotaped Field
 Sobriety Test More Objective Measure of Intoxica-
 tion than Police Officer's Observations

Michael F. Dailey, Bronx, for petitioner.
 Eric T. Schneiderman, Attorney General, New York
 (Claude Platon of counsel), for respondents.
 Determination of respondent Department of Motor
 Vehicles Appeals Board, dated November 30, 2010,
 affirming a determination of the Department of Mo-
 tor Vehicles, which, after a hearing, revoked peti-
 tioner's driver's license for refusal to submit to a
 chemical test, annulled, without costs, and the peti-
 tion in this proceeding brought pursuant to CPLR
 article 78 (transferred to this Court by order of Su-
 preme Court, New York County [Geoffrey D.
 Wright, J.], entered on or about May 19, 2011),
 granted.

In reviewing respondent's determination, made after
 a hearing, our review is "limited to whether

[respondent's] determination is supported by sub-
 stantial evidence upon the entire record" (*Matter of
 Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]).
 Moreover, we may not substitute our own judgment
 of the evidence for that of respondent's, "but should
 review the whole record to determine whether there
 exists a rational basis to support the findings upon
 which the agency's determination is predicated" (*id*
).

Here, petitioner's refusal to submit to a chemical
 test could only result in revocation of his driver's li-
 cense if a chemical test was authorized by law in
 the first instance. To the extent relevant here, the
 Vehicle and Traffic Law authorizes a chemical test
 when reasonable grounds exist to believe that a per-
 son was operating a motor vehicle under the influ-
 ence of alcohol or drugs, meaning while impaired
 or intoxicated (Vehicle and Traffic Law §§ 1192,
 1194 [2] [a] [1]). The statute further states that
 reasonable grounds "shall be determined by view-
 ing the totality of circumstances surrounding the in-
 cident which, when taken together, indicate that the
 operator was driving in violation of [Vehicle and
 Traffic Law § 1192 and § 1192-a]" (Vehicle and
 Traffic Law § 1194 [2] [a] [3]).

The arresting officer's refusal report, admitted in
 evidence at the hearing, indicates that upon stop-
 ping petitioner because he was speeding, following
 too closely, and changing lanes without signaling,
 the officer observed that petitioner was unsteady on
 his feet, had bloodshot eyes, slurred speech and "a
 strong odor of alcoholic beverage on [his] breath."
 However, the field sobriety test, administered ap-
 proximately 25 minutes later, a video of which was
 admitted in evidence at the hearing, establishes that
 petitioner was not impaired or intoxicated. Spe-
 cifically, the video demonstrates that over the
 course of four minutes, petitioner was subjected to
 standardized field sobriety testing and at all times
 clearly communicated with the **2 arresting *441
 officer, never slurred his speech, never demon-
 strated an inability to comprehend what he was be-

95 A.D.3d 439

(Cite as: 95 A.D.3d 439, 943 N.Y.S.2d 96)

ing asked, and followed all of the officer's commands. Petitioner successfully completed the three tests he was asked to perform; thus never exhibiting any signs of impairment or intoxication.

Certainly, the contents of the arresting officer's refusal report, standing alone, establish reasonable grounds for the arrest under the Vehicle and Traffic Law (*Matter of Nolan v Adduci*, 166 AD2d 277, 278 [1990] [police officer's testimony that operator of motor vehicle was exceeding the speed limit, driving erratically, and his breath smelled of alcohol constituted reasonable grounds to arrest him for driving under the influence of alcohol], *appeal dismissed*⁷⁷ NY2d 988 [1991]). However, where, as here, a field sobriety test conducted less than 30 minutes after the officer's initial observations convincingly establishes that petitioner was not impaired or intoxicated, respondent's determination that there existed reasonable grounds to believe that petitioner was intoxicated has no rational basis and is not inferable from the record (*Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984] ["If the agency's determination is not supported by substantial evidence or it constitutes a clearly erroneous interpretation of the law or the facts, it will be annulled"]). A field sobriety test is "accepted within the scientific community as a reliable indicator of intoxication" (*People v Hammond*, 35 AD3d 905, 907 [2006], *lv denied*⁸ NY3d 946 [2007]). Here, the field sobriety test, conducted shortly after petitioner was operating his motor vehicle, which failed to establish that petitioner was intoxicated or otherwise impaired, leads us to conclude that respondent's determination is not supported by substantial evidence.

The dissent ignores the threshold issue here, namely, that refusal to submit to a chemical test only results in revocation of an operator's driver's license if there are reasonable grounds to believe that the operator was driving while under the influence of drugs or alcohol and more specifically, insofar as relevant here, while *intoxicated or impaired*. Here, while the officer's initial observations

are indeed indicative of intoxication or at the very least, impairment, the results of the field sobriety test administered thereafter—a more objective measure of intoxication—necessarily precludes any conclusion that petitioner was operating his vehicle while intoxicated or impaired. Any conclusion to the contrary simply disregards the applicable burden which, as the dissent points out, requires less than a preponderance of the evidence, demanding only that "a given inference is *442 reasonable and plausible" (*Matter of Miller v DeBuono*, 90 NY2d 783, 793 [1997] [internal quotation marks omitted]). Even under this diminished standard of proof, it is simply unreasonable and uninferable that petitioner was intoxicated or impaired while operating his motor vehicle and yet, 25 minutes later he successfully and without any difficulty passed a field sobriety test. *Matter of Whelan v Adduci* (133 AD2d 273 [1987], *lv denied*⁷⁰ NY2d 616 [1988]) is inapposite. *Matter of Whelan* simply stands for the proposition that a police officer's observation of bloodshot eyes and alcohol on an operator's breath constitute reasonable grounds to believe that the operator is intoxicated or impaired (*id.* at 273); a proposition with which we agree and is aptly supported by the case law (*see Matter of Nolan*, 166 AD2d at 278). However, as is the case here, the court in *Matter of Whelan* was never confronted with evidence that shortly after the officer's observations of intoxication or impairment, the operator successfully completed a field sobriety test. Such evidence warrants a finding in favor of petitioner.

We have considered respondent's remaining contentions and find them unavailing. Concur—Friedman, J.P., Renwick and Román, JJ.

Sweeny and DeGrasse, JJ., dissent in a **3 memorandum by DeGrasse, J., as follows: In my view, respondents' determination was supported by substantial evidence and I respectfully dissent. The instant determination was made after a chemical test refusal hearing that was held pursuant to Vehicle and Traffic Law § 1194 (2) (c). The issue before us is whether substantial evidence supported the admin-

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(Cite as: 95 A.D.3d 439, 943 N.Y.S.2d 96)

istrative law judge's (ALJ's) determination that the police officer who arrested petitioner had reasonable grounds to believe that he was driving while intoxicated. The majority finds substantial evidence to be lacking on the basis of a video depicting petitioner's performance on three coordination tests that were administered at a precinct 25 minutes after his arrest. The real question, however, is whether reasonable cause existed when petitioner was stopped by the police officer, not 25 minutes later. For reasons that follow, I disagree with the majority's apparent conclusion that the video is dispositive under a substantial evidence analysis.

An administrative determination "is regarded as being supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978] [internal quotation marks and citations omitted]). The standard "is less than a preponderance of the evidence" and demands only that "a given *443 inference is reasonable and plausible, not necessarily the most probable" (*Matter of Miller v DeBuono*, 90 NY2d 783, 793 [1997] [internal quotation marks omitted]). Measured against this standard, the evidence before the ALJ was sufficient to support respondent's determination.

The ALJ credited the police officer's report in which it was stated that petitioner was speeding, followed other vehicles too closely and changed lanes without signaling several times. The report also noted and the ALJ found that petitioner "displayed strong smell of alcohol on breath, bloodshot/watery eyes, slurred speech, swaying and unsteady gait." Although the video showed that petitioner was steady on his feet and did not slur his speech when he took the coordination tests, it did not refute the evidence of petitioner's erratic driving, the smell of alcohol on his breath and his bloodshot and watery eyes. Under a substantial evidence analysis, these factors alone can suffice as reasonable grounds to believe that a motorist was

driving while intoxicated **4 (see e.g. *Matter of Whelan v Adduci*, 133 AD2d 273 [1987], *lv denied* 70 NY2d 616 [1988]; cf. *People v Donaldson*, 36 AD2d 37 [1971]). I would therefore confirm respondents' determination.

Copr. (c) 2013, Secretary of State, State of New York

NY,2012.

95 A.D.3d 439, 943 N.Y.S.2d 966022012 WL 15375699992012 N.Y. Slip Op. 035144603, 943 N.Y.S.2d 966022012 WL 15375699992012 N.Y. Slip Op. 035144603, 943 N.Y.S.2d 966022012 WL 15375699992012 N.Y. Slip Op. 035144603

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