

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF ERIE

3 DANIEL T. WARREN,)

4 Plaintiff,)

5 vs.)

6 ARTHUR J. ROTH , Individually, and as)
Commissioner of the New York State Department)
of Taxation and Finance and his successors in)
office, and)

7 GEORGE E. PATAKI , Individually, and as)
Governor of the State of New York, and)

8 JOSEPH PASSAFIUME as Director of the Erie)
County Division of Budget, Management &)
Finance, and)

9 COMMISSIONER OF THE ERIE COUNTY)
10 FINANCE DEPARTMENT, and)

11 COUNTY OF ERIE, NEW YORK, and)

12)
13 CYRUS M. SCHINDLER, JR., Individually, and)
as President of the Seneca Nation of Indians, and)
14 as owner of Big Indian Smoke Shop, and on behalf)
of all similarly situated owners of retail enterprises,)

15 R. K. KARTONS, BUCKTOWN TRADING)
16 a/k/a BUCKTOWNTRADING.COM, NATIVE)
PRIDE a/k/a FIRST AMERICAN TOBACCO)
17 a/k/a FIRSTAMERICANTOBACCO.COM,)
OJIBWAS TRADING POST a/k/a SENECA)
18 TRADING POST a/k/a OJIBWAS.COM a/k/a)
SENECAS.COM and BIG INDIAN)
19 SMOKESHOP, individually and on behalf of all)
similarly situated enterprises,)

20 MILHELM ATTEA & BROS., INC.,)
21 Individually, and on behalf of all similarly situated)
wholesalers.)

22 Defendants)
23)

NOTICE OF MOTION

Index # I 2002-4880

24 Upon the annexed Plaintiff's Memorandum of Law in Support of Motion to Reargue pursuant to
25 CPLR § 2221 and to Settle Order pursuant to 22 NYCRR 202.48(c) the Plaintiff will move this court in
Part 7, at the Erie County Courthouse, 92 Franklin St., Buffalo, New York 14202, on the 20th day of
September, 2002, at 9:30 a.m. for an Order granting reargument of Defendant Pataki and Roth's motion to

1 dismiss the complaint and the Defendants Joseph Passafiume, Commissioner of the Erie County Finance
2 Department, and the County of Erie, New York's, motion for summary judgment pursuant to CPLR §
3 2221 and granting upon reargument reinstatement of the second and third causes of action in the
4 Amended Verified Complaint and to settle the order and judgment to be entered in this action based on
5 this Court's Decision dated August 20, 2002, together with such other, further or different relief as the
6 court deems just and proper.

7 The above referenced action is for declaratory judgment and permanent injunction.

8 Pursuant to CPLR § 2214(b), answering papers, if any, are required to be served upon the
9 undersigned at least seven days before the return date of this motion.

10 DATED: August 28, 2002
Buffalo, New York

11 Yours, etc.,

12
13
14

Daniel T. Warren
15 Plaintiff, Pro Se
836 Indian Church Road
West Seneca, New York 14224-1235

16 TO: Frederick G. Attea, Esq.
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18 Buffalo, New York 14202

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25

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PLAINTIFF'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO REARGUE PURSUANT
TO CPLR § 2221 AND TO SETTLE ORDER
PURSUANT TO 22 NYCRR 202.48(C)

Index # I 2002-4880

24 A motion to reargue "may be granted only upon a showing that the court overlooked or
25 misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision" (*Matter*
of Mayer v National Arts Club, 192 AD2d 863, 865, citing *Foley v Roche*, 68 AD2d 558; *see*, CPLR 2221
[d] [2]; *Dixon v New York Cent. Mut. Fire Ins. Co.*, 265 AD2d 914).

1 **ARGUMENT**

2
3 In my original papers in opposition to Defendants respective motions I brought to the Court's
4 attention that an Amended Verified Complaint was filed in this action. I also expressed the fact that
5 Defendant Pataki and Roth's motion to dismiss should be construed as attacking only the first cause of
6 action of the Amended Verified Complaint. I also expressed this in opposition to the County Defendants'
7 motion for summary judgment. Specifically I asserted that their motion was premature absent an Answer
8 to the Amended Pleading but that it may be construed as a motion to dismiss only the first cause of action.
9 Defendants Pataki and Roth did not challenge this position in their reply papers nor did they assert that
10 this amended filing was a nullity until oral argument. The County Defendants also did not challenge the
11 propriety of the Amended Verified Complaint and specifically addressed it in their reply papers.

12
13 **PROPRIETY OF SUPPLEMENTAL SUMMONS AND AMENDED VERIFIED COMPLAINT**

14
15 CPLR § 3025(a) provides "A party may amend his pleading once without leave of court within
16 twenty days after its service, or at any time before the period for responding to it expires, or within
17 twenty days after service of a pleading responding to it."

18 CPLR § 1003 provides "Parties may be added . . . once without leave of court within twenty
19 days after service of the original summons or at anytime before the period for responding to that
20 summons expires or within twenty days after service of a pleading responding to it."

21 The County Defendants Amended Answer to the original Verified Complaint is dated August 1,
22 2002. The Amended Verified Complaint and Supplemental Summons was filed with the Erie County
23 Clerk's Office on August 1, 2002 and served on opposing counsel pursuant to CPLR § 2103 on August 6,
24 2002. The State Defendants time to respond to the original Verified Complaint was extended until ten
25 days after an order has been entered pursuant to CPLR § 3211(f).

Therefore, the filing and service of the Supplemental Summons and Amended Verified Complaint
as of right was proper. See *Perez v. Wegman Companies*, 557 N.Y.S.2d 779; 162 A.D.2d 959 (4th Dept.

1 1990; STS Management Development v. New York State Department of Taxation, 254 A.D.2d 409, 678
2 N.Y.S.2d 772 (2nd Dept. 1998))

3 The action has to proceed on the assumption that the amended complaint is the only complaint in
4 the action (St. Lawrence Explosives Corp. v Law Bros. Contr. Corp., 170 AD2d 957; Hawley v Travelers
5 Indem. Co., 90 A.D.2d 684 [4th Dept 1982]).

6 The real question is the effect the amended pleading had on the then pending motions. It has been
7 held that the motion "abates", that is, that it must automatically be denied as moot since it refers to a
8 pleading which has been superseded. (Aikens Construction of Rome, Inc. v. Simons, 284 A.D.2d 946,
9 727 N.Y.S.2d 213 (4th Dept. 2001); Lipary v Posner, 96 Misc. 2d 578) In fact, it has been held that the
10 motion to dismiss actually abated upon the service of the amended pleading (St. Lawrence Explosives
11 Corp. v Law Bros. Contr. Corp., supra.; Aikens Construction of Rome, Inc. v. Simons, supra.; Ross v
12 Davis, 83 N.Y.S.2d 85 [Sup Ct, NY County 1948], affd 274 App Div 925 [1st Dept 1948]).

13 Assuming for the sake of this motion that this Court's Decision is correct it should only be
14 applied to the first cause of action of the Amended Verified Complaint if at all.

15 16 **PLAINTIFF'S INDIVIDUAL STANDING TO ASSERT THE SECOND CAUSE OF ACTION**

17
18 The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "is
19 *essentially a direction that all persons similarly situated should be treated alike.*" City of Cleburne v.
20 Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (citing Plyler v.
21 Doe, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)).

22 The United States Supreme Court stated "A racial classification, regardless of purported
23 *motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.* Brown v.
24 Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686; McLaughlin v. Florida, 379 U.S. 184, 13
25 *L. Ed. 2d 222, 85 S. Ct. 283. This rule applies as well to a classification that is ostensibly neutral but is
an obvious pretext for racial discrimination. Yick Wo v. Hopkins, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct.
1064 ; Guinn v. United States, 238 U.S. 347, 59 L. Ed. 1340, 35 S. Ct. 926 ; cf. Lane v. Wilson, 307 U.S.*

1 268, 83 L. Ed. 1281, 59 S. Ct. 872 ; Gomillion v. Lightfoot, 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125."
2 In Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 @ 272, 60 L. Ed. 2d 870, 99 S. Ct.
3 2282 (1979).

4 It is well settled that the Equal Protection Clauses of the New York State and the U.S.
5 Constitutions afford identical protection. Pinnacle Nursing Home v. Axelrod 928 F.2d 1306, 1317 (2d
6 Cir. 1991) (citing Dorsey v. Stuyvesant Town Corp. (1949) 299 N.Y. 512, 530, 87 N.E.2d 541, cert.
7 denied, 339 U.S. 981 (1950)) (co-extensive coverage of N.Y. Const. art. I, § 11 and U.S. Const. amend.
8 XIV).

9 The essence of an action alleging a violation of equal protection both under the State and Federal
10 Constitutions is that a challenged governmental classification rests on a ground wholly irrelevant to the
11 achievement of a valid governmental objective and treats persons similarly situated differently under the
12 law (see, Margolis v New York City Tr. Auth., 157 A.D.2d 238, 240-241; Matter of Cooke v Board of
13 Educ., 140 A.D.2d 439).

14 There are several ways for a plaintiff to plead intentional discrimination that violates the Equal
15 Protection Clause. A plaintiff could point to a law or policy that "expressly classifies persons on the basis
16 of race." [Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999)] (citing Adarand Constructors, Inc.
17 v. Pena, 515 U.S. 200, 213, 227-29 (1955)). Or, a plaintiff could identify a facially neutral law or policy
18 that has been applied in an intentionally discriminatory manner. See Yick Wo v. Hopkins, 118 U.S. 356,
19 373-74 (1886). A plaintiff could also allege that a facially neutral statute or policy has an adverse effect
20 and that it was motivated by discriminatory animus. See Village of Arlington Heights v. Metropolitan
21 Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Johnson v. Wing, 178 F.3d 611, 615 (2d Cir. 1999). 221
22 F.3d at 337

23 The complaint alleges that the plaintiff is personally liable to pay the New York State Department
24 of Taxation and Finance any taxes that should have been reported, collected and remitted in the
25 transaction of his business. (Amended Verified Complaint ¶ 61, 63)

Plaintiff is a member of a class of persons (hereinafter for purposes of this brief will be referred
to as "The Personal Liability Class") defined by New York Tax Law § 1133(a) as "every person required

1 to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or
2 required to be collected under this article” and New York Tax Law § 1131(a) defines “a person required
3 to collect any tax under this article” as “every vendor of tangible personal property or services; every
4 recipient of amusement charges; and every operator of a hotel. *Said terms shall also include any*
5 *officer, director or employee of a corporation or of a dissolved corporation, any employee of a*
6 *partnership, any employee or manager of a limited liability company, or any employee of an*
7 *individual proprietorship who as such officer, director, employee or manager is under a duty to act*
8 *for such corporation, partnership, limited liability company or individual proprietorship in*
9 *complying with any requirement of this article; and any member of a partnership or limited liability*
10 *company.”* (Amended Verified Complaint ¶ 59, 62)

11 Defendant Cyrus Shindler is the owner of Big Indian Smoke Shop (Amended Verified Complaint
12 ¶ 16).

13 Defendant Schindler is also liable for the failure to collect, report and/or remit the subject taxes
14 and is a member of The Personal Liability Class (Amended Verified Complaint ¶ 64).

15 Members of The Personal Liability Class that are Native American will not be held personally
16 liable for their obligations under the New York Tax Law due to their race, national origin or religion
17 through the Defendants acts and/or omissions under color of state law (Amended Verified Complaint ¶
18 66, 67, 68).

19 Although the Native American members of The Personal Liability Class are citizens or enrolled
20 members of their respective Indian Governmental Entities they are also citizens of the State of New York
21 and the United States. The Fourteenth Amendment to the United States Constitution provides that all
22 persons “born or naturalized in the United States . . . are citizens of the United States and of the State
23 wherein they reside.” This applies to Indians See *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz.
24 1975), *aff’d sub nom. Apache County v. U.S.*, 429 U.S. 876 (1976) the Fourteenth Amendment further
25 provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the
laws.” It also prohibits state officials from discriminating against any person on account of race, color,
creed, or religion. Any difference in treatment based on one of these factors is unconstitutional unless the

1 state has a compelling interest that necessitates this discrimination (*Brown v. Board of Education*, 347
2 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967)).

3 The barrier erected by the State and County Defendants in their individual and official capacities
4 is their failure/refusal to implement regulations and enforce the New York State Tax Law upon all
5 similarly situated people (Amended Verified Complaint ¶ 66).

6 Others similarly situated as plaintiff are not held personally liable for the failure of their business
7 to report, collect or remit taxes that must be collected from non-indian consumers transacting retail sales
8 with them based on their nationality, race or religion as Native-American/Indian. An injury need not be
9 economic or tangible. See, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, at 376 (deprivation of social
10 benefits of living in an integrated neighborhood constitutes cognizable injury); (Amended Verified
11 Complaint ¶ 71, 83, 85)

12 As the Supreme Court stated in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097, 132 L.Ed.2d
13 158 "*Consistency does recognize that any individual suffers an injury when he or she is disadvantaged by*
14 *the government because of his or her race, whatever that race may be. This Court clearly stated that*
15 *principle in Croson, see 488 U. S., at 493-494 (plurality opinion); id., at 520-521 (Scalia, J., concurring*
16 *in judgment); see also Shaw v. Reno, 509 U. S. ___, ___ (1993); Powers v. Ohio, 499 U. S. 400, 410*
17 *(1991)."*

18 The Equal Protection Clause does not prevent State Legislatures from drawing lines that treat one
19 class of individuals or entities differently from others, unless the difference in treatment is "palpably
20 arbitrary" or amounts to an "invidious discrimination" (*Trump v Chu*, 65 N.Y.2d 20; see also, *Alevy v*
21 *Downstate Med. Center*, 39 N.Y.2d 326). However, plaintiff is challenging the Executive Defendant's
22 unilateral creation of a class of people for different treatment than others similarly situated based on race,
23 national origin or religion under color of state law in excess of their powers. It is the Legislature that "has
24 nearly unconstrained authority in the design of taxing measures unless they are utterly unreasonable or
25 arbitrary" (*Ames Volkswagen v State Tax Comm.* 47 N.Y.2d 345, at 349; *Gautier v Ditmar*, 204 N.Y. 20,
28, 97 N.E. 464) not the Executive Branch of our government. As the New York Court of Appeals stated
in *Rapp v. Carey*, 375 N.E.2d 745; 44 N.Y.2d 157, "Where power is delegated to one person, the power is

1 *always guided and limited by standards. In fact, even the Legislature is powerless to delegate the*
2 *legislative function unless it provides adequate standards (Packer Coll. Inst. v University of State of N. Y.,*
3 *298 NY 184, 189). Without such standards there is no government of law, but only government by men left*
4 *to set their own standards, with resultant authoritarian possibilities.”*

5
6
7 **EXECUTIVE DEFENDANTS’ ACTS AND OMISSIONS UNCONSTITUTIONALLY DIMINISHES OR**
8 **DILUTES THE POWER OF PLAINTIFF’S VOTE**

9 *"[T]he Constitution grants to the States a broad power [to regulate Congressional elections*
10 *under] Art. I, § 4, cl. 1, which power is matched by state control over the election process for state*
11 *offices." Tashjian v. Republican Party of Conn., 479 U.S. 208, 217, 93 L. Ed. 2d 514, 107 S. Ct. 544*
12 *(1986); see also Oregon v. Mitchell, 400 U.S. 112, 124-25, 27 L. Ed. 2d 272, 91 S. Ct. 260*
13 *(1970)(opinion of Black, J., delivering the judgment of the Court) (observing that under the 10th*
14 *Amendment, one of the powers reserved to the states is the regulation of state elections). But as the*
15 *Supreme Court has emphasized, the state's power to protect the integrity of its electoral processes "does*
16 *not justify, without more, the abridgement of fundamental rights, such as the right to vote, see Wesberry*
17 *v. Sanders, 376 U.S. 1, 6-7, 11 L. Ed. 2d 481, 84 S. Ct. 526 (1964)" Tashjian, 479 U.S. at 217; see also*
18 *Miami Herald v. Tornillo, 418 U.S. 241, 41 L. Ed. 2d 730, 94 S. Ct. 2831 (1974) and Mills v. Alabama,*
19 *384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 1434 (1966)(striking down on first amendment grounds state*
20 *election laws interfering with newspapers' rights to comment on political candidates); Hunter v.*
21 *Underwood, 471 U.S. 222, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985)(10th Amendment cannot save*
22 *legislation prohibited by subsequently enacted fourteenth amendment).*

23 *The right of suffrage, whether in an election for state or federal office, is one that qualifies under*
24 *the Equal Protection Clause of the Fourteenth Amendment for protection from impairment, "when such*
25 *impairment resulted from dilution by a false tally, cf., United States v. Classic, 313 U.S. 299 (1941); or by*
a refusal to count votes from arbitrarily selected precincts, cf., United States v. Mosley, 238 U.S. 383
(1915), or by a stuffing of the ballot box, cf., Ex Parte Siebold, 100 U.S. 371 (1879); United States v.

1 *Saylor*, 322 U.S. 385 (1944)." *Baker v. Carr*, 369 U.S. 186, 208 and 247-48 (1962). This was bluntly
2 stated in *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964): "[T]he Constitution of the United States
3 protects the right of all qualified citizens to vote, in state as well as in federal elections. . . . The right to
4 vote can neither be denied outright, . . . nor diluted by ballotbox stuffing. . . ."

5 The United States Supreme Court ruled in *Bush v. Gore* 121 S.Ct. 525, 121 S.Ct. 525, 531 U.S.
6 98, 531 U.S. 98, 148 L.Ed.2d 388, 148 L.Ed.2d 388 (U.S. 12/12/2000) "The right to vote is protected in
7 more than the initial allocation of the franchise. Equal protection applies as well to the manner of its
8 exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and
9 disparate treatment, value one person's vote over that of another. See, e.g., *Harper v. Virginia Bd. of*
10 *Elections*, 383 U. S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be
11 drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must
12 be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a
13 citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v.*
14 *Sims*, 377 U. S. 533, 555 (1964)."

15 The threshold question in any due process inquiry is whether or not the interest sought to be
16 protected is fundamental. Fundamental rights are those explicitly guaranteed by the constitution or
17 implicit in the concept of ordered liberty (*San Antonio School District v. Rodriguez*, 411 U.S. 1, 17, 93
18 S.Ct. 1278, 1288, 36 L.Ed.2d 16; *Palko v. Connecticut*, 302 U.S. 319, 324-325, 58 S.Ct. 149, 151-152, 82
19 L.Ed.2d 288). Where the right sought to be protected is fundamental, the questioned state action must
20 serve a compelling state interest or the intrusion is unconstitutional (*Skinner v. Oklahoma*, 316 U.S. 535,
21 62 S.Ct. 1110, 86 L.Ed. 1655; *San Antonio School District v. Rodriguez*, supra). The right to Equal
22 Protection of the Laws and the Right to Vote is guaranteed by the New York and U.S. Constitutions and
23 is implicit in the concept of ordered liberty.

24 The Executive Defendants violation of the Plaintiff's Due Process and Equal Protection Rights
25 and their violation of the separation of powers doctrine by usurping the state legislature's policy making
role in the area of taxation has the effect of valuing the vote of Native Americans more than the plaintiff's
vote. Therefore plaintiff's voting power has been diluted and diminished in holding his legislative

1 members accountable for the policies enacted through the electoral process. See Rudder v. Pataki, 93
2 N.Y.2d 273, 711 N.E.2d 978, 689 N.Y.S.2d 701.

3 The illegal action stated above alters the procedural and policy landscape in the area of taxation
4 and dilutes, diminishes or eliminates the power of plaintiff's vote in this area and is an unlawful
5 abrogation of a constitutionally protected right to vote. "*It has been long established that The People*
6 *have conferred upon their legislative body an unlimited power of taxation ... and if legislators abuse their*
7 *power in enacting some new plan of taxation, or act unwisely in imposing some new form of tax, it is to*
8 *the People that they are answerable*" (People ex rel. Eisman v Ronner, 185 NY 285, 291-292). "*In*
9 *imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against*
10 *erroneous and oppressive taxation.*" (McCulloch v Maryland, 4 Wheat [17 US] 316, 428.) The power to
11 tax may not, however, be delegated to administrative agencies or other governmental departments
12 (Gautier v Ditmar, 204 NY, at 27-28; Matter of Brooklyn Children's Aid Socy. v Prendergast, 166 App
13 Div 852, 861, affd 215 NY 705). "*it would be incompetent for the legislature to leave to a state officer or*
14 *department the power to determine whether a tax should be levied, or at what rate, or upon what*
15 *property*" (Gautier v Ditmar, 204 NY, at 28).

16 In its Notice of Adoption the Executive Defendants stated "Recent events have shown that the
17 implementation of the system contained in the existing regulations is inconsistent with the State's
18 objectives with regard to both the sovereignty of the Indian nations and to the general welfare of the
19 people of this state. Additionally, statutory deficiencies impede our ability to administer the system
20 contained in the existing regulations . . . finally, repeal of these regulations is in keeping with federal
21 policies promoting tribal sovereignty. These factors make apparent the necessity for the repeal of these
22 regulations. (20 NY Reg, April 29, 1998, Issue 17, Book 1, at 22-24.)'

23 The Governor has admitted that legislative approval for his policy is needed. In his May 22, 1997
24 press release Defendant Pataki said "Let me make my message to all Indian Nations clear: It is your land,
25 we respect your sovereignty and, if the Legislature acts as I am requesting, you will have the right to sell
tax-free gasoline and cigarettes free from interference from New York State." Needless to say that the
Legislature has not acted.

1 The Executive Defendants by enacting this policy in the absence of Legislative approval has
2 deprived plaintiff of his equal protection and due process rights in having his vote counted in the
3 consideration of this tax policy and plaintiff's vote is rendered incompetent to hold his legislative
4 representatives responsible for this taxation policy. As the Court of Appeals stated in Rudder v. Pataki,
5 93 N.Y.2d 273 (1999), “. . . in some circumstances . . . allegations of governmental action impinging
6 upon the constitutional separation of powers may bear so heavily on the right to vote as to dilute or impair
7 it”

8
9 **CLARIFICATION OF DECISION IS NECESSARY FOR SETTLEMENT OF ORDER**

10 It is necessary that the parties obtain clarification from the Court regarding its decision so as to
11 permit it to be reduced to an order.

12 The Court in its decision states that “. . .the defendants have each moved to dismiss the plaintiff's
13 action, pursuant to CPLR § 3211(a)(3). . .” The County Defendants actually moved for summary
14 judgment pursuant to 3212. This raises the following questions:

15 Did the Court determine whether or not the Supplemental Summons and Amended Verified
16 Complaint was properly filed and served in this action or did the court consider it a request to re-plead
17 under CPLR § 3211(e) which was denied?

18 Did the Court convert the County Defendants' motion from 3212 to 3211 because it found that
19 the Amended Verified Complaint rendered a motion for summary judgment premature or did the court
20 not reach the County Defendants' motion because the granting of the State Defendants' motion rendered
21 it academic?

22 These questions will clarify for appellate review as to whom was aggrieved by this decision and
23 what issues were or were not resolved. For example, although the County Defendants' moved for
24 summary judgment based on standing they asserted in their reply papers, which I would object to as
25 improper and should not have been considered, that even if plaintiff had standing they were an improper
party. The County Defendants also raised this argument at oral argument. The County Defendants are
incorrect in this position because although the complaint does not seek injunctive relief against them it

1 does seek declaratory relief against the Defendants Passafiume and Commissioner of the Erie County
2 Finance Department due to their positions within the executive branch of county government. The
3 County of Erie is a necessary party because it would be inequitably affected by a judgment in this action
4 in its absence. Therefore the County Defendants' may be an aggrieved party and entitled to cross-appeal
5 the denial of their motion for summary judgment. As well as the issues raised on the motion to reargue
6 stated above.

7 Wherefore, plaintiff respectfully prays for an Order granting reargument of Defendant Pataki and
8 Roth's motion to dismiss the complaint and the Defendants Joseph Passafiume, Commissioner of the Erie
9 County Finance Department, and the County of Erie, New York's, motion for summary judgment
10 pursuant to CPLR § 2221 and upon granting reargument reinstatement of the second and third causes of
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14 DATED: August 28, 2002
15 Buffalo, New York

16 Yours, etc.,

17
18 _____
19 Daniel T. Warren
20 Plaintiff, Pro Se
21 836 Indian Church Road
22 West Seneca, New York 14224-1235

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