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

PRESENT: EMILY JANE GOODMAN Justice PART 17

0106234/2004

COMMITTEE TO PROTECT
VS
NEW YORK STATE D.H.C.R.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

ARTICLE 78

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No Petition

Upon the foregoing papers, it is ordered that this ~~motion~~ is decided in accordance with the attached Decision and Judgment of the Court

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given until entry is obtained. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/9/05

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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Committee to Protect Rent Controlled Tenants
Frederick Marshall,

Petitioner,

–against- Index No.: 106234/04

New York State Division of Housing and Community Renewal,

Respondent.

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GOODMAN, EMILY JANE, J.S.C.:

Petitioners bring this Article 78 proceeding (motion seq. 001) for an order and judgment vacating, declaring invalid and annulling a determination by Respondent New York State Division of Housing and Community Renewal (DHCR) establishing a 17.2% standard adjustment factor (SAF) for the 2004/05 maximum base rent (MBR) applicable to rent-controlled apartments.[1] Petitioners seek judicial review of the system by which MBRs are established, contending that DHCR's use of a single SAF for all increases in MBRs has become arbitrary and capricious due to alleged changes in the New York City rental market. Petitioners claim that increases in market rents due to deregulation and increases in rents under rent stabilization as a result of vacancy allowances are reflected in the return on capital value and real estate tax components of the MBR formula, resulting in inflated MBR rent increases for rent-controlled tenants. Moreover, Petitioners maintain that because of the dramatic decrease in rent-controlled apartments since 1970, from over 1 million to less than 50,000, DHCR's resort to statistical

[1]The SAF is used to adjust a ceiling above which rents in rent-controlled apartments cannot rise.

averaging based on a sampling of buildings, as opposed to auditing of each individual building, is no longer necessary, nor appropriate. Petitioners ask this Court to enjoin DHCR from implementing the 17.2% standard adjustment factor for 2004/05, and to require DHCR to fulfill its obligations under the rent control laws by conducting a comprehensive review of the MBR formula in order to establish an appropriate formula.

In motion sequence no. 002, DHCR moves, pursuant to CPLR 404, 3211 and 7804(f), to dismiss the verified petition on the ground that it fails to state a cause of action and based on lack of standing.[2] In deciding the motion to dismiss, the Court must assume the truth of the allegations in the petition and view them in the most favorable light (see Northway 11 Communities, Inc. v Town Bd. of Malta, 300 AD2d 786 [3rd Dept 2002]). However, only conclusions of fact, not law, are deemed to be true (see Hines v State Bd. of Parole, 293 NY 254 [1944]).

Background

In 1970, the City of New York enacted Local Law 30, which established a maximum base rent (MBR) for each rent-controlled unit as of January 1, 1972 (Administrative Code of the City of NY § Y51-5.0 [a]; now McKinney's Uncons Laws of NY § 26-405[a] [hereafter RCL]). The dual purpose of the MBR system was to substantially raise the standards of building maintenance and stem the tide of housing deterioration and abandonment in New York City, while at the same time protecting tenants from excessive rents and sharp increases (see Matter of Community

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[2]Under CPLR 7804 (f), a respondent may raise an "objection in point of law" in a motion to dismiss, which is a defense that can produce summary dismissal of the proceeding, as under CPLR 3211 (see Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:7).

Hous. Improvement Program, Inc. v New York State Div. of Hous. and Community Renewal, 230 AD2d 66, 67 [3d Dept 1997]; 89 Christopher Inc. v Joy, 44 AD2d 417, 419 [1st Dept 1974], affd 35 NY2d 213 [1974]). Local Law 30 specified a formula by which a building's MBR was to be determined. The MBR was to reflect the costs actually incurred by a landlord in maintaining the unit, namely: (1) real estate taxes; (2) water rates and sewer charges; (3) an operation and maintenance expense allowance; and (4) a vacancy allowance and a collection loss allowance (RCL § 26-405 [a] [3]). In addition, the statute currently provides for an 8.5% return on capital value of the building (where capital value is defined as the equalized assessed valuation based upon the appropriate tax class ratio established under Article 12 of the Real Property Tax Law), (id.). The MBRs were to be adjusted every two years to reflect "changes, if any, in the factors which determine maximum gross building rental ..." RCL § 26-405(a)(4).[3] The maximum collectible rent (i.e., the most that a landlord could collect in rent from each tenant) could be increased each year by no more than 7.5% until the MBR was reached (RCL § 26-405 [a] [5]).

Rents were calculated for each of the City's 1.1 million rent-controlled units using a complex formula devised by the City's rent agency with the assistance of the Rand Institute of New York City.[4] Lengthy delays occurred in the calculation of the initial base rents and the first

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[3]Pursuant to the Emergency Housing Rent Control Law, New York State administered rent control beginning in 1947, including in New York City from 1950 to 1962 (see L 1946, ch 274 and L 1950, ch 250, as amended). Then under the Local Emergency Housing Rent Control Act, New York City acquired power to administer rent control and enact local laws setting and adjusting the MBR (see L 1962, ch 21). However, under the New York State Omnibus Housing Act of 1983, responsibility for administering rent control was transferred back to the State (DHCR), from New York City's Department of Housing Preservation and Development, beginning April 1, 1984 (see L 1983, ch 403 § 3).

[4]The MBR formula is set out in a document called "The Maximum Base Rents Formula, a cost index approach to controlled rents," published by the City of New York Housing &

biennial adjustment to take effect January 1, 1974. Thus, in October 1974, the City's rent agency announced that it would not be able to continue calculating individual MBRs based on actual operating expenses. Instead, the City adopted a practice of promulgating a single SAF, based on the average experience of a small fraction of the 74,000 rent-controlled buildings, rather than calculating each building's experience. While this constituted a modification of the individual determinations envisioned under the statute, it was upheld by the Court of Appeals in Matter of Tenants' Union of the West Side, Inc. v Beame (40 NY2d 133 [1976]).

Petitioners' Allegations

Petitioners maintain that Respondent has acted arbitrarily and capriciously, in derogation of law, and in violation of due process, by (1) failing to conduct regular audits, accurately assemble data, and adjust the MBR formula; (2) failing to segregate income and expenses attributable to non rent-controlled apartments from rent-controlled apartments; (3) treating rent-controlled tenants differently from rent stabilized tenants; and (4) failing to comply with the Administrative Procedure Act. Petitioners make the appealing argument that the reasons for adopting the SAF averaging formula, in lieu of regular audit and review, no longer exist. The number of registered rent-controlled apartments has fallen from over 1 million, when Local Law 30 was enacted in 1970, to less than 50,000 at the present time. The data required to initiate and conduct backup review is available from the City's Department of Finance. Moreover, Petitioners point to substantial changes in the New York City rental market since the use of statistical averaging was first employed and approved by the Court of Appeals in Matter of Tenants' Union of the West Side, supra. Petitioners point to (1) the decrease in the number of

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Development Administration in or about 1971.

rent-controlled apartments, and corresponding increase in building incomes; (2) a dramatic rise both in residential rents for non-controlled units and in rent stabilized units due to vacancy allowances; and (3) the substantial decrease in mortgage costs, as the result of falling interest rates. In light of these substantial changes, Petitioners maintain that DHCR's continued use of statistical averaging based on a sampling of buildings has undermined the accuracy and flexibility required by statute. With respect to the first two changes, Petitioners postulate that the increase in rents inflate both real estate taxes and the assessed value of the buildings thereby inflating the return of capital value. They note that almost half of the proposed 17.2% SAF is based on two factors: real estate capital value and real estate taxes. The petition alleges that:

> 35. Real Estate taxes are based on the tax rate multiplied by assessed equalized valuation (a function of assessed value). The return of capital value is based on the multiplication of the equalized assessed value by the 8.5% limitation on return.
>
> ***
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> 37. As rents increase building values increase.
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> 38. As the value of the buildings increase (based on the increase of rents for non-rent-controlled units), the return and tax components of the SAF is driven upward causing under the respondents formula the rents chargeable to rent-controlled tenants to be driven up.

Petition ¶¶ 35-38. Thus, Petitioners allege that rent-controlled tenants are subjected to increases that are unreasonable and unjustifiable, and which have no relationship to cost and a fair return.

Respondent's Motion to Dismiss

A. Standing

DHCR moves to dismiss the petition on the ground that Petitioners lack standing to bring this proceeding. The individual petitioner, Frederick Marshall, is a resident of an apartment on Jane Street in Manhattan. Mr. Marshall is said to fit the profile of tenants of rent-controlled

apartments--above 65 years of age, with limited income, and paying more than 40% of his income for rent. The petition alleges that the Committee to Protect Rent Control Tenants is an association of similarly-situated tenants of rent-controlled apartments in New York City.

"[T]he administrative decision for which review is sought must be shown to have a harmful effect upon the party asserting standing" (City of New York v Civil Service Commn., 60 NY2d 436, 442-43 [1983]; see also Matter of Dairylea Coop. v Walkley, 38 NY2d 6, 8-11 [1975]). "The court has no power to act and to right a wrong unless plaintiff's rights are affected" (The Society of the Plastics Indus., v County of Suffolk, 77 NY2d 761, 769 [1991]). Standing is a threshold determination, and Petitioners have the burden to establish standing to adjudicate the claim presented (id. at 772-73).

DHCR contends that Frederick Marshall lacks standing to challenge the 2004/05 SAF, because he is "prima facie" eligible to participate in the Senior Citizen Rent Increase Exemption (SCRIE) program. The SCRIE program exempts tenants who are 62 years of age with a family income of less than $20,000 a year from rent increases (RCL § 26-405 [m]). However, there is no evidence before the Court that Mr. Marshall meets SCRIE's income limit. According to the 2002 New York City Housing and Vacancy Survey, slightly more than half of all rent-control tenants are excluded from the benefits of the program because of the income limit. Presumably, Mr. Marshall would be signed up for SCRIE if he was eligible, and if he was a participant in the program, DHCR would be privy to that fact. Based on Mr. Marshall's comments at the January 6, 2004 public hearing, he is susceptible to rent increases, which he can ill afford. Accordingly, DHCR's motion to dismiss the petition on the ground that Marshall lacks standing is denied.

As for the Committee to Protect Rent Controlled Tenants, DHCR contends that the

petition presents no facts to support standing for this "unidentified entity." In opposition to DHCR's motion to dismiss, Petitioners' counsel proffers a joint affidavit from four individuals who state that they are members of the "Executive Committee" of this organization, and that it is comprised of 243 individual members, 90% of whom are tenants in rent-controlled apartments. In addition, these Executive Committee members aver that 23 tenant associations and community groups are part of this organization. Accordingly, the Committee has demonstrated that it has standing to maintain a challenge to rent control increases (see Matter of Tenants' Union of the West Side, supra [organizations representing tenants of accommodations subject to rent control properly brought Article 78 challenge to 1974/75 MBR orders]).

B. Capacity to Sue

Capacity to sue, however, "concerns a litigant's power to appear and bring its grievance before the court" (Community Bd. of the Borough of Manhattan v Schaffer, 84 NY2d 148, 155 [1994]). An unincorporated association has no legal existence separate and apart from its individual members (see United Mine Workers of Am. v Coronado Coal Co., 259 US 344, 385 [1922]; Kirkman v Westchester Newspapers, 261 App Div 181, 183 [1st Dept 1941], affd 287 NY 373 [1942]). They "are accorded the capacity to bring suit through their presidents or treasurers by statute"(Community Bd. of the Borough of Manhattan, 84 NY2d at 155, citing General Associations Law § 12; see also CPLR 1025). When an unincorporated association has no president or treasurer, the de facto officer performing the equivalent functions and responsibilities of those positions has the capacity to sue on the association's behalf (see Matter of Chavis v New York Temporary State Commn. on Lobbying, 6 Misc 3d 917, 922 [Sup Ct, Albany County 2004]; Matter of Pasch v Chemoleum Corp., 26 Misc 2d 918, 920 [Sup Ct, NY County 1960], affd 13

AD2d 470 [1st Dept 1961]).

The record before the court is silent as to whether the Committee to Protect Rent Controlled Tenants has a president or treasurer, or whether Thomas Siracuse, a member of the Executive Committee and the purported Chairman, performs the equivalent functions and responsibilities of a president or treasurer. However, since this is a defect that may be overlooked in the absence of prejudice to DHCR (see Fellows v Fox, 186 AD2d 1051 [4th Dept 1992]; Gianunzio v Kelly, 90 AD2d 623, 624 [3d Dept 1982]; Miller v Student Assn., State Univ. of New York at Albany, 75 AD2d 843 [2d Dept 1980]), and Marshall has standing to maintain this proceeding, Petitioners may bring this proceeding.

C. Limitation on Review

Respondent also contends that Marshall personally appeared and spoke at the public hearing on January 6, 2004, but did not raise any of the arguments presented in the petition. Respondent thus argues that a petitioner in an Article 78 proceeding may not raise arguments nor submit evidence that he failed to raise or produce in the administrative proceeding, citing Fanelli v New York City Conciliation and Appeals Bd. (90 AD2d 756 [1st Dept 1982], affd 58 NY 952 [1983] ["Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered"]). However, a public hearing is not the equivalent of an administrative proceeding. Respondent has cited no cases limiting judicial review to those matters specifically raised at the public hearing itself. Additionally, the concerns raised in the petition were raised by others who spoke at the hearing and in written submissions to DHCR. Accordingly, the arguments presented in the petition are properly raised.

D. Failure to State A Cause of Action

The use of sampling techniques and statistical averages to calculate one city-wide SAF was accepted by the Court of Appeals in Matter of Tenants' Union of the West Side, supra. The Court rejected the contention that the rent agency was required to compute MBRs on a building-by-building basis, taking into account each one's separate operating experience. The Court concluded that the statistical variance between the SAF average and the 9,000 individual computations that had thus far been performed in 1974 was "very small" (id. at 138). In 1974, the size of the random sample of buildings that had satisfied the Court of Appeals was 1,242 buildings out of a universe of 74,000 rent-controlled buildings. The sample of buildings used by DHCR to calculate the 2004/05 preliminary SAF was far larger: 4,785 buildings out of approximately 14,000 buildings.[5] But this Court has not been provided with any basis to reach Petitioners' conclusion that the sampling technique employed by DHCR for the 2004/05 preliminary SAF is not "sound, fair, representative and, in general, designed to produce an accurate result . . ." and fails to take into account the alleged changes in the rental market (id.).

Assuming that the sampling technique employed by DHCR does not accurately reflect the market changes raised by Petitioners, rendering the SAF formula unreasonable and unjustifiable--the petition fails to present any empirical data to support that finding. Although it may be

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[5]The 2004/05 preliminary SAF factor of 17.2% was determined by calculating the median of the percentage change in each of the sample's building-wide MBRs. According to the preliminary report dated November 21, 2003 (Report), the 17.2% median increase in the MBR was caused by double-digit rises in the percentages of all of the MBR cost components, with the highest increase for real estate taxes- a 26.29% rise since 2002 (see Report, Exh A to the Affidavit In Support of the Motion to Dismiss). The relative weights of the components vary, with the portion attributable to return on capital value and real estate taxes combined accounting for 54.91%. Report, at 10. Operation and maintenance costs accounted for 40.15% of the 2004/05 MBR.

generally known that substantial rent increases are imposed upon rent controlled tenants who can ill afford them, it is not something of which the Court can take judicial notice or rely on common sense conclusions without more in the way of data, economists and statisticians affidavits, or similar support.[6]

Petitioners' contention that DHCR is required by law to periodically re-evaluate the MBR formula, and to develop a means for ascertaining when a building exceeds the 8.5% return on capital value, to ensure that rent-controlled tenants preserve their apartments and are protected from speculative rents, is meritorious public policy, but is unsupported in the papers submitted. The RCL provides that DHCR "shall establish maximum rents. . . and biennially thereafter by adjusting the existing maximum rent to reflect changes, if any, in the factors which determine maximum gross building rental under paragraph three of this subdivision . . ." (RCL § 26-405 [a] [4]). The Court of Appeals has already determined that the building audits required under subsection (a)(4) are not mandatory, but "a matter of administrative discretion" (Matter of Tenants' Union of the West Side, supra at 139 [although periodic agency audits of landlords' books is desirable, the law does not specifically require that the agency make the audit]).[7] The

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[6]The Court may have viewed this proceeding differently had Petitioners submitted an affidavit from an economist or other expert supporting Petitioners' arguments and further detailing the extent of the impact on Petitioners' rents, such that a court could conclude that resort to the current formula is arbitrary and capricious. Although Petitioners maintain that resort to the stated formula has lead to unjustified increases, it is not clear to what extent Petitioners' rents have been increased as a result of the current formula.

[7]RCL § 26-405(a) (4) provides that DHCR "shall require" each owner to make available their books and records "at least once every three years for the purpose of determining whether the maximum formula rent is appropriate for each building in light of actual expenditures therefor and shall also alter such formula rent to take into account significant variations between the formula and actual cost experience."

petition fails to allege facts evidencing that DHCR has abused its discretion by not conducting audits of landlords books to re-evaluate the MBR formula and to ascertain when a building exceeds the 8.5% return on capital value. Moreover, as conceded by Petitioners, DHCR does not have the authority to revise the 8.5% return on capital value (Levy Affirm ¶ 48).[8]

Petitioners also contend that DHCR has acted arbitrarily and in violation of law by not conducting an analysis to determine whether the components of the MBR formula should be apportioned among different types of housing accommodations within a building by way of ratios, and that the RCL supports such an apportionment. In support of this claim, Petitioners rely on the fifth sentence of section 26-405(a)(3) which states:

> Where the property receives income from sources other than such housing accommodations, the taxes, water and sewer charges and the capital value attributed to the portion consisting of housing accommodations shall be in the same ratio of the total taxes, water and sewer charges (where not computed separately) and the total capital value as the gross income from such portion consisting of housing accommodations bears to the total gross income from the property, as prescribed by the agency (emphasis added).

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[8]The RCL provides that "[t]he return allowed on capital value may be revised from time to time by local law." RCL § 26-405 (a) (4). Prior to June 2003, the City of New York was authorized to change the MBR formula, provided that any such local law did not violate the Urstadt Law's prohibition on "more stringent or restrictive provisions of regulation and control than those presently in effect." L 1971, ch 371. The MBR formula was specifically revisited in 1997, when the City enacted Local Law 73, amending the statute to revise the definition of capital value by basing it on Article 12 of the Real Property Tax Law, instead of Article 12 A. However, effective June 20, 2003 and in direct response to the Court of Appeals decision in City of New York v New York State Div. of Hous. and Community Renewal (97 NY2d 216 [2001]), that Local Law 73 did not violate the Urstadt Law, Governor George E. Pataki signed legislation removing from New York City any power to adopt or amend local laws with respect to the establishment and adjustment of rents, except for (1) extending or declining to extend rent control or (2) deregulating certain classes of housing accommodations (L 2003, ch 82, § 1). Thus, as Petitioners' counsel concedes, any increase or decrease to the 8.5% return on capital component must come from Albany.

consisting of housing accommodations bears to the total gross income from the property, as prescribed by the agency (emphasis added).

(RCL § 26-405 [a] [3]). Petitioners imply that the language "such housing accommodations," refers to rent-controlled accommodations only and maintains that the language cannot refer to all residential accommodations, because deregulated apartments did not exist in 1970 when the statute was enacted. DHCR interprets the language to refer to commercial income (such as from parking or stores) for all residential accommodations. DHCR has correctly interpreted the statute as requiring the apportionment of income from non-housing sources.[9] The language of the first sentence of RCL § 26-405(a) (3) expressly provides that the maximum rents be established using the "maximum gross building rental from all housing accommodations in the property whether or not subject to or exempt from control under this chapter." Thus, although perhaps Respondent should be, it is not mandated by RCL § 26-405 (a) (3) to separate the costs and returns attributable to non rent-controlled apartments from rent-controlled apartments.

Petitioners are also not denied equal protection of the laws because apartments subject to rent control are treated differently than apartments subject to rent stabilization (see Felner v Office of Rent Control of the New York City Department of Rent and Housing Maintenance, 27 NY2d 692 [1970]). Finally, Respondent has not violated the New York State Administrative Procedure Act (SAPA) by failing to publish the 2004/05 SAF; by failing to consider or publish the adverse and other comments made at the January 6, 2004 public hearing; and by failing to provide a regulatory impact statement. The specific procedures for establishing the MBR are dictated by RCL § 26-405 (a) (9). Petitioners have cited no cases, nor has the Court found any, holding that

[9]The proposed 2004/05 SAF accounts for commercial income, as explained in paragraph G of the Report.

specific procedures contained in RCL § 26-405 (a) (9). Petitioners have not argued, nor could they, that DHCR failed to comply with RCL § 26-405 (a) (9). DHCR held a public hearing on January 6, 2004, in accordance with RCL § 26-405 (a) (9), to collect information relating to all the factors which DHCR considers in establishing the 2004/05 MBR. Notice of the date, time and location of the public hearing was published in the City Record from December 5, 2003 to January 5, 2004, and in the New York Post on December 5, 2003 and December 22, 2003. The published notice contained a telephone number whereby people could register to speak at the hearing and obtain a report on DHCR's recommendation of a 17.2% SAF. Additionally, DHCR mailed its Report containing the proposed 17.2% SAF to individuals and organizations which had placed their names on a mailing list for receipt of the Report. The entire hearing was transcribed by a legal stenographer, and the transcript is on file at DHCR's offices along with written comments submitted by members of the public. Accordingly, DHCR has satisfied its obligations in establishing the MBR for 2004/05, in accordance with the procedures required under RCL § 26-405 (a) (9).

Accordingly, in view of the lack of empirical and expert evidence supporting Petitioners' contentions that Respondent's use of the SAF sampling technique and the current MBR formula is arbitrary and capricious as a result of market changes not present thirty years ago, the Court is constrained to dismiss the proceeding.

ADJUDGED that Respondent's motion to dismiss the petition is granted on the ground that it fails to state a cause of action, and the proceeding dismissed.

Dated: September 9, 2005

This constitutes the Decision and Judgment of the Court.

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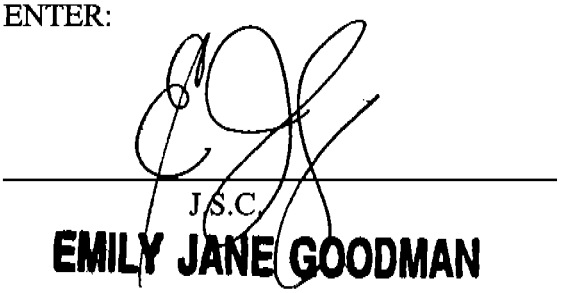

J.S.C.

EMILY JANE GOODMAN