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

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JON H. HAMMER,

Plaintiff, Index No. 600029/2000

-against-

THE AMERICAN KENNEL CLUB and
BRITTANY CLUB OF AMERICA a/k/a
THE AMERICAN BRITTANY CLUB, INC.,

Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTIONS
TO DISMISS THE AMENDED VERIFIED COMPLAINT

Plaintiff respectfully submits this memorandum of law in opposition to the motions of Defendants for an order dismissing the Amended Verified Complaint herein dated January 4, 2001.

Preliminary Statement

Plaintiff, Jon H. Hammer, respectfully submits this Memorandum of Law, together with the Affidavits and exhibits annexed, in opposition to the motions of the Defendants American Kennel Club ("AKC") and the American Brittany Club, Inc. ("ABC") to dismiss the Amended Complaint. Pursuant to this Court's decision of January 4, 2001, Plaintiff has: (i) effectuated clearly proper service upon ABC; and (ii) served and filed an Amended

Complaint which fully and specifically sets forth allegations of discriminatory, arbitrary and capricious actions on the part of the Defendants. These allegations of the Amended Complaint are essentially unrefuted.

Statement of Facts

Plaintiff is the owner of an AKC registered canine, known as the Brittany. It has an undocked tail – now full grown – of approximately ten inches in length. The subject dog's tail is full feathered, and the dog is approximately 17 ¾ inches in measured height. It is not disputed that the AKC approved Brittany standard *de facto* mandates a four inch tail. No Brittany with a tail in excess thereof has been shown or competed in any AKC breed or Brittany specialty shows. It is equally not subject to any reasonable argument that the foregoing Brittany standard compels and sanctions, solely for cosmetic purposes, tail amputation, euphemistically referred to as "docking".

There is no rational refutation by Defendants that the medical procedure of docking inflicts great pain, is hazardous to the animal, is accompanied by inherent risk of anesthesia, blood loss, infection and gangrenous long-term adversity to the spinal area. This has been confirmed by the national American Veterinary Medical Association ("AVMA"), the Humane Society of New York, current prominent practicing veterinarians and academics. The superficial Theilen ("ABC") Affidavit, by a retired cancer specialist, whose opinion is repudiated by his own organization ("AVMA"), pales into insignificance. It clearly fails to raise any reasonable triable issue of fact on the question of pain and medical risks to the canine caused by tail docking.

The canine tail, whether in the Brittany, any sporting breed, indeed any breed or the beloved mixed breed so prevalent in this country, provides an essential physiological purpose for the animal; to wit, it serves as a balancing mechanism while in motion. Hunters and veterinarians have clearly confirmed this physiological fact of nature. The canine tail, unlike the vestigial human coccyx, is essential anatomy to the functioning of the dog. ABC attempts to trivialize this canine anatomical aspect, by fabricating multiple rationale for the painful docking mutilation. It argues that: (1) the Brittany is a smaller hunting dog; (2) it carries its tail low in the field; (3) it is seven to eight inches shorter than the English Setter, which does not have its tail docked for either breed standard or hunting in the field. Each of these factual rationales is patently and indisputably erroneous, as confirmed by Plaintiff's affidavit. The misdirection by Ms. Trimble is refuted by the photographic exhibits, the experience of noted hunter-author Parlasca and by her clear failure to distinguish between the large laverack English Setter and the much smaller field Llewelin English Setter, whose breed standards sanctioned by AKC are illogically identical.

The Amended Complaint

The factual allegations of the Amended Complaint stand substantively unrefuted by the moving affidavits. Moreover, the arbitrary and capricious actions and implemented policy of AKC are in large part culled from its own "bible" of standards, the "Complete Dog Book". It cannot be seriously disputed that AKC has a virtual complete monopoly in the United States in purebred dog registrations and no less in the showing thereof in breed and specialty shows.

The irrational, arbitrary and capricious action of AKC may be demonstrated by reference to three other sporting breeds, of which group the Brittany is a member. The English Pointer and German Shorthaired Pointer, as confirmed by Dr. Cheever in her affidavit, are nearly identical dogs in size, customary use in the field and heritage. Indeed, the AKC Complete Dog Book lists as common genealogy the so-called "Old Spanish Pointer". Even in color, they often are quite similar. One significant difference is extant; to wit, the full undocked tail in the English Pointer (mandated by AKC standard) and the docking of 60% of the dog's tail (mandated by AKC standard) for the German Shorthaired. The AKC attaches part of its "Complete Dog Book" for the sporting group. Significantly, it omits the Welsh Springer Spaniel, which is traditionally utilized in the field quite similarly to the Brittany. In height and weight, they are quite close; and even in color generally they are virtually identical. Again, one significant distinction further demonstrates the arbitrary action of the AKC. While the Welsh Springer tail is generally docked – at the option of the breeder or owner – the AKC standard neither mandates a docked tail nor to any extent invokes any penalty for the undocked tail, unlike that for the Brittany. AKC has permitted such undocked Welsh Springer Spaniels at the prestigious annual Westminster Kennel Club Show.[1]

The Defendant AKC (Crowley Affidavit, ¶14) and ABC (Trimble Affidavit, ¶8) submit that "breed standards", "including the tail standard" are "used by breeders to guide them in their efforts to breed better quality dogs". The amputation of a tail for cosmetic historical purposes obviously has nothing to do with breeding better quality dogs; it only

[1] See fn. 2, ¶ 25, p. 8 Amended Complaint.

serves to satisfy a tradition has no purpose in function, breeding or morality. As Dr. Bruce Fogle points out,[2] this standard has been widely dropped as "needless mutilation".

The AKC and ABC would impale this Court on the horns of putative insoluble trilemma. ABC implies that the breed standards are effective only when given the final imprimatur of AKC (Trimble Affidavit, ¶20). Conversely, AKC argues that it merely performs the ministerial act of approving the parent club breed standard (Crowley Affidavit, ¶¶9 & 10). Thirdly, the Defendants argue that it is not they who "are . . . performing . . . tail docking" (Christensen Affidavit, ¶22). The inescapable denouement of this analysis is that no entity is responsible for this mandated animal cruelty. The Defendants seek to have this Court grant them immunity for the national and state implications of their policy. The Brittany is almost universally born with a full tail. Defendants promote, condone and in substance mandate tail docking; they must bear the legal responsibility for the undisputed effects thereof, resulting in a clear derogation of New York law.

Defendant AKC further seeks to abrogate its responsibility by resort to its charter provisions. The Crowley Affidavit cites the Court to Article IV, Section 4, whereby it is provided that no AKC breed standard is effective without approval of the parent breed. Mr. Crowley, however, omits to allude to the second unnumbered paragraph thereof, which provides that no breed standard may be modified until approved by the AKC Board of Directors. AKC thus retails ultimate national control. Moreover, *ex post facto*, AKC

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[2] Plaintiff's Affidavit, ¶4.

eliminated a charter provision in effect until January 2001 whereby AKC control over breed standards was even greater than now purports to be extant.

Finally, after the AVMA nationally condemned tail docking in July, 1999, it was AKC, not the breed clubs, which publicly set forth a position as promoting tail docking for breed standards.[3] The AKC attempt to abrogate its responsibility for the discredited and painful process has not the slightest basis in fact or public avowals.

Argument

POINT I

CANINE TAIL DOCKING FOR COSMETIC PURPOSES IS A CLEAR VIOLATION OF NEW YORK LAW

New York State Agriculture and Markets Law, §353 does not, on its face, interdict canine tail docking. However, it would be an affront to the judicial process if such a statute could not be reasonably construed to effectuate the obvious legislative intent, namely to prohibit animal cruelty. The statute specifically penalizes maiming and mutilation. Webster's Dictionary defines maiming as follows: "to deprive of the use of some necessary part of the body". It further defines mutilation as follows:

> "to cut off or damage a limb or other important part of (a person or animal)." (emphasis added) Webster's New World Dictionary

Can it be seriously argued that the reasonable construction of this statute was not intended to encompass what the facts clearly demonstrate is animal (canine) cruelty!

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[3] Plaintiff's Affidavit, ¶16.

Moreover, contrary to the rule at common law penal statutes are no longer to be strictly construed. The provisions must be read to promote justice and promote the objects of the law. 97 Am Jur 2d §203, p. 161. The undisputed expert testimony from practicing veterinarians, academics and the New York Humane Society is clearly to the effect that tail docking (amputation, mutilation) causes extreme pain and imposes serious medical risk. The national AVMA supports this conclusion.

Defendants submit that this clear animal cruelty should not be within the gravamen of the law because "tail docking" is not expressly within the four corners of the statute. It is now well settled that the:

> "fact that statute can be applied in situations not expressly anticipated [by the legislature] does not demonstrate ambiguity; it demonstrates breadth." PGA Tour Inc. v. Martin, 69 USLW 4367 (U.S. Sup. Ct. 2001); see also, Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 212 (1998); Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S.4 (1985).

Defendants rely on a City Court decision in Jefferson County, People v. Rogers, 183 Misc.2d 538, 703 N.Y.S.2d 891 (City Ct. 2000). The decision, notwithstanding its lower court status, is clearly unpersuasive. The decision fails to indicate submission of the type of expert testimony which is now before this Court, i.e., affidavits and AVMA resolution documenting animal cruelty by mutilation. Moreover, the standards of a criminal prosecution, as in Rogers, are not those by which this Court is governed.

Oliver Wendell Holmes, Jr., in his famous treatise, has directed the judiciary to the path in which it is to permit society to grow and evolve. Professor Holmes stated, in pertinent part, as follows:

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed.
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> * * *
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> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles . . . It will become entirely consistent only when it ceases to grow. (emphasis added) Holmes, The Common Law, Little Brown & Co. (1938) at pp. 1, 36.

This Court must necessarily construe the provisions of §353 of the Agriculture and Markets Law. In addition to the foregoing analysis and case law guidance from the cited federal sources, the New York legislature has provided assistance in this judicial task. It is manifest that §353 is a remedial statute designed to promote humanitarian ends consistent with the present state of societal values.

McKinney's Statutes, §321, directs in pertinent part as follows:

> ". . . Remedial statutes meet with judicial approval and are liberally construed to spread their beneficial results as widely as possible . . . and to promote justice."

See also, Machinski v. Ford Motor Co., 277 App.Div. 634, 102 N.Y.S.2d 208, 213 (3d Dept. 1951). The interpretation and construction of §353 contended for by Defendants is at variance with every basic rule of statutory construction.

POINT II

THE ARBITRARY AND CAPRICIOUS ACTIONS OF DEFENDANTS WARRANT JUDICIAL INTERVENTION

The interim decision of this Court dated January 4, 2001 granted Plaintiff leave to replead allegations of discriminatory and arbitrary and capricious actions on the part of Defendants. The Amended Complaint served pursuant thereto sets forth clear factual allegations of said arbitrary and capricious actions. The Plaintiff's affidavit in opposition and the unrefuted allegations of the Amended Complaint demonstrate same. See particularly ¶¶25-27 thereof, which are based upon the documents of the AKC. AKC argues that Plaintiff has no "legally protected interest in his dog winning a Brittany breed competition[4] (emphasis added). Plaintiff does not dispute same, and seeks only to compete on a non-arbitrary, capricious and discriminatory basis, without penalty. The facts confirm the arbitrary AKC position on tail docking: The disparate irrational standard on docking with respect to the Brittany, the Welsh Springer Spaniel, the English Pointer, the German Shorthaired Pointer, as with other sporting dogs, set forth in the AKC publication are all reflective of an arbitrary and capricious policy by the Defendants.

[4] pp. 10-11 AKC Memorandum.

The undisputed expert factual presentation confirms that there is not the slightest justification for any tail docking, except cosmetics custom, and probably economics. The rationale submitted by ABC executive Trimble and retired veterinarian Theilen, have been demonstrated to be palpably spurious.

AKC counsel argues at p. 11 of his memorandum, without citation to that effect, that "arbitrary and capricious" relates only to governmental action, continually raising the red herrings of equal protection and separation of powers. The standard of arbitrary and capricious is certainly not one limited to governmental action. See, Miller v. United Welfare Fund, 72 F.3d 1066, 1072 (2d Cir. 1995).

POINT III

THIS COURT MAY INTERVENE IN THE PUBLIC PROCEDURES OF A MONOPOLY WHICH IS ALLEGEDLY NOT-FOR-PROFIT

Defendants argue that, as private not-for-profit corporations, they may in essence do as they please. They submit further that mutilating a canine by sanctioning a standard which mandates amputating its tail somehow "promote[s] the integrity of the sport of purebred dog breeding and shows", is "used by breeders to guide them . . . to breed better quality dogs" and encourages "breeding to an ideal type." It defies logic and the submitted expert opinions to conceive that post-natal amputation can possibly achieve such results. If there were the slightest credence to this spurious argument, it would not have been necessary for nearly a century to continue such amputation; at this late date, the so-called breeding would have produced the Brittany with a naturally bobbed tail.

It has not been denied that AKC is a multi-million dollar entity with millions in annual revenues, one which has a virtual monopoly over the purebred registration of dogs and dog showing. While as a general rule courts are reluctant to interfere in the internal affairs of private entities, such cannot be the case where, as here, (1) the entity is a nationwide monopoly controlling the purebred dog industry; (2) the entity promotes a national policy in derogation of law; (3) the monopoly permits an aggrieved party no other area of competition; and (4) its policy is condemned by the national American Veterinarian Medical Association.

In Martin v. PGA Tour, Inc., 994 F.Supp. 1242 (D. One 1998), the court intervened in the procedures of another multi-million dollar alleged not-for-profit entity, in order to compel compliance with a federal statute on disability. The United States Supreme Court, in affirming the Ninth Circuit in Martin, noted that the PGA did not challenge the *nisi prius* ruling that the PGA was not exempt as a private club.[5] Such is the case with the Defendants in the present action.

When an otherwise private entity through the exercise of its monopoly power impacts a significant segment of society, it takes on a fiduciary duty to the general public and is subject to judicial scrutiny. 76 Harv LR 983, 1037-1049, citing Falcone v. Middlesex County Medical Society, 34 N.J. 582, 170 A.2d 791 (Sup. Ct. 1961). Such is the case in the instant action. The ABC cites Freeman v. Sports Car Club of America, Inc., 51 F.2d 1358 (7th Cir. 1995) for the position that the plaintiff may compete elsewhere. In fact, the Seventh

[5] 69 USLW A 4370 (2001).

Circuit in Freeman noted that the defendant Club did not have monopolistic control; and plaintiff clearly had recourse to compete "elsewhere". Such also is not the case here.

POINT IV

DECLARATORY RELIEF IS WARRANTED IN THE CASE AT BAR

The Defendants both argue that Plaintiff has no standing to complain or seek declaratory relief. Defendants, in essence, maintain that no relief is available for a clear wrong, except for Plaintiff to mutilate his dog, inflict needless pain and risk prosecution by the district attorney. Even were the district attorney to decline prosecution in light of this action, the damage would be irreparable.

Defendants cite this Court to a plethora of cases, from Indiana, Texas and Ohio, none of which appear remotely dispositive of the present issue. However, certain New York precedent relied on by Defendants in fact supports Plaintiff's prayer for declaratory relief, as discussed *supra*.. Moreover, the inventory of cases cited by Defendants at no point involves a national multi-million dollar business monopoly as is the case with AKC and the PGA Tour sued by golfer Casey Martin. In Hatley v. American Quarterhorse Assoc., 552 F.2d 646 (5th Cir. 1977), an anti-trust case, the Court noted that the mundane issue of the horse's markings were within the discretion of the association since no question existed of violation of good morals or state law. The converse is true in the present action. Defendant AKC reaches the incongruous conclusion that to award declaratory relief to Plaintiff "would require the Court to make an aesthetic judgment as to the appearance of Brittanys."[6] Obviously, no such

[6] Memorandum, p. 21.

judgment is necessary, nor is one requested. ABC counsel, moreover, echoes this view and erroneously relies on Crouch v. National Ass'n. for Stock Car Racing, 845 F.2d 397 (2d Cir. 1988) as authority therefor. In Crouch, the Second Circuit similarly held that it would not interfere in an association decision regarding the conduct of one road car race. The Second Circuit further indicated that the principle of judicial non-interference in voluntary associations would not be applicable if, as is the case here with AKC, the not-for-profit entity "completely dominated the field" of commerce at issue, 845 F.2d at p. 400. Other New York authorities cited by Defendants are equally inapposite. Gerard v. State High School Athlete Assoc., 210 A.D.2d 938, 620 N.Y.S.2d 670 (4th Dept. 1994), involves a local high school athletic program with no evidence of acts of an arbitrary and capricious nature or an abuse of discretion. Such absence is not the case here. In Reed v. Littleton, 275 N.Y. 150 (1937), and N.Y. Foreign Trade Zone Operators v. SLA, 285 N.Y. 272 (1941), the Courts were confronted with efforts to restrain a public official or agency from enforcing a statute. Indeed, in N.Y. Foreign Trade, the Court would issue a declaratory judgment to interpret a statute. 285 N.Y. 276. Such is the only issue here. The Theilen affidavit, purporting to raise a factual issue on the question of cruelty, is patently frivolous and has been clearly repudiated by his own organization (AVMA) and outside experts.

Defendants together raise the multiple spectre of civil rights, equal protection, statutory discrimination, separation of powers, private right of action and infringement of prosecutorial discretion; and then perfunctorily proceed to deny Plaintiff any right to relief

under such principles. Defendants misconstrue, or at least, are unwilling to take cognizance of the substance of Plaintiff's claim.

Our Courts are vested with the discretionary power under CPLR §3001 to issue declaratory relief in order to stabilize societal relations of a legal nature and eliminate uncertainty as to present or future obligations. See Saunders v. State, 129 Misc.2d 45, 492 N.Y.S.2d 510, 513 (Sup. Ct. Nass. 1985). In Saunders, the court issued declaratory relief notwithstanding the living will proponent was not hospitalized, although quite ill. Plaintiff's situation, although not life and death, is also substantially ripe for determination.

The essential purpose of the declaratory judgment statute is to enable responsible persons who seek to comply with uncertain situations under the law to act without regard to the perilous implications of said law. Saunders v. State, *ibid.* at p. 513. See also the learned exposition by the Court of Appeals on declaratory relief in N.Y. Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527 (1977), where the Court noted the discretionary nature of the remedy and that such relief is appropriate where, as here, legal redress is essential. 42 N.Y.2d at pp. 530-531. The Court must consider the "realities of life." Defendants seek to deny the practical reality and effect of its Brittany breed standard. See Indium Corp. of America v. Semi-Alloys, Inc., 591 F.Supp. 608, 612 (N.D.N.Y. 1984), where the Court noted that there is no hard and fast rule as to whether a case and controversy exists, there always being a question of degree in light of the "realities." 591 F.Supp. at 612. Defendants would have this Court plainly ignore the "realities" and compel Plaintiff to perform vain, futile cruel

and illegal acts in order to have a basis for legal redress. See also, Matter of Storar, 52 N.Y.2d 363 (1981).

In Bunis v. Conway, 17 A.D.2d 207, 234 N.Y.S.2d 435 (4th Dept. 1962), the Court granted declaratory relief to a bookseller to determine if the contemplated book sale violated the Penal Law; he was not required to sell the book and incur the risk of prosecution. Plaintiff seeks no more in the case at bar.

POINT V

PLAINTIFF DOES NOT SEEK COURT IMPRIMATUR FOR BREED STANDARDS, BUT ONLY FAIR AND IMPARTIAL TREATMENT

The Defendants, by virtue of their alleged non-profit sporting status attempt to insulate themselves from an individual seeking to obviate arbitrary, capricious, arcane and inhumane policies. Defendants further appear to argue that "private sporting associations" should be granted some form of immunity under law for their improprieties. Perhaps that may have been the case when August Belmont caused the AKC to be formed in 1884, but the "realities" warrant a different conclusion in the twenty-first century. The courts have properly gone where none have gone before in order to grant relief. Private golf clubs are no longer insulated islands of discrimination. The PGA golf tour, a bastion of conservatism, has been shown that it too must act responsibly and fairly. Sporting associations are no longer beyond the law. The AKC is a multi-million dollar monopoly employing a multitude and expending a multitude. It has a fiduciary duty to the public at large not to promote inhumane and illegal practices.

Defendants' reliance on New York State Soccer Football Ass'n. v. United States Soccer Football Ass'n, 18 Misc.2d 112, 181 N.Y.S.2d 964 (Sup. Queens, 1958) is misplaced. First, unlike the instant action, Plaintiff there failed to exhaust or utilize any existing remedies. 181 N.Y.S.2d 970. Second, the plaintiff, also unlike here, was not subject to possible criminal prosecution. Defendants' other citations in this point are equally inapposite. See, Thornton v. The American Kennel Club, Inc., 182 A.D.2d 358, 585 N.Y.S.2d 694 (1st Dept. 1992).

Jessup v. The American Kennel Club, 61 F.Supp. 2d 5 (S.D.N.Y. 1999); Abbott v. Harris Publications, Inc., et al., 2000 U.S. Dist. Lexis 9384 (S.D.N.Y. 2000); Drach v. American Kennel Club, Inc., 1995 U.S. App. Lexis 9712 (9th Cir. 1995) have been cited or attached merely because AKC was a party. They scarcely have any bearing on the issues before this Court. Plaintiff, here, has clearly made a showing of discriminatory and "arbitrary and capricious conduct" on the part of AKC. The private sporting club monolith has a legal obligation in the twenty-first century. There is clear evidence here of substantial wrongdoing on the part of AKC, certainly misfeasance, even if not malfeasance. Jackson v. American Yorkshire Club, 340 F.Supp. 628 (N.D. Iowa 1971) is a membership suspension case, raising absolutely none of the penal law and discrimination issues here present; any brief comment on the standards for pigs is purely *dicta* and certainly not relevant to the statute before this Court. There is no reasonable factual dispute here, only a question of law ripe for declaratory relief.

Defendants are Principal Actors in Violation of Law

Defendant AKC argues (Christensen Affidavit, ¶¶10, 22) that since it does not itself perform the act of tail docking, no cause of action is stated. Certainly public policy can not permit a national monopoly to encourage, instigate and control a policy in derogation of a state remedial criminal statute, and, by reason thereof insulate its actions from judicial scrutiny and remedy. Where there is, as here, a wrong, there is certainly a remedy under law.

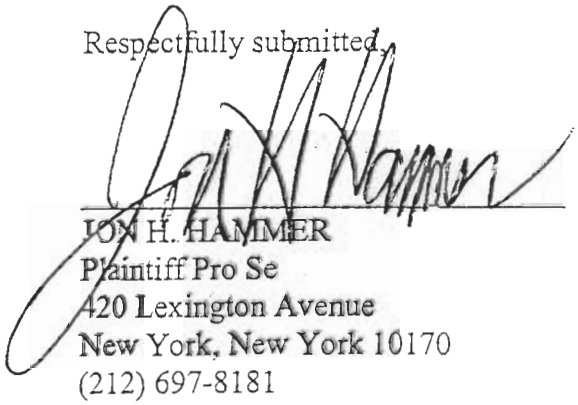
In order to be the responsible participant in a violation of law, whether it be a tortious act or otherwise, one need not be the actual entity which commits the unlawful act. One who "advises, encourages, procures, instigates or controls" is equally responsible, 74 Am Jur 2d, Torts, §66 at p. 676. A beneficial organization, if indeed the AKC alleged non-profit status can permit it to be so characterized, is liable for injuries brought about by its own procedures and by-laws. See Thompson v. Knights of Maccabees, 189 N.Y. 294 (1907); see also Steinberg v. Goldstein, 51 Misc.2d 825, 274 N.Y.S.2d 46 (Sup. Ct. Kings 1966), *aff'd.* 27 A.D.2d 965, 279 N.Y.S.2d 242 (3d Dept. 1967). Steinberg, although finding no liability on the facts in a civil assault case, reiterates the principle of liability on the part of one who acts "in some way [to] command, authorize, justify or approve the act." 274 N.Y.S.2d at p. 48. Such is presently the case with respect to the instant Defendants. The remedial criminal statute here at issue establishes a public policy which the Defendants may not, in effect, be permitted to emasculate by their assertions of immunity.

Conclusion

For the foregoing reasons and those set forth in the accompanying affidavits submitted by Plaintiff (with exhibits annexed), the motions of the Defendants should be, in all respects, denied and Plaintiff should be granted other relief as the Court deems just and proper, including granting the relief sought by the Amended Complaint.

Dated: New York, New York
July 12, 2001

Respectfully submitted,



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