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### Malaczynski v. Wittmann

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<b>Malaczynski v Wittmann</b>
2022 NY Slip Op 30941(U)
April 5, 2022
Civil Court of the City of New York, Queens County
Docket Number: Index No. L&T 66592/19
Judge: Clinton J. Guthrie
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF QUEENS: HOUSING PART E

-----X  
BOGUSLAW MALACZYNSKI,

Petitioner,

-against-

CHARLES WITTMANN, EMILIADIA  
HANSEN,

Respondents.  
-----X

Index No. L&T 66592/19

**DECISION/ORDER  
AFTER HEARING UPON  
MOTION**

Present:

Hon. CLINTON J. GUTHRIE  
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner’s motion to declare the hardship declarations invalid, for a status conference, and for amendment of the warrant of eviction:

<b>Papers</b>	<b>Numbered</b>
Notice of Motion & Affidavit/Exhibits Annexed.....	<u>1 (NYSCEF #3-7)</u>
Affirmation in Opposition & Affidavits/Exhibits Annexed.....	<u>2 (NYSCEF #8)</u>
Hearing Exhibits (1, A-B).....	<u>3-5</u>

Upon the foregoing cited papers and the hearing conducted on multiple dates (November 19, 2021, December 10, 2021, January 7, 2022, and February 4, 2022), the decision and order on petitioner’s motion is as follows.

PROCEDURAL HISTORY

The court refers to the Procedural History in this court’s November 17, 2021

Decision/Order.<sup>1</sup> By that Decision/Order, the court granted petitioner's instant motion to the extent of deeming the "conference" requirements under the applicable law and administrative orders satisfied and awarding a hearing on the validity of respondents' hardship claims. The hearing was conducted on four dates (referenced above) between November 19, 2021 through February 4, 2022. Official Polish court interpreters were present for all testimony. Prior to the February 4, 2022 court date, respondents, through counsel, filed an order to show cause to stay execution of the warrant after a marshal's notice of eviction was served. By Decision/Order of the same date (February 4, 2022), the court granted the order to show cause to the extent of quashing the marshal's notice and staying execution of the warrant pending the issuance of an order resolving the instant motion. Both sides rested for the purposes of the hearing on the same date and decision was reserved.

#### HEARING

##### I. November 19, 2021 testimony.

Petitioner called two witnesses, the respondents Emiliadia Hansen and Charles Wittmann. Respondents' attorneys cross-examined both witnesses, but respondents called no witnesses. Ms. Hansen testified first. Ms. Hansen testified to the following. She has lived at the subject premises since September 2018 and lives there with Mr. Wittmann, her partner. She rented the apartment with Mr. Wittmann, and at the time of the rental, she was working as an event coordinator and Mr. Wittmann was working as an energy salesman and waiter. When asked whether their jobs changed in March 2020, Ms. Hansen testified that she was laid off as a result of the COVID-19 pandemic and that Mr. Wittmann was laid off from both of his jobs (though she could not recall precisely

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<sup>1</sup> Reported at 73 Misc 3d 849 [Civ Ct, Queens County 2021].

when he was laid off).

Next, Ms. Hansen was questioned about her tax returns. She testified that neither she nor Mr. Wittmann filed tax returns in 2018. In 2019, she filed a tax return, but Mr. Wittmann did not. When asked if her job as an event coordinator was paid by check, she responded that it was. However, she testified that she did not know if Mr. Wittmann was paid by check. Other than work income for her and Mr. Wittmann, Ms. Hansen further testified that she had no income between September 2018 to March 2020. When asked if she and Mr. Wittmann maintained checking or savings accounts during that period (September 2018-March 2020), Ms. Hansen testified that she last had a Chase account that closed in 2014. She also testified that she and Mr. Wittmann do not share financial information with each other and that they keep their finances separate.

Next, petitioner introduced its Exhibit 1, which Ms. Hansen recognized as a copy of her 2019 federal tax return. After Ms. Hansen testified as to the filing of the original return and the tax return was admitted as petitioner's Exhibit 1. Certain contents of the tax return were then acknowledged by Ms. Hansen, including a reported income of \$35,263.00 in 2019. When asked about the inclusion of Mr. Wittmann as a dependent on the tax return, Ms. Hansen testified that she was the head of household and Mr. Wittmann did not make enough income to file taxes. Ms. Hansen explained, upon a further question invoking her earlier testimony about not sharing financial information with Mr. Wittmann, that while they communicate about finances.

Ms. Hansen next testified to the nature of her work and her deductions while she was working as an event coordinator. She stated that she did not have typical hours and that they varied week to week. Her deductions in 2019 were for social security taxes, federal taxes, state tax, and paid leave tax. She stated that she paid out-of-pocket for health insurance and that it cost \$100 per

month. Ms. Hansen then testified that she then (at the time of the hearing) had Medicaid and had it for the past year.

Next, Ms. Hansen was asked about her expenses in 2019. She stated that she paid \$1,100.00 for rent. She did not pay utilities but was responsible for \$40 per month during the summer for air-conditioning. She also stated that she paid for internet in 2019 and also at the time of the hearing. She owned a car, but the car (a 2005 Ford Explorer) was paid off prior to 2019. She also confirmed that she paid insurance on the car in 2019 and at the time of the hearing, with the cost of insurance at \$500.00 in 2019. Ms. Hansen then testified about medical bills for her mother, who was treated for leukemia. She stated that she paid between \$5,000.00 and \$10,000.00 towards those bills in 2019. However, she stated that she had not made regular payments towards these bills since March 2020, paying less than \$2,000.00. Ms. Hansen also testified to recurring expenses for a cell phone, dentistry, internet, and physical therapy in 2019; when questioned, though, she stated that she was not paying similar amounts for her expenses since she no longer had the finances to do so (paying, as she described it, "\$25 here, \$50 there").

Petitioner's attorney then asked Ms. Hansen general questions about her financial situation before and after the pandemic. She denied having financial difficulties before the pandemic but stated that she did have financial difficulties at the time of the pandemic. She stated that she was furloughed from her job in March 2020.

Next, petitioner's attorney inquired about rent payments. Ms. Hansen stated that she stopped paying rent at some point. After some follow-up questions, Ms. Hansen identified the time as September 2019, after she received the "first eviction notice." Ms. Hansen then described finding a new apartment right before the pandemic but being ultimately denied the apartment. She

also explained that she had continuously tried to find a new apartment, but that she could find no affordable home.

Ms. Hansen was again asked about her employment. She stated that she had not been employed since the pandemic started and had no other income from non-governmental sources. She also stated that Mr. Wittmann had not been employed since March 2020. Ms. Hansen stated that she started receiving unemployment benefits in March 2020, and she was on unemployment until July 2021. The amount that she received was \$467.00 (gross) per week. She explained that her benefits ended in July 2021 because someone was using her social security number in Michigan and no benefits had been paid since then, even though she believed that she was eligible for additional benefits.

Ms. Hansen then testified that she applied for food stamps in 2020 but was denied. She acknowledged receiving federal stimulus checks in the amounts of \$1,200.00, \$600.00, and \$1,400.00. When asked if Mr. Wittmann had received stimulus checks, Ms. Hansen testified that he had not. Ms. Hansen stated that all of her stimulus checks went towards her mother's chemotherapy. After confirming her unemployment benefit amount again and confirming that she understood the amount to include enhanced federal benefits, Ms. Hansen acknowledged that she had applied for public assistance (PA) when she applied for food stamps but was also denied.

Subsequently, Ms. Hansen was asked about her health conditions. She stated that she has a heart murmur and that she has received medical care for it in the past. Asked how the heart murmur affects her on a day-to-day basis, Ms. Hansen replied that it affects, mobility, breathing, anxiety, and makes her heart "pitter-patter." She stated that she takes vitamins suggested by her doctor to treat the condition. She also stated that she has gone to physical therapy. When asked how the

heart murmur specifically affected her employment, Ms. Hansen stated that it did not limit the kinds of work that she can do but that she had received accommodations from her employer in the past, such as being relieved from setup while working as an event coordinator when she would be too shaky. When asked about any special precautions that she takes for the heart murmur, she stated that she sees a heart doctor and tries to avoid stress.

II. December 10, 2021 testimony.

Ms. Hansen resumed her testimony. She reiterated her heart murmur condition, then testified that she receives \$408.00 per week in unemployment benefits after taxes. She also confirmed again that her unemployment benefits stopped in July 2021 due to someone attempting to use her social security number in Michigan. Petitioner's attorney then asked Ms. Hansen about a series of companies and her involvement with them. The first company was Americare Inc. Ms. Hansen testified that she was familiar with it and had started training to become a home health aide with them. However, she stated that she never completed the training and was not paid by the company. The second company was Model Bartenders Inc. Ms. Hansen confirmed that she had heard of the company and had done an internship with them in 2018. She also acknowledged corresponding with the company in 2021 but that she had received a rejection letter from them. The next company was Chedeville Inc., d/b/a Sterling Affair. Ms. Hansen confirmed that she was familiar with the company and had done events with them pre-pandemic. She stated that she had reached out to them for employment after March 2020 but had only received rejection letters. Finally, Ms. Hansen was asked about Personal Touch catering company. She confirmed that she had worked with them pre-pandemic and had also received rejection letters from them. Asked if she was paid by any of these companies, Ms. Hansen replied in the negative.



Ms. Hansen next testified that she had not had any savings or checking/savings accounts since March 2020. Petitioner's attorney then asked a series of questions about Mr. Wittmann's income. Ms. Hansen stated that she could not recall Mr. Wittmann's income since 2019. She also did not recall details about energy salesman, waiter, and temporary jobs that Mr. Wittmann may have had. Ms. Hansen was asked whether any of Mr. Wittmann's income appeared on her 2019 tax return and she stated that it did not. Ms. Hansen also denied receiving any income from third parties after March 2020.

Petitioner's attorney then questioned Ms. Hansen about a document that was not admitted into evidence. Ms. Hansen identified it as a photocopy of a piece of mail but did not recall receiving it. Ms. Hansen also testified that she did not know the contents of the mailing. Next, Ms. Hansen was asked if she filed 2020 taxes. She testified that she had not because she did not have sufficient finances to hire an accountant and did not have technical knowledge of computers that would have allowed her to file on her own. Ms. Hansen also confirmed, upon questioning, that Mr. Wittmann relied on her for more than half his support in 2020.

Ms. Hansen then testified about a residence in Wantagh, New York where Mr. Wittmann's mother lives. Ms. Hansen denied living in the Wantagh residence. She explained that it was not habitable because Mr. Wittmann's mother is a hoarder and there is not enough room to sleep in the bedrooms. When asked if she had ever stayed overnight, Ms. Hansen confirmed that she had and that the most recent time was at Thanksgiving in 2021 (days earlier). Ms. Hansen testified that Mr. Wittmann had not lived at the Wantagh residence in 15 years, though she acknowledged that he gets mail there.

Ms. Hansen was then asked a series of questions about rejection letters and mail from

various companies. An exhibit of combined documents was shown to Ms. Hansen and she recognized as photocopies of envelopes from various entities but she did not recall receiving them in the mail, with the exception of one, from Sterling Affair. She testified that the document looked like a rejection letter. The exhibit was not admitted into evidence.

Respondents' attorneys then cross-examined Ms. Hansen. Ms. Hansen was asked if she stopped working in March 2020. She testified that she had and that the company that employed her, Lovin' Oven, notified her by mail that she was furloughed because the company was shutting down. Ms. Hansen testified that she applied for unemployment benefits after she was furloughed. She testified about the unemployment application process and then she was shown respondents' Exhibit A, which she identified as New York State Department of Labor record of her unemployment benefit payment history. After additional questioning to lay its foundation, Exhibit A was admitted.

Ms. Hansen was then asked if her income from unemployment was less than her income prior to the pandemic. She responded in the affirmative. She was also asked about the three (3) stimulus checks that she received. She responded that she gave most of the money from the stimulus checks to her mother and used some to pay bills. When asked if she had been able to move to another apartment, Ms. Hansen responded that she had not, and that she had found the prospect of moving challenging due to having no reliable income.

Finally, on cross-examination, Ms. Hansen was asked about her heart murmur. She was asked if her heart murmur was considered a "heart condition," and replied that it was. She testified that she was not taking pharmaceutical medications for her condition, but instead treated it with natural herbs and vitamins. Upon respondents' attorney's request, the court then took judicial

notice of the CDC (Centers for Disease Control and Prevention) “People With Certain Medical Conditions” advisory sheet, which was marked as Exhibit B.

Finally, on rebuttal, Ms. Hansen was asked what she was living on (in terms of income). She replied that she was “existing,” and relying on pantries for food and used unemployment money for laundry, cell phones, and other bills. When asked where the unemployment money had come from since benefits were cut off in July 2021, Ms. Hansen testified about making payment plans and using \$500.00 for a 3-month period.

Charles Wittmann was then called to testify as petitioner’s second witness. He first testified that Ms. Hansen is his partner and that they had been together for approximately 15 years. He testified that he was present for Ms. Hansen’s testimony and that he did not disagree with any of her answers. He then testified that he last worked in March 2020. He worked that time as an independent contractor, part-time. He could not recall the name or names of the last companies he worked for. When asked if he had memory recall issues, he testified that he had high blood pressure and other issues affecting his health. While he confirmed that he was aware of a memory recall issue, he did not recall how long it affected him. When asked what kind of work he did, Mr. Wittmann testified that he did door-to-door energy sales and worked as a server on a temp basis. When asked how much he earned in 2019, Mr. Wittmann testified that it was between \$500-\$600 per month.

Upon further questioning, Mr. Wittmann testified that the names of two companies where he worked as an energy salesman were 212 Solutions and Platinum. Mr. Wittmann was then asked about an affidavit bearing his name from January 2021. While Mr. Wittmann recognized his signature on the affidavit, he did not recall signing it. When asked about an assertion in the

affidavit that he was laid off in November 2019 and how to reconcile this with his earlier testimony, Mr. Wittmann testified that his jobs were sporadic and “practically non-existent” as of the date of the affidavit, and that he had stopped working as an energy salesman in November 2019. When asked about a statement in the affidavit that his income was \$350-\$400 per week and how he reconciled this with his testimony that he made less than \$6,000 per year, he explained that the \$350-\$400 amount was an “approximation of 2 combined potentials.”

II. January 7, 2022 testimony.

Mr. Wittmann’s testimony continued. When asked again about his precise income in 2019, he testified that the \$350-\$400 per week affidavit statement was “speculative” and that his actual income fluctuated but was less than \$6,000 for the year. When asked how much less than \$6,000 his income was, Mr. Wittmann testified that he could not recall the exact amount. After confirming that he was listed as a dependent on Ms. Hansen’s tax return (Exhibit 1), Mr. Wittmann testified that he had not had income since January 2020. He explained that he was treating health issues and could not seek full-time employment. When asked when he had last filed a tax return, Mr. Wittmann testified that he could not recall and that it had been a long time. He confirmed that he had not filed a tax return in 2020 or 2021. When asked whether anyone other than Ms. Hansen supports him, he testified that he gets contributions from friends and family. When asked about these contributions, Mr. Wittmann testified that he had received an \$80 loan, but that the rest of the contributions were for \$20-\$30 and that none came on a regular basis. Mr. Wittmann testified that he had no savings before January 2020, and that he had not worked in 2021.

Mr. Wittmann was asked whether he owns a car. He testified that he owns a 2005 Ford Explorer, and he had no car loan. He did, however, confirm that he pays insurance on the car and

that the amount is \$120 per month. He testified that his sister helps him with the insurance payments, and that he considers her help a “loan.” Further questions about car expenses were asked, and Mr. Wittmann responded that he paid for them with help from his sister or from friends. Mr. Wittmann was then asked about medical insurance. He testified that he was on Medicaid. When asked if he was on Medicaid prior to January 2020, he testified that there was a “gap” and that he was previously on Blue Cross insurance.

Next, Mr. Wittmann was asked about work activities since January 2020. He denied doing any volunteer work, internships, commission work, or unpaid trainings. Mr. Wittmann testified that he had started a corporation approximately 30 years before, but that it “never panned out.” Mr. Wittmann was asked about appearances on YouTube. He testified that he recorded more than 50 recruitment webinars for a company called Fund My Home. He also testified that he was not compensated for his work and that the company was a “Ponzi scheme” that was being investigated by the state Department of State. Nonetheless, Mr. Wittmann confirmed that he had given himself the unofficial title of vice president for the company. When asked when he ended participation with the company, he first testified that it was two-and-a-half years before, but upon further questioning, he had ended a year to a year-and-a-half before.

Mr. Wittmann was then asked about a company called 4 Quantum Monetary Resources LLC. He testified that this was a name he had formulated with someone as a “speculative business.” After denying that he had any formal title or role with the company, he testified that his partner in the company is Jason, though he could not recall Jason’s last name. He also testified that a person named Joe is a potential partner for the company, but also could not recall Joe’s last name. Mr. Wittmann was asked about an individual named Carlos Beratini, who he confirmed is the CEO

of Fund My Home. He was also asked about a company named Gianoplus Consortia. He confirmed that he was introduced to someone associated with the company in the course of networking and trying to find clients, but he denied that he had ever held a title with the company.

Finally, Mr. Wittmann was asked about his Facebook page. Mr. Wittmann was shown a document that was not admitted into evidence and confirmed that it contained a photo of his mother's former dog. He testified that he did not know if the document was a representation of his Facebook page, as he had lost access to it. No further testimony was taken on January 7, 2022 and both sides rested without any further testimony on February 4, 2022.

#### DISCUSSION & CONCLUSION

The court first denies petitioner's request to amend the warrant of eviction as moot. The relevant provision of L 2021, ch 417 (Part C, Subpart A, Sec. 6) addressing warrant requirements expired on January 15, 2022. Accordingly, no amendment is necessary for the warrant, issued in November 2019, to be effective.

With regard to the validity of respondents' hardship declarations, the court notes at the outset that while the presumptive stay of execution of the warrant imposed by the filing of the hardship declarations has expired (also as of January 15, 2022), the validity of the declarations is not a moot issue since L 2021, ch 417, Part C, Subpart A, Sec. 9, which is not expired, creates a rebuttable presumption, "[u]nless a court determines a tenant's hardship claim is invalid[.]" that a tenant is experiencing a financial hardship "for the purposes of establishing a defense under chapter 127 of the laws of 2020 [Tenant Safe Harbor Act], an executive order of the governor or any other local or state law, order or regulation restricting the eviction of a tenant suffering from a financial hardship during or due to COVID-19[.]" In assessing the hearing testimony and evidence, the court

holds that petitioner did not establish that respondents' hardship claims are invalid.

As defined by the statute (L 2021, ch 417), "hardship" means either:

"(a) an inability to pay rent or other financial obligations due in full pursuant to a lease or rental agreement or obtain alternative suitable permanent housing due to one or more of the following reasons where public assistance, including unemployment insurance, pandemic unemployment assistance, disability insurance, or paid family leave, does not fully make up for the loss of household income or increase expenses:

- (i) a significant loss of household income during the COVID-19 pandemic; or
- (ii) increase in necessary out-of-pocket expenses related to performance of essential work or related to health impacts during the COVID-19 pandemic; or
- (iii) childcare responsibilities or responsibilities to care for an elderly, disabled, or sick family member during the COVID-19 pandemic have negatively affected the ability of the tenant or a household member to obtain meaningful employment or earn income; or
- (iv) increased necessary out-of-pocket expenses; or
- (v) moving expenses and related difficulty in securing alternative housing make it a hardship to relocate to another residence during the COVID-19 pandemic; or
- (vi) other circumstances related to the COVID-19 pandemic have significantly reduced household income or significantly increased expenses; or

(b) an inability to vacate the premises and move into new permanent housing because doing so would pose a significant risk of severe illness or death from COVID-19 that a tenant or household member would face due to being over the age of sixty-five, having a disability or having an underlying medical condition, which may include but is not limited to being immunocompromised." L 2021, ch 417, Part C, Subpart A, Sec. 1, § 5.

Ms. Hansen's hardship declaration form checks both "A" and "B" boxes, which correspond with the "a" and "b" subsections of the hardship definition. Mr. Wittmann's hardship declaration form checks only the "A" box. Starting with the first component of the "A" box, Ms. Hansen testified to a substantial loss of income during the pandemic, which was substantiated by a pre-pandemic tax return and proof of her unemployment benefits after the beginning of the pandemic. Ms. Hansen's gross income in her 2019 tax return was \$35,263.00. Ms. Hansen credibly testified to a loss of employment coinciding with the onset of the pandemic in March 2020. The

unemployment benefits record admitted into evidence shows that Ms. Hansen became eligible for unemployment benefits on March 30, 2020, and that her weekly benefit was \$467.00. Although the court does not fully credit Ms. Hansen's explanation for the cessation of benefits in July 2021, the yearly gross unemployment benefits amount (based on 52 weeks) totaled \$24,284.00. Ms. Hansen testified (and petitioner did not demonstrate otherwise via any rebuttal) that she had no other income or benefits aside from Medicaid health insurance and stimulus checks totaling \$3,200.00. Therefore, the unemployment benefits and stimulus checks that Ms. Hansen received did not "fully make up for" the substantial loss of income that she experienced during the COVID-19 pandemic. Moreover, while petitioner's attorney attempted to suggest, via the copies of letters from various employers about which he questioned Ms. Hansen at the hearing, that she may have had undisclosed income, nothing credible to that end was established and no witness was called to refute her testimony.

As for the Option "B" basis for hardship, Ms. Hansen testified to having a heart murmur and how the condition affects her. In the absence of any medical documentation or testimony from any medical clinician, however, the court does not find, on the hearing record, that the condition potentially poses a "significant risk of severe illness or death" from COVID-19 such that Ms. Hansen would be unable to vacate the subject premises and move into new permanent housing. The CDC advisory sheet presented that the court took judicial notice of at trial only refers to "heart failure, coronary artery disease, cardiomyopathies, and possibly high blood pressure" as heart conditions that may lead to severe illness from COVID-19. Without additional evidence to demonstrate that Ms. Hansen's put her at greater risk from a COVID-19 infection, the court does not find that the Option "B" basis for hardship exists.



Turning to Mr. Wittmann, his testimony was that his loss of employment and income had occurred prior to the onset of the pandemic, in January 2020. Nonetheless, the statute refers to “household income.” Both Ms. Hansen and Mr. Wittmann testified that they were partners and lived together. Petitioner did not elicit any testimony or set forth any evidence disputing that Ms. Hansen and Mr. Wittmann were a single household. As Ms. Hansen’s income was the couple’s sole source of income when the pandemic began, her substantial loss of income was a loss of “household income” for Mr. Wittmann (and was not fully made up for by Ms. Hansen’s unemployment benefits and stimulus checks). While Mr. Wittmann did testify about contributions from friends and family for certain expenses, petitioner did not establish the amount of these contributions or that they made up for the loss of income. Finally, while Mr. Wittmann’s testimony about the recruitment webinars and other business-related activities that he engaged in strained credulity, petitioner nonetheless failed to present any witness or admissible evidence to demonstrate that Mr. Wittmann actually earned any income from these activities.

Having determined that petitioner did not establish that respondents’ hardship claims are invalid, the court grants petitioner leave to execute upon the warrant of eviction. The court has already determined that the conference requirements of Administrative Order (AO) 245/21 and L 2021, ch 417 were met, and the court deems petitioner’s motion to be one for execution upon a pre-COVID warrant pursuant to DRP-217. Respondents have now received the benefit of the statutory hardship declaration stays, as well as prior administrative stays and a stay pending the issuance of this Decision/Order. Petitioner was first granted a judgment against respondents in October 2019. In order for respondents to vacate with dignity, the court stays execution of the warrant though April 20, 2022. Upon default, petitioner shall be entitled to execute upon the warrant after service

of a marshal's notice of eviction. *See* RPAPL § 749(2). No pre-service of the marshal's notice is permitted pursuant to this Decision/Order. This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York  
April 5, 2022

  
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HON. CLINTON J. GUTHRIE, J.H.C.

To: Adam Fertig, Esq.  
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Ozone Park, NY 11417  
*Attorney for Petitioner*

SO ORDERED - HON. CLINTON J. GUTHRIE

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