SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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ELENA RUTH SASSOWER and DORIS L. SASSOWER, Individually and as Director and President, respectively, of the Center for Judicial Accountability, Inc., and CENTER FOR JUDICIAL ACCOUNTABILTY, INC., Acting *Pro Bono Publico*,

Index #10-12596

Justice Peter Fox Cohalan

Plaintiffs,

-against-

GANNETT COMPANY, INC., The Journal News, LoHud.com HENRY FREEMAN, CYNDEE ROYLE, BOB FREDERICKS, D. SCOTT FAUBEL, KEITH EDDINGS, DOES 1-10,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW

IN SUPPORT OF DISQUALIFICATION/DISCLOSURE, VACATUR, REARGUMENT/RENEWAL & OTHER RELIEF

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December 21, 2011

MEMORANDUM OF LAW

This memorandum of law is submitted in support of the relief sought by plaintiffs' accompanying notice of motion: most importantly, disqualification of the Court for demonstrated actual bias and interest and vacatur of its September 22, 2011 short-form order (Exhibit 20) [hereinafter "decision"] whether directly by reason of its disqualification or by way of the granting of reargument/renewal or vacatur for fraud and lack of jurisdiction.

As demonstrated by plaintiffs' analysis of the September 22, 2011 decision (Exhibit 23), no fair and impartial tribunal could render it as it flagrantly violates ALL cognizable legal standards and adjudicative principles to grant defendants relief to which they are not entitled, *as a matter of law*, and to deny plaintiffs relief to which the law – and mandatory rules of judicial conduct – absolutely entitle them. Such decision is, in every respect, a knowing and deliberate fraud by the Court and "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause" of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Should the Court not disqualify itself and vacate its September 22, 2011 decision based on plaintiffs' analysis thereof, it must – consistent with its ethical duty – disclose the facts bearing upon the appearance and actuality of its bias and interest.

THIS MOTION MEETS THE STANDARD FOR JUDICIAL DISQUALIFICATION & VACATUR OF THE SEPTEMBER 22, 2011 DECISION – & IF SUCH ARE DENIED, THE COURT MUST ADDRESS THE FACTS AND LAW PRESENTED AND MAKE DISCLOSURE

The bedrock principle for a judge is judicial impartiality. Over 150 years ago, the New York Court of Appeals recognized that 'the first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality', *Oakley v. Aspinwall*, 3 N.Y. 547 (1850), quoted in *Scott v. Brooklyn Hospital*, 93 A.D.2d 577, 579 (2nd Dept. 1983). This standard of impartiality, both

in appearance and actuality is the hallmark of the Chief Administrator's Rules Governing Judicial Conduct (Part 100) – which, pursuant to Article VI, §§20 and 28(c) of the New York State Constitution, has constitutional force.[1]

§100.3E pertains to judicial disqualification and states in pertinent part:

> "(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably questioned, including but not limited to instances where: (a)(i) the judge has a personal bias or prejudice concerning a party...(d) the judge knows that the judge...(iii) has an interest that could be substantially affected by the proceding."

Judiciary Law §14 governs statutory disqualification for interest. In pertinent part, it states:

> "A judge shall not sit as such in, or take any part in the decision, of an action, claim, matter, motion or proceeding...in which he is interested..."

It is long-settled that a judge disqualified by statute is without jurisdiction to action and the proceedings before him are void, *Oakley v. Aspinwall, supra*, 549, *Wilcox v. Arcanum*, 210 NY 370, 377 (1914), *Casterella v. Casterella*, 65 AD2d 614 (2nd Dept. 1978), 1A Carmody-Wait 2d §3:94.

It is to ensure the impartiality of judicial proceedings that cases are required to be randomly assigned to judges.[2]

Although recusal on non-statutory grounds is "within the personal conscience of the court", a

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[1] NYS Constitution, Article VI, §20b: "Judges and justices of the courts specified in this subdivision [court of appeals, supreme court, court of claims, county court, surrogate's court, family court or court of New York City] shall also be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals.";

NYS Constitution, Article VI, §28(b): "The chief administrator, on behalf of the chief judge, shall supervise the administration and operation of the unified court system..."; . ; (c) The chief judge, after consultation with the administrative board, shall establish standards and administrative policies for general application throughout the state, which shall be submitted by the chief judge to the court of appeals, together with the recommendations, if any, of the administrative board. Such standards and administrative policies shall be promulgated after approval by the court of appeals."

[2] Cf., §202.3(b) of the Uniform Rules of the Supreme Court and the County Court. "[A]ssignment by random selection is mandatory", *Morfesis v. Wilk*, 138 AD2d 244, 248 (dissent)(1st Dept. 1988) Its purpose is "to prevent judge-shopping by lawyers and judge-steering by administrators", LEXSTAT 1-15 WEINSTEIN,

judge's denial of a motion to recuse will be reversed where the alleged "bias or prejudice or unworthy motive" is "shown to affect the result", *People v. Arthur Brown*, 141 AD2d 657 (2nd Dept. 1988), citing *People v. Moreno*, 70 NY2d 403, 405 (1987); *Matter of Rotwein*, 291 NY 116, 123 (1943); 32 New York Jurisprudence 44, *Janousek v. Janousek*, 108 AD2d 782, 785 (2nd Dept 1985): "The only explanation for the imposition of such a drastic remedy...is that...the court became influenced by a personal bias against defendant."

A judge who fails to disqualify himself upon a showing that his "unworthy motive" has "affect[ed] the result" and, based thereon, does not vacate such "result" is subject not only to reversal on appeal, but to removal proceedings:

> "*A single decision or judicial action, correct or not, which is established to have been based on improper motives and not upon a desire to do justice or to properly perform the duties of his office, will justify a removal...*", italics added by Appellate Division, First Department in *Matter of Capshaw*, 258 AD 470, 485 (1st Dept. 1940), quoting from *Matter of Droege*, 129 AD 866 (1st Dept. 1909).

In *Matter of Bolte*, 97 AD 551 (1st Dept. 1904), cited in the August 20, 1998 New York Law Journal column, "*Judicial Independence is Alive and Well*", by the then administrator and counsel of the New York State Commission on Judicial Conduct, Gerald Stern, the Appellate Division, First Department held:

> "A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for *willfully* making a wrong decision or an erroneous ruling, or for a reckless exercise of his judicial functions without regard to the rights of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of another..." (at 568, emphasis in the original).
>
> "...Favoritism in the performance of judicial duties constitutes corruption as disastrous in its consequence as if the judicial officer received and was moved by a bribe." (at 574).
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> §100.3F of the Chief Administrator's Rules Governing Judicial Conduct provides that where

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KORN & MILLER CPLR MANUAL§ 15.02.

a judge's "impartiality might reasonably be questioned" or he has an interest, he may:

> "disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation of the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

The Commission on Judicial Conduct's annual reports explicitly instruct:

> "All judges are required by the Rules of Judicial Conduct to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned."

According to the Commission in its brief before the New York Court of Appeals in Matter of *Edward J. Kiley*, (July 10, 1989, at p. 20),

> "It is cause for discipline for a judge to fail to disclose on the record or offer to disqualify under circumstances where his impartiality might reasonable (sic) be questioned."

Treatise authority holds:

> "The judge is ordinarily obliged to disclose to the parties those facts that would be relevant to the parties and their counsel in considering whether to file a disqualification motion", Flamm, Richard E., Judicial Disqualification: Recusal and Disqualification of Judges, p. 578, Little, Brown & Co., 1996.

Where a motion for judicial disqualification is made,

> "The factual basis for the motion must be stated with specificity – that is, for the moving party's allegations to warrant the requested relief, such allegations, when taken as true, must contain information that is definite as to time, place, persons, and circumstances. Before acting on a judicial disqualification motion, the challenged judge should carefully examine the allegations to determine whether the motion alleges specific, objective facts that, considered as a whole, would lead a reasonable person to believe that the court is biased, that the appearance of the court's impartiality is in doubt, or that a fair and impartial disposition did not occur' Flamm, Judicial Disqualification, pp. 572-3.

Adjudication of a motion for a court's disqualification must be guided by the same legal and evidentiary standards as govern adjudication of other motions. Where, as here, the motion details specific, supporting facts, the court, as any adversary, must respond to those facts, as likewise the

law presented relative thereto. To fail to do so would subvert the very purpose of resolving the 'reasonable questions' warranting disqualification.

Such is consistent with the "recusal reform" advocacy of the American Bar Association and such organizations as the Brennan Center for Justice, in collaboration with the national coalition Justice at Stake Campaign. Among their positions, "Enhanced Disclosure" and "Transparent and Reasoned Decision-Making", as to which they have explained:

> It is critically important – for litigants, for the courts, and for the public at large – that disqualification decisions offer transparent and reasoned decision-making. ...a failure to explain recusal decisions 'allows judges to avoid conscious grappling with the charges made against them' and 'offends not only a basic tenet of legal process, but also a basic tenet of liberal democracy – that officials must give public reasons for their actions in order for those actions to be legitimate.'[fn] Such a failure often makes it far more difficult for those reviewing a specific disqualification decision to understand the underlying rationale or facts, and denies other judges, justices, and courts both precedent for use in other cases and the chance to build on this precedent in developing a more refined body of disqualification jurisprudence.", "*Invigorating Judicial Disqualification: Ten Potential Reforms*", Judicature, Vol. 92, #1 (July-August 2008) – excerpted from its April 2008 report "*Fair Courts: Setting Recusal Standards*".

The imperative of giving reasons is set forth in *Nadle v. L.O. Realty Corp*, 286 AD2d 130, 735 NYS2d 1 (App. Div. 1st Dept. 2001) – approvingly cited by the Appellate Division, Second Department in *Hartford Fire Insurance Co. v. Cheever Development Corp*, 289 A.D.2d 292; 734 N.Y.S.2d 598 (2001):

> "'...we now take this opportunity to explain the basis for our insistence on the inclusion of the reasoning underlying a ruling. First of all, as the Third Department has had occasion to note:
>
> > Written memoranda assure the parties that the case was fully considered and resolved logically in accordance with the facts and law. Indeed, written memoranda may serve to convince a party that an appeal is unlikely to succeed or to assist this court when considering procedural and substantive issues when appealed.

(*Dworesky v. Dworesky*, 152 A.D. 2d 895, 896.) In addition to the potential

benefits to the litigants, the inclusion of the court's reasoning is necessary from a societal standpoint in order to assure the public that judicial decision making is reasoned rather than arbitrary.'". (*Nadle v. L.O. Realty*, underlining added).

The law is clear that "failing to respond to a fact attested to in the moving papers...will be deemed to admit it", Siegel, New York Practice, 281 (4th ed. 2005, p. 464), citing *Kuehne v. Nagel, Inc. v. Baiden*, 36 N.Y.2d 539 (1975), itself citing Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. "If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it'.

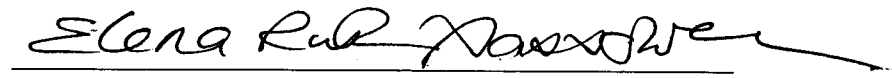
Moveover, "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant fats are contrary to those asserted by the party." Corpus Juris Secundum, Vol. 31A, §166 (1996 ed., p. 339).

This motion resoundingly meets the standard for this Court's disqualification. It documents, "specific, objective facts that, considered as a whole, would lead a reasonable person to believe that the court is biased, that the appearance of the court's impartiality is in doubt, [and] that a fair and impartial disposition did not occur." It demonstrates that the Court's September 22, 2011 decision is not just factually and legally insupportable, but is, in every respect, a fraud by the Court, requiring vacatur by reason thereof.

Such decision is *prima facie* evidence of pervasive actual bias – and so brazen as to suggest that the Court was propelled by interest. The actuality of bias and the appearance of interest, which this Court's September 22, 2011 decision makes impossible to ignore, furnishes grounds for renewal.

Should the Court not disqualify itself based on this motion, it must justify its September 22, 2011 decision by confronting and addressing, with specificity, the facts and law which the motion presents. Only by so doing can it demonstrate that there are no grounds on which its impartiality might "reasonably be questioned". In such circumstances, it must disclose facts bearing upon its

impartiality.



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Dated: December 21, 2011