SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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JOHN McFADDEN,

Appellate Term:
#2008-1427-WC
#2009-148-WC

-against-

(White Plains City Court: #SP-651/89 & SP-1474-2008)

DORIS L. SASSOWER,

ELENA SASSOWER,

Appellant.

----------x **NOTICE**

----------x **OF MOTION**

JOHN McFADDEN,

Appellate Term:
#2008-1433-WC
#2008-1428-WC

-against-

(White Plains City Court: #SP-1502/07)

ELENA SASSOWER,

Appellant.

---------- x

PLEASE TAKE NOTICE that upon the annexed affidavit of appellant *pro se* ELENA SASSOWER, sworn to on October 4, 2010, the exhibits annexed thereto, and upon all the papers and proceedings heretofore had herein, appellant ELENA SASSOWER will make a motion to the Appellate Division, Second Department at 45 Monroe Place, Brooklyn, New York 11201 on October 26, 2010 at 10:00 a.m., or as soon thereafter as the parties or their counsel may be heard, for an order:

1. granting appellant an appeal to this Court, by leave, if not by right, or alternatively, leave to appeal to the Court of Appeals, so as to afford appellate review of the Appellate Term's July 8, 2010 decision & order, purportedly by Justices Denise F. Molia and Angela G. Iannacci, denying, without reasons and with no disclosure, appellant's April 25, 2010 motion to disqualify them and, if denied, for disclosure;

2. referring the record of the above cases, including this motion, to authorities within the New York State judiciary charged with recommending, promulgating, and amending rules, procedures, and laws governing judicial disqualification, including the Chief Judge of the Court of Appeals, the Chief Administrative Judge, the Judicial Conference, the Administrative Board, the Judicial Institute, and the Judicial Institute on Professionalism in the Law – pursuant to §100.1 of the Chief Administrator's Rules Governing Judicial Conduct;

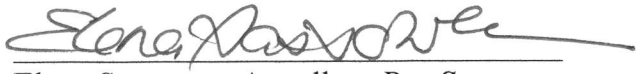
3. referring the record of the above cases, including this motion, to disciplinary and criminal authorities based on the evidence of corruption presented by appellant's April 25, 2010 disqualification motion and reinforced by the Appellate Term's July 8, 2010 decision & order – pursuant to §100.3D of the Chief Administrator's Rules Governing Judicial Conduct;

4. granting such other and further relief as may be just and proper, and, in particular, if the foregoing is denied, disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon the fairness and impartiality of this Court's justices.

Pursuant to CPLR §2214(b), answering papers, if any, are required to be served at least seven days prior to the October 26, 2010 return date.

Dated: October 4, 2010
New York, New York

Yours, etc.



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White Plains, New York 10606

New York State Attorney General Andrew M. Cuomo
Attorney for Non-Party White Plains City Court Clerk Patricia Lupi [#2009-148-WC]
ATT: Deputy Solicitor General Benjamin N. Gutman
Assistant Solicitor General Diana R.H. Winters
120 Broadway, 25th Floor
New York, New York 10271

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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JOHN McFADDEN,

Appellate Term:
#2008-1427-WC
#2009-148-WC
(White Plains City Court: #SP-651/89 & SP-1474-2008)

-against-

DORIS L. SASSOWER,

ELENA SASSOWER,

Appellant.

----------x **MOVING**
----------x **AFFIDAVIT**

JOHN McFADDEN,

Appellate Term:
#2008-1433-WC
#2008-1428-WC
(White Plains City Court: #SP-1502/07)

-against-

ELENA SASSOWER,

Appellant.

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STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss.:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the appellant *pro se* in the above four appeals, purportedly decided by a two-judge panel of the Appellate Term for the Ninth and Tenth Judicial Districts, consisting of Justices Denise F. Molia and Angela G. Iannacci, following the *sua sponte* recusal from the panel of Appellate Term Presiding Justice Francis A. Nicolai, *without reasons*, at the December 16, 2009 oral argument, with no replacement.

2. I am fully familiar with all the facts, papers, and proceedings heretofore had and submit this affidavit in support of my accompanying notice of motion.

3. This motion is timely. The Appellate Term's July 8, 2010 decision & order on

motion, denying me leave to appeal, has yet to be served upon me with notice of entry (CPLR §5513(b)). A copy is annexed hereto as Exhibit A-1.

4. For the convenience of the Court, a Table of Contents follows:

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* * *

INTRODUCTION: AN APPEAL LIES OF RIGHT

5. I believe this appeal lies of right, as my appeal is not, in the first instance, from what CPLR §5703(a) identifies as requiring permission to appeal, *to wit*, "an order of the appellate term which determines an appeal from a judgment or order of a lower court". Rather, it is an appeal from an Appellate Term decision & order denying my motion to disqualify its own justices and to vacate their prior decisions/orders by reason thereof. Unless there is a law "limit[ing] or condition[ing] the right of appeal to the Appellate Division "from a judgment or order which does not finally determine an action", the Appellate Term's decision& order would appear to be reviewable, of right, pursuant to Article VI, §4k of the New York State

Constitution.[1]

6. At issue is the legal sufficiency of my April 25, 2010 motion to disqualify Justice Iannacci, as, likewise, the legal sufficiency of my January 2, 2010 motion to disqualify Justice Molia, embodied therein – both seeking their disqualification:

> "for demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14...and, if denied, disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon [their] fairness and impartiality" (underlining in the original).

Copies of my April 25, 2010 and January 2, 2010 motions are furnished herewith in Folders #1 and #2, respectively.

7. Treatise authority holds:

> "As a general rule...once a challenged judge has...been made the target of a timely and sufficient disqualification motion, he immediately loses all jurisdiction in the matter except to grant the motion and in some circumstances to make those orders necessary to effectuate the change.", §22.1, Judicial Disqualification: Recusal and Disqualification of Judges, Richard E. Flamm, Little, Brown & Company.[2]

8. The only adjudications of these two disqualification motions were by Justices Molia and Iannacci themselves, denying them, *without* reasons, *without* revealing that the basis for disqualification was "demonstrated actual bias and interest" or the rule and statutory provisions invoked, *without* findings as to the legal sufficiency of either motion, *without*

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[1] Article VI, §4k of the New York State Constitution provides that "the right of appeal to the appellate divisions from a judgment or order which does not finally determine an action...may be limited or conditioned by law."

[2] See, also, §22.4.1 of the same treatise, "Void Orders":

> "When a judge presumes to take substantive action in a case...after he should have recused himself but did not, any such action is often considered a nullity and any orders issued by such a judge are considered absolutely void for want of jurisdiction."

revealing that each was unopposed, *as a matter of law*,[3] and *without* any disclosure, indeed, concealing that disclosure had been alternatively requested.

9. A copy of their July 8, 2010 decision & order denying my April 25, 2010 disqualification motion – the same as denied me leave to appeal to this Court – is annexed as Exhibit A-1. A copy of their two February 19, 2010 decisions and accompanying two orders denying my January 2, 2010 disqualification motion are annexed as Exhibits A-2 and A-3.

10. Consequently, this is <u>not</u> a second appeal – the apparent premise for this Court's statutory discretion to review appeals from the Appellate Term, enunciated by the Court's decision in *Handy v. Butler*, 183 AD 359 (2nd Dept. 1918):

> "The right of an appeal has been recognized uniformly by the Legislature as 'Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved.' (*Yates v. People*, 6 Johns 364.)...
>
> Our law does not recognize the right of a second appeal..."

11. Rather, this is a first appeal from the Appellate Term's July 8, 2010 decision & order denying my April 25, 2010 motion to disqualify its Justices (Exhibit A-1) – as to which there has been no independent adjudication in the first instance.

12. The most fundamental principle of judicial disqualification is that "no man shall be judge of his own cause". Obviously, Justices Molia and Iannacci, in deciding my April 25, 2010 motion, as likewise my prior January 2, 2010 motion, were deciding their own cause.

13. New York's standard for legal sufficiency of disqualification motions, highlighted by my April 25, 2010 motion (at ¶3), is "<u>bias or prejudice or unworthy motive...shown to affect the result</u>" (underlining added), for which I provided the citation:

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[3] This, because none of the facts, law, or legal argument presented by my motions were denied or disputed by adverse counsel.

"*People v. Arthur Brown*, 141 A.D.2d 657 (2nd Dept. 1988), citing *People v. Moreno*, 70 N.Y.2d 403, 405 (1987), *Matter of Rotwein*, 291 N.Y. 116, 123 (1943); 32 New York Jurisprudence §44; *Janousek v. Janousek*, 108 A.D.2d 782, 785 (2nd Dept.1985)".

14. This is the clear, unequivocal standard of New York caselaw for legal sufficiency of disqualification motions, as well as for appellate reversal/vacatur.[4]

15. As the United States Supreme Court has held: "[A] biased decisionmaker [is] constitutionally unacceptable", *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Such is the case here, involving actual bias – not its appearance – which is the "constitutionally unacceptable" bias the Supreme Court was referring to. See, most recently, *Caperton v. A.T. Massey Coal Co*, 129 S.Ct. 2252 (2009).

16. As chronicled by my January 2, 2010 and April 25, 2010 disqualification motions, the actual bias of Justices Molia and Iannacci is manifested by their decisions and orders which, when compared to the record,[5] are *readily-verifiable* as "judicial frauds", being "insupportable in

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[4] See, *inter alia*, *Schwartzberg v. Kingsbridge Heights Care Center*, 28 A.D.3d 465, 466 (2nd Dept. 2006); *Matter of Johnson v. Hornblass*, 93 A.D.2d 732, 733 (2nd Dept. 1983); *Schrager v. New York University*, 227 A.D.2d 189, 191 (1st Dept. 1996); *State Division of Human Rights v. Merchants Mutual Insurance Co.*, 59 A.D.2d 1054, 1056 (4th Dept. 1977); 1A Carmody-Wait 2d (2008), §3:106 "Appeal from failure to disqualify", §3:104 "Effect of disqualification; loss of jurisdiction".

[5] The importance of the record in assessing judicial decisions is described in the MUST-READ law review article, "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*", 73 Albany Law Review 1 (2009), by Gerald Caplan:

> "Attorneys and judges perform at a low level of visibility. Assessment is possible…
> 'The most illuminating kind of critical study would compare the judge's opinion…with the opinion of the lower-court judge, the record of the case, and the lawyers' briefs and oral arguments, along with any internal court memoranda written by the judge, his colleagues, or his or their law clerks. The aim would be to determine the accuracy and completeness of the judge's opinion; whether it was scrupulous in its use of precedent; the value it added to the briefs… .'
> A series of critical judicial studies would yield insights into the methods as well as the quality of the judge." (at p. 2)
> …Performance assessment cannot occur without close examination of the trial record,

fact and law – and knowingly so", and "'so totally devoid of evidentiary support as to render [them] 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)."

17. Such fraudulent decisions, devoid of due process, should suffice to entitle me to an appeal of right to this Court, consistent with the standard enunciated by the Court of Appeals in *Valz v. Sheepshead Bay*, 249 N.Y. 122-131-2 (1928), as governing appeals of right to that Court:

> "Where the question of whether a judgment is the result of due process is the decisive question upon an appeal, the appeal lies to this court as a matter of right."

THIS COURT'S REQUIREMENTS & CRITERIA FOR LEAVE TO APPEAL

18. This Court's Rule 670.6(b)(2) pertaining to motions for leave to appeal requires:

> "a copy of the opinions, decisions, judgments, and orders of the lower courts, including: A copy of the Appellate Term order denying leave to appeal; a copy of the record in the Appellate Term if such record shall have been printed or otherwise reproduced; and a concise statement of the grounds of alleged error."

19. Other than the decisions and orders annexed as Exhibits A-1, A-2, and A-3, the Appellate Term's other "opinions, decisions, judgments, and orders" are all exhibits to, and explicated by, my January 2, 2010 and April 25, 2010 motions (Folders #2 and #1)[6].

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briefs, oral argument and the like..." (p. 53, underlining added).

[6] The following are exhibits to my January 2, 2010 motion:
(1) the Appellate Term's undated [October , 2008] decision & order – Exhibit F thereto;
(2) the Appellate Term's November 26, 2008 decision and order – Exhibit H thereto;
(3) the Appellate Term's June 22, 2009 decision and order – Exhibit I thereto.
The following are exhibits to my April 25, 2010 motion:
(1) the Appellate Term's February 19, 2010 decision & order – Exhibit L thereto;
(2) the Appellate Term's February 23, 2010 decision & order (#2009-148-WC) – Exhibit M thereto;
(3) the Appellate Term's February 23, 2010 decision & order (#2008-1427-WC) – Exhibit N thereto;
(4) the Appellate Term's February 23, 2010 decision & order (#2008-1428/1433-WC – Exhibit O thereto.

20. The "opinions, decisions, judgments, and orders" of White Plains City Court Judges Brian Hansbury and JoAnn Friia – the subject of my four appeals to the Appellate Term – are annexed hereto as Exhibits B and C, respectively.

21. These four appeals were perfected on the original White Plains City Court record, with material portions reproduced and annexed as exhibits to my briefs. Two of these annexed documents were highlighted by my briefs as dispositive of all four appeals, warranting reversal, if not vacatur, *as a matter of law*:

> (a) my November 9, 2007 order to show cause to disqualify Judge Hansbury for demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14 and, if denied, for disclosure pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct; and
>
> (b) my July 18, 2008 order to show cause to disqualify Judge Friia for demonstrated actual bias and interest pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14 and, if denied, for disclosure pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct.

22. Copies of these two orders to show cause to disqualify Judges Hansbury and Friia are furnished herewith in Folders #3 and #4. Their only adjudications were by Judges Hansbury and Friia themselves:

> (a) Judge Hansbury denied the disqualification sought by my November 9, 2007 order to show cause, after signing it, stating that it "offer[ed] no basis in fact or law for [his] disqualification", thereupon announcing, *without* reasons, that he was recusing himself. His January 29, 2008 decision/order is Exhibit B-2.
>
> (b) Judge Friia denied all the relief sought by my July 18, 2008 order to show cause, without signing it, by a hand-written July 21, 2008 notation: "All issues raised have been previously addressed/Appeal(s) may be taken to Appellate Court. No other action by City Court of White Plains to be taken." It is annexed hereto as Exhibit C-2.

23. The sufficiency of these motions – and the demonstrated actual bias of Judges

Hansbury and Friia – were the overarching issues on my four appeals to the Appellate Term[7]. My briefs demonstrated that the scant reasons given by Judges Hansbury and Friia for denying the requested disqualification were not just false, but – like virtually every one of their other rulings – were "judicial frauds", "insupportable in fact and law – and knowingly so", and "'so totally devoid of evidentiary support as to render [them] 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)"[8] – in other words, the product of "bias or prejudice or unworthy motive…shown to affect the result".

24. Nevertheless, the Appellate Term's three February 23, 2010 decisions and orders on my appeals, *purportedly by Justice Molia and Iannacci, but not signed by them*, concealed that I even raised a bias objection to Judges Hansbury and Friia, let alone that I had moved to disqualify Judges Hansbury and Friia by orders to show cause which I contended were legally sufficient, divesting them of jurisdiction to proceed further and rendering their appealed-from decisions/orders *void ab initio*.[9]

25. My April 25, 2010 motion (Folder #1: ¶¶19, 40-46; 19, ¶¶29-37; 20-22) presents the particulars of what the Appellate Term did on my appeals, in support of vacatur and

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[7] This was so-highlighted by my January 2, 2010 motion for Justice Molia's disqualification (Folder #2, ¶¶7-9, 12, fn.9), which annexed the "Introductions" to my three appellant's briefs as Exhibits B-1, C-1, and D-1 thereto (Folder #2). Page references in my briefs include the following: (a) my appellant's brief for #2008-1433-WC (at pp. v, 1, 36, 45-46); (b) my appellant's brief for #2008-1428-WC (at pp. iv-v, 1-2, 26-34); and (c) my appellant's brief for #2008-1427-WC & #2009-148-WC (at pp. vii-ix, 2-4, 67-68, 79-96).

[8] See, *inter alia*, my appellant's brief for #2008-1433-WC (at pp. 35-36); my appellant's brief for #2008-1428-WC (at pp. 26-28, 32, 33); and my appellant's brief for #2008-1427-WC & #2009-148-WC (at pp. 2, 79-80, 93).

[9] *See*, ¶7 & its footnote 2, *supra* – and corresponding references in my appellant's brief for #2008-1428-WC (at p. 29) and my appellant's brief for #2008-1427-WC & #2009-148-WC (at pp. 24-25, 32, 45).

reargument/renewal of its three February 23, 2010 decisions and orders, copies of which are Exhibits M, N, and O to the April 25, 2010 motion. As therein stated and demonstrated:

> "the... three February 23, 2010 decisions on my four appeals (Exhibits M-1, N-1, O-1) ignored my overarching appellate issue that Judges Hansbury and Friia were disqualified, concealing that I had even raised an issue as to their disqualification either before them or on appeal, thereby effectively denying me appellate review of that issue[fn], as likewise of the issue of their failure to make disclosure. The Court also ignored, with one exception, every appellate issue my prior motions had presented [as dispositive] – effectively denying me appellate review of those issues as well." (Folder #1, pp. 12-13, underlining added).[10]

26. The Appellate Term's February 23, 2010 appellate decisions – effectively denying me a first appeal of my appellate issues – are, by definition, lacking in legitimacy, as likewise its without-reasons February 19, 2010 and July 8, 2010 decisions denying my motions for its disqualification (Exhibits A-1, A-2/A-3). Such is clear from the masterful exposition in "*Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*", 53 University of Kansas Law Review, 531 (2005) by Amanda Frost, particularly in her section "Procedure as a Source of Judicial Legitimacy" (pp. 552-556), whose subsections are:

"A. Litigants Initiate and Frame Disputes";
"B. Adversarial Presentation of Disputes",
"C. Reasoned Decisionmaking";
"D. Reference to Governing Body of Law"; and
"E. Impartial Decisionmaker".

It is a MUST READ.

27. As for the "concise statement of the grounds of alleged error", required by this

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10 As further stated:

> "Common to all three [Appellate Term] decisions [on my four appeals] is that they do not identify any of the facts, law, or legal argument presented by my appellant's briefs or by my reply briefs... Consistent therewith, the [Appellate Term] does not identify any of the 'Questions Presented' by my appellant's briefs – or any of the documents asserted therein and reiterated by my January 2, 2010 motion (at ¶¶7-8, 12) as dispositive of my appeals". (¶8, underlining in the original).

Court's Rule 670.6(b)(2), there is no "error", insofar as that connotes good faith adjudication. Rather, the Appellate Term has, with but one exception, willfully and deliberately subverted ALL adjudicative standards by its fraudulent judicial decisions. Indeed, the Appellate Term's February 23, 2010 decision on my two appeals of Judge Hansbury's decisions (#2008-1433-WC and #2008-1428-WC) is exponentially more fraudulent and prejudicial to me than Judge Hansbury's lawless two decisions. So, too, its February 23, 2010 decision on my appeal of Judge Friia's decision in #2009-148-WC is a more corrupt cover-up than the decision of Judge Friia it affirmed. This, too, is particularized by my April 25, 2010 disqualification motion.[11]

28. Such catastrophic state of affairs, where two levels of our state judiciary – one being appellate – obliterate the most fundamental adjudicative standards and render decisions "so devoid of evidentiary support as to render [them] unconstitutional under the Due Process Clause" compels review by this Court by leave, if not by right, in discharge of its supervisory responsibilities.

29. This Court's decision in *Handy v. Butler*, *supra* – quoted in LEXSTAT 12-5703 New York Civil Practice: CPLR 5703:03 – enunciates the criteria for the Court's granting of leave to appeal, *to wit*:

> "the case (1) has settled a principle that may affect the decision in numerous other cases, or (2) conflicts directly with one of this court or of the Court of Appeals, or (3) construes or interprets a public statute, or (4) affects a large public interest or is of public importance or (5) presents a question that is new so far as the decisions of this State are concerned. Questions of evidence, although novel, will not ordinarily justify the allowance."

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[11] See ¶¶4, 5, 8 & fn.7, ¶¶40-75, detailing the Appellate Term's fraudulent dismissal of my four Counterclaims, whose compensatory and punitive value was $1,000,000, and its fraudulent granting of summary judgment to Mr. McFadden for possession of the subject apartment, accomplished by a *sua sponte* and utterly bogus "search[ing] the record", as well as ¶¶20-25.

30. This case fits several of these criteria. This includes as to "Questions of evidence" – the Appellate Term decisions being so evidentiarily baseless, indeed rebutted, as to mandate "the allowance" on constitutional grounds.

31. My April 25, 2010 motion identifies countless decisions of this Court and the Court of Appeals with which the Appellate Term's decisions on its own disqualification and on my appeals directly conflict – beginning with the decisions cited at ¶13 *supra*, as to the legal standard for disqualification: "bias or prejudice or unworthy motive...shown to affect the result".

32. Among other conflicting decisions: *Hartford Fire Insurance Co. v. Cheever Development Corp*, 289 A.D.2d 292; 734 N.Y.S.2d 598 (2001), wherein, as stated by ¶16 of my April 25, 2010 motion, this Court approvingly cited the First Department's decision in *Nadle v. L.O. Realty Corp*, 286 AD2d 130, 735 NYS2d 1 (2001), for the proposition:

> "...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."

33. Consistent therewith, my April 25, 2010 motion (at ¶17) highlighted for Justices Molia and Iannacci the adjudicative standard appropriately governing judicial disqualification motions, which my January 2, 2010 motion had previously presented (at ¶19) – each replicating, *verbatim*, the standard I had presented first to Judge Hansbury and then to Judge Friia on my

motions to disqualify them:

> "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 motion's very purpose of resolving the 'reasonable questions' warranting disqualification."[12]

34. Such adjudicative standard, which all four judges flagrantly repudiated in denying disqualification, is one this Court should rightfully enunciate – along with the principle, here applicable, that:

> **It is *prima facie* disqualifying and misconduct *per se* for a judge to fail to give reasons in denying a disqualification motion or to give reasons that are false, or to fail to disclose facts bearing upon his/her fairness and impartiality when expressly called to do so.**
>
> **Likewise, it is *prima facie* disqualifying and misconduct *per se* for appellate judges to conceal and/or fail to adjudicate appellate issues of judicial bias and interest and/or the sufficiency of disqualification motions based thereon.**

THIS APPEAL PRESENTS THE COURT WITH THE OPPORTUNITY AND OBLIGATION TO LEAD NECESSARY "RECUSAL REFORM" IN NEW YORK STATE & THE NATION

35. The absence of rules and procedures governing judicial disqualification, both at the trial and appellate levels – exemplified by this case – "affect[] a large public interest", are "of public importance", and "present [] questi1on[s] that [are] new so far as the decisions of this State are concerned". This is demonstrated by my April 25, 2010 motion, whose footnotes 15, 16, and 17 pertain to the recusal reform advocacy of the Brennan Center for Justice at New York University, in collaboration with the Justice at Stake Campaign, accessible *via* the website,

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[12] *See* Folder #3: my November 8, 2007 memorandum of law in support of my order to show cause to disqualify Judge Hansbury (at p. 5) [also quoted in my appellant's brief (at p. 19) for my appeal of Judge Hansbury's January 29, 2008 decision (#2008-1328WC)]; Folder #4: my July 18, 2008 order to show cause to disqualify Judge Friia (at ¶11).

www.justiceatstake.org. [state court issues].

36. The Brennan Center/Justice at Stake recusal reform advocacy is addressed, in the first instance, to state judiciaries, and calls upon them to clarify and invigorate their protocols for judicial disqualification. Among their recommendations – for which this case is the perfect vehicle for this Court to enunciate clear rules and procedures:

- "Enhanced disclosure";
- "Independent adjudication of disqualification motions",
- "Transparent and reasoned decision-making";
- "De novo review on interlocutory appeals"; and
- "Mechanisms for replacing disqualified judges".

37. Portions of this recusal reform advocacy, quoted by my April 25, 2010 motion and worth repeating here, include:

> "*All disqualification decisions should be in writing and should explain the grounds for the decision.*
>
> It is critically important – for litigants, for the courts, and for the public at large – that disqualification decisions offer transparent and reasoned decision-making. As explained in the Brennan Center's recusal report [Fair Courts: Setting Recusal Standards], 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. Finally, in a state in which judges or justices are subject to election or re-election, a failure to explain disqualification decisions deprives the public of valuable information concerning how those judges or justices address challenges to a central component of their judicial fitness: their impartiality."[13]

and

> "*Independent Adjudication of Disqualification Motions*
>
> The fact that judges in many jurisdictions decide their own recusal challenges, with little to no prospect of immediate review,[fn] is one of the most

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13 Justice Molia will be up for re-election in 2012.

> heavily criticized features of United States disqualification law – and for good reason. Recusal motions are not like other procedural motions. They challenge the fundamental legitimacy of the adjudication…
>
> Allowing judges to decide on their own recusal motions is in tension not only with the guarantee of a neutral decision-maker, but also with the explicit commitment to objectivity in this area. 'Since the question whether a judge's impartiality 'might reasonably be questioned' is a 'purely objective' standard' – a standard that virtually every state has adopted – 'it would seem to follow logically that the judge whose impartiality is being challenged should not have the final word on the question whether his or her recusal is 'necessary' or 'required.'[fn]"

38. For the Court's convenience, a copy of the Brennan Center's article "*Invigorating Judicial Disqualification: Ten Potential Reforms*", Judicature, Vol. 92, #1 (July-August 2008) – excerpted from its April 2008 report "*Fair Courts: Setting Recusal Standards*" – is annexed hereto as Exhibit D. As noted therein, the first nine potential reforms are ones the courts "could implement unilaterally", although some could also be implemented by state legislatures.

39. Similarly, the American Bar Association has been undertaking recusal reform efforts focused on the state judiciaries. Its Standing Committee on Judicial Independence has circulated a draft judicial disqualification resolution and report for comment– which, after it is finalized, will be presented to its House of Delegates at the ABA's 2011 Midyear Meeting. Following approval, it will be

> "transmitted to the highest court of each state and territory and to any other entities having regulatory responsibility for judicial disqualification practices, and procedures in the jurisdiction." (at p. 1),

with a recommendation that:

> "Each State[fn] should have in place clearly articulated procedures, whether statutory or judicial rules-based, for the handling of disqualification determinations and the review of denials of such motions. These procedures should be designed to produce resolutions of judicial disqualification issues that are both prompt and meaningful." (at p. 2).

40. In urging states to "review existing policies and procedures for disqualification,

both *sua sponte* and on motion", the ABA's Standing Committee on Judicial Independence proposes that states shift determination of disqualification motions away from the challenged judge, quoting two law review articles: "*Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*", *supra*, by Amanda Frost:

> "The Catch-22 of the law of disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case." (at p. 16)

and "*Deciding Recusal Motions: Who Judges the Judges?*", 28 Valparaiso University Law Review, 542, 561 (1994) by Leslie W. Abrahamson:

> "The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationship prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system which should rely on the presence of a neutral and detached judge to preside over all court proceedings." (at pp. 16-17).

41. It also urges reasoned decisions, stating:

> "...review of motions to disqualify can only be meaningful if judges explain the bases for their decisions with enough frequency. Particularly where a motion to disqualify has been denied, an explanation therefore should be provided either in a written decision or otherwise on the record; the same requirement would apply to decisions on appeals from such denials. Such written explanations would not only enrich the law of judicial disqualification but, more importantly, would over time provide firmer guidance to judge who have to apply disqualification rules to novel factual settings and to lawyers wrestling with the question of whether disqualification is warranted." (at p. 19).

42. Additionally, the ABA Standing Committee on Judicial Independence recommends reforms for "Disqualification at the Appellate Level", including:

> "...the appellate judge being challenged by a disqualification motion is usually the person who decides the question in the first instance.[fn] Consideration should also be given, therefore, to the review procedures to be followed when such a motion is denied." (at p. 20).

43. The Standing Committee's draft report and recommendations are accessible from

its website, http//new.abanet.org/committees/judind/Pages/default.aspx . For the Court's convenience, pages 1 and 2 are annexed hereto as Exhibit E, along with the Standing Committee's flier for its August 7, 2010 program "Judicial Disqualification Forum: Finding Prompt and Meaningful Solutions for State Judiciaries", held in conjunction with the ABA's 2010Annual Meeting.

44. Even more pointed, because it specifically analyzes New York's disqualification law, is "*Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*", 57 Buffalo Law Review 1597 (Dec. 2009), by Jeffrey Fiut. Concluding that:

> "New York recusal law is broken and in dire need of a clear and effective system of recusal. Without a clear standard, New York recusal law will continue to be a crazy quilt consisting of an outdated statute, unenforced regulations, disillusioned courts, and an ethics committee that is both powerless and inconsistent." (at p. 1624)

and that

> "it is in New York's best interest to quickly modernize its recusal law" (at p. 1601),

the article proposes that New York's Advisory Committee on Judicial Ethics be empowered "to decide recusal motions and issue binding opinions that either compel a judge to recuse herself or allow her to continue to preside over the case" [14] subject to appellate review by the New York Court of Appeals[15] – manifesting both the consensus that judges NOT decide their own recusal

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[14] Justice Molia is a member of the Advisory Committee on Judicial Ethics.

[15] This proposal would seemingly be endorsed by the Brennan Center, whose recommendation for independent adjudication of recusal motions is footnoted as follows:

> "...one might argue that a challenged judge's colleagues are not independent enough to rule on her disqualification motion, on account of the collegiality and reciprocity pressures that they will likely face in such situations. One might therefore prefer the use of outside

motions and the value of appellate review, even where such motions are independently adjudicated in the first instance. A copy of its analysis of New York State's "decrepit" recusal law is annexed hereto as Exhibit F.

45. At least one of this state's judges has himself stated, unequivocally, his view as to the inappropriateness of judges deciding motions for their own disqualification: Westbury Village Justice Thomas F. Liotti, who, as a practitioner, had his own experiences with recusal motions His decision in *People v. Ventura*, 17 Misc. 3d 1132A (2007), annexed hereto as Exhibit G, includes the following:

> "The system of recusal is deliberately flawed because applications for recusal must go before the Judge presiding over the case. This procedure remains in effect because our judiciary wishes to discourage recusal motions by a process of systemic intimidation wherein it considers such motions to be a monkey wrench thrown into the works of its turnstile. When a judge's fairness might reasonably be questioned or when a Judge is being asked to overrule himself, to change the law of the case or to alter an interlocutory ruling, then recusal should be a forethought instead of an afterthought.
>
> ...
>
> The law in New York and federally still requires that parties or attorneys seeking recusal must do so before the very judge before whom recusal is sought. This absurd requirement causes attorneys to have to second guess themselves and decide whether they wish to make an application thereby incurring the judge's wrath and possibly tainting the remainder of the proceedings with a judge who harbors animosity because an attorney or litigant dared to suggest even the potential of unfairness on the part of the judge.
>
> ...
>
> An attorney or party making the recusal application or creating the legal issue which forces the court to consider same should not be viewed as the enemy."

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arbitrators instead. We find this idea intriguing and not necessarily outlandish, but we do not address it here because of the deep practical and possibly constitutional concerns that any such scheme would raise." (Exhibit D, fn. 27).

Such "deep practice and possibly constitutional concerns" are addressed by the Buffalo Law Review article (Exhibit F, at pp. 1629-32).

LEAVE TO APPEAL TO THE COURT OF APPEALS

46. As hereinabove demonstrated, this appeal presents a powerful opportunity, indeed, obligation, for clarifying, revising, and reinforcing rules and procedures for judicial disqualification motions – and for doing so in the context of actual, not apparent, bias[16]. Consequently, if this Court does not accept this appeal of right and does not grant leave to appeal to it, I request that it grant leave to appeal directly to the Court of Appeals.

REFERRAL TO AUTHORITIES CHARGED WITH RECOMMENDING, PROMULGATING, & AMENDING RULES, PROCEDURES, & LAWS GOVERNING JUDICIAL DISQUALIFICATION

47. For the same reason, I also request that this Court bring this motion and the underlying Appellate Term and White Plains City Court records to the attention of other authorities within the state judiciary charged with recommending, promulgating, and amending rules, procedures, and laws governing judicial disqualification, including the Chief Judge of the Court of Appeals, the Chief Administrative Judge, the Judicial Conference, the Administrative Board, the Judicial Institute, and the Judicial Institute on Professionalism in the Law. Such would not only be consistent with §100.1 of the Chief Administrator's Rules Governing Judicial Conduct that "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct", but would afford New York's judiciary a last chance to put its own house in order and obviate action by the legislature that may be less deferential to exaggerated judicial independence claims.

REFERRAL TO DISCIPLINARY & CRIMINAL AUTHORITIES

48. Finally, pursuant to §100.3D(1) of the Chief Administrator's Rules Governing Judicial Conduct, requiring judges to take "appropriate action" when they receive information

indicating "a substantial likelihood " that another judge has "committed a substantial violation" of the Chief Administrator's Rules Governing Judicial Conduct, I request that this Court refer this case to disciplinary and criminal authorities for investigation and prosecution based on the record of judicial lawlessness chronicled by my April 25, 2010 motion (Folder #1), whose accuracy in fact and law is only reinforced by the Appellate Term's July 8, 2010 decision & order, unaccompanied by any reasons or findings (Exhibit A-1).

DISCLOSURE BY THIS COURT OF FACTS BEARING UPON ITS FAIRNESS & IMPARTIALITY

49. Should the Court deny the foregoing relief – all legally compelled – I request that its judges disclose facts bearing upon their fairness and impartiality, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct. Such would include the manner in which they themselves have denied motions for their own disqualification/disclosure and addressed, as appellate judges, appeals presenting issues of actual bias and the sufficiency of judicial disqualification motions.

ELENA RUTH SASSOWER

Sworn to before me
this 4th day of October 2010

Notary Public

MARGARET M. O'CONNOR
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN SUFFOLK COUNTY
REG. NO. 01OC6132954
MY COMMISSION EXPIRES AUG. 29, 2013

[16] Unlike the foregoing advocacy, scholarship, and judicial decision.

TABLE OF EXHIBITS

Exhibit D: "*Invigorating Judicial Disqualification: Ten Potential Reforms*", Brennan Center for Justice, Judicature, Vol. 92, #1 (July-August 2008)

Exhibit E: American Bar Association Standing Committee on Judicial Independence: pages 1, 2 from draft report and recommendation; flier for its August 7, 2010 program "Judicial Disqualification Forum: Finding Prompt and Meaningful Solutions for State Judiciaries"

Exhibit F: "*Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*", 57 Buffalo Law Review 1597 (Dec. 2009), Jeffrey Fiut

Exhibit G: *People v. Ventura*, 17 Misc. 3d 1132A (Westbury Village Court-Thomas F. Liotti, 2007)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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JOHN McFADDEN,

Appellate Term:
#2008-1427-WC
#2009-148-WC

-against-

(White Plains City Court: #SP-651/89 & SP-1474-2008)

DORIS L. SASSOWER,

ELENA SASSOWER,

Appellant.

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JOHN McFADDEN,

Appellate Term:
#2008-1433-WC
#2008-1428-WC

-against-

(White Plains City Court: #SP-1502/07)

ELENA SASSOWER,

Appellant.

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MOTION FOR LEAVE TO APPEAL, IF NOT APPEAL BY RIGHT, & OTHER RELIEF

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