Center for Judicial Accountability, Inc. (CJA)

From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Monday, October 15, 2018 2:12 PM
To: 'Jane Landes'; 'ecarey@nycourts.gov'; 'ad3clerksoffice@nycourts.gov'; 'Janet.Sabel@ag.ny.gov'; 'Kent.Stauffer@ag.ny.gov'; 'Meg.Levine@ag.ny.gov'; 'Jeffrey Dvorin'; 'Brian.Mahanna@ag.ny.gov'; 'Alvin.Bragg@ag.ny.gov'; 'marty.mack@ag.ny.gov'; 'Matthew.Colangelo@ag.ny.gov'; 'Margaret.Garnett@ag.ny.gov'; 'manisha.sheth@ag.ny.gov'; 'Adrienne Kerwin'; 'Helena.Lynch@ag.ny.gov'
Cc: 'Brodie, Frederick'; 'Barbara.Underwood@ag.ny.gov'; 'Paladino, Victor'
Subject: CJA v. Cuomo Citizen-Taxpayer Action Appeal: #527081 -- Demanding a "Surreply" from Attorney General Underwood, Personally as to the CPLR 5015(a)(4) Vacatur Relief Sought by Appellants' Fully-Submitted OSC

TO: Appellate Division, Third Department Attorney Jane Landes and Chief Motion Attorney Ed Carey

This responds to Assistant Solicitor General Brodie's below October 12th e-mail to me, to which he copied you, as likewise his direct supervisor Assistant Solicitor General Paladino and his top supervisor Attorney General Underwood.

I was already at the law library, further researching the law, when I received same – and ALL the additional cases I examined further reinforce the flagrant fraud that Mr. Brodie committed by "pages 2-3 of respondents' September 24, 2018 opposition memorandum" – to which his October 12th e-mail adheres in purporting that they "dispose of the questions presented by [my] e-mail".

Among the cases I examined, this Court's 2015 decision in *Kilmer v. Moseman*, 124 A.D.3d 1195, 1198, authored by now Presiding Justice Garry on behalf of a four-judge panel that included Associate Justice Devine, citing to and following the recognized standard for assessing disqualification for financial interest under Judiciary Law §14, articulated by the Appellate Division, First Department in its 1911 decision in *People v. Whitridge*, 144 A.D. 493, 498:

> "The interest which will disqualify a judge to sit in a cause need not be large, but it must be real. It must be certain, and not merely possible or continent; it must be one which is visible, demonstrable, and capable of precise proof."

At bar, the financial interests of each of the panel's four judges in the citizen-taxpayer appeal is "large", "real", "certain", "visible, demonstrable, and capable of precise proof", so-particularized by ¶5 of my July 24, 2018 moving affidavit in support of appellants' original order to show cause – the accuracy of which was undenied and undisputed by Assistant Solicitor General Brodie in his opposition to both the original order to show cause and the instant order to show cause.

The panel judges were, therefore, absolutely disqualified by Judiciary Law §14 and without jurisdiction to sit and take part in any decision in the case – and *Whitridge* makes this evident, as does the Court of Appeals' 1850 decision in *Oakley v. Aspinwall*, 3 N.Y. 547, on which it relies – and an abundance of other cases, including this Court's 2008 decision in *People v. Alteri*, 47 A.D.3d 1070:

> "A statutory disqualification under Judiciary Law §14 will deprive a judge of jurisdiction (*see Wilcox v. Supreme Council of Royal Arcanum*, 210 N.Y. 370, 377, 104 N.E. 624 [1914]; *see also Matter of Harkness Apt. Owners Corp. v. Abdus–Salaam*, 232 A.D.2d 309, 310, 648 N.Y.S.2d 586 [1996]) and void any prior action taken by such judge in that case before the recusal (*see People v. Golston*, 13 A.D.3d 887, 889, 787 N.Y.S.2d 185 [2004], lv. denied 5 N.Y.3d 789, 801 N.Y.S.2d 810, 835 N.E.2d 670 [2005]; *Matter of*

> *Harkness Apt. Owners Corp. v. Abdus– Salaam*, 232 A.D.2d at 310, 648 N.Y.S.2d 586). In fact, "a judge disqualified under a statute cannot act even with the consent of the parties interested, because the law was not designed merely for the protection of the parties to the suit, but for the general interests of justice' ' (*Matter of Beer Garden v. New York State Liq. Auth.*, 79 N.Y.2d 266, 278–279, 582 N.Y.S.2d 65, 590 N.E.2d 1193 [1992], quoting *Matter of City of Rochester*, 208 N.Y. 188, 192, 101 N.E. 875 [1913])".

See, also, this Court's 2008 decision in *Kampfer v. Rase*, 56 A.D.3d 926, identifying, in addition to "a legal disqualification under Judiciary Law §14", that "[r]ecusal, as a matter of due process, is required [] where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion", citing to *People v. Alomar*, 93 N.Y.2d 239 (1999) – plainly the situation at bar particularized by my aforesaid ¶5.

The only way for the four panel judges to have overcome the jurisdictional bar of Judiciary Law §14 and the due process protection it affords is by the "narrow exception" that is "the Rule of Necessity", *General Motors Corp. v. Rosa*, 82 N.Y.2d 183, 188 (1993). The August 7, 2018 decision did not invoke "the Rule of Necessity" – and for that reason is void, *on its face*.

The treatise authority that my below October 12th e-mail cites from New York Jurisprudence – emanating from *Oakley v. Aspinwall* and reflected in *Whitridge* – is that the four-judge panel, having been without jurisdiction to have rendered the August 7, 2018 decision, based on Judiciary Law §14, is without jurisdiction to void it. As such, appellants' fully-submitted order to show cause cannot be submitted to the panel. Rather, it must be submitted to another panel of the Court which, upon invoking "the Rule of Necessity", will immediately void it – or, if too actually biased and interested to void it, as is its duty, *as a matter of law*, will promptly transfer it to a different appellate division, or to the Court of Appeals, to be voided – with all branches of the original order to show cause thereafter determined by such tribunal, as well as its requested TRO, upon the granting of oral argument therefor.

Should the Court deem transfer to another appellate division, rather than to the Court of Appeals, the appropriate course, I request the transfer be to the Appellate Division, Fourth Department – as I believe the impact of its financial interests and relationships are slightly less overpowering than they are in the other three departments.

Needless to say, appellants have no objection to the Court requesting "a surreply" from Attorney General Underwood. In fact, based on the outright fraud and deceit particularized by my October 9, 2018 reply affidavit, especially its ¶¶9-13 – on which Assistant Solicitor General Brodie would have the Court continue to rely -- I believe she must be directed to do so, personally.

Thank you.

Elena Sassower, unrepresented plaintiff-appellant
On her own behalf, on behalf of the Center for Judicial Accountability, Inc.,
and on behalf of the People of the State of New York and the Public Interest
914-421-1200

From: Brodie, Frederick <Frederick.Brodie@ag.ny.gov>
Sent: Friday, October 12, 2018 12:31 PM
To: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Cc: 'Jane Landes' <jlandes@nycourts.gov>; ecarey@nycourts.gov; Paladino, Victor <Victor.Paladino@ag.ny.gov>; Underwood, Barbara <Barbara.Underwood@ag.ny.gov>
Subject: RE: CJA v. Cuomo Citizen-Taxpayer Action Appeal: #527081 -- ON-HOLD: Appellants' Fully-Submitted OSC to Disqualify the Court for Demonstrated Actual Bias, Etc.

Dear Ms. Sassower,

I write in response to your email to Attorney General Underwood. Because this matter has been assigned to me, correspondence regarding the case is properly directed to me—not to the Attorney General or to other officials in this office.

Your most recent Order to Show Cause has been fully briefed and submitted. Unless the Court requests a surreply, respondents are not entitled to submit one. I note, however, that pages 2-3 of respondents' September 24, 2018 opposition memorandum dispose of the questions presented in your email.

Very truly yours,

Frederick A. Brodie
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From: Center for Judicial Accountability, Inc. (CJA) <elena@judgewatch.org>
Sent: Friday, October 12, 2018 12:14 PM
To: Underwood, Barbara <Barbara.Underwood@ag.ny.gov>
Cc: 'Jane Landes' <jlandes@nycourts.gov>; ecarey@nycourts.gov; ad3clerksoffice@nycourts.gov; Brodie, Frederick <Frederick.Brodie@ag.ny.gov>; Paladino, Victor <Victor.Paladino@ag.ny.gov>; Sabel, Janet <Janet.Sabel@ag.ny.gov>; Stauffer, Kent <Kent.Stauffer@ag.ny.gov>; Levine, Meg <Meg.Levine@ag.ny.gov>; Dvorin, Jeffrey <Jeffrey.Dvorin@ag.ny.gov>; Mahanna, Brian <Brian.Mahanna@ag.ny.gov>; Bragg, Alvin <Alvin.Bragg@ag.ny.gov>; marty.mack@ag.ny.gov; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Garnett, Margaret <Margaret.Garnett@ag.ny.gov>; Sheth, Manisha <Manisha.Sheth@ag.ny.gov>; Kerwin, Adrienne <Adrienne.Kerwin@ag.ny.gov>; Lynch, Helena <Helena.Lynch@ag.ny.gov>
Subject: CJA v. Cuomo Citizen-Taxpayer Action Appeal: #527081 -- ON-HOLD: Appellants' Fully-Submitted OSC to Disqualify the Court for Demonstrated Actual Bias, Etc.

TO: Attorney General Barbara Underwood

This is to advise that appellants' fully-submitted order to show cause to disqualify the Court for demonstrated actual bias and other relief is on-hold. The reason is to allow the parties to be heard with respect to the jurisdictional issue reflected by footnote 5 of my October 9th reply affidavit, to which I alerted Appellate Division, Third Department Court Attorney Jane Landes and Chief Motion Attorney Ed Carey in phone messages on October 9th and October 10th, culminating in a lengthy phone conversation yesterday afternoon with Court Attorney Landes.

Footnote 5 annotates my ¶11 pertaining to the fact that your September 24th "Memorandum in Response", submitted on your behalf by Assistant Solicitor General Frederick Brodie and his direct supervisor, Assistant Solicitor General Victor Paladino, does not even offer up a passing sentence concerning the requested vacatur of the Court's August 7, 2018 decision and order on motion pursuant to CPLR §5015(a)(4) for "lack of jurisdiction", arising from the justices' Judiciary Law §14 violation.

Footnote 5 reads:

"'There are a myriad of authorities on the subject, including, 32 N.Y. Jurisprudence §43 (1963): 'Effect when judge disqualified under statute':

> 'A judge disqualified for any of the reasons set forth in the statute,[fn], or a court of which such judge is a member, is without jurisdiction, and all proceeding[s] had before such a judge or court are void.[fn] In that situation, jurisdiction cannot be conferred by consent.[fn] Such a judge is even incompetent to make an order in the case setting aside his own void proceedings.[fn] It is not necessary, however, that a judgment rendered under such circumstances be set aside by an appellate court;[fn] such a disposition properly may be made by the court originally entertaining the proceeding, provided, of course, that the disqualified judge does not sit therein.[fn] ...' (underlining added).

The cases cited by the final footnote begin with *Oakley v. Aspinwall, supra*."

The corresponding current treatise, 28 New York Jurisprudence 2nd §403 (2018) "Disqualification as causing a loss of jurisdiction", comparably reads:

> "A judge disqualified for any of the statutory grounds, or a court of which such a judge is a member, is without jurisdiction, and all proceedings had before such a judge or court are void.[fn] ... A disqualified judge is even incompetent to make an order in the case setting aside his or her own void proceedings.[fn] However, it is not necessary that a judgment rendered under such circumstances be set aside by an appellate court.[fn] Such disposition may properly be made by the court originally entertaining the proceeding, provided, of course, that the disqualified judge does not sit therein." (underlining added).

Here, too, the final footnote leads off with *Oakley v. Aspinwall*, 3 N.Y.547 (1850) – and such footnote and the prior footnotes include citations to Appellate Division, Third Department decisions consistent therewith.

As highlighted by ¶12 of my October 9th reply affidavit, the four justices who rendered the August 7th decision and order on motion – Appellate Division, Third Department Presiding Justice Elizabeth Garry and Associate Justices John Egan, Jr., Eugene Devine, and Stanley Pritzker -- are not only absolutely disqualified pursuant to Judiciary Law §14, based on the particulars of their HUGE financial interest quoted therein from ¶5 of my July 24, 2018 moving affidavit in support of appellants' original order to show cause, but, contrary to your "Memorandum in Response" (at p. 2), their Judiciary Law §14 violation – which you do not acknowledge as such-- is not "overridden by the Rule of Necessity", which their decision did NOT even invoke.

What is your "legal opinion"? Do you agree that the four-judge panel is without jurisdiction to void its own void order – and that appellants' fully-submitted order to show cause must be determined by other judges? Please advise both me and the Court by Monday, but which time I will be able to respond based on my further law library research.

For your convenience, my October 9th reply affidavit is attached. CJA's webpage for the reply affidavit, with its exhibits, is here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/10-9-18-reply-aff.htm. CJA's webpage posting links to the full record before the Appellate Division – including your submissions -- is here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/record-app-div.htm.

Thank you.

Elena Sassower, unrepresented plaintiff-appellant
On her own behalf, on behalf of the Center for Judicial Accountability, Inc.,
and on behalf of the People of the State of New York and the Public Interest
914-421-1200