No. 20-8178

IN THE

SUPREME COURT OF THE UNITED STATES

Heena Shim
(Your Name)

PETITIONER

ORIGINAL

vs.

City of New York

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Second Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Heena Shim
(Your Name)

260 W 153rd St, Apt. 7H
(Address)

New York, NY 10039
(City, State, Zip Code)

646-763-1668
(Phone Number)

QUESTION(S) PRESENTED

1. The Seventh Circuit Court of Appeal's criticism regarding the infamous Chicago 7 trial includes that "in comparable situations, the judge was more likely to exercise his discretion against the defense than against the government."; and "the court made rulings which were, comparatively, more restrictive against the defense than the government." Since the time of that trial, in the 1970s, American jurisprudence, including 28 U.S.C. § 455 in 1974, adopted an objective standard of recusal. Given such history, if a judge makes rulings more restrictive against one party than the other in comparable situations, does such judge must be disqualified under 28 U.S.C. § 455?

2. If a judge makes rulings more restrictive against *pro se* party than attorneys in comparable situations, does it aggravate the level of favoritism enough to require the judge's recusal under 28 U.S.C. § 455 and grant of mandamus appeal?

3. When a party reasonably has brought errors to the attention of a judge, if the judge reacts as certifying that an appeal would not be taken in good faith under 28 U.S.C. § 1915(a)(3), instead of correcting the errors, does it demonstrate that the judge took it as a personal attack and display the judge's inability to render fair judgment, which requires recusal?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- City of New York
- Scott Silverman

RELATED CASES

Shim-Larkin v. City of New York, No. 16-cv-6099, U.S. District Court for the Southern District of New York.

In Re: Heena Shim-Larkin, No. 20-4254, U. S. Court of Appeals for the Second Circuit. Judgement entered April 7, 2021.

In Re: Heena Shim-Larkin, No. 19-431, U. S. Court of Appeals for the Second Circuit. Judgement entered June 19, 2019.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B,C,D,E to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinions of the U.S. magistrate court appear at Appendixes F, G, H, I to the petition and are unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 7, 2021.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S. Code § 455 - Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

The underlying district court case commenced on August 1, 2016, when Petitioner filed a complaint alleging illegal discriminations and retaliations concerning her employment at Tompkins Square mini pool from July 2, 2015 through August 19, 2015. On November 23, 2016, District Judge Nathan referred general pretrial to Magistrate Judge Fox.

Petitioner's complaint included allegations that she was constructively discharged and Respondent denied Petitioner's request for transfer to another location even though Respondent knew that Petitioner was suffering from harassments and hostile work environment at Tompkins Square mini pool by other coworkers and supervisors. One of the reasons why Respondent knew about such harassments was that a pool patron, Leticia Vargas, made a complaint which resulted in 311 DPR[1] complaint report. After Petitioner talked to Ms. Vargas, Petitioner was convinced that Respondent's DPR complaint report mischaracterized Ms. Vargas's complaint. Therefore, Petitioner was investigating why and how such mischaracterization occurred during the discovery. Respondent denies any knowledge regarding the above mentioned harassments. Regarding issues related to the 311 operators who interacted with Ms. Vargas, during the conference pursuant to SDNY Local Civil Rule 37.2, on November 21, 2017, Magistrate Judge Fox ordered that:

"[o]n the issue of the 311 operator, I don't know why the defendant's

1 NYC Department of Parks and Recreation ("DPR")

> position is that that person's identity is irrelevant, given that Ms. Shim-Larkin has challenged the accuracy of the complaint recorded in the 311 complaint form, given the statements made by Ms. Vargas about what her complaint is or was – excuse me -- in some detail in an affidavit. So to the extent that there is a conflict about what was reported and what was recorded by the 311 operator, it is relevant." (parts of transcript is at Appendix I, at 34:14-22)

Respondent did not object to such order within 14 days.

Based on the documents Petitioner acquired through New York State Freedom of Information Law ("FOIL") request before commencing the underlying SDNY action, Respondent's interrogatory responses concerning 311 operator are inaccurate and incomplete. And such interrogatory responses were not verified, in violation of FRCP 33(b)(3) and (b)(5). During SDNY Local Civil Rule 37.2 conference on March 13, 2018, Magistrate Judge Fox instructed Petitioner that motion for sanctions must be made through a formal motion, not a letter-motion. Also, as a result of such conference, Magistrate Judge Fox entered a written order dated March 16, 2018 stating:

> "on or before March 27, 2018 the defendant shall cause to be signed or verified any interrogatory answer(s) previously submitted to the plaintiff without the signature of the person who answered the interrogatory"; and "the time for the parties to complete pretrial discovery activities is enlarged to May 11, 2018, solely for the limited purpose of exchanging the above referenced materials and conducting any discovery-related activities germane to those materials" (Appendix H, ¶¶ 10, 12).

Respondent did not object to such order within 14 days.

On April 4, 2018 (which is untimely), Respondent provided verifications from Liam Kavanagh, First Deputy Commissioner for DPR, and Michelle Rauen,

Assistant Legal Services Manager at NYC 311, concerning interrogatory responses. Since Petitioner is allowed conduct "any discovery-related activities" "germane to those materials [ordered to provide pursuant to Mar 16, 2018 order]" (Appendix H, ¶ 12); those verifications of Kavanagh and Rauen are the materials provided pursuant to Mar 16, 2018 order (Appendix H, ¶ 10); and Petitioner has reasonable basis to challenge the accuracy and completeness of those verifications based on the above mentioned FOIL documents, Petitioner served additional discovery requests on Respondent.

For example, Petitioner requested "[a]ll "the books and records of the New York City Department of Parks and Recreation and other departments of the city government" which bases Liam Kavanagh's belief, as indicated in his verification dated April 4, 2018", pursuant to FRCP 34, and served other discovery requests designed to clarify Respondent's evasiveness and to investigate the inaccuracies of the interrogatory responses.

On April 17, 2018, Respondent filed a letter stating that "[Saint-Fort[2]] write[s] with regard to [Magistrate Judge Fox]'s March 16, 2018 Order [] stating that "the time for the parties to complete pretrial discovery activities is enlarged to May 11, 2018, solely for the limited purpose of exchanging the above-referenced materials and conducting any discovery related activities germane to those materials." ECF Dkt. No. 222, ¶ 12."; and "Defendant seeks an order precluding defendant from the need to respond to plaintiff's Twelfth, Thirteenth and

2 Respondent's attorney, Dominique Saint-Fort.

Fourteenth discovery demands and an Order prohibiting plaintiff from serving any further discovery demands." Saint-Fort made arguments that: she did not interpret Mar 16, 2018 order as permitting Petitioner to serve additional discovery requests; and once an interrogatory response is verified, further discovery requests concerning that verification are not warranted. On April 24, 2018, Petitioner responded to above letter-application with formal Cross-motion for Sanctions.

On April 30, 2018, Magistrate Judge Fox denied Respondent's above mentioned letter-application. In such order, Magistrate Judge Fox stated that:

> "Application denied. The Court's March 16, 2018 order permitted the parties to conduct, by May 11, 2018, "any discovery-related activities germane to [the] materials" that were to be exchanged pursuant to the March 16, 2018 order. It is unclear - given the above-quoted text of the order - why the defendant "interpreted the Court's Order" as not allowing the plaintiff to serve discovery demands after the exchange of the materials identified in the order, provided those discovery demands are germane to the exchanged materials. The defendant, in conclusory fashion, declares that the plaintiff's Twelfth, Thirteenth and Fourteenth sets of discovery demands are not germane to the materials exchanged pursuant to the March 16, 2018 order. However, without explaining how or why the plaintiff's Twelfth, Thirteenth and Fourteenth sets of discovery demands are not germane to the materials exchanged pursuant to the March 16, 2018 order, the defendant has not supplied the Court with information from which it could find, reasonably, that granting the relief the defendant seeks is warranted."

There is no indication that Magistrate Judge Fox considered Petitioner's April 24, 2018 cross-motion when he issued the above order.

On May 14, 2018, Respondent filed FRCP 72(a) objection to the above order. Respondent's argument heading was "B. PLAINTIFF'S DISCOVERY DEMANDS ... RELATED TO VERIFICATIONS SUBMITTED BY DEFENDANT ARE NOT

GERMANE" TO THE MARCH 16, 2018 ORDER" and there was no other heading indicating specific arguments that Respondent raises. On May 15, 2018, Petitioner opposed above objection asserting that Petitioner's discovery requests are germane to the materials to be provided pursuant to Mar 16, 2018 Order. Petitioner also stated that "[e]ven though Plaintiff reasonably believes that Plaintiff's previous motions to compel must be decided by Magistrate Judge, after speedy resolution of Defendant's Objection, Plaintiff refers specific docket numbers and pages numbers where Plaintiff explained for each discovery requests why it is relevant and necessary, just in case. While Defendant's April 17, 2018 letter-application (ECF #251) was pending, Plaintiff filed a formal cross-motion for sanctions (ECF #259, page 2), which included a request to compel regarding Plaintiff's discovery requests. Defendant has not filed its opposition to that motion yet." Petitioner referred pending motions, including above mentioned April 24, 2018 cross-motion for sanctions, because Petitioner thought that District Judge Nathan might want to verify whether matters concerning Petitioner's discovery requests are indeed pending before Magistrate Judge Fox.

On September 27, 2018, District Judge Nathan granted Respondent's above mentioned objection to Magistrate Judge Fox's order and stated as follow:

> The Court concludes that the Magistrate Judge's order was clearly erroneous because it did not acknowledge or rule on the Defendant's argument that the requests contained in the Plaintiffs twelfth, thirteenth, and fourteenth discovery requests are irrelevant to the parties' claims and defenses - an argument this Court concludes is correct and should preclude the Defendant from being forced to respond to the discovery requests. ...

> A court "must limit the frequency or extent of discovery ... if it determines that ... the proposed discovery is outside the scope permitted by Rule 26(b)(l)." Fed. R. Civ. P. 26(b)(2)(C)(iii). ...
>
> Rather than make arguments in her opposition to the Defendant's objections, the Plaintiff merely identifies previously filed documents in which the Plaintiff had discussed the relevancy of her discovery requests and assumes the Court will reread each document and construct the Plaintiff's argument for her. See P. Opp. at 5-7. The Plaintiff is admonished that in future filings, she must make all applicable arguments in any filing before the Court or the Court will not consider the argument. ...
>
> The Court concludes that none of these requests seeks information or evidence that is relevant to any claims or defenses in this action. As a result, it was clearly erroneous for the Magistrate Judge to overlook the Defendant's argument that these discovery requests sought irrelevant information outside the appropriate scope of discovery and to allow the Plaintiff to proceed with these discovery requests. (Appendix E, pp. E-2 to E-4, footnote 1)

Petitioner filed two motions for reconsideration on September 28, 2018 and on October 9, 2018. Petitioner's arguments in those motions included that i) nowhere in Respondent's Apr 17, 2018 letter-application and FRCP 72(a) objection, Respondent mentioned FRCP 26(b)(2)(C) at all, but the District Judge invoked FRCP 26(b)(2)(C) on its own, without fair notice to *pro se* Petitioner that District Judge intends to invoke FRCP 26(b)(2)(C), ii) Magistrate Judge Fox already ruled on November 21, 2017 (Appendix I) that the identities of 311 operators who interacted with Ms. Vargas are relevant, since Petitioner challenges the accuracy of DPR complaint report; and iii) Petitioner did not assume that "the Court will reread each document and construct the Plaintiff's argument for her" when Petitioner referred the pending motions, but did so because Plaintiff thought that District

Judge might want to verify whether the matters concerning Petitioner's discovery requests are indeed pending before Magistrate Judge Fox. Until the District Judge invoked FRCP 26(b)(2)(C) in September 27, 2018 order (Appendix E), *pro se* Petitioner was not familiar with FRCP 26(b)(2)(C) and did not conduct any legal research on FRCP 26(b)(2)(C).

On February 13, 2019, District Judge denied Petitioner's above motions for reconsideration and administratively denied Petitioner's multiple motions, including April 24, 2018 motion, without prejudice, "given the relevance of the Court's September 27, 2018[] order". District Judge further instructed that "[Petitioner] may file **a single motion** addressing any issues from docket items 259, 271, 278, and 355 that remain in light of the Court's September 27, 2018, order and the instant order. This motion shall be no more than fifteen pages in length and shall fully comply with the requirements of Local Rule 7.1." (Appendix D) (emphases in original) Petitioner could not file "a single motion" at that time due to the unreasonable restrictions District Judge imposed.

Regarding separate interrogatories, on August 30, 2018, Petitioner filed motion for sanctions. In the Aug 30, 2018 memo, Petitioner argued that:

> Besides, if Defendant does not tell Plaintiff whether it needs more information or not, then Plaintiff does not know. In this case, **the responses to Interrogatory No.1 in Third Response (ECF #132-1, page 4) [dated August 24, 2017, which was signed by Scott Silverman] ... , Defendant was silent about "PAA[3] Demuth's supervisor who was at the 13th precinct next to PAA Demuth when Plaintiff was interacting with PAA Demuth"**, ... Defendant did not inform Plaintiff that it needs more

3 Police Administrative Aide ("PAA")

information to start a search, until Oct 16, 2017 phone call."

> The reasonable inquiry requirement under **FRCP 26(g)** includes reaching out to Plaintiff and asking for additional information or clarification, given that there is a discovery order. If Defendant wants to stay silent about the issue and later blame Plaintiff, then Defendant does so at its peril. See *Update Art, Inc. v. Modiin Pub., Ltd., 843 F.2d 67, at 73 (2d Cir. 1988)* ("we wish to emphasize the importance we place on a party's compliance with discovery orders. Such compliance is necessary to the integrity of our judicial process. A party who flouts such orders does so at his peril."). Also see *Cathay Pac. Airways, Ltd. v. Fly & See Travel, Inc., 1991 U.S. Dist. LEXIS 11056, *7 (S.D.N.Y. 1991)* ("Based upon the deposition excerpts that were provided, it appears that the necessary documents may be invoices which may no longer exist. It is also possible that passengers' addresses are not in the possession of defendants. However, if that is the case, then defendants have an obligation to say so clearly and specifically in responding to the interrogatories. It was not responsive to make general reference to a list of documents and to state that the information may or may not be available. Only defendants know if it is available and playing "cat and mouse" with the plaintiffs is inconsistent with both the letter and spirit of the federal discovery rules.") (internal citation is omitted) (emphasis added)

Regarding the interrogatory at issue in the above quoted paragraphs, Magistrate Judge Fox already ruled on August 23, 2017 that Respondent waived all objections pursuant to FRCP 33(b)(4). And Respondent did not object to such order.

In opposition to the motion, Respondent argued that it did not and could not commence an investigation into the identity of 'PAA Demuth's supervisor' before Oct 16, 2017.

Petitioner notes that she presented evidences, such as NYPD patrol guide and deposition transcript of NYPD officer, which proves that there must be a Desk Officer at a precinct stationhouse, whose rank must be a sergeant or higher, at all

times and Desk Officer's duty includes interviewing visitors[4], and the command log records who was the Desk Officer at any given time.

Petitioner also reiterated in reply that "the point of *Cathay Pac. Airways, Ltd.* was that the courts do not condone "cat and mouse" game, and that even when a party is unable to respond to discovery request, the party must clearly state so."

On February 5, 2019, Magistrate Judge granted Aug 30, 2018 motion in part and found that Silverman[5]'s Rule 26(g) signature in August 2017 response to Petitioner's first set of interrogatories violated Rule 26(g) because the motion records established that he did not take "reasonable inquiry", before signing August 2017 response, such as i) requesting the 13th precinct's schedule and roll call; and ii) interviewing PAA Demuth (Appendix G, pp. G-18 to G-19). Magistrate Judge further "reject[ed], as untenable, the defendant's suggestion that Shim-Larkin's limited description of the PAA's supervisor delayed the commencement of or frustrated the progress of the defendant's investigation. The defendant did not need information from Shim- Larkin, such as the rank of the supervisor, to retrieve its records and review them with the PAA [Demuth] ..." (*Id*, p. G-20) Magistrate Judge also reopened limited discovery and found that "these records [which are to be provided during the reopened discovery] are relevant to the claims and defenses asserted and that the requests are reasonable and proportional to the needs of the case." (*Id*, p. G-24)

4 Plaintiff visited the 13th precinct stationhouse to report the incident happened at her work.
5 Respondent's former attorney, Scott Silverman.

Respondent objected to such order on March 8, 2019 arguing that Silverman had no notice since he withdrew from the case. Petitioner opposed on April 5, 2019 presenting SDNY ECF notification emails (Appendix J), which proved that Silverman received all motion papers submitted in regards to Aug 30, 2018 motion. In the opposition, Petitioner also asserted that she gave warning to Silverman before he withdrew that FRCP 26(g) motion will be forthcoming regarding his FRCP 26(g) signatures, through her Sep 12, 2017 opposition to Silverman's motion to withdraw. On September 28, 2020, Judge Nathan granted Respondent's Mar 8, 2019 objection on the ground that Silverman had no notice and Petitioner's motion did not seek sanction against him (Appendix C, p. C-4).

Regarding another separate discovery issue, on June 20, 2019, Magistrate Judge Fox issued an order to show cause. Respondent responded on June 27, 2019 and Petitioner was not authorized to file any response. Judge Fox imposed Rule 11 sanction (Appendix F). His sanctions included that Saint-Fort distribute Judge Fox's sanction order to other attorneys in Saint-Fort's office and her supervisors. Respondent objected to such order on September 30, 2019. Petitioner opposed to such objection on October 10, 2019. On September 28, 2020, Judge Nathan granted in part Respondent's objection on the ground that she "discerns little if any service of the broader goals of specific and general deterrence [would be caused by distributing Magistrate Judge's order to other attorneys' in Saint-Fort's office]". (Appendix C, p. C-9).

On October 13, 2020, Petitioner filed motion for reconsideration of Judge

Nathan's Sep 28, 2020 order arguing that Judge Nathan applied unequal standards between parties, in otherwise comparable situations.

On November 18, 2020, shortly after Petitioner discovered Judge Nathan's order entered in another case, *United States v. Nejad, 18-cr-224 (AJN), 2020 WL 5549931 (S.D.N.Y. September 16, 2020)* (Appendix K, p. K-2), Petitioner filed motion to recuse Judge Nathan alleging that i) Judge Nathan applied unequal standards between parties; ii) Judge Nathan comprehended that the above mentioned Magistrate Judge's sanction will have effect of deterring others unlike her opinion expressed in Sep 28, 2020 order; and iii) pervasively disregarded binding legal authorities.

On December 23, 2020, Judge Nathan denied both motion to recuse (Appendix B) and motion for reconsideration. On or about December 28, 2020, Petitioner filed petition for writ of mandamus. On April 7, 2021, the Second Circuit Court of Appeals denied the petition for writ of mandamus on the ground that "Petitioner has not demonstrated that exceptional circumstances warrant the requested relief." (Appendix A)

REASONS FOR GRANTING THE PETITION

1. Legislative History concerning 28 U.S.C. § 455

In September of 1969, eight defendants—known widely as the "Chicago Eight"[6]—were charged with conspiracy and, in violation of the federal Anti-Riot Act, "individually crossing state lines and making speeches with intent to 'incite, organize, promote and encourage' riots."[7] "The showdown between '60s radicals, their determined attorneys, and an authoritarian judge became a showcase for the critical lesson judges and the country must learn—the quality of justice depends not only on the laws themselves, but on those responsible for implementing the laws, especially our judges."[8]

Judge Julius Hoffman, the federal district judge who tried the Chicago Seven, was rated "unqualified by 78 percent of the lawyers polled in a 1976 survey of judicial performance by the Chicago Council of Lawyers."[9] "Updated but similar versions of the problems encountered (and created) by Judge Julius Hoffman now confront our newer, younger, and more qualified judges."[10]

"At the time of the Chicago Eight Trial, judges had too narrow of a lens on their ethical responsibilities. The focus was simply on statutory recusal. However, since the time of that trial, the lessons of the Chicago Eight Trial have impacted the

---

6 Bobby Seale was eventually severed from the case, and thus later became Chicago Seven.
7 JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL 9 (rev. ed. 1993).
8 Laurie L. Levenson, *Judicial Ethics: Lessons from the Chicago Eight Trial*, 50 Loy. U. Chi. L.J. 879, 880 (2019)
9 Stephanie B. Goldberg, *Lessons of the '60s: "We'd Do It Again," Say the Chicago Seven's Lawyers*, A.B.A. J., May 15, 1987, at 32, 33.
10 Susan R. Klein, *Movements in the Discretionary Authority of Federal District Court Judges over the Last 50 Years*, 50 Loy. U. Chi. L.J. 933, 934 (2019)

evolution of judicial ethics both in case law and ethical codes. ... in the 1970s, American jurisprudence almost harmoniously shifted to focus on implementing an objective standard of recusal. In 1972, the American Bar Association adopted a comprehensive Model Code of Judicial Conduct.[11] Then, in 1973, the Judicial Conference promulgated the Code of Conduct for United States Judges.[12] Serving as a judiciary guide for federal judges, the Code of Conduct established an objective standard for recusal which mirrored that of the American Bar Association. In 1974, a similar objective standard was adopted under 28 U.S.C. § 455,[13] thereby eliminating the previously imposed "duty to sit." The statute provided, "Any justice, judge, or magistrate judge of the United States should disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[14] Since then, the statute has been revised so that a judge "shall," not "should," disqualify himself in situations of impropriety.[15] The linguistic shift demonstrates an ongoing emphasis on mandatory recusal, perhaps motivated by an aversion to situations like the one presented in the Chicago Eight Trial."[16]

"Yet, even today, the advisory opinions in the Guide to Judiciary Policy may still not go far enough in preventing or responding to the types of situations Judge

11 MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 1998).

12 Richard K. Neumann Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 386 & n.66 (2003).

13 See 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3541 (3d ed. 2008) (noting that the statute, which was first enacted in 1792, was completely rewritten in 1974, and now serves as the basic provision on disqualification of federal judges).

14 28 U.S.C. § 455 (2012).

15 *Id.* See M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 47 (2005). ("The key change in 1990 was to replace 'should' with 'shall' to reflect the mandatory nature of the standards.").

16 Levenson, *supra* note 8, at 891-893. (several citations omitted)

Hoffman's behavior raised in the Chicago Eight Trial. Out of the 115 published advisory opinions, none of them deal with a judge's demeanor on the bench. Moreover, judges who openly express annoyance with a case still do not think that such concerns require them to recuse themselves.[17] They may be correct in that assessment, but the potential that they will act in a biased manner while on the bench is high. The hard decision is knowing when a judge has been so influenced by his or her disdain for a case or a party to realize that, objectively, the judge cannot be impartial in the matter."[18]

Accordingly, above mentioned lack of advisory opinions which deal with a judge's demeanor on the bench requires grant of instant petition.

2. Seventh Circuit's criticism against Judge Hoffman's demeanor

"Seventh Circuit found that Judge Hoffman's personal entanglement in the trial was so significant that all impartiality had been eroded, ultimately requiring the reversal of all convictions."[19] Especially, under the heading of "VIII. DEMEANOR OF THE JUDGE AND PROSECUTORS[,]" the Seventh Circuit stated that "[i]t does appear, however, that in comparable situations, the judge was more likely to exercise his discretion against the defense than against the government."

---

17 See Debra Cassens Weiss, *Federal Judge Who Said He Wouldn't Wish Case on His Worst Enemy Refuses to Recuse Himself,* A.B.A. J. (Apr. 18, 2017, 3:35 PM), http://www.abajournal.com/news/article/federal_judge_who_said_he_wouldnt_wish_case_on_his_worst_enemy_refuses_to_r/ (quoting the judge as saying his comments, though mistakenly made, "do not demonstrate bias against the plaintiff but rather frustration at irresolution of the action").

18 Levenson, *supra* note 8, at 894-895.

19 Levenson, *supra* note 8, at 881. (internal citations omitted)

and "[d]uring final argument to the jury the court made rulings which were, comparatively, more restrictive against the defense than the government." *U.S. v. Dellinger, 472 F.2d 340, 387, 390 (7th Cir. 1972)*

Given the above explained history of Chicago Seven trial and 28 U.S.C. § 455, the purpose of objective standard in 28 U.S.C. § 455 is to prevent similar problems encountered (and created) by Judge Hoffman, especially the ones the Seventh Circuit found, which quoted above. Therefore, if a judge makes rulings which are, comparatively, more restrictive against one party than the other, such judge must recuse himself under 28 U.S.C. § 455.

Therefore, review by this Court is necessary to correct a situation that, if left as is, will severely impair public's confidence in judicial system.

3. District Judge Nathan's unequal standards in acknowledging parties' arguments

Respondent's Apr 17, 2018 letter had zero particularity concerning its claim that Petitioner's discovery requests are irrelevant to the parties' claims and defenses, in violation of FRCP 7(b)(1)(B)[20]. Respondent's such claim was briefly mentioned as a fraction of a single sentence included in the same paragraph where it mainly asserted that, once an interrogatory response is verified, further discovery into such verification is not warranted. Yet Judge Nathan's Sep 27, 2018 order (Appendix E, p. E-2) concluded that "the Magistrate Judge's order was clearly erroneous because it did not acknowledge or rule on the Defendant's argument that

20 "A request for a court order must ... state with particularity the grounds for seeking the order"

the requests contained in the Plaintiffs ... discovery requests are irrelevant to the parties' claims and defenses[.]" Considering Judge Nathan's concession that Magistrate Judge "did not acknowledge or rule" on the Respondent's (zero particularity) argument, she knew (or should have known) that real prejudice exists caused by Respondent's failure to meet particularity standard – that Respondent did not give enough notice to Magistrate Judge. See *Feldberg v. Quechee Lakes Corp., 463 F.3d 195, 197 (2d Cir. 2006)* ("The motion must ... apprise the court and the opposing party of the grounds upon which reconsideration is sought. ... motion, which failed to give any indication of the grounds on which it was based, did not comply with [FRCP] 7(b)(1)")

In contrast, Petitioner's Aug 30, 2018 motion met higher standards in *Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 334 (2d Cir. 1999)*, "the notice requirement mandates that the subject of a sanctions motion be informed of: (1) the source of authority for the sanctions being considered; and (2) the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense." (internal citation omitted) Specifically, Aug 30, 2018 motion notified "the specific conduct or omission for which the sanctions are being considered" as that Respondent's interrogatory response, which was signed by Silverman, was silent about "PAA Demuth's supervisor", and "the source of authority for the sanctions being considered" as FRCP 26(g). Furthermore, Respondent presented its position concerning the above mentioned silence in interrogatory response through its opposition papers. Thus,

there is no prejudice.

However, Judge Nathan concluded in Sep 28, 2020 order (Appendix C, p. C-4) that Petitioner's motion did not seek sanction against Silverman, which indicates that she failed to acknowledge the above mentioned Petitioner's arguments about Silverman's FRCP 26(g) violation in Aug 30, 2018 motion.

Considering that Judge Nathan acknowledged Respondent's claim, which failed to meet FRCP 7(b)(1)(B) particularity standard and caused real prejudice, but failed to acknowledge Petitioner's arguments, which met higher standard in *Schlaifer* and caused no prejudice, a reasonable person will conclude that such contrast evidences deep-seated favoritism and unequivocal antagonism that would make fair judgment impossible and raises reasonable questions about the impartiality, and the neutral and objective character of the court's rulings.

Additionally, such inequality is aggravated since Petitioner is *pro se*, whose submission must be construed liberally than represented Respondent, which makes Petitioner's already clear and indisputable right to the relief even more clear and indisputable.

4. Clearly erroneous view of the law

It seems that Judge Nathan used the issue of whether the attorney who violated FRCP 26(g) withdrew from the case or not when she decides whether the attorney was served with a notice, because she mentioned such issue only, not

SDNY Local Civil Rule 5.2.(a)[21] or SDNY ECF Rule 9.1.[22], in her Sep 28, 2020 order (Appendix C, p. C-4). Petitioner's Aug 30, 2018 motion papers were duly served on Silverman, according to ECF notification emails (Appendix J), and pursuant to SDNY ECF Rule 9.1 and Local Civil Rule 5.2.(a). Therefore, it was clearly erroneous view of the law for Judge Nathan to rely on that Silverman withdrew from the case, instead of the above mentioned ECF Rule and Local Rule.

Furthermore, Judge Nathan's failure to apply judicial estoppel is another clearly erroneous view of the law, and the records indicates that it is Respondent's bad faith tactic to rely on Silverman's withdrawal in order to freely change the strategy once the initial tactic failed. Before Magistrate Judge, Respondent employed a strategy to portray that it did not and could not commence an investigation into the identity of 'PAA Demuth's supervisor' before Oct 16, 2017. Especially, Saint-Fort declared under penalty of penalty in opposition to Aug 30, 2018 motion that "Defendant then commenced an investigation [after Oct 16, 2017 'meet and confer' conversation]" and stated similarly in the accompanying brief. Respondent did not provide any explanation why Saint- Fort did not check with Silverman, about whether there was any investigation before Oct 16, 2017 before

21 "Parties serving and filing papers shall follow the instructions regarding Electronic Case Filing (ECF) published on the website of each respective Court. A paper served and filed by electronic means in accordance with such instructions is, for purposes of Fed. R. Civ. P. 5, served and filed in compliance with the Local Civil Rules of the Southern and Eastern Districts of New York."

22 "In cases assigned to the ECF system, service is complete provided all parties receive a Notice of Electronic Filing (NEF), which is sent automatically by email from the Court (see the NEF for a list of who did/did not receive notice electronically). Transmission of the NEF constitutes service upon all Filing and Receiving Users who are listed as recipients of notice by electronic mail. It remains the duty of Filing and Receiving Users to maintain current contact information with the court and PACER and to regularly review the docket sheet of the case."

declaring under penalty of perjury above quoted statements. The fact that Saint-Fort uploaded Silverman's declaration during the FRCP 72(a) objection proceeding indicates that she did not have any problem with contacting Silverman and getting his cooperation. Once Respondent's initial strategy became unsuccessful before Magistrate Judge, it changed strategy in FRCP 72(a) proceeding and now claims that there was some investigation before Oct 16, 2017. Despite the above mentioned absence of explanation, Judge Nathan accommodated this bad faith tactic. A court in SDNY already denied the similar excuse that transition between the lawyers caused untimely submission and the Second Circuit affirmed.

> "The claim of appellant's counsel that the "confusion" surrounding the transition between the three different lawyers handling Seinfeld's case constitutes excusable neglect is similarly unpersuasive. ... In any firm, attorneys acquire new clients, take leave for vacation, and move on for new career opportunities. In the context of this case, the possibly harried transition between the lawyers representing Seinfeld does not excuse their collective failure to read electronic notifications from a court pertaining to an appeal integral to their client's case."
> *Seinfeld v. WorldCom, Inc., 2007 U.S. Dist. LEXIS 24759, *12-13 (S.D.N.Y. Apr 4, 2007) aff'd 283 Fed. Appx. 876 (2d Cir. 2008)*

Additionally, through Petitioner's Sep 12, 2017 opposition to Silverman's withdrawal motion, she gave another notice, before his withdrawal, that a motion for sanctions concerning his violation of FRCP 26(g) is forthcoming. Even after such opposition, neither Silverman nor Respondent stopped seeking his withdrawal from the case. Therefore, both Silverman and Respondent implicitly consented that they will be accountable for any disadvantage from his withdrawal concerning Petitioner's upcoming FRCP 26(g) sanction motion.

5. Comprehension of Magistrate Judge's sanction

Magistrate Judge's FRCP 11 sanction order dated Sep 16, 2019 (Appendix F, p. F-22) included that Saint-Fort distribute the order to other attorneys in her office and her supervisors. In such order, Magistrate Judge considered that i) Respondent was sanctioned for Saint-Fort's misconduct, including disregarding the Court's order[23]; ii) Saint-Fort's allegation about how she "understood" Petitioner's statements in Jan 9, 2018 declaration and July 20, 2018 declaration is "falsehearted and strains credulity" (Appendix F, p. F-19), and "spurious, unsupported by evidence and contrary to the record." (*Id.* p. F-20); and iii) even after "[t]he Court noted in the February 5, 2019 order that the defendant's contention at issue was undermined by the record" (*Id.* p. F-17), Saint-Fort repeated such contention.

In Sep 28, 2020 order (Appendix C, pp. C-8 to C-9), Judge Nathan did not explicitly deny above findings of Magistrate Judge. Especially, Judge Nathan did not mention Saint-Fort's previously sanctioned misconduct or Magistrate Judge's finding that Saint-Fort's proposed excuse was "falsehearted and strains credulity" and "spurious, unsupported by evidence and contrary to the record".

Petitioner notes that since Magistrate Judge Fox conducted more than a dozen pre-motion conferences – some of them did not lead to FRCP 72(a) objection proceedings, thus, Judge Nathan is not familiar with those – he is more familiar

23 "The monetary sanction in the amount of $300 that was imposed previously in this action, albeit on the defendant for violations of the Fed. R. Civ. P. 33 and the Court's order, Docket Entry Nos. 319, 492, did not seem to have a deterrent effect on Saint-Fort and prevent her from violating Rule 11(b)(3)." (Appendix F, p. F-21) In particular, Saint-Fort blatantly asserted objections to certain interrogatories even after Judge Fox forbade to do so to such interrogatories.

with the discovery issues in instant case, and he at least had opportunities to observe the tone of voices of Petitioner and Saint-Fort on numerous occasions. To Petitioner's knowledge, Judge Nathan did not have such opportunity, since there was never an in-person or telephonic conference before her. In contrast, there were in-person conference at the beginning of discovery and more than a dozen telephonic conferences before Judge Fox. Therefore, Judge Fox is more familiar with the issues and Petitioner and Saint-Fort, thus, better situated than Judge Nathan to marshal the pertinent facts and apply a fact-dependent legal standard. See *Rankin v. City of Niagara Falls, 569 Fed. Appx. 25, 26 (2d Cir. 2014)* ("the district court is familiar with the issues and litigants and is thus better situated than the court of appeals to marshal the pertinent facts and apply a fact-dependent legal standard." *Storey v. Cello L.L.C., 347 F.3d 370, 387 (2d Cir. 2003)* (quoting *Cooter & Gell v. Corp., 496 U.S. 384, 402, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)*) (alterations and internal quotation marks omitted))

Judge Nathan's expressed ground in Sep 28, 2020 order (Appendix C, p. C-9) in overturning Magistrate Judge's sanction that Saint-Fort distribute the order to other attorneys in her office was that she "discerns little if any service of the broader goals of specific and general deterrence [would be caused by the sanction]." Judge Nathan did not explicitly deny that the goal of FRCP 11 sanction includes deterring others similarly situated. FRCP 11 sanction automatically attaches the goal of deterring others similarly situated under FRCP 11(c)(4) and "a law firm must be held jointly responsible" under FRCP 11(c)(1).

Even though the above quoted order indicates that Judge Nathan believed that distributing the sanction order to other attorneys will not have effect of deterring others similarly situated, the order entered in *Nejad* case on September 16, 2020 (Appendix K), only 12 days before, indicates differently. Based on *Nejad* order (Appendix K, p. K-2) that "the Acting United States Attorney shall ensure that all current AUSAs and Special AUSAs read this Opinion" "to ensure future prosecutions brought under the aegis of her office do not suffer from the same [misconduct,]" a reasonable person will conclude that Judge Nathan comprehended that making other attorneys in a law office to read an order will have a positive effect of ensuring that the same misconduct described in such order will not be repeated in the future.

Especially, in Oct 10, 2019 opposition to Respondent's FRCP 72(a) objection, Petitioner explained that:

> "every attorney within the New York City Law Department, Labor & Employment Law Division" are "others similarly situated", since they practice the law in the same area with Saint-Fort. Therefore, informing those "similarly situated" people that the conducts described in sanction order are sanctionable conducts will have an effect of preventing those "similarly situated" people from engaging such conducts.
> Additionally, informing acting corporation counsel and Saint-Fort's supervisor, who may be responsible for not supervising enough to prevent Saint-Fort from engaging sanctionable conducts, about which conducts can be sanctionable will have an effect of promoting better supervision of other "similarly situated" people to not engage in such conducts."

Based on Judge Nathan's above mentioned *Nejad* order, a reasonable person

will believe that she agreed with Petitioner's above quoted explanation.

Accordingly, this contrast in Judge Nathan's orders between instant case and *Nejad* case evidences deep-seated favoritism and unequivocal antagonism that would make fair judgment impossible and raises reasonable questions about the impartiality, and the neutral and objective character of the court's rulings.

6. Unequal standards in using the Court's power

Judge Nathan rejected the above mentioned sanction imposed on Saint-Fort by Judge Fox, while Judge Nathan did not hesitate to put extreme measures against Petitioner.

In Feb 13, 2019 order (Appendix D, p. D-2), Judge Nathan administratively denied Petitioner's four motions and ordered that "Plaintiff may file **a single motion** addressing any issues from docket items 259, 271, 278, and 355 that remain in light of the Court's September 27, 2018, order and the instant order. This motion shall be no more than fifteen pages in length and shall fully comply with the requirements of Local Rule 7.1." (emphases in original)

Even though "district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases", "[b]ecause the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court's inherent powers must be exercised with restraint." *Dietz v. Bouldin, 136 S. Ct. 1885, 1892-1893 (2016)* (internal citations

omitted)

The narrowest possible measure in this case would be setting the briefing schedule for those motions at ECF #259, 271, 278, and 355, instead of administratively denying those motions.

Almost always, it is a party who decides whether to request reliefs and present arguments in separate motions or in one motion, not a judge. But Judge Nathan unreasonably ordered Petitioner to merge four motions into a single motion.

Moreover, considering that Judge Nathan's own individual rule 3.B. set the page limit as 25 pages, not 15 pages, she conceded that the reasonable page limit for memorandum of law in support of motion is 25 pages, even when a person does not have to combine multiple motions into a single motion. And such rule applies to attorneys, who have more skills in writing concisely than *pro se*. "[A] *pro se* litigant ... cannot be expected to act with the diligence or skill of an attorney." *Baptista v. Hartford Bd. of Educ., 427 Fed. Appx. 39, 43 (2d Cir. 2011)* Such discrepancy between Judge Nathan's own individual rule and the limit imposed on Petitioner gives an appearance of unequivocal antagonism towards Petitioner.

Since such limits are unreasonable, it is *de facto* sanction imposed on Petitioner without providing the mandatory *Schlaifer* notice to her.

Additionally, Judge Nathan previously "admonished" Petitioner that "in future filings, she must make all applicable arguments in any filing before the Court or the Court will not consider the argument." in September 27, 2018 order (Appendix E, p. E-3, footnote 1). Thus, above mentioned unreasonable page limit

specifically imposed on Petitioner cannot be compensated by referring to previously filed motions which Judge Nathan administratively denied.

For the foregoing reasons, Judge Nathan is not using the same or reasonable standard – such as whether the misconduct was found, and narrower measure will suffice – when it imposes measures or sanctions against a party. "*[P]ro se* litigants in federal court should be granted greater leniency and patience than persons who are represented by counsel" *Spiegelman v. Reprise Records, 1996 U.S. App. LEXIS 11825, *3 (2d Cir. 1996)* (citing *Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)*) Even without considering such leniency and patience afforded to *pro se*, Judge Nathan is not applying the same or reasonable standards between *pro se* Petitioner and represented Respondent.

7. Decisions cannot be located within the range of permissible decisions

The Sep 28, 2020 order (Appendix C) was entered in the context of FRCP 72(a) objection. Under FRCP 72(a), the court has authority to "modify or set aside any part of the [Magistrate Judge's] order that is clearly erroneous or is contrary to law." In other words, any part of the order which is not clearly erroneous or is not contrary to law shall not be modified or set aside.

In Feb 5, 2019 order (Appendix G, p. G-24), Judge Fox made a finding as "these records [which were ordered to provide during the reopened discovery concerning anticipated Lt. Kalicovic deposition] are relevant to the claims and defenses asserted and that the requests are reasonable and proportional to the

needs of the case."

However, Sep 28, 2020 order (Appendix C, pp. C-5 to C-6) made conflicting findings that "the highly tenuous connection Lt. Kalicovic bears to this litigation even accepting Ms. Shim-Larkin's narrative as true ... that discovery should not be reopened to permit Ms. Shim-Larkin to depose Lt. Kalicovic[,]" without finding that above mentioned Judge Fox's finding about relevance and proportionality is clearly erroneous. Even though Judge Nathan provided explanation about why she thinks Judge Fox's finding that Respondent failed to meet FRCP 26(g) standard is clearly erroneous, she did not provide any explanation about why Judge Fox's finding about relevance and proportionality is clearly erroneous. If records are "proportionally" relevant, then they cannot be "tenuously" relevant.

Also, as explained above, Judge Fox is better situated than Judge Nathan to marshal the pertinent facts and apply a fact-dependent legal standard.

8. Other decisions cannot be located within the permissible range

If Respondent's interrogatory answer with respect to the identity of PAA Demuth's supervisor was "unable to determine"[24] at the time Silverman signed the interrogatory response, then Respondent should have provided such answer, "unable to determine", under oath pursuant to FRCP 33(b)(3) and signed by a person who is not an attorney pursuant to 33(b)(5). By signing interrogatory

24 During the FRCP 72(a) proceeding, Respondent submitted Silverman's declaration which declared that "In sum and substance, I was informed by NYPD personnel from the Thirteenth Precinct that they were unable to determine who Plaintiff was referring to ..."

response which did not include the answer that "unable to determine", Silverman violated FRCP 26(g). Thus, Judge Nathan's order (Appendix C, p. C-5) that "the City acted reasonably under the Federal Rules" is contrary to FRCP 33(b)(3) and 33(b)(5).

Petitioner notes that, concerning the interrogatory at issue, Magistrate Judge Fox already ruled on August 23, 2017 that Respondent waived all objections pursuant to FRCP 33(b)(4). And Respondent did not object to such order. Therefore, Respondent should have answered the interrogatory without asserting any objections.

9. Inability to render a fair decision

In the rare case where a judge has repeatedly adhered to an erroneous view after the error is called to his attention, reassignment to another judge may be advisable in order to avoid "an exercise in futility [in which] the Court is merely marching up the hill only to march right down again[.]" *United States v. Robin, 553 F.2d 8, 11 (2d Cir. 1977)* (internal citation omitted)

District Judge refused to correct errors even after Petitioner called the attention to such errors though motion for reconsideration and motion to recuse. Furthermore, Judge Nathan stated that "pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith" in regard to those two motions (Appendix B, p. B-3). Such firmness of Judge Nathan demonstrates that she took Petitioner's motion to recuse as personal attack and her inability to render a fair decision, which requires recusal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Heena Shim

Date: May 24, 2021