Analysis of Judge Hartman's May 5, 2017 Decision + Amended Decision paragraphs 5-8, 10-11 of plaintiffs' June 12, 2017 affidavit in support of order to show cause for reargument, renewal, + vacatur

questioned.'

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

> 'It is cause for discipline for a judge to fail to disclose on the record or offer to disqualify under circumstances where his impartiality might reasonable (sic) be questioned.'" (plaintiffs' September 30, 2016 memorandum of law, at pp. 43-44).

4. To facilitate the Court's fixing the shortest return date possible, I have given AAG Kerwin a "head-start" in responding by already e-mailing her the unsigned order to show cause, this affidavit, and all its annexed exhibits *via* the link to CJA's webpage posting them. The e-mail receipt is annexed (Exhibit D). Suffice to note that a longer return date would not benefit defendants in the slightest. No amount of time will enable them to refute the showing herein, as it is factually and legally accurate, mandating the granting of the reargument/renewal/vacatur relief sought, *as a matter of law*.

5. The basis for the requested relief is that the Court's two May 5, 2017 decisions are factually and legally insupportable and fraudulent, further demonstrating the actual bias that this Court demonstrated by its December 21, 2016 decision that was the basis for plaintiffs' February 15, 2017 order to show cause, whose substantiating proof was plaintiffs' 23-page, single-spaced analysis of the December 21, 2016 decision, annexed as Exhibit U.

6. In denying plaintiffs' February 15, 2017 order to show cause, this Court's barely 1-1/2-page May 5, 2017 decision (Exhibit A-2) makes no mention of plaintiffs' Exhibit U analysis, whose accuracy it does not contest. Nor does it mention or contest the accuracy of plaintiffs' 53-page September 30, 2016 memorandum of law on which the Exhibit U analysis principally relies. Instead, the decision disposes of the February 15, 2017 order to show cause by two short conclusory paragraphs of two sentences and three sentences, respectively, neither identifying a single fact other

than that "Plaintiff correctly points out that the Court['s December 21, 2016 decision] failed to 'recite the papers used on the motion,' as required by CPLR 2219(a)." These two paragraphs follow upon a two-sentence introductory paragraph which conceals the alternative relief specified by the first branch of the February 15, 2017 order to show cause in the event the Court did not disqualify itself, *to wit*, "disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon [its] fairness and impartiality." The May 5, 2017 decision makes no disclosure.

THE GROUNDS FOR REARGUMENT

7. In keeping with the euphemistic phrasing of CPLR §2221, the grounds for reargument are that the Court "overlooked or misapprehended" ALL the facts, law, and legal argument presented by plaintiffs' February 15, 2017 order to show cause, other than the violation of CPLR §2219(a) in its December 21, 2016 decision/order. Such facts, law, and legal argument are dispositive of plaintiffs' entitlement to the granting of their February 15, 2017 order to show cause "in its entirety" – and to adjudication of the four threshold integrity issues specified at the outset of plaintiffs' Exhibit U analysis as concealed, without adjudication, by the December 21, 2016 decision, *to wit*:

> (1) Justice Hartman's duty to disqualify herself and, absent that, to make on-the-record disclosure of facts pertaining to her financial interest and multitudinous associations and relationships with the defendants;
>
> (2) plaintiffs' entitlement to the Attorney General's representation/intervention, pursuant to Executive Law §63.1 and State Finance Law Article 7-A;
>
> (3) plaintiffs' entitlement to the disqualification of defendant Attorney General Schneiderman from representing his fellow defendants;
>
> (4) plaintiffs' entitlement to sanctions, and disciplinary and criminal referrals of AAG Kerwin and those supervising her in the Attorney

General's office, responsible for her legally-insufficient, fraudulent September 15, 2016 dismissal cross-motion.

8. In the interest of economy, plaintiffs rest on the analysis of the May 5, 2017 decision set forth at pages 52-55 of their May 15, 2017 reply memorandum of law in further support of their March 29, 2017 order to show cause for summary judgment, leave to supplement, and injunctive relief. Here, as on that *sub judice* motion, the Court's threshold duty is disclosure, absent its disqualifying itself. Plaintiffs' analysis of the May 5, 2017 decision is framed by that issue, as follows:

> "Instructive of the Court's obligation to make disclosure and address whether it should disqualify itself, even in the absence of a formal motion for its disqualification – and to do so, threshold, before determining the motion before it – is the decision '*Trimarco v. Data Treasury Corp.*, 2014 NY Slip Op 30664[U] [Sup Ct, Suffolk County 2014]' – cited by its May 5, 2017 decision (at p. 2).
>
> Yet the Court's May 5, 2017 decision, like its December 21, 2016 decision, not only makes no disclosure, it conceals that plaintiffs even requested disclosure.
>
> The specifics of plaintiffs' disclosure requests, as stated initially in their September 30, 2016 memorandum of law (at p. 5) and then quoted, *verbatim*, in their Exhibit U analysis of the Court's December 21, 2016 decision, are no less germane now, as then, and were as follows:
>
> > '...apart from this Court's $60,000-a-year judicial salary interest, plus the additional thousands of dollars in salary-based, non-salary benefits challenged by this citizen-taxpayer action, are the Court's professional and personal relationships that led to its being appointed to the bench by defendant Governor Cuomo and confirmed by defendant Senate, last year, after 30 years of employment in the Attorney General's office, including as an assistant solicitor general to defendant Attorney General Schneiderman and, before that, as an assistant solicitor general to then-Attorney General defendant Cuomo.[fn4]' (Exhibit U analysis, at p. 6).
>
> The Court responded to this – and to the balance of plaintiffs' Exhibit U analysis on which their February 15, 2017 order to show cause for its disqualification rested – with three sentences in its May 5, 2017 decision:
>
> > '...plaintiff has not alleged a proper ground for disqualification. The undersigned Judge has no interest in this litigation or blood relation or

> affinity to any party hereto (*see People v. Call*, 287 AD2d 877, 878-879 [3d Dept 2001]; *People v Call*, 287 AD2d 877 [3d Dept 2001]; *Trimarco v. Data Treasury Corp.*, 2014 NY Slip Op 30664[U] [Sup Ct, Suffolk County 2014], citing *Paddock v. Wells*, 2 Barb. Ch. 331, 333 [Chancellor's Ct 1847]). Plaintiffs' conclusory allegations of bias and fraud are meritless.' (at p. 2, underlining added).

Suffice to note that even Judge McDonough, in denying plaintiffs' requests for his disqualification, did not purport that he had 'no interest'. Rather, and without revealing that the case before him involved the unconstitutionality and unlawfulness of judicial salary increases, he stated:

> 'The alleged financial conflict that plaintiffs describe is equally applicable to every Supreme and Acting Supreme Court Justice in the State of New York, rendering recusal on the basis of financial interest a functional impossibility (*see*, Matter of Maron v Silver, 14 NY3d 230, 248-249 [2012]).'

Inasmuch as the first branch of plaintiffs' March 29, 2017 order to show cause is for summary judgment on their sixth cause of action to void the statute that since April 1, 2016 has raised the Court's salary by over $20,000 a year and that will raise it by another $10,000 on April 1, 2018, and will result in the voiding of the predecessor statute that gave its salary a $40,000 boost, with the consequence that its yearly salary will plummet from its current $193,000-plus to $136,700 – on top of which it will be subject to a claw-back of approximately $100,000 since it took the bench two years ago, this Court must disclose the basis for its bald declaration that it has 'no interest in this litigation'. Certainly, such declaration gives the appearance that it is not fair and impartial, as no fair and impartial judge would make so false a claim.

In that connection, the Court should also disclose whether it agrees with the position, asserted by plaintiffs before Judge McDonough, but ignored by him, that:

> 'A judge can be financially interested, yet nonetheless rise above that interest to discharge his duty. A judge who cannot or will not do that and so-demonstrates this by manifesting his actual bias – must disqualify himself or be disqualified.' (underlining in the original)[fn4].

As plaintiffs' February 15, 2017 order to show cause for the Court's disqualification was not only for 'interest', but, in the first instance, for 'demonstrated actual bias' – as to which plaintiffs furnished their Exhibit U analysis of its December 21, 2016 decision as the *prima facie* proof – the Court must

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"fn4 See plaintiffs' Exhibit G analysis of Judge McDonough's August 1, 2016 decision, annexed to their September 2, 2016 verified complaint (at pp. 11-14, under the section heading: 'The Threshold Issue of Justice McDonough's Disqualifying Actual Bias, Born of his Financial Interest – Shoved to the Back & Covered-Up')."

additionally disclose the basis upon which its May 5, 2017 decision, without identifying the Exhibit U analysis or contesting its accuracy in any respect, baldly proclaimed 'Plaintiff's conclusory allegations of bias and fraud are meritless.' Here, too, no fair and impartial judge would make so false a claim.

Likewise, the Court must disclose the basis upon which its May 5, 2017 decision makes the one-sentence declaration 'plaintiff has not established 'matters of fact or law' that the Court 'overlooked or misapprehended,' or new facts that would warrant renewal or reargument' – which, as to reargument, is belied by the Exhibit U analysis and, as to renewal, is belied by the responses to plaintiffs' FOIL requests pertaining to the Court's 30-year tenure at the Attorney General's office, working for defendants CUOMO and then SCHNEIDERMAN and its appointment to the bench by defendant CUOMO, confirmed by defendant SENATE – which, like Exhibit U, were exhibits to plaintiff SASSOWER's moving affidavit and summarized therein (¶¶9-11).

As to the Court's 30-year tenure at the Attorney General's office, disclosure is certainly warranted as to its personal and professional relationships with named defendants SCHNEIDERMAN and CUOMO, with Attorney General supervisory staff, and with AAG Lynch and AAG Kerwin, given its complete cover-up of the Attorney General's flagrant litigation fraud and disregard of the interests of the state. In that regard, disclosure is warranted as to whether the Court, when it worked in the Attorney General's office, itself was a practitioner of the AG's *modus operandi* of litigation fraud (Exhibit 7-a), such that it cannot now blow the whistle on what it itself did.

Then, there is a reasonable question as to whether, given all the circumstances, including plaintiffs' April 10, 2017 and April 21, 2017 complaints to supervising judges about its demonstrated actual bias and its subsequent further demonstration of actual bias by its May 5, 2017 decision, as herein summarized, make 'the risk of bias [] too high to be constitutionally tolerable'. As to this disqualification standard, the United States Supreme Court rendered a decision on March 6, 2017 in *Rippo v. Baker*, 580 U. S. ____ , stating:

> 'Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge ''ha[s] no actual bias.'' *Aetna Life Ins. Co. v. Lavoie*, 475 U. S. 813, 825 (1986). Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' *Withrow v. Larkin*, 421 U. S. 35, 47 (1975); *see Williams v. Pennsylvania*, 579 U. S. ___, ___ (2016) (slip op., at 6) ('The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias' (internal quotation marks omitted))....the question our precedents require [is]: whether, considering all the circumstances alleged, the risk of bias was too high to be

constitutionally tolerable.'" (Plaintiffs' May 15, 2017 reply memorandum of law, at pp. 52-55).

9. All the above specified disclosure germane to plaintiffs' pending March 29, 2017 order to show cause is here warranted, upon reargument, absent the Court's disqualifying itself for the actual bias demonstrated by its December 21, 2016 decision and now by its two May 5, 2017 decisions.

10. There are two other manifestations of the Court's actual bias demonstrated by its May 5, 2017 decision (Exhibit A-2) – warranting its explanation, in the context of disclosure:

(a) Although the decision's first sentence identifies that this is a "citizen-taxpayer action pursuant to State Finance Law 123-b", its balance conceals the Court's willful and deliberate violation of the expedition commanded by State Finance Law §123-c(4). Thus, the decision eliminates all procedural history for what it identifies as plaintiffs' motion, not revealing it to be an order to show cause, its date, and that my February 15, 2017 moving affidavit requested as short a return date as possible, facilitating same by annexing an e-mail showing that the order to show cause had already been furnished to AAG Kerwin, and that, upon signing the order to show cause, on February 21, 2017, the Court inexplicably set a return date of March 24, 2017, affording defendants more than five weeks for their response and plaintiffs less than two days for their reply – thereafter delaying its paltry and fraudulent disposition on the submitted motion a full five weeks – to May 5, 2017.

(b) Although the decision ends with a CPLR §2219(a) listing of "Papers Considered", this is the only place where the decision refers to AAG Kerwin's opposition papers – as to which, on the March 24, 2017 return date, I wrote to the Court notifying it that such opposition was fraudulent and that I was endeavoring to secure supervisory oversight by AAG Kerwin's superiors at the Attorney General's office to withdraw it, thereby obviating my having to reply. Such March 24, 2017 letter, the Court's March 24, 2017 responding so-ordered letter, and my subsequent e-mails alerting the Court to the supervisory nonfeasance and misfeasance at the Attorney General's office[2] are not listed in the CPLR §2219(a) recitation of "Papers Considered", nor referred to elsewhere in the decision. The impression thereby created by the Court is that plaintiffs neither replied, nor sought to reply, which is false.

11. As the May 5, 2017 decision makes no comment or finding with respect to AAG

[2] My March 24, 2017 letter to the Court and its March 24, 2017 so-ordered responding letter are Exhibits 6-a and 6-b, respectively, to my May 15, 2017 reply affidavit in further support of plaintiffs' March

Kerwin's March 22, 2017 opposition papers – as was its obligation to do pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct – annexed is plaintiffs' analysis thereof (Exhibit E), which I wrote and to whose accuracy, both factually and legally, I swear. Chronicled therein is the flagrant fraud of AAG Kerwin's March 22, 2017 opposing affirmation and memorandum of law that the Court "overlooked" when it "Considered" them. Such defense fraud, to which the Court gave a "free pass", reinforces the four threshold integrity issues highlighted by plaintiffs' Exhibit U analysis (at pp. 3-8) and, prior thereto, by their September 30, 2016 memorandum of law (at pp. 1-6, 42-52) —beginning with the Court's duty to make disclosure of its personal and professional relationships with defendants, with AAG Kerwin, and with supervisory levels at the Attorney General's office, absent its disqualifying itself, as no lawyer would do what AAG Kerwin did by her March 22, 2017 opposition papers unless confident that a biased and self-interested court would let her get away with it.

12. Suffice to note that just as the May 5, 2017 decision conceals the disclosure sought by plaintiffs' February 15, 2017 order to show cause, so too AAG Kerwin's opposition papers. Obvious from this double concealment is that neither AAG Kerwin nor the Court can concoct any argument to counter the Court's mandatory duty to make disclosure. Indeed, the Commission on Judicial Conduct's most recent annual report – issued March 2017 – reinforces this. There, under the heading "Conflicts of Interest" (at p. 14), is mirrored what plaintiffs' September 30, 2016 memorandum of law had stated (at p. 44):

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

29, 2017 order to show cause. My further e-mails to the Court reflecting the supervisory nonfeasance and misfeasance at the Attorney General's office are also annexed thereto, as Exhibits 6-n and 7-b.