8/17/98

STATE OF NEW YORK
COURT OF APPEALS

ROBERT L. SCHULZ, GARY T. LOUGHREY, MARK N. AXINN, BRADFORD R. ARTER, and JAMES B. STRAWHORN,

Plaintiffs-Appellants,

- against -

THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY AND JOSEPH BRUNO, SENATE MAJORITY LEADER; and THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR, H. CARL MC CALL, COMPTROLLER,

Defendants-Respondents,

And

THE CITY OF NEW YORK; and THE NEW YORK CITY TRANSITIONAL FINANCE AUTHORITY,

Intervenors-Defendants-Respondents.

NOTICE OF MOTION TO DISQUALIFY

Albany County
Index No. 3256-97
A.D. No. 81812

PLEASE TAKE NOTICE that, based on the annexed affidavit by Robert L. Schulz and Gary T. Loughrey, plaintiffs will move this Court on August 31, 1998, to disqualify Chief Judge Judith Kaye and Judges Joseph Bellacosa, Carmen Ciparick, and Howard Levine, and for such other and further relief as the Court may deem proper and just.

DATED: Queensbury, 1998
August 17, 1998

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Intervenors-Defendants-Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO DISQUALIFY

Albany County
Index No. 3256-97
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Robert L. Schulz and Gary T. Loughrey, being duly sworn, depose and say:

1. We are the plaintiffs-appellants in the matter captioned above and we make this affidavit in support of plaintiffs' motion to disqualify, returnable August 31, 1998.

2. This is a declaratory judgment action which seeks to have two state statutes declared unconstitutional, null and void: State Finance Law Section 123-b(1) and Chapter 16 of the Laws of 1997.

3. SFL 123-b(1) was enacted in 1975 ostensibly to deny standing to any citizen to maintain an action in court if the subject matter involved public borrowing, even if the citizen's complaint is deeply rooted in the New York or United States Constitutions. Plaintiffs' complaint is that SFL 123-b(1) is violative of plaintiffs' fundamental right to petition for a redress of grievances (1st Amendment and Article I, Section 9.1 of the N.Y. Constitution) and plaintiffs' right to

(1st Amendment and Article I, Section 9.1 of the N.Y. Constitution) and plaintiffs' right to freedom from laws which abridge their privileges and immunities (14th Amendment to the U.S. Constitution) and their right to a government republican in form and substance (Article IV, Section 4 of the U.S. Constitution).

4. Chapter 16 of the Laws of 1997 establishes yet another political subdivision and public corporation of the State -- the N.Y.C. Transitional Finance Authority ("TFA") -- for the expressed purpose of circumventing the N.Y. Constitution's cap on the amount of debt N.Y.C. is authorized to incur.[1] Chapter 16 L97 commits/dedicates City income tax and State sales tax revenues to the TFA, there to be used, first, to pay the principal of and interest on any bonds issued by the TFA, for as long as TFA bonds are outstanding. Plaintiffs' complaint is that Chapter 16 L97 violates the following provisions of the N.Y. Constitution as well as the guarantee clause (Article IV, Section 4) and the privileges and immunities clause (14th Amendment, Clause 2) of the U.S. Constitution:

1. Article VIII, Section 4 (limits NYC debt)
2. Article VIII, Section 2 (requires City to pledge its full faith and credit when incurring debt)
3. Article VIII, Section 12 (requires legislature to prevent abuses in taxation and borrowing)
4. Article X, Section 5 (prohibits the use of public funds to pay the debt of any public corporation)
5. Article VII, Section 7 (requires appropriation by law before any money can be paid out of funds under the care and management of the State Comptroller)
6. Article VII, Section 11 (requires voter approval before the State can contract indebtedness)
7. Article VII, Section 8 (prohibits the State from giving its credit to a public corporation)
8. Article VIII, Section 1 (prohibits the City from giving its credit to a public corporation)

[1] See Section 1, "Legislative findings," Chapter 16 L97.

5. For plaintiffs to be able to receive equal justice under the law in the highest court in the State, much less to prevail in their assertion of constitutional infirmities in this case, it would first be necessary for Chief Judge Judith Kaye and Judges Bellacosa, Ciparick and Levine (hereinafter the "Judges") to do something each has failed to do in prior similar cases brought to them at the Court of Appeals by plaintiff Schulz and other citizens -- recognize the unconstitutionality of SFL 123-b(1) because it is violative of the First Amendment's guarantee of every citizen's right to petition the government for a redress of grievances.

6. Then, with SFL 123-b(1) no longer serving as an impenetrable barrier to judicial review of legislative and executive public borrowing schemes, in order for plaintiffs to receive equal justice in the court to say nothing of prevailing in their assertion of the constitutional infirmities they see regarding Chapter 16 L97, it would then be necessary for the Judges to hazard the value of their personal financial interests and, in the case of Judge Kaye's spouse, the length and content of the list of lucrative state public corporation clients of the law firm of which he is a partner.[2]

7. It is understood that, should plaintiffs prevail in this case, the constitutionality of tens of billions of dollars of outstanding bonds issued by public corporations/political subdivisions of the state would be called into question. This would adversely affect the value of all bonds issued by the state's public authorities and corporations, and compromise the state's ability to redeem those bonds according to their fixed schedules.[3]

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[2] Proskauer, Rose, Getz and Mendelsohn.

[3] Plaintiffs are not interested in creating financial chaos irrespective of any opinions to the contrary. They do believe, however, that the fall of the state's "shadow government" approach to raising money is inevitable and that it must be dealt with sooner rather than later if chaos is to be avoided. Prospective relief is an open avenue and the court knows this since it was brought up in Judge Smith's dissenting opinion in the Court's "Attica decision" of 1993.

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8. Should plaintiffs prevail in this case, the adverse impact on the value of the financial securities owned by the Judges would be substantial. However, if the State's credit rating is kept low by continual use of SFL 123-b(1) as a shield against appropriate Judicial scrutiny of Legislative and Executive borrowing activities, the interest income of bond holders is maintained at a high level.

9. As reported on their financial disclosure forms (attached), the Judges have economic interests as follows:[4]

Judge Kaye's husband has a partnership interest in a law firm that lists among its clients numerous New York bond-issuing authorities, such as the Metropolitan Transit Authority, City of New York, NYC Transit Authority, NYC Housing Authority, NYC School Construction Authority, and several others. She has listed investment that include New York City bonds and government securities and money funds held by Merrill Lynch, Smith Barney, CJ Lawrence, Deutsche Morgan Grenfell, Citibank, and Bessemer -- either in IRA or regular accounts. Her balanced fund, fixed-income fund, and money market fund investments contain hundreds of bonds, which would include New York municipals.

Judge Bellacosa has listed investments that also contain hundreds of bonds, including New York State Urban Development Corporation, NYS Power Authority, Tri-Borough Bridge & Tunnel Authority, Port Authority of NY & NJ, NYC Water Finance Authority, NYS Dormitory Authority, and several others. He has listed Merrill Lynch IRA and Keogh bond accounts and investments in two

[4] Judge Wesley's wife works for the Livonia Central School, but there is no listing of a TIAA/CREF investment on his financial disclosure form. If Mrs. Welsey does, indeed, have one, that could be regarded as a potential conflict or appearance of a conflict.

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Merrill Lynch N.Y. municipal bond funds. The TIAA retirement account is not specific as to the exact TIAA fund(s) it contains, but some of TIAA's five funds have sizable proportions of bonds, and one is specifically a bond fund. Investment time horizons of well-advised senior judges would typically result in a high proportion of bonds.

Judge Ciparick lists TIAA/CREF Retirement Annuity for her spouse on her disclosure form. Again, TIAA/CREF is a family of funds and is not sufficiently specific, any more than it would be to list "Fidelity" or "Vanguard" or "T. Rowe Price," investment firms that each have many funds. As noted above, a fund may be entirely bonds, a mixture of stocks and bonds, or primarily stocks. As retirement nears, the balance would shift toward bonds. Also listed are her Copeland Company N.Y.S. Deferred Compensation Plan and her spouse's City of New York Teachers' Retirement System Tax-Deferred Annuity (TDA). It is quite likely that these investments would contain N.Y. bonds. Since N.Y. has for some time been the state most aggressively pumping out municipal bonds and these bonds are particularly high yield due to New York's low credit rating, it is virtually inevitable that these investments would contain N.Y. bonds.

Judge Levine has listed investments including NYS Dormitory Authority and City of New York bonds, and the (Oppenheimer) Rochester Tax Free Fund (regarded by some as the premier New York muni-bond fund, which contains over 800 NY bond issues).

10. The Judges, except Judge Levine who has recused himself in prior similar cases that came before the Court of Appeals, have, by their action or inaction, conveyed a bias and prejudice

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favor of the State parties to the actions and of their own personal financial interests and against plaintiffs, while so conflicted.

11. For example, in Schulz I,[5] Chief Judge Kaye and Judge Bellacosa (writing for the majority) while conflicted and not personally disinterested in the outcome of their decision, totally ignored plaintiffs' claim that SFL 123-b(1) was unconstitutional but still cited SFL 123-b(1) in dismissing plaintiffs' Article X, Section 5 and Article VII, Section 8 constitutional challenge to Chapter 190 of the Laws of 1990, which "authorized" inter alia the Urban Development Corporation to issue $241 million in bonds for the purpose of purchasing Attica Prison from and leasing it back to the Office of General Services. And, in the same case, with respect to plaintiffs' Article VII, Section 11 (voter referendum) challenge to Chapter 190 L90, Judges Kaye and Bellacosa allowed the State to ***acquire*** (seize) the power to borrow without voter approval. Never, in the history of any state has the Judiciary allowed the state to acquire power restricted by the State Constitution, simply because plaintiffs may have delayed in getting to court.

12. In Schulz II,[6] Chief Judge Kaye and Judge Bellacosa (writing for the majority), while conflicted and not personally disinterested in the outcome of their decision, totally ignored plaintiffs' claim that SFL 123-b(1) was unconstitutional but still went on to cite SFL 123-b(1) as the cause for dismissing plaintiffs' Article X, Section 5 and Article VII, Section 8 and Article II, Section 11 constitutional challenge to Chapter 220 of the Laws of 1990 as amended by Chapter 946 of the Laws of 1990 and Chapter 2 of the Laws of 1991, which created the Local Government Assistance Corporation ("LGAC"), and authorized it to issue $4.7 billion

[5] Schulz, et al. v State of N.Y., et al., 81 NY2d 336 (1993) (No. 43).
[6] Schulz, et al. v State of N.Y., et al., 81 NY2d 336 (1993) (No. 44).

in tax-supported bonds which, it turned out, were to be used to balance the state's budget.

13. In Schulz III,[7] Chief Judge Kaye (writing for the Court) and Judges Bellacosa and Ciparick concurring (Judge Levine recused), while conflicted and not personally disinterested in the outcome of their decision, totally ignored plaintiffs' claim that SFL 123-b(1) was unconstitutional, but still went on to cite SFL 123-b(1) in dismissing plaintiffs' Article X, Section 5 and Article VII, Section 8 constitutional challenge to Chapter 56 of the Laws of 1993 which "empowered" the Metropolitan Transit Authority and the Thruway Authority to issue $6 billion in bonds "on behalf of the State." With respect to plaintiffs' Article VII, Section 11 constitutional challenge to Chapter 56 L93, Chief Judge Kaye and Judges Bellacosa and Ciparick ruled that the bonds of the MTA and T.A. were not legally enforceable debt of the State because Chapter 56 L93 said they weren't. Judges Kaye, Bellacosa and Ciparick chose to ignore plaintiffs' argument regarding the state constitutional mandate (Article VII, Section 16) which directs the Legislature to appropriate money to repay money borrowed on behalf of the State, and the Comptroller to impound the next money that comes into the State's treasury, if necessary to redeem all bonds issued on behalf of the State.[8] Finally, it must be noted that Judge Kaye recommended that if state borrowing "gimmickry" has "stretched the words of the Constitution beyond the point of prudence," then voters should consider amending the Constitution! She referred to the specific constitutional amendment then being proposed by the Legislature that would have legalized all the unconstitutional financing schemes the State was engaged in, including back-door borrowing,

[7] Schulz, et al. v State of N.Y., et al., 84 NY2d 231 (1994).

[8] To read the decision one would never know the extensiveness of plaintiffs' arguments to the Court, detailing the many reasons why the State would be ethically obliged and, indeed, legally liable to pay the bondholders in bonds issued on behalf of the State. The decision did not address these arguments as would normally be expected in a judicial proceeding.

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increasing the security of all N.Y. bond holders. The voters, indeed, considered that proposal and resoundingly rejected it in 1995. Her own words acknowledge that the gimmicky does, indeed, involve state debt and is contrary to the Constitution.

14. In Schulz IV,[9] the Judges (except Judge Levine who recused), while conflicted and not personally disinterested in the outcome of their decision, totally ignored plaintiffs' claim that SFL 123-b(1) was unconstitutional, but still went on to cite SFL 123-b(1) in dismissing plaintiffs' Article III, Section 16 constitutional challenge to Chapters 412 and 413 of the Laws of 1996. Judge Kaye (writing for the Court) said, in effect, that it was more important to minimize "uncertainty in the minds of potential investors" than to allow citizens to petition the government for a redress of grievances.

15. A pattern of improper activity by Chief Judge Kaye and Judges Bellacosa and Ciparick is obvious. The adverse effect of the improper activity on the economic well-being of the people of the State and the judicial system has been substantial, amounting to tens of billions of dollars in public debt and a dispassionate market assessment giving New York State the lowest of credit ratings among all the states having passed Louisiana on the "race to the bottom." Adverse effects on the judicial system include loss of credibility, setting bad examples for judges of the lower courts, creating bad case law that will be referred to by the courts for years to come, and causing an increase in the disrespect and distrust among the public and a loss of public confidence.

16. For the reasons given in the next 14 paragraphs, as set forth in the rules governing judicial conduct, the Judges are disqualified and should recuse.

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[9] Schulz, et al. v N.Y.S. Executive, et al., ___NY2d___(June 9, 1998).

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17. All Judges in the Unified Court System ***shall*** comply with the rules of judicial conduct as laid down in 22 NYCRR Part 100. See Part 100.6.

18. The text of 22 NYCRR Part 100 et.seq. is intended to govern the conduct of judges and to be binding on them. See Section 100, Preamble.

19. The Judges are prohibited from participating in the instant proceeding because the decision could substantially affect the value of their economic interests. See 22 NYCRR Part 100.D(1),(4). It makes no difference how small that economic interest is. See 22 NYCRR 100.D.

20. An independent and honorable judiciary is indispensable to justice in our society. See Part 100.1. Participation by the Judges in this decision would discredit the integrity and independence of the Judiciary in violation of Part 100.1.

21. The Judges have failed to avoid impropriety and the appearance of impropriety in all the Judges' activities in violation of Part 100.2. Participation by the Judges in this case would erode public confidence in the integrity and impartiality of the Judiciary in violation of Part 100.2(A).

22. For the Judges to participate in this proceeding would be to advance the private interests of the Judges and Judge Kaye's spouse in violation of Part 100.2(c).

23. The Judges cannot be impartial in this proceeding due to their personal biases and prejudices concerning the State -- a party to this case -- and the State's fiscal practices. See Part 100.3(E)(1)(a).

24. The unwarranted and gratuitous imposition of cost sanctions against plaintiff Schulz in the Court's decision in the "Clean Water/Clean Air" case, was apparently done in violation of Part

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130 of Chapter 1 of the Judicial Administration rules.[10] There was no frivolous conduct, no written (or unwritten) explanation as to what conduct was deemed frivolous, and no opportunity to be heard. This shows a mental attitude or disposition of the Judges toward Schulz that renders the Judges unable to exercise their function impartially.

25. Judge Kaye's husband has a prohibited economic interest in the subject matter in controversy and in the State -- party to this case. See Part 100.3(E)(1)(c).

26. The Judges have economic interests which could be substantially affected by this proceeding. See Part 100.3(E)(1)d)(iii).

27. Lack of personal knowledge about their personal economic interests and the economic interests of their spouses is no defense against disqualification. The Judges cannot claim lack of knowledge especially since they were the ones who submitted the information about their spouse's economic interests. See Part 100.3(E)(2).

28. The extra judicial, economic interests of the Judges cast reasonable doubt on their capacity to act impartially as judges. See Part 100.4(A)(1).

29. The Judges' participation in New York's tax-exempt, high-yield municipal bonds and bond funds may reasonably be perceived as an exploitation of the Judges judicial position as arbiter of the constitutionality of such bonds. See Part 100.4(D)(1)(a).

30. The Judges' financial investments and continuing relationship as a lender of money to New York State and its public corporations was prohibited, in the first place, given the likelihood since 1975 that those parties and their representatives would be coming before this Court. See Part 100.4(D)(1)(c).

[10] Schulz, et al. v N.Y.S. Executive, et al., ___ NY2d___ (June 9, 1998).

31. If the Judges are not disqualified, and remain conflicted, there is no reason to believe that this or any future similar case would receive impartial justice.

32. Based on the above considerations, plaintiffs respectfully request an order granting plaintiffs' motion to disqualify Judges Kaye, Bellacosa, Ciparick and Levine.

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Sworn to before me this
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