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October 29, 2018

BY ECF

Honorable Vera M. Scanlon
United States Magistrate Court Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York, 11201

CORRECTED/SUPPLEMENTAL LETTER IN OPPOSITION

Re: *Da Silva v. New York City Transit Authority, et al.*, 1:17-cv-04550 (FB)(VMS)

Dear Judge Scanlon:

PRELIMINARY STATEMENT.

The within letter is respectfully submitted on behalf of David A. Roth, Esq., counsel in the above-captioned action for Plaintiff Luisa Janssen Harger Da Silva, and in *opposition* to the September 21, 2018 letter-motion ("Motion to Disqualify") of Smith Mazure ("Defense Counsel"), counsel for Defendants Metropolitan Transportation Authority ("MTA") and New York City Transit Authority ("NYCTA"). In a transparent attempt to deny Plaintiff the counsel of her choosing, Defense Counsel falsely accuses Mr. Roth of attorney misconduct (including fraud) and demands that Mr. Roth "be disqualified as counsel, sanctioned, or prohibited from further inappropriate contact with represented parties." (Motion to Disqualify, pp. 3-4.)

It is respectfully submitted that Defense Counsel's claims of attorney misconduct and *ad hominem* attacks against Mr. Roth are unwarranted, and are legally and factually devoid of any merit; and, accordingly, Defense Counsel's Motion to Disqualify should be denied in its entirety.

As Your Honor previously explained, with language particularly relevant to the case at bar:

> "'Motions to disqualify are generally not favored. They are often tactically motivated; they cause delay and add expense; they disrupt attorney-client relationships sometimes of long standing; in short, they tend to derail the efficient progress of litigation.' ... Although federal courts often look to state disciplinary rules for guidance, 'such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification.' … In deciding whether to disqualify counsel, a court must balance 'the need to maintain the highest standards of the profession' against 'a client's right freely to choose his counsel.' …
>
> ….Disqualification is appropriate only if the attorney's misconduct 'tends to ''taint the underlying trial'' by affecting his or her presentation of the case.' … 'The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it.' … In addition, the Court of Appeals has demanded 'a high standard of proof on the part of the party seeking to disqualify an opposing party's counsel.' … "[1]

Fatal to their Motion to Disqualify as a threshold matter, Defense Counsel does ***not*** *allege that absent disqualification, this litigation will tend to be "tainted," and that any "prejudice" may occur by Mr. Roth's continued representation of Ms. Da Silva.* It is respectfully submitted that by failing to allege taint or prejudice absent Mr. Roth's disqualification – Defense Counsel's Motion to Disqualify – on its face – is factually and legally deficient; and, therefore, the Motion should be denied in its entirety.

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[1] *Guan v. Long Is. Bus. Inst., Inc.*, No. 15 Civ. 02215 (CBA) (VMS), 2017 U.S. Dist. LEXIS 10490 (E.D.N.Y Jan. 24, 2017) (Report & Recommendation, ECF No. 158 [a copy of which is attached hereto as "Exhibit A"]), pp. 16-18 (internal citations omitted); *see also id.*, at ECF No. 162 (Memorandum & Order of the Honorable Carol B. Amon, dated March 6, 2017, adopting Your Honor's Report & Recommendation ["R&R"] in the *Guan* Case).

The burden is on the moving party (here Defense Counsel) to "'demonstrate[e] specifically how and as to what issues ... prejudice may occur,'" thereby warranting disqualification. *SEC v. Lek*, No. 17 Civ. 1789 (DLC), 2018 U.S. Dist. LEXIS 6704, at *10-11 (S.D.N.Y. Jan. 16, 2018), citing *Murray v. Metropolitan Life Ins. Co.*, 583 F.3d 173, 178 (2d Cir. 2009) (citation omitted*); see also Araujo v. Macaire*, No. 16 Civ. 9934 (PAE) (KNF), 2018 U.S. Dist. LEXIS 153728, at *10-11, 14-15 (S.D.N.Y. Sep. 7, 2018) (discussing high standard of proof and "threat of taint" required to disqualify on ethics-related grounds [citations omitted]). As evidenced by the discussion herein, it is respectfully submitted that Defense Counsel has failed to meet the high burden of proof imposed by the Second Circuit and this Court as applied to motions to disqualify.

Finally, your undersigned counsel respectfully requests that Your Honor accept the within oversized letter in opposition in light of Defense Counsel's serious allegations, which, as discussed below, have made it necessary, at great length to defend against Defense Counsel's tactical ploy to rid Plaintiff of the counsel of her choosing, Mr. Roth; and to defend Mr. Roth against Defense Counsel's untrue claims of attorney misconduct – because any adverse finding by this Court of attorney misconduct may result in severe and stigmatizing sanctions that may also deprive an attorney of the ability to practice his or her chosen profession. *See infra*, pp. 30-31 (discussing legal principle that attorney misconduct investigations and proceedings are considered "quasi-criminal" in nature and, therefore, attorneys are entitled to certain due process, including "fair notice" of what conduct is proscribed); *see also infra*, pp. 13-15 (discussing Defense Counsel's efforts to disqualify Mr. Roth in three additional New York State cases unrelated to this case).

SUMMARY OF THE ARGUMENT & THE RELEVANT FACTS.

The Motion to Disqualify is, at its core, predicated upon Defense Counsel's claim that, *supposedly*, Mr. Roth violated New York's "No-Contact" Rule 4.2(a) of the New York Rules of Professional Conduct ("Rule" or "N.Y.R.P.C."), which provides, in relevant part, that "[i]n representing a client, a lawyer shall not communicate … about the subject of the representation with a party ... represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." Defense Counsel further alleges that in the act of intentionally violating Rule 4.2(a), Mr. Roth also intentionally made a false statement by omission in violation of Rule 4.1, and intentionally engaged in dishonesty, fraud, deceit *and* misrepresentation in violation of Rule 8.4(c). (Motion to Disqualify, p. 3)

The alleged attorney misconduct concerns Mr. Roth's presence at an August 21, 2018 "town hall-style public meeting" (the "Town Hall Public Meeting"), at York College, sponsored by NYCTA in connection with its "Fast Forward" Plan.[2] Defense Counsel claims that "Mr. Roth attempted to gain unauthorized discovery by making direct contact with a high-ranking representative of the MTA and NYCTA with speaking power [Andy Byford, President of NYCTA], without disclosing his relationship to litigation involving the NYCTA, and without contacting counsel representing NYCTA for consent." (Motion to Disqualify, p. 2)

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[2] *See* MTA Press Releases, "MTA NYC Transit to Host First Town Hall Meeting on 'Fast Forward' Plan to Modernize Subways, Buses & Paratransit…." (Aug. 19, 2018) (a copy of which is attached hereto as "Exhibit B").

The *now-historic* facts make it clear that Defense Counsel's allegations of misconduct are tactically motivated and have been created from whole cloth for the purpose of manufacturing their Motion to Disqualify Mr. Roth in the case at bar (and, as discussed below, *in three other cases not before Your Honor*). We say "now-historic" because the factual statements asserted by Defense Counsel, and which form the stated basis for their Motion to Disqualify, cannot reasonably and credibly be reconciled with *Mr. Roth's recorded words* at the Town Hall Public Meeting held on August 21, 2018, which was video recorded and subsequently transcribed on or about August 30, 2018, in advance of Defense Counsel filing their Motion to Disqualify on September 21, 2018.[3]

As evidenced by the following assertions set forth in their Motion to Disqualify, Defense Counsel attempts to intimate, through innuendo and hyperbole that Mr. Roth – in a Perry Mason-like moment – somehow cross-examined Mr. Byford about Ms. Da Silva's case, peppering him with hostile, lawyer-like questions for an extended period of time, with the intent of somehow breaking Mr. Byford into confessing:

- *Supposedly*, "Mr. Roth appeared before the panel and **questioned** Andy Byford … about platform edge safety in blatant violation of Rule 4.2(a)…." (Motion to Disqualify, p. 1 [emphasis added].)

- *Supposedly,* "[t]he salient portion with the **questions** posed by Mr. Roth to President Byford is reflected in pages 81 through 84 of the transcript." (*Id.* [internal footnote omitted].)

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[3] The video recording of the Town Hall Public Meeting is available at the following website link: https://drive.google.com/file/d/1yBGBW5DntTJ8yoW0Oz6-2YUrkAmyY6Vk/view (Mr. Roth appears for a total of approximately 84.5 seconds beginning at time-stamp 1:47:35); and the written transcription of the video recording of the Town Hall Public Meeting is attached hereto as "Exhibit C" (Mr. Roth appears at pages 81-84).

- *Supposedly,* "Mr. Roth … without disclosing his status as the attorney representing Ms. Harger Da Silva … proceeded to **question** President Byford on that very issue as it relates to individuals being contacted by subway trains allegedly because of the absence of those devices." (*Id.*, at pp. 1-2 [emphasis added].)

- *Supposedly,* "Mr. Roth **questioned** Mr. Byford about whether NYCTA would be installing platform safety devices at all stations as part of the Fast Forward initiative." (*Id.*, at p. 2 [emphasis added].)

- *Supposedly,* at the Town Hall Public Meeting, Mr. Roth had a "**conversation**" with Mr. Byford." (*Id.* [emphasis added].)

- *Supposedly,* " … Mr. Roth made contact with a high-ranking potential witness [Mr. Byford] … without disclosing his representation of Ms. Harger Da Silva … pertaining to the propriety of platform screen doors – the very issue Mr. Roth raised in his **questions**." (*Id.*, at p. 3 [emphasis added].)

- *Supposedly,* Mr. Roth violated Rule 4.2(a) by his "failure to disclose his role … and **questioning** President Byford concerning the gravamen of that complaint [in Ms. Da Silva's case]…." (*Id.* [emphasis added].)

It is respectfully submitted that the foregoing assertions by Defense Counsel are untrue and/or misleading, and simply cannot be reconciled with Mr. Roth's own recorded words at the Town Hall Public Meeting. Mr. Roth *never* asked Mr. Byford "questions"; Mr. Roth *never* had a "conversation" with Mr. Byford concerning Ms. Da Silva's case; and Mr. Roth *never* engaged in "questioning" President Byford" concerning this case.

It is particularly troubling that Defense Counsel spent the first three of four pages of their Motion to Disqualify falsely accusing Mr. Roth of engaging in attorney misconduct – while appearing to *deliberately* conceal from this Court, until the very last paragraph of the last page of their Motion, the fact that *Mr. Roth's mother is blind*. Mr. Roth attended the Town Hall Public

Meeting related, first and foremost, to his mother and matters of concern, generally, for the safety of others; and *Mr. Roth asked a single question* about accessibility of subways as to this matter of safety. Mr. Roth's question was simple, straightforward and uncalculated – "*What's your plan to protect them?*" (Exhibit C, Tr. at 81-82 [emphasis added].)

At the Town Hall Public Meeting, like all other speakers, Mr. Roth was permitted to ask as many questions within the 90 seconds he was allotted. As confirmed by the video recording of the Town Hall Public Meeting, and the following transcription of same, for approximately 82 seconds Mr. Roth spoke about the concern for his blind mother and the need to make subways safe and accessible, first and foremost, driven by the concern for his mother and safety in general, and then Mr. Roth spent a total of approximately 2.5 seconds asking Mr. Byford a *single question*:

> "**MR. DAVID ROTH:** Thank you for hearing me today. **So my mom is blind and I think that to be truly accessible, the subway needs to be safe**. According to your signage, 50 people a year are getting hit and killed by subways, 170 I think, well, whatever the sign that I saw in the subway today, in 2015, were hit by subways, causing major amputations. I was very, I felt compelled to come here today because in your plan to modernize, you're not taking it to a platform edge safety into your plan. There's no, there is a method to prevent, I think since 2013 there's been about, until today, if it's 50 a year, that's 500 deaths, excuse me, 750 deaths. And if this plan is going to go forward ten more years without platform edge doors, there's going to be another 500 deaths, and you can stop it because at the AirTrain, as you know, there's zero, nobody's been hit by a car, nobody's been amputated, nobody's been killed. **And I can't let my mom go on the subway. And even if you get escalators and you get elevators, she's not going down there**, because as you know, in London, they put them in. In Tokyo, in Toronto, I think there's just an add that they're going to put them in when one person died. **What's your plan to protect them?**

> Because modernization includes safety." (Exhibit C, Tr. at 81-82 [emphasis added].)[4]

Predicated upon the foregoing recorded record, Defense Counsel claims that, *supposedly*, "Mr. Roth attempted to gain unauthorized discovery by making direct contact with a high-ranking representative of the MTA and NYCTA...." (Motion to Disqualify, p. 2) Yet, inexplicably, Defense Counsel: *fails* to identify what specific "unauthorized discovery" Mr. Roth was *supposedly* seeking; *fails* to provide this Court with the *supposed* "question**s**" (i.e., more than a single question) that Defense Counsel claims Mr. Roth asked Mr. Byford; and *fails* to identify the admission or disclosure made by Mr. Byford that somehow poses a threat of taint to this case, or that otherwise specifically demonstrates how and as to what issues may be prejudiced by Mr. Roth's continued representation of Ms. De Silva.[5]

As further discussed herein, and evidenced by the following, we respectfully submit that Defense Counsel's failure to plead this most basic information was not a coincidence:

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[4] At the conclusion of Mr. Byford's comments, Mr. Roth thanked him and made reference to the Second Avenue subway line, which pre-dated Mr. Byford's employment with NYCTA, which began in or about January 2018. (*See* Exhibit C, Tr. at 83-84.) The Second Avenue subway line is *not* the subject of Ms. Da Silva's case, but, rather, is the subway line located one block from where Mr. Roth's mother lives and would be her subway line if it was safe to use.

[5] On the bottom of page 3 of 4 of their Motion to Disqualify, Defense Counsel for the first time sets forth a legal standard to be applied to their Motion, stating, in part: "Disqualification is appropriate *only if the attorney's misconduct tends to taint the underlying trial* by affecting his or her presentation of the case. *Tradewinds Airlines, Inc. v. Soros*, 2009 U.S. Dist. LEXIS 40689 at 10." (Emphasis added.) However, nowhere in their Motion to Disqualify, does Defense Counsel allege – with or without a factual basis – that absent disqualification, Mr. Roth's conduct or continued representation will likely taint the case at bar.

First, at all times and in all respects, Mr. Roth's conduct while in attendance at the Town Hall Public Meeting was proper and ethical and entirely consistent with the express purpose of, and invitation to attend, the Town Hall Public Meeting. On August 19, 2018, the MTA issued a Press Release, "MTA NYC Transit to Host First Town Hall Meeting on 'Fast Forward' Plan to Modernize Subways, Buses & Paratransit … ," which stated, in relevant part:

> "MTA New York City Transit announced today that it is hosting a series of town hall-style public meetings … to discuss the Fast Forward Plan to modernize the subway system … including subway service and subway stations….*The plan also sets out to improve accessibility across all services*….President Byford and MTA New York City Transit staff will be presenting the plan at the town hall meetings …, speaking to customers and soliciting feedback on how the Fast Forward Plan will affect their commutes and how NYC Transit plans to improve accessibility and customer service. **Members of the public are highly encouraged to attend and ask questions to President Byford and his staff**…." (Exhibit B [emphasis added].)

Second, contrary to Defense Counsel's legal and factual claims, as evidenced by the now-historical facts of this case, Mr. Roth's conduct at the Town Hall Public Meeting was not intended to, nor did it fall within, the scope of conduct otherwise prohibited by Rule 4.2(a). Mr. Roth did "not communicate … about the subject of the representation [*i.e., in Ms. Da Silva's case*] with a party [*i.e., Mr. Byford*] the lawyer knows to be represented by another lawyer in the matter [*i.e., in Ms. Da Silva's case*]…." *See infra*, pp. 11 n.8, 27-28 (discussing right to appear at the Town Hall Public Meeting protected by, *inter alia*, right to petition the government for redress of grievances).

Third, Defense Counsel cannot credibly point this Court to any admission or disclosure made by Mr. Byford at the Town Hall Public Meeting that somehow creates a threat of taint or prejudice (or that should otherwise be precluded) because – as made clear by the now-historic record from the Town Hall Public Meeting – no such admission or disclosure exists. The absence of any such sensitive or even relevant admission or disclosure is further evidenced by the fact that, as part of their Motion to Disqualify, Defense Counsel *publicly filed* the transcript and *publicly made accessible* the recording of the Town Hall Public Meeting.[6] It should also be noted that Defense Counsel did not also seek certain other relief, including moving to preclude or seal particular statements made at the Town Hall Public Meeting.[7]

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[6] The matters discussed at the Town Hall Public Meeting have also already been, generally, reported to the public. *See* Ameena Walker, "NYCT Chief Hosts First Town Hall on Ambitious Plan to Fix Subway," *Curbed New York* (Aug. 22, 2018) (accessed at https://ny.curbed.com/2018/8/22/17769068/nyct-fast-forward-plan-subway-repair-andy-byford-town-hall [last visited Oct. 11, 2018] [reporting on the August 21, 2018 Town Hall Public Meeting, stating, in part, that "[o]n Tuesday night, the New York City Transit Authority held its first of several scheduled town hall meetings, where agency president Andy Byford presented his 10-year Fast Forward plan to vitalize the city's subway, bus, and accessibility services. The estimated $38 billion plan was laid out to the public, where they were then given an opportunity to have questions and concerns addressed by Byford himself."]).

[7] In its Motion to Disqualify, Defense Counsel seems to suggest that they *may be seeking an order of preclusion*, stating that "Courts have also excluded the resulting statement from evidence for a party who has violated Rule 4.2." (Motion to Disqualify, p. 3), citing *SEC v. Lines*, 669 F. Supp.2d 460, 464 (S.D.N.Y. 2009). However, nowhere in their Motion to Disqualify does Defense Counsel identify for the Court a single admission or disclosure made by Mr. Byford in response to the single question asked by Mr. Roth at the Town Hall Public Meeting that Defense Counsel now seeks to preclude.

Fourth, Defense Counsel claims that: *supposedly*, Mr. Roth, by way of omission, engaged in fraud, dishonesty, deceit and misrepresentation by not identifying himself as Plaintiff's counsel at the Town Hall Public Meeting; and, *supposedly*, Mr. Roth engaged in misconduct because "[a]t no point did Mr. Roth gain consent from any individual from the New York City Transit Authority let alone the Law Department or outside counsel to … attend the [T]own [Hall Public] [M]eeting…." (Motion to Disqualify, p. 3) Defense Counsel's claims are devoid of any merit

As further discussed herein, Mr. Roth's conduct at the Town Hall Public Meeting was not intended to, nor did it fall within, the scope of conduct otherwise prohibited by Rule 4.2(a); and no other legal or ethical obligation required Mr. Roth to identify himself as Plaintiff's counsel at the Town Hall Public Meeting or to obtain advance consent (or any other type of consent) from Defense Counsel to attend the Town Hall Public Meeting. In fact, Mr. Roth was not legally or ethically required to provide or otherwise identify himself by name[8]; and Mr. Roth could have identified himself as "Mr. Y." (*See* Exhibit C, Tr. at 4, 28-30 [member of the public attended the

[8] *See* N.Y. State Comm. Open Govt. AO 2696 (Jan. 8, 1997) (accessed at https://docs.dos.ny.gov/coog/otext/o2696.htm [last visited Oct. 28, 2018], Advisory Opinion of the State of New York Department of State Committee on Open Government, stating, in relevant part, " … §103 of the Open Meetings Law provides that meetings of public bodies are open to the 'general public.' As such, any member of the public, whether a resident of the District or of another jurisdiction, would have the same right to attend. That being so, *I do not believe that a member of the public can be required to identify himself or herself by name* … in order to attend a meeting of a public body. Further, since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only…." [emphasis added]); *see infra*, pp. 27-28 (discussing right to appear at the Town Hall Public Meeting as protected by, *inter alia*, the First Amendment's right to petition the government for redress of grievances).

Town Hall Public Meeting, signed-in, later approached the podium and was permitted to ask questions without ever revealing his name – identifying himself only as "Mr. X."].)[9]

Moreover, venal intent is a critical element must be established in order to sustain any fraud-related charge of attorney misconduct under of Rule 8.4(c) (formerly D.R. 1-102[a][4)], as Defense Counsel alleges in their Motion to Disqualify. [10] It is respectfully submitted that Defense Counsel's fraud-related charge should be rejected, as a matter of law, based upon Defense Counsel's failure to allege facts to support a finding that Mr. Roth acted with the requisite "venal

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[9] Although not utilized or otherwise relied upon in the case at bar, there is some legal authority to support the position that Mr. Roth *could have* used either a "straw"-type speaker or an investigator to attend the Town Hall Public Meeting in his place for the purpose of gathering information to be used thereafter to protect the public's safety. Mr. Roth did *not* believe that there was any reason to do so (or to otherwise not disclose his name) because Mr. Roth was *not* attending the Town Hall Public Meeting in connection with the case at bar. *See Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp.2d 119, 121-22 (S.D.N.Y. 1999) (Attorney used undercover investigators to meet with, and tape record, conversations with a salesperson of a company, which was believed to be violating a federally registered trademark. Counsel directed undercover investigators to misrepresent their identities when visiting defendant's showrooms and warehouse, and through deception, investigators obtained key evidence in the case. Although the attorney's conduct in directing deception by his investigators arguably violated the language of New York's anti-deceit ethics rules, nonetheless, the Court refused to find a disciplinary violation, in part, because the "policy interests" in forbidding misrepresentation were not present and the enforcement of the ethical rule in the circumstances of the case "would not promote the purpose of the rule."); *see also Cartier v. Symbolix, Inc.*, 386 F Supp.2d 354 (S.D.N.Y. 2005) (discussing same; internal citations omitted); *Apple Corp. v. International Collectors Society*, 15 F. Supp.2d 456, 475 (D.N.J. 1998) (discussing same).

[10] As to Defense Counsel's fraud-related charges against Mr. Roth – that he engaged in fraud and other deceitful and dishonest conduct in violation of Rules 4.1 and 8.4(c) – those allegations are entirely predicated, legally and factually, upon Defense Counsel's claim that Mr. Roth violated New York's No-Contact Rule 4.2(a). Accordingly, the fraud-related allegations will not be separately discussed below, but, rather, are discussed together with Defense Counsel's predicate allegation that, *supposedly*, Mr. Roth violated Rule 4.2(a).

intent." *See Matter of Altomerianos*, 160 A.D.2d 96 (1st Dept. 1990) ("venal intent" is a necessary element of fraud-related allegations under Rule 8.4(c) (formerly D.R. 1-102[A][4]); *Peters v Comm. on Grievs. for the United States Dist. Ct. for the S. Dist. of N.Y.* 748 F.3d 456, 461-62 (2d Cir. 2014) (same), citing and quoting, *inter alia*, *Matter of Altomerianos*, *supra; see also In re Gilly*, 206 F. Supp.3d 940, 944 (S.D.N.Y. 2016) (discussing requirement element of "venal intent" in the context of the New York Rules of Professional Conduct [previously the Code of Professional Responsibility [internal citations and quotations omitted]); *In re Liu*, 664 F.3d 367, 372, n.4 2d Cir 2011) (same [citations omitted]).

Fourth, in their Motion to Disqualify, Defense Counsel claims that based upon the alleged misconduct, Mr. Roth – *and only Mr. Roth* – must "be disqualified as counsel, sanctioned, *or* prohibited from further inappropriate contact with represented parties." (Motion to Disqualify, pp. 3-4 [citations omitted].) It is respectfully submitted that there is no credible basis in law or in fact to grant the alternative relief sought by Defense Counsel – that Mr. Roth be admonished or otherwise sanctioned. The foregoing general denial is necessitated by the fact that, in their Motion to Disqualify, Defense Counsel *fails* to articulate what sanction it seeks to have this Court impose upon Mr. Roth; Defense Counsel *fails* to cite to a single statute, rule, case or other legal authority in support of its demand that this Court sanction Mr. Roth.

A final point is warranted as to Defense Counsel's ongoing misconduct in connection with, and misuse of, their Motion to Disqualify now-pending before Your Honor. The Transit Authority, by and through its in-house counsel, has sought to use their Motion to Disqualify, by producing a

copy of that Motion in connection with *three separate and unrelated* gap cases now-pending in Supreme Court, New York County (*see, e.g., Merinstein v. NYCTA* [Index No. 155319/2016, Sup. Ct. N.Y. Co.], *Morang v. NYCTA* [Index No. 157780/2012, Sup. Ct. N.Y. Co.]), and *Pollack v. NYCTA* [No. 155263/2016, Sup. Ct. N.Y. Co.] [collectively, the "Three Unrelated State Gap Cases"]). Defense Counsel's motivation is clear – seek to indiscriminately and improperly have Mr. Roth disqualified as a tactical ploy, presumably, in as many cases as possible.

The Three Unrelated State Gap Cases, which are now-pending before the Honorable Lisa A. Sokoloff, have absolutely nothing whatsoever to do with the case at bar – that is other than the fact that NYCTA is a defendant and Mr. Roth is plaintiffs' counsel of record. There is simply no connection between the Three Unrelated State Gap Cases, anything Mr. Roth or Mr. Byford said at the Town Hall Public Meeting and the case at bar. Notwithstanding the foregoing, by email dated September 26, 2018, Transit Authority's in-house counsel, Matthew T. Fairley, Esq., wrote to Justice Sokoloff, through Her Honor's Staff, seeking to adjourn the Three Unrelated State Gap Cases (which were subsequently adjourned to November 8, 2018), stating, in relevant part:

> "We write to advise the Court that NYCTA has filed the attached letter motion in an EDNY litigation against Transit requesting that plaintiff's counsel David Roth be disqualified in that matter. Please see letter attached, as well as the transcript referred to in that letter….Because of this matter, we seek a short adjournment of the above three actions against NYCTA by Mr. Roth's office that are currently scheduled for conferences on Thursday, September 27." [11]

[11] A copy of Mr. Fairley's September 26, 2018 email exchange with Justice Sokoloff's Staff (without its enclosures – Defense Counsel's Motion to Disqualify and the transcript of Town Hall Public Meeting), is attached hereto as "Exhibit D."

It is respectfully submitted that by transmitting their September 26th email, the Transit Authority sought to needlessly and frivolously delay the Three Unrelated State Gap Cases from moving forward – claiming, *ipse dixit*, "because of this matter" (referring to the Motion to Disqualify filed in the case at bar). In their September 26th email, Transit Authority's in-house counsel: *failed* to provide any factual or legal basis for transmitting the within now-pending Motion to Disqualify to Justice Sokoloff; *failed* to provide any factual or legal basis as to how the within now-pending Motion to Disqualify is any way relevant to the Three Unrelated State Gap Cases; and *failed* to provide any factual or legal basis as to how the events relating to the Town Hall Public Meeting are in any way related to the Three Unrelated State Gap Case.

Bluntly stated, Defense Counsel's Motion to Disqualify – transmitted by the Transit Authority's in-house counsel to a different Court in connection with the Three Unrelated State Gap Cases – is a transparent act of harassment against Mr. Roth simply because he has zealously pursued actions against the Defendants in prior separate and unrelated litigations on behalf of other plaintiffs. The Second Circuit has repeatedly lamented the unfortunate, but too common, practice of litigants using disqualification motions in order to obtain some tactical advantage over their adversary. We respectfully submit that Defense Counsel's conduct should not be condoned.

For all of these reasons, as more fully discussed herein, Defense Counsel's claims of attorney misconduct against Mr. Roth are wholly inappropriate and wrong as a matter of fact, law and attorney ethics; and, accordingly, we respectfully submit that Defense Counsel's Motion to Disqualify should be denied in its entirety.

ARGUMENT:

DEFENSE COUNSEL'S MOTION TO DISQUALIFY FAILS TO MEET THE "HIGH BURDEN" OF PROOF REQUIRED TO DISQUALIFY MR. ROTH.

A. THE SECOND CIRCUIT'S HIGH BURDEN OF PROOF IMPOSED UPON MOVANTS SEEKING TO DISQUALIFY OPPOSING COUNSEL.

The law is well-settled in the Second Circuit that the "decision to disqualify is committed to the sound discretion of the trial court." *Guan* Case, R&R (Exhibit A), p. 17, citing *Cresswell v. Sullivan & Cromwell*, 92 F.2d 60, 72 (2d Cir. 1980). The Court's "discretionary authority to disqualify a civil litigant's counsel stems from its responsibility to supervise members of the bar and its 'inherent power to preserve the integrity of the adversary process.'" *Almonte v. City of Long Beach*, No. 04 Civ. 4192 (JS) (JO), 2007 U.S. Dist. LEXIS 21782, at *8 (E.D.N.Y. Mar. 27, 2007), quoting *Hempstead Video, Inc. v. Incorporated Vill. of Valley Stream,* 409 F.3d 127, 132 (2d Cir. 2005); *Guan* Case, R&R (Exhibit A), p. 17 (discussing same).

"'In a technical sense the only truly binding authority on disqualification issues is [Second] Circuit precedent, because [the Court's] authority to disqualify an attorney stems from the Court's inherent supervisory authority.'" *Guan* Case, R&R (Exhibit A), p. 17, quoting *Skidmore v. Warburg Dillon Read LLC*, No. 99 Civ. 10525 (NRB), 2001 WL 504876, at *2 (S.D.N.Y. May 11, 2001). "Although federal courts often look to state disciplinary rules for guidance, 'such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification.'" *Guan* Case, R&R (Exhibit A), p. 17, quoting *Hempstead Video*, 409 F.3d at 132.

Not surprisingly, to avoid mischief and gamesmanship, "'[m]otions to disqualify are generally not favored. They are often tactically motivated; they cause delay and add expense; they disrupt attorney-client relationships sometimes of long standing; in short, they tend to derail the efficient progress of litigation." *Guan* Case, R&R (Exhibit A), pp. 16-17 (citation omitted). "In deciding whether to disqualify counsel, a court must balance 'the need to maintain the highest standards of the profession' against 'a client's right freely to choose his counsel.'" *Guan* Case, R&R (Exhibit A), pp. 16-17, quoting *Hempstead Video*, 409 F.3d at 132 (citations omitted); *see also Culver*, 1997 U.S. Dist. LEXIS 6041, at *5-6 (the courts in the Second Circuit have held that a party's choice of counsel is generally not to be disturbed unless an attorney's conduct tends to "taint the underlying trial"), citing *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (other citations omitted); *Almonte*, 2007 U.S. Dist. LEXIS 21782, at *7-9 (discussing same; citations omitted).

Thus, "[b]ecause the courts must guard against tactical use of motions to disqualify counsel, they are subject to fairly strict scrutiny" *Lek*, 2018 U.S. Dist. LEXIS 6704, at *10, quoting *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir. 1989); and, consequently, "*the Court of Appeals has demanded 'a high standard of proof on the part of the party seeking to disqualify an opposing party's counsel*.'" *Guan* Case, R&R (Exhibit A), p. 18 (emphasis added), quoting *Secured Worldwide, LLC v. Kinner*, No. 15 Civ. 1761 (CM), 2015 WL 4111325, at *3 (S.D.N.Y. June 24, 2015); *Araujo*, 2018 U.S. Dist. LEXIS 153728, at *10-11 (same).

The burden is on the moving party (here Defense Counsel) to "'demonstrate[e] specifically how and as to what issues ... prejudice may occur,'" thereby warranting disqualification. *Lek*,

2018 U.S. Dist. LEXIS 6704, at *10-11, citing *Murray*, 583 F.3d at 178 (citation omitted*); see also Araujo*, 2018 U.S. Dist. LEXIS 153728, at *10-11, 14-15 (discussing high standard of proof and "threat of taint" required to disqualify on ethics-related grounds [citations omitted]). "The Second Circuit has adopted a restrained approach, where '*disqualification is called for only where an attorney's conduct tends to taint the underlying trial*.'" *Lek*, 2018 U.S. Dist. LEXIS 6704, at *10-11 (citation omitted); *Guan* Case, R&R (Exhibit A), p. 17 (discussing same); *Araujo*, 2018 U.S. Dist. LEXIS 153728, at *10-11 (same), quoting *GSI Commerce Solutions, Inc. v. Baby Cente*r, L.L.C., 618 F.3d 204, 209 (2d Cir. 2010) (citation omitted).

For the reasons more fully discussed herein, it is respectfully submitted that Defense Counsel's allegations of attorney misconduct are without merit and Defense Counsel has failed to meet its heavy burden to warrant or otherwise require Mr. Roth's disqualification.

B. MR. ROTH'S CONDUCT AT THE TOWN HALL PUBLIC MEETING DID NOT VIOLATE – OR EVEN TRIGGER – RULE 4.2(A)'S NO-CONTACT PROSCRIPTION.

In their Motion to Disqualify, Defense Counsel claims that, *supposedly*, in violation of New York's No-Contact Rule 4.2(a), "Mr. Roth attempted to gain *unauthorized discovery* by making direct contact with a high-ranking representative of the MTA and NYCT...." (Motion to Disqualify, p. 2 [emphasis added].) Contrary to Defense Counsel's assertions, the plain language of Rule 4.2(a) makes it clear that Mr. Roth's conduct at the Town Hall Public Meeting did not violate – or even trigger – the letter or intent of Rule 4.2(a)'s no-contact proscription, which "by its terms … prohibits contact without the opposing lawyer's consent only if (a) such contact

involves communication, (b) the communication is about the subject of the representation, and (c) the communication is not authorized by law." N.Y.S.B.A. Op. 894 (2011) (internal citation omitted); *see generally Niesig v. Team I*, 76 N.Y.2d 363, 370 (1990) (discussing intent of DR 7-104(A)(1) [now Rule 4.2(a)], "the 'general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel'" [internal citations omitted]); N.Y.S.B.A. Op. 894 (2011) (discussing same).

In this regard, ABA Formal Op. 95-396 (1995) is also particularly instructive in addressing the meaning, intent and scope of Rule 4.2:

- *First*, "Rule 4.2 makes reference to *the subject matter of two representations, and requires a link between them*. Thus, it provides that 'in representing a client,' a lawyer shall not communicate 'about the subject of the representation' – referring to the lawyer's representation of her client. It goes on to refer to communications with one whom the lawyer knows to be 'represented in the matter' – requiring that the second representation be within the compass of the inquiring lawyer's representation. *This required connection between the two representations, imparted by the phrase 'in the matter,' significantly limits the scope of [Rule 4.2(a)'s] prohibition*." ABA Formal Op. 95-396 (internal footnotes and citations omitted; emphasis added).

- *Second*, "[b]y prohibiting communication about the subject matter of the representation, *the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation*. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. However, *where the representation is general – such as where the client indicates that the lawyer will represent her in all matters – the subject matter lacks sufficient specificity to trigger the operation of Rule 4.2*." *Id.* (emphasis added).

- *Third*, " … retaining counsel for 'all' matters that might arise would not be sufficiently specific to bring the rule into play. *In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer*. Therefore, *a client or her lawyer cannot simply claim blanket, inchoate representation for all future conduct whatever it may prove to be, and expect the prohibition on communications to apply.* Indeed, in those circumstances, the communicating lawyer could engage in communications with the represented person without violating the rule. … In the civil context also, the 'matter' with which the representation is concerned must have been *concretely identified*…." *Id.* (Emphasis added).

Consistent with ABA Formal Op. 95-396, and balancing "'the need to maintain the highest standards of the profession' against 'a client's right freely to choose his counsel'" (*Guan* Case, R&R (Exhibit A), pp. 16-17 (citations omitted), courts have declined to disqualify counsel even where the attorney has violated New York's No-Contact Rule where there is no taint or reasonable risk of tainting the trial. *See, e.g., Tylena M. v. HeartShare Human Servs.*, No. 02 Civ. 8401 (VM) (THK), 2004 U.S. Dist LEXIS 10398 (S.D.N.Y. June 7, 2004), *citing, inter alia, Evans v. Artek Sys. Corp.,* 715 F.2d 788, 794 (2d Cir. 1983), and *Nyquist,* 590 F.2d at 1246; *Rocchigiani v. World Boxing Counsel*, 82 F. Supp.2d 182, 189, 192 (S.D.N.Y. 2000) (denying disqualification motion where the danger of trial taint was not obviously present) (other citations omitted).

As evidenced by the record of the Town Hall Public Meeting, Mr. Roth did "not communicate … about the subject of the representation [*i.e., in* Ms. Da Silva's case] with a party [*i.e., Mr. Byford*] the lawyer knows to be represented by another lawyer in the *matter* [*i.e., in Ms. Da Silva's case*]…." Accordingly, Mr. Roth's conduct did not violate Rule. 4.2(a). *See* N.Y. State Bar Assoc. Cmt. [2] to Rule 4.2 ("Paragraph (a) applies to communications with any party who is

represented by counsel concerning the matter to which the communication relates."); N.Y. State Bar Assoc. Cmt. [4] to Rule 4.2 ("This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person *concerning matters outside the representation*….." [emphasis added]).

In light of the discussion above, it is not surprising that based upon our exhaustive review of all New York Federal and State cases, we have not found a *single reported case* wherein a court has ordered an attorney's disqualification or sanctioned an attorney, based upon unique facts analogous to the case at bar, and which has applied the Second Circuit's rigorous standards and high burden of proof as applied to disqualification motions. Notwithstanding the foregoing, Defense Counsel asserts that Mr. Roth's alleged violation of Rule 4.2(a) requires disqualification specifically citing four New York Federal cases: *Zeller v. Bogue Electric Manufacturing Corp.*, No. 71 Civ. 5502 (RO) (S.D.N.Y. 1975); *Papanicolaou v Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080 (S.D.N.Y. 1989); *Zheng v. Kobe Sushi Japanese Cuisine 8, Inc.*, No. 1:15 Civ. 10125 (AKH) (S.D.N.Y. June 20, 2016); and *Guan v. Long Is. Bus. Inst., Inc.*, *supra*. It is respectfully submitted that these four cases are factually and legally distinguishable from the case at bar, and do not support Defense Counsel's Motion to Disqualify Mr. Roth.

First, Defense Counsel relies upon *Zeller v. Bogue Electric Manufacturing Corp.*, No 71 Civ. 5502 (RO) (S.D.N.Y. 1975), stating that, in "*Zeller* … Judge Owen held that where the sum and substance of the inappropriate meeting went to the essence of the lawsuit, the attorney *had to be* disqualified to protect the adverse party from any unfair advantage the attorney may have

achieved by the improper meeting." (Motion to Disqualify, p. 3) Although we have not been able to locate the unreported 1975 decision in the *Zeller* case, nonetheless, it appears that Defense Counsel's summary of the facts of, and reliance upon, the *Zeller* case is misplaced and simply wrong. In *In re Complaint of Korea Shipping Corp.*, 621 F. Supp 164, 169 (D. Alaska 1985), in declining to disqualify or sanction the attorney, the District Court specifically commented on the facts of the *Zeller* case stating, in relevant part:

> " … in [*Zeller v. Bogue Electric Mfg. Corp.*, No. 71 Civ. 5502, Slip Op. at 3, 5 (S.D.N.Y. Mar. 11, 1975), an unreported case heavily relied upon by [the movant], disqualification occurred because the court could not cleanse the litigation of the effects of a *2-1/2-hour ex parte interrogation* of a defendant by plaintiff's counsel, during which '*specific facts*' going '*to the heart*' of the dispute were revealed." (Emphasis added.)

In stark contrast to the facts of the *Zeller* case, Mr. Roth *never* interrogated Mr. Byford for two-plus hours or for any period of time; and Mr. Roth *never* questioned Mr. Byford about the "specific facts" going "to the heart" of this case. At the Town Hall Public Meeting, Mr. Roth, as a private citizen (who also happens to be a lawyer), spoke about the concerns for his blind mother and the need to make subways safe and accessible, first and foremost, driven by the concern for his mother and safety in general, and then Mr. Roth spent less than approximately 3 seconds asking Mr. Byford a *single question consisting of six words*. It is respectfully submitted that Mr. Roth's conduct is in no way analogous to the conduct in the *Zeller* case.

Second, Defense Counsel relies upon the *Papanicolaou* case, stating that "[a]n attorney who participated in a conference with the opposing party without the presence of counsel and

discussed the merits of an ongoing lawsuit violated Model Rule 4.2, and was *required to be disqualified*." (Motion to Disqualify, p. 3) It is respectfully submitted that Mr. Roth's single question at the Town Hall Public Meeting is in no way analogous to the facts that resulted in disqualification in the *Papanicolaou* case, which were as follows:

> "The underlying controversy between the parties involves allegations of fraud with respect to a settlement agreement entered into by the plaintiff after he defaulted on loans extended to him by the defendant. On May 25, 1989, the plaintiff arrived at Milbank's offices to attend a deposition, which had ended earlier that day. The plaintiff encountered the responsible Milbank partner in the firm's reception area. They exchanged pleasantries and the plaintiff asked the partner how the case was going. The conversation immediately became sensitive, and the plaintiff suggested the two go to a conference room. The partner agreed. The resulting meeting, which was joined about twenty minutes later by one of the defendant's employees, lasted *an hour and a half*….
> ….
> … *the plaintiff asserts that the Milbank partner goaded him on and threatened him with negative press coverage at trial* – and revenge later – if he continued to pursue the suit. … *See* Affidavit of the plaintiff, para. 3, 9, 13, 14, 19 (May 30, 1989). The Milbank partner, in contrast, insists that the conversation remained cordial, save, perhaps, for the plaintiff's comment that '*Chase would destroy its relationship with the entire Greek shipping community if it went forward with [the] case*.' Affidavit of the responsible Milbank partner para. 26 (June 8, 1989)." 720 F. Supp. at 1081-82, n.2 (emphasis added).

Again, in stark contrast to the facts in the *Papanicolaou* case: Mr. Roth did *not* meet with Mr. Byford for 90 minutes to discuss the case at bar; Mr. Roth did *not* question Mr. Byford in connection with the case at bar; and Mr. Roth and Mr. Byford *never* engaged in hostile-type communications or discussions concerning the case at bar.

Third, Defense Counsel relies on the *Zheng* case, stating that "Judge Hellerstein held that disqualification of counsel was proper when counsel who represented plaintiffs was contacted by and discussed the case with the defendant employer who was unaware that he was sharing information with his adversaries' lawyer." (Motion to Disqualify, p. 4) The operative facts giving rise to and resulting in disqualification in the *Zheng* case are set forth in the Court's Order Granting Motion to Disqualify Counsel (No. 1:15 Civ. 10125 [AKH], ECF No. 27 [the "*Zheng* Case, Order]"), which can be summarized as follows:

- "[The attorney] learned relevant and useful information from [the adverse party] and, should he remain in the case, would be acting prejudicially to one or the other of his adverse clients, or both. The 'vigor of the attorney's representation' of the earlier client either can reasonably be called into question or, conversely, be given 'an unfair advantage' by having 'confidential information obtained from a potential client.' … [The attorney's] solicitation of [the adverse party], and [the adverse party's] conversation with [the attorney], '*poses a significant risk of trial taint' that can be remedied only by disqualification of [the attorney]*.'" *Zheng* Case, Order, p. 2 (internal citations omitted; emphasis added).

- "'The knowledge presumptively gained by [the attorney] was of a character indelibly affecting intuition and judgment with respect to such related issues: ''knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what to pursue, what settlements to accept and what offers to reject,'' and the like.''' … '*[The attorney's] argument that nothing important was learned is based on wishful speculation, not fact*.'" *Zheng* Case, Order, pp. 2-3 (internal citations omitted; emphasis added).

It is respectfully submitted that the facts of the *Zheng* case are wholly distinguishable from the case at bar. Unlike the *Zheng* case, where the Court concluded that the attorney had learned useful and relevant information in connection with the underlying matter, and as a result of the

attorney's conduct, there was a significant risk of taint – in the case at bar, Defense Counsel *fails* to identify the admission or disclosure made by Mr. Byford that somehow poses a threat of taint to this case, or that otherwise specifically demonstrates how and as to what issues may be prejudiced by Mr. Roth's continued representation of Ms. De Silva.

Fourth, in their Motion to Disqualify (pp. 3-4), Defense Counsel cites, but does not discuss, *Guan v. Long Island Bus. Inst., Inc.*, 2017 U.S. Dist. LEXIS 10490, at *37-38 (E.D.N.Y. Jan 24, 2017) (CBA) (VMS). This Court is already very familiar with the facts of the *Guan* case, as Your Honor considered the motion to disqualify that was the subject of that case; the Court, in its 32-page Report & Recommendation, provided a comprehensive analysis of the motion to disqualify; and Judge Amon subsequently adopted Your Honor's Report & Recommendation wherein Your Honor had concluded that disqualification was *not* warranted. *See Guan* Case, R&R (Exhibit A), pp. 17-22; *see also Guan* Case, No. 15 Civ. 02215, at ECF No. 162 (Memorandum & Order of the Honorable Carol B. Amon, dated March 6, 2017, adopting Report and Recommendation). It is respectfully submitted that as disqualification was not warranted in the *Guan* Case, then certainly the facts herein, which Defense Counsel relies upon for their Motion to Disqualify, do not warrant Mr. Roth's disqualification in the case at bar.

As made clear by several cases and ethics authorities that have interpreted Rule 4.2(a) and its ABA Model Rules' counterpart, Rule 4.2 was never intended to be broadly applied as it is being used by Defense Counsel in the case at bar. Nor was Mr. Roth's conduct of the character and nature specifically intended to be included within the reach of Rule 4.2(a). Notwithstanding the

foregoing, in an excess of caution we briefly discuss below the additional "*authorized ... by law*" exception set forth in Rule 4.2(a), which provides that "[i]n representing a client, a lawyer shall not communicate … about the subject of the representation with a party ... represented by another lawyer in the matter, *unless the lawyer ... is authorized to do so by law*." (Emphasis added.)

First, particularly instructive in understanding and applying Rule 4.2(a)'s authorized by law exception, it is helpful to consider the RESTATEMENT OF THE LAW [THIRD] GOVERNING LAWYERS (ALI, 2000) (the "RESTATEMENT") §§ 99 and 101, which provide in relevant part:

- The RESTATEMENT § 99(1) ("A Represented Nonclient – The General Anti-Contact Rule"), provides in relevant part, that: "A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient … unless: **(a) the communication is with a public officer or agency to the extent stated in § 101; or … (c) the communication is authorized by law**…."; and

- The RESTATEMENT § 101(2) ("A Represented Governmental Agency or Officer"), provides in relevant part, that: "In negotiation or litigation by a lawyer of a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity, the prohibition stated in § 99 applies, **except that the lawyer may contact any officer of the government if permitted by the agency or with respect to an issue of general policy**." (Emphasis added.)

Consistent with the type of government agency-related exception set forth in the RESTATEMENT § 101(2), several courts have addressed and further explained the import of the exchange of information between the public and the government. For example, in *Matter of Madris (Oliviera)*, 97 A.D.3d 823, 824-826 (2d Dept. 2012), in connection with family court proceeding involving the Department of Social Services, the Appellate Division, Second

Department reversed the trial court's disqualification of counsel determining, in part, that there was no violation of Rule 4.2:

> "'An entity cannot claim a blanket protection from *ex parte* interviews by taking the position that house counsel is responsible for all future legal matters affecting that entity.' ... Similarly, 'if a governmental party were always considered to be represented by counsel for purposes of [the rule against *ex parte* communications], the free exchange of information between the public and the government would be greatly inhibited….'"

Citing *Schmidt v. State of New York*, 279 A.D.2d 62, 65 (4th Dept. 2000), citing ABA Formal Op. 95-396 (1995), and quoting N.Y.S.B.A. Op. 652 (1993); *see also XTL-NH, Inc. v. N.H. State Liquor Comm'n*, No. 2013 Civ. 00119, 2013 N.H. Super. LEXIS 24, *6 (N.H. Sup. Ct. Merrimack Co. Dec. 31, 2013) (same), citing and quoting *Madris and Schmidt,* and the RESTATEMENT § 101.

As to Rule 4.2(a)'s authorized by law exception, it is also helpful to consider the following "Comments" to the RESTATEMENT § 101:

- The RESTATEMENT § 101, cmt. b states, in relevant part, that "[a]ll jurisdictions accept, of course, that direct contact is permissible when protected by the right of the client or lawyer under the First Amendment to petition the government for redress of grievances. … The exception to the anti-contact rule for *contact authorized by law* … may have particularly wide application to governmental clients. For example, if the announced policy of a governmental agency is that comments concerning a matter should be directed to a particular officer, such communications may be made without consent of any agency lawyer who may be representing the agency…." (emphasis added); and

- The RESTATEMENT § 101, cmt. c states, in relevant part, that "[e]ven litigation over a specific claim may involve general policy issues, as when the litigation involves a novel question of the applicability or validity of a regulation. In such instances, this Section permits direct contact with any governmental officer with power to affect the policy, contact that may be

> protected under the First Amendment in any event. Alternatively, the contact may be in a context where such is regarded as customary or expected by the government agency, and as such is permissible."

Second, it is axiomatic that the government may not impose unreasonable restrictions on First Amendment activity. Whether a First Amendment activity is improperly restricted depends on whether the speech is protected by the First Amendment, the nature of the forum, and whether there is sufficient justification for limiting the First Amendment activity. *Cornelius v. NAACP Legal Defense & Educational Fund,* 473 U.S. 788, 797 (1985). The application of these factors to the case at bar clearly demonstrates that requiring Mr. Roth – to identify himself as an attorney representing plaintiffs in personal injury actions against the MTA and NYCTA, and/or to gain the consent of Defense Counsel prior to attending the Town Hall Public Meeting and questioning President Byford – would constitute an unreasonable restriction on his First Amendment activity.

Third, Mr. Roth's attendance at the Town Hall Public Meeting, as a private citizen (who also happens to be a lawyer), to hear and address matters concerning public safety, was protected by the First Amendment, by the right to petition the government for redress of grievances. *See United Mine Workers v. Illinois Bar Assoc.,* 389 U.S. 217, 222 (1967) (the right to petition for a redress of grievances is, generally, safeguarded and protected by, *inter alia*, First Amendment). The Second Circuit has made it clear that the First Amendment's right to petition includes the "right[] to complain to public officials and to seek administrative and judicial relief." *Franco v. Kelly,* 854 F.2d 584, 589 (2d Cir. 1988).

Fourth, the "Fast Forward" Town Hall Public Meeting at York College constituted a "designated public forum." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("Designated public fora … are created by purposeful governmental action"); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985) ("The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse."). Thus, the government may not restrict or exclude any speaker, including Plaintiff's counsel, "without a compelling governmental interest" that is "narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800 ("when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest"). As noted earlier, on August 19, 2018, the MTA issued a Press Release, which stated, in relevant part, "MTA New York City Transit announced today that it is hosting a series of town hall-style public meetings … to discuss the Fast Forward Plan….Members of the public are highly encouraged to attend and ask questions to President Byford and his staff…." (Exhibit B [Press Release]) It is respectfully submitted that Mr. Roth's decision to attend, and his conduct while in attendance at, the Town Hall Public Meeting was proper and ethical and entirely consistent with the express purpose of, and the invitation to attend, the Town Hall Public Meeting.

Fifth, Defense Counsel has not and cannot demonstrate that their proposed restrictions with respect to Mr. Roth attending the Town Hall Public Meeting are or otherwise would have been narrowly tailored or constituted a "compelling" government interest that would justify any

restrictions on Mr. Roth's speech; and we respectfully submit that Defense Counsel's proposed restrictions, as set forth in their Motion to Disqualify, would constitute an unlawful prior restraint on Mr. Roth's First Amendment activity. Because the government cannot discriminate against citizens on the basis of their status or the content of their speech at public meetings to hear the views of citizens, Defense Counsel cannot demonstrate that their interest in restricting Mr. Roth's speech outweighed his First Amendment right to petition and free speech rights. *See City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 174–75 (1976); *U.S. v. Albertini*, 472 U.S. 675, 687–88 (1985) (quotations and citation omitted).

A final observation is appropriate based upon the allegations of attorney misconduct asserted by Defense Counsel in their Motion to Disqualify, and in light of the collateral estoppel effect that the adjudication of those claims may have on Mr. Roth. Even assuming, *arguendo*, that the Court concludes that Rule 4.2(a) was applicable to the particular facts of the Town Hall Public Meeting, Mr. Roth did not have fair notice of the broad application of the Rule's application as applied to the case at bar. We respectfully request that this Court consider the legal principle that attorney disciplinary proceedings and investigations are considered "quasi-criminal" in nature. *See In re Peters*, 642 F.3d 387, 389 (2d Cir. 2011), citing *In re Ruffalo*, 390 U.S. 544, 550-51 (1968), and *Erdmann v. Stevens*, 458 F.2d 1205, 1209 (2d Cir. 1972).

We refer to this principle that disciplinary proceedings and investigations are quasi-criminal because New York's Rules of Professional Conduct permit severe and stigmatizing sanctions that may, in effect, deprive an attorney of the privilege to practice his or her chosen

profession. *See*, *e.g.*, *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-06 (1963); *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 238-39 (1957). Disciplinary proceedings are considered quasi-criminal in nature, and attorneys in such proceedings are "accordingly entitled to procedural due process, which includes fair notice of the charge." *In re Ruffalo*, 390 U.S. at 550-52; *In re Peters*, 642 F.3d at 389. Fair notice is the *sine qua non* for the imposition of any attorney discipline. In determining whether an attorney has been accorded "fair notice" of an ethical obligation, "the guiding principle must be whether a reasonable attorney, familiar with the [Rules of Professional Conduct] and its ethical structures, would have notice of what conduct is proscribed." *In re Holtzman*, 78 N.Y.2d 184, 191 (1991).

In sum, then, even assuming, *arguendo*, that this Honorable Court concludes that Rule 4.2(a) was applicable to Mr. Roth's conduct as it relates to the Town Hall Public Meeting – if Mr. Roth had the same understanding as, *inter alia*, N.Y. State Comm. Open Govt. AO 2696, Rule 4.2(a)'s authorized by law exception, and ABA Formal Op. 95-396 – Mr. Roth did not have fair notice of construct and broad application of Rule 4.2(a) as it is now being applied to the facts of the case at bar. Accordingly, we respectfully submit that "due process" insulates Mr. Roth from being sanctioned.

For all of these reasons, as set forth herein, it is respectfully submitted that Defense Counsel's Motion to Disqualify should be denied in its entirety; however, should any claim of attorney misconduct against Mr. Roth remain unresolved, the allegation should be referred to the

appropriate attorney grievance authority at the conclusion of Ms. Da Silva's case. In the seminal case, *Bd. of Educ. v. Nyquist*, 590 F.2d at 1246, the Second Circuit explained, stating, in part:

> "Weighing the needs of efficient judicial administration against the potential advantage of immediate preventive measures, we believe that unless an attorney's conduct tends to 'taint the underlying trial,' … courts should be quite hesitant to disqualify an attorney. Given the availability of both federal and state comprehensive disciplinary machinery …, there is usually no need to deal with all other kinds of ethical violations in the very litigation in which they surface." (Internal citations omitted.)

Allegations of attorney misconduct should be addressed "under the auspices of the appropriate bar association and should in no way be permitted to affect the decision on the merits of the case." *Ceramco, Inc. v. Lee Pharms.*, 510 F.2d 268, *271 (2d Cir. 1975) The Second Circuit has concluded that "[g]iven the availability of both federal and state comprehensive disciplinary machinery, ... there is usually no need to deal with all other kinds of ethical violations in the very litigation in which they surface. *Nyquist*, 590 F.2d at 1246. Moreover, "[c]ourts are neither the sole forum for adjudicating alleged ethical lapses nor even the best forum for doing so....[B]ar authorities ... have a specific mandate to enforce the disciplinary rules of their respective jurisdictions and to sanction the attorneys who violate those rules...." *Almonte,* 2007 U.S. Dist. LEXIS 21782, at *7-9 (citations omitted).

More recently, in *Tour Tech. Software, Inc. v. RTV, Inc.*, No. 17 Civ. 5817 (MKB) (CLP), 2018 U.S. Dist. LEXIS 130021, at *9-15 (E.D.N.Y. Aug. 2, 2018), the District Court determined that, in connection with a conflicts-related claim, disqualification was *not* warranted and writing, in relevant part:

> "Even if his representation of [the defendant] … in this litigation were a violation of his professional obligations, there is no indication that any such violation would taint the trial in this case. The rules promulgated by the ABA and the State of New York 'merely provide guidance' to federal courts in determining whether to disqualify an attorney, and thus 'not every violation of a disciplinary rule will necessarily lead to disqualification.'… Indeed, '[g]iven the availability of both federal and state comprehensive disciplinary machinery, there is usually no need to deal with all other kinds of ethical violations in the very litigation in which they surface.' …; *see* L. Civ. R. 1.5(a), (b)(5) (establishing E.D.N.Y. Committee on Grievances….). *That is precisely the case here. Plaintiff has made no demonstration that the underlying trial of this case on the merits would be tainted by any alleged ethical violation.*" (Emphasis added; internal citations omitted.)

As evidenced by the facts herein, Defense Counsel has *failed* to sustain their charges against Mr. Roth, i.e., that a single question at the Town Hall Public Meeting violated the New York Rules of Professional Conduct warranting disqualification; and, accordingly, it is respectfully submitted that Defense Counsel's Motion to Disqualify should be denied in its entirety. However, assuming, *arguendo*, if upon adjudicating Defense Counsel's Motion to Disqualify, if any claim of attorney misconduct remains unresolved, it is respectfully submitted that any such claim should be referred to the appropriate attorney grievance authority at the conclusion of Ms. Da Silva's case.

C. AN AWARD OF REASONABLE ATTORNEYS' FEES AND COSTS INCURRED BY PLAINTIFF'S COUNSEL IN OPPOSING DEFENSE COUNSEL'S FRIVOLOUS MOTION IS APPROPRIATE.

As evidenced by the facts of the within matter, this Motion to Disqualify is both disingenuous and frivolous, and contains false factual claims and allegations of attorney misconduct that are legally and ethically inappropriate, wrong and arguably sanctionable under,

inter alia, N.Y.R.P.C. 3.1, 3.2, 3.3, 4.1 and 8.4, and 18 U.S.C. § 1927, and this Court's inherent authority. It is not unreasonable to say that Defense Counsel's Motion seeking to disqualify or otherwise sanction Mr. Roth warrants the imposition of sanctions.

We respectfully submit that there is a sound legal and factual basis for Your Honor to conclude that Defense Counsel's conduct in pursuing it Motion to Disqualify was "so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose," and that their "conduct constitute[es] or [is] akin to bad faith"; and, therefore, Your Honor has the discretion, pursuant to the Court's inherent powers (and 28 U.S.C. § 1927) to sanction Defense Counsel by ordering them to pay reasonable attorney's fees and costs. *See In re 60 E. 80th St. Equities, Inc.,* 218 F.3d 109, 115 (2d Cir. 2000); s*ee also Agee v. Paramount Communications, Inc*., 114 F.3d 395, 398 (2d Cir. 1997) (setting forth elements required to impose sanctions under either the Court's its inherent authority or 28 U.S.C. § 1927); *Gollomp v. Sptizer*, 586 F.3d 355, 374 (2d Cir. 2009) (while "[i]t is an unpleasant task to sanction attorneys … the rules and statutes that authorize sanctions exist by necessity and for good reason").

Based upon Defense Counsel's false claims of attorney misconduct and fraud, and the frivolous conduct in filing and thereafter pursuing the instant Motion to Disqualify, it is respectfully submitted that a sound basis exists for this Court to impose sanctions, including attorneys' fees and costs, against Defense Counsel; however, we leave that determination to the Court's inherent discretion and authority.

* * * *

CONCLUSION.

Accordingly, for the foregoing reasons, we respectfully submit that Your Honor should deny Defense Counsel's Motion to Disqualify in its entirety, and grant such other and further relief, which as to this Court deems just, equitable and appropriate, including attorneys' fees and costs.

Dated: New York, New York.
October 29, 2018

Respectfully submitted,

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