Supreme Court No. 93321-9

(Appeal from Court of Appeals No. 73493-8-I)

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,

Plaintiff-Respondent,

v.

MICHIKO STEHRENBERGER

Defendant-Petitioner.

APPEAL FROM DIVISION ONE
OF THE WASHINGTON COURT OF APPEALS

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

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PETITIONER'S REPLY TO ISSUES
RAISED IN RESPONDENT'S ANSWER

Petitioner Michiko Stehrenberger replies to the issues raised by Respondent JPMorgan Chase Bank, N.A. in its Answer as follows:

1. **Respondent's Answer at pages 1, 5 and 6 asserts that the Petition for Review was untimely.**

Petitioner's Reply: The Petition was timely-filed with Division Three of the Court of Appeals on June 16, 2016. See *Exhibit 1*, conformed copy dated June 16, 2016, incorporated herein by reference. Additionally, the Court's internal docket specifically notes that the Petition was timely filed and received on June 16, 2016.

2. **The Respondent Bank misreads CJC Rule 2.11's comment 5, which requires a judge's transparent disclosure of any interest in one of the parties to be made on the record of the case, even if the judge considers the interest only de minimis.**

Respondent's Answer at page 7 states:

> "Nor was Judge Erlick required to make any disclosures with respect to [his connections with Respondent Bank]."

Petitioner's Reply: CJC Rule 2.11's comment 5 requirement for a judge's disclosure to be made openly, on the record of the case, is mandatory:

> [5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification. (emphasis added)

The Respondent curiously misapprehends the disclosure requirement, seeking to eliminate it entirely for instances when a judge somehow subjectively determines his or her own pecuniary interest in one of the parties is too inconsequential or de minimis to merit disclosure, such as if the interest is part of a common or mutual investment fund referenced in CJC Rule 2.11's comment 6. But as the Rule's comment states, disclosure is still required, "even if the judge believes there is no basis for disqualification." *CJC Rule 2.11, cmt. 5.*

Further, under the adjacent Rule 2.11(B), a judge cannot rely on not-knowing what his or her investment interests are to evade the disclosure requirement:

> A judge shall keep informed about the judge's personal and fiduciary economic interests . . . . *CJC Rule 2.11(B)*

CJC Rule 2.11(B) specifically requires judges to be aware of what they have in their investment holdings, and the judge's personal retirement accounts through the Washington State Investment Board are not held in "blind trusts" from which the judges would otherwise have no awareness of their own investment holdings. Instead, their personal investment portfolio holdings through the Washington State Investment Board, through public record requests responses, are a matter of open and public record, as well as through a Google search for the portfolio holdings in each investment type, such that there is little practical barrier, if any, to a

judge being able to know what he or she owns for the purposes of disclosing to the parties prior to issuing substantive rulings in their case. Given that JPMorgan Chase is openly listed among the top-ten investment portfolio holdings in the S&P fund, Dreyfus funds, Dodge & Cox fund, and various other prevalent investment funds, this information was readily accessible to each of the judges and should have been disclosed by the judges on the record of the case.

CJC Rule 2.11(B) imputes this specific knowledge to the judges of what entities in which they each are personally invested, to avoid the obvious problem of a judge claiming not to know to escape the CJC Rule 2.11 comment 5 disclosure requirement. With the increase in foreclosure- and debt collection-related litigation brought and defended by major financial institutions since the 2008 financial fallout, it is reasonable that a conscientious judge would anticipate some overlap in his or her investments with those of the major financial institutions coming before him or her as parties. A judge's decision not to disclose therefore casts a shadow of partiality of proceedings over which the judge then issues rulings in favor of those same financial institutions.

The adjacent CJC Rule 2.11(C)[1] further supports this open transparency concept by giving the parties in the case the authority to waive any conflict in writing if the parties–not the judge– consider the judge's interest to be de minimis. If one or more of the parties decline to waive the conflict, RCW 4.12.050 separately authorizes them to obtain a different judge in their proceeding–as a matter of right–without further need for actual proof of the disqualification or bias, beyond the procedural filing a disqualification motion supported by an Affidavit of Prejudice. *RCW 4.12.040-.050.*

According to the Respondent Bank's flawed reasoning, if a judge subjectively determines his or her own pecuniary interest in the Bank to be de minimis, the judge then, somehow, does not have to disclose. This flies in the face of the very purpose of CJC Rule 2.11(A), to preserve not only the impartiality–but also the appearance of impartiality–of our judges. In Respondent Bank's universe of reasoning, a judge may somehow choose to keep secret his or her pecuniary interests in a party if the judge

[1] CJC Rule 2.11(C) states:

> (C) A judge disqualified by the terms of Rule 2.11(A)(2) or Rule 2.11(A)(3) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship
> is immaterial or that the judge's economic interest is de minimis, the judge is no longer disqualified, and may
> participate in the proceeding. When a party is not immediately available, the judge may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

subjectively believes the interest not to matter, and based on the judge's subjective belief, the parties to an action should be denied (1) the open transparency of disclosure of the judge's pecuniary interests in the party, even though required under CJC Rule 2.11, comment 5; (2) the right to waive the conflict under the neighboring Rule 2.11(C); and the right to obtain a financially-disinterested judge under RCW 4.12.050 based upon any concerns related to the judge's pecuniary interests.

Yet the Respondent Bank is eager to have this Court ignore the clear language of CJC Rule 2.11, comment 5, which unequivocally requires the transparency of full disclosure by the judge to the parties on the record of the case, even if the judge does not personally consider his or her own interest disqualifying. It is undisputed that Judge Erlick had an $11,129.00 to $18,888.79 interest in the Respondent Bank's parent corporation–a direct pecuniary interest–that he had a duty to disclose that interest to the parties. When a judge chooses not to disclose her or her own interests, rather than adhering to the objective requirement put forth in CJC Rule 2.11, comment 5, this violates the very appearance of impartiality required of our judges.

The U.S. Supreme Court in *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), had concluded that an amount as small as $12.00 was significant enough a dollar amount to disqualify the decision-maker. Even if Judge

Erlick himself did not consider his own $11,129.00 to $18,888.79 investment in JPMorgan Chase to be a disqualifying interest, his failure to disclose these interests to the parties on the record of the case was a per se violation of CJC Rule 2.11, comment 5, because he is required to disclose this information even if he believes it is not a basis for disqualification.

But for Judge Erlick's failure to disclose at the beginning of his involvement in the case, Ms. Stehrenberger would have had notice of facts to supports her filing a motion to obtain a different judge as a matter of right under RCW 4.12.050–and her Constitutional right to have her case heard by an impartial tribunal would not have been violated.

3. **The Respondent asks this Court to ignore the language of CJC Rule 2.11's comment 6 that creates an exception to interests in a mutual fund when that interest "could be substantially affected by the outcome of a proceeding before a judge."**

   Respondent's Answer at 7-8 states:

   > "Judge Erlick did not need to recuse himself from this case based on de minimis connections with . . . [Respondent Bank]."

   The Respondent Bank argues that under CJC Rule 2.11, cmt. 6, even when a judge directly and personally owns shares related to the Bank simply through "a mutual or common investment fund," that the judge cannot ever be disqualified because that type of interest is only de minimis.

However, when one reads the complete language of the relevant portion of comment 6, we see there is an exception-to-the-exception that sinks the Respondent's position that a "mutual or common investment fund" is somehow sufficient, by itself, to end of the inquiry as to whether the judge is disqualified. Comment 6 states:

> [6] "Economic interest," as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:
>
> (1) an interest in the individual holdings within a mutual or common investment fund . . .(emphasis added)

The Bank's argument entirely ignores the exception stated within the very same comment 6–that the judge is disqualified even when the interest is one in a "mutual or common investment fund" when that mutual or common investment fund interest "could be substantially affected by the the outcome of the proceeding" before that judge. The language states "could be" and the actual effect is therefore not required to be proved with any absolute certainty for the judge to be disqualified.

In the context of the language within Washington Mutual Purchase and Assumption Agreement for which judicial determination is being sought in this case, a judge's interests in JPMorgan Chase reasonably "could be substantially affected by the outcome of [this] proceeding

[determining the terms and effects of the Purchase and Assumption Agreement] before [that] judge."

The Respondent Bank relies entirely on the contractual language of a single 44-page document, the Purchase and Assumption Agreement, which the Bank admits on the record contains no list identifying any of the assets of Washington Mutual being conveyed, for its nationwide claims to billions of dollars' worth of unidentified, unaccounted-for Washington Mutual assets. Ms. Stehrenberger's Answer, affirmative defenses, and counterclaims indicate her intention to request judicial construction of that Purchase and Assumption Agreement's actual terms as to whether the Bank actually obtained loans and negotiable instruments that were never identified in any list of assets in that Agreement. Along with JPMorgan Chase & Co. CEO James Dimon's remarks in the 2008 Annual Report that these same unidentified Washington Mutual assets have substantially increased Chase's share price to its shareholders and is expected to continue increasing in value over time, a judge's interest in a "mutual or common investment fund" invested in JPMorgan Chase reasonably "could be substantially affected by the outcome of a proceeding" before that judge, and that judge was therefore disqualified.

The rulings made by these judges at the trial court and appellate level, for which it is undisputed that these five judges owned interests in

"mutual and common investment fund" at the same time as making their rulings in favor of the Bank, should therefore be vacated.

4. **The Respondent Bank misleads this Court by asking it to rely upon the "de minimis" decision in *Kok v. Tacoma Sch. District No. 10.***

The Respondent's Answer at page 7 states:

> "Judges are not required to disqualify themselves if they have insignificant economic interests in the parties to the proceeding. See CRJC 211(A)(3); *see also Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 25-26 (2013)."

Petitioner's Reply: The Bank's counsel is well-aware from prior briefing in the courts below, that *Kok v. Tacoma Sch. District No. 10* does not support its conclusion that the judge's direct, pecuniary interests in JPMorgan Chase are de minimis, yet it still cites to it here. In *Kok,* that judge's interest was considered de minimis only because the interest was through a third-party, the judge's husband, regarding a client of the husband's law firm in an unrelated real estate matter.

The *Kok* judge's interests were indirect, by several layers, and were not direct, pecuniary interests in any of the parties, as they are here. Not even the Bank disputes that the five judges in this case directly owned shares in JPMorgan Chase, and that Judge Erlick specifically owned between $11,129.00 to $18,888.79 in JPMorgan Chase at the same time he granted summary judgment in favor of Chase. These judges were therefore

disqualified at the time they made their rulings in favor of Chase, and these rulings should all be vacated.

5. **Respondent Bank wrongly asserts that Ms. Stehrenberger has argued that <u>all</u> Washington judges are disqualified.**

   The Respondent's Answer at 9 states:

   > "If the rule were otherwise, there probably would not be a single in the State of Washington that could hear Stehrenberger's case, insofar as each would have a similar interest in the judicial-retirement system."

   Petitioner's Reply: The Respondent Bank is already aware from the briefing in the courts below that Ms. Stehrenberger does not actually argue that <u>all</u> judges are automatically disqualified from hearing this case, simply because they may have a retirement account with the Washington State Investment Board. Rather, her position is that the judges could have cured the disqualification by divesting themselves of the disqualifying interests prior to hearing this case, as is already done by federal court judges under the companion federal rules.

   Divestiture of the disqualifying interests would cure the problem. Of the benefits of owning shares in a top-ten investment such as JPMorgan Chase, is the ease with which an investor can buy and sell these shares rapidly on the open market. A phone call or an online trade, and the conflicting ownership interest can be sold off within moments, and leaving the judge free to make decisions unfettered by the pecuniary conflicts.

Additionally, Washington State judges file their Personal Financial Affairs Statements with the Public Disclosure Commission, and they are a matter of public record. These records for the most recently-reported year of 2015 show that there are multiples Washington State judges who are not disqualified by interests in retirement accounts invested in JPMorgan Chase. Upon vacatur ad remand, prior to assignment to the new trial court judge, a quick search can identify which Superior Court judges are not disqualified by retirement account holdings in JPMorgan Chase, and, as a fallback position, the court rules allow for assignment of this case to other judges from other areas to hear the case, so as to expand the reach for a ready and available impartial tribunal to hear this case. There is no actual barrier to being able to have Ms. Stehrenberger's case heard by a financially-impartial judge who does not own shares in JPMorgan Chase, and the disqualified rulings should be vacated.

6. The Respondent Bank argues that Ms. Stehrenberger's diligent defense is improper, even when the Bank, as the plaintiff in this case, has at all times had the right to end the litigation.

Respondent's Answer at pages 2 and 10 makes a litany of character attacks, asserting that her defense in this case, including this second request for review by this Court given its Constitutional, is somehow "an attack on the judiciary."

Petitioner's Reply: A licensed attorney is required to represent his or her client with diligence. As a self-represented party, Ms. Stehrenberger has carried out the same duty of diligence to her client, herself, in carefully investigating the facts and applying the applicable statutes and case law in good faith.

Over the course of this case, the Respondent Bank has made surprisingly candid admissions that indicate it cannot meet the prima facie elements to enforce a negotiable instrument or the assignment of a negotiable instrument under the governing Washington laws, RCW 62A.3 and 62A.9A. No court has yet addressed the interplay between the contractual "all right, title, and interest" provision of the Purchase and Assumption Agreement and RCW 62A.3-203(a) and (b)'s Official Comment 1 barring enforcement even under "all right, title, and interest" language when the entity seeking to enforce cannot prove receipt by physical delivery of the original paper negotiable instrument, and RCW 62A.9A-108's requirements for the sufficiency of the description of assets.

Based on the record admissions indicating defects in the Bank's proof, a diligent and ethical defense attorney would not do his client the disservice of simply walking away from the defense. Nor should a reasonable self-represented party. Aware of the stigma courts may attach to self-represented parties, Ms. Stehrenberger's communications and

exchanges with the Respondent have been courteous, efficient, and polite; the exchanges from the Bank's counsel, less so.

As the plaintiff, if the Bank somehow feels aggrieved by having to take part in the litigation it commenced, it has had at all times the opportunity to voluntarily dismiss its case. It is the Bank who has chosen to focus on ad hominem character attacks, rather than putting forth clean legal reasoning, and it is unfortunate that its judicial audience has been comprised of only judges who already themselves personally own shares in JPMorgan Chase. There is nothing unreasonable about a party making diligent and good faith efforts to correct the apparent errors in law, by judges who declined to disclose even required to do so by our Judicial Code, so as to preserve the public's confidence in the impartiality and objectivity of our judiciary.

CONCLUSION

The Respondent Bank's ad hominem attacks repeatedly seek to distract this Court from the merits of this request for review, which include that the judges' failure to disclose have deprived Ms. Stehrenberger of her due process rights to obtain a different judge under RCW 4.12.050 from the very beginning.

For the foregoing reasons Ms. Stehrenberger respectfully requests the Supreme Court of Washington grant her Petition for Review and reverse, vacate, and remand her case to a different trial court judge for new proceedings to allow her case to be heard by an impartial trial court judge.

Dated this 25th day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on the date below, I served a true and correct copy of the **Petitioner's Reply to Respondent's Answer to Petition for Review** related to Washington Supreme Court case number 93321-9, upon the Respondent, JPMorgan Chase Bank, N.A., upon its counsel of record, by both (1) including this Reply by email to HughMcCullough@DWT.com as a cc: email sent at the same time as filing this Reply by email to the Court at Supreme@Courts.WA.gov; and (2) by depositing a hard copy of this Reply in an outgoing mailbox, as prepaid first-class mail, addressed to the following:

Mr. Hugh McCullough and Mr. Fred Burnside
Davis Wright Tremaine, LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101

Dated July 25th, 2016, at Alexandria, VA.

Michiko Stehrenberger

Exhibit 1

Supreme Court No. _____

(Court of Appeals No. 73493-8-I)

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OF THE STATE OF WASHINGTON

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PETITION FOR REVIEW

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OFFICE RECEPTIONIST, CLERK

From: document.request@gmail.com
Sent: Monday, July 25, 2016 1:13 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: hughmccullough@dwt.com; document.request@gmail.com
Subject: For filing in case no. 93321-9 (JPMorgan Chase Bank, N.A. v. Stehrenberger) - thank you!
Attachments: Case No 93321-9 - Reply of Michiko Stehrenbeger - as filed by email 7-25-2016.fl.pdf

July 25, 2016

To: Clerk of the Washington State Supreme Court

Cc: Mr. Hugh McCullough
Davis Wright Tremaine, LLP
Attorney for Respondent JPMorgan Chase Bank, N.A.

From: Michiko Stehrenberger
Petitioner

Re: Reply of Petitioner
Michiko Stehrenberger v. JPMorgan Chase Bank, N.A.
No. 93321-9

Attached please the Reply of Petitioner Michiko Stehrenberger to be filed in the above matter.

The Respondent is being electronically served both by cc: along with this email, and a hard copy by mail.

Thank you!

- Michiko Stehrenberger