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No. 73493-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,

Respondent,

v.

MICHIKO STEHRENBERGER

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE JOHN P. ERLICK

AMENDED REPLY BRIEF OF APPELLANT

By: Michiko Stehrenberger
Appellant

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ARGUMENT IN REPLY

The scope of this appeal is narrow: Did the trial court judge and three Division I judges in the prior appeal have pecuniary shareholder interests in the plaintiff, JPMorgan Chase, at the same time they issued decisions allowing Chase to prevail? If so, did the four judges timely disclose these interests in Chase prior to taking part in the decision-making process, to allow the parties to file a motion for disqualification and obtain a different judge "as a matter of right" under RCW 4.12.050? If not, did the failure to disclose deprive Ms. Stehrenberger of the right to have her case and prior appeal heard by impartial and financially-disinterested judges, and should the prior decisions now be vacated to restore that lost right?

As a preliminary matter, Ms. Stehrenberger respectfully requests this Court disregard Chase's ad hominem arguments and instead consider her intentions in raising these due process and appearance of impartiality concerns, as stated within her CR 60 supporting declaration, *CP 1224*:

> "I have great respect and deep admiration for the objectivity of the legal process, and for the work that judges do. I intend no disrespect to any person by filing this motion. It has been a difficult decision for me to make, but I am sincerely concerned that a permanent injustice will result to myself and to others in a position similar to mine, who are also going through the court system seeking an objective determination from the courts, if I do not file this motion now that these undisclosed conflicts of interest have been made known to me." *CP 1224, Decl. ¶ 2.*

Also, no Rule of Necessity applies just because more than one judge has a shareholder interest in Chase within a judicial retirement plan; under the guidance provided by 28 U.S.C.§ 455(f), the companion federal statute to CJC Rule 2.11(A),[1] judges are allowed to divest themselves of their disqualifying interests prior to taking part in the decision-making process, to then be allowed to hear the case without raising the due process and appearance of impartiality concerns that arose here.

1. **The proper standard of review is *de novo.***

Chase in its brief does not dispute any of the facts of the existence of the four judges' shareholder interests in Chase, only their legal effect, and therefore "questions as to whether undisputed facts violate due process or the appearance of fairness doctrine are legal and reviewed *de novo*." In re Discipline of King, 168 Wn. 2D 888, 899, 232 P.2d 1095 (2010); In re Crace, 157 Wn. App. 81, 98, 236 P.3d 914 (2010); City of Redmond v. Moore, 151 Wash.2d 664, 668, 91 P.3d 875 (2004). Chase suggests an abuse of discretion standard under Rivers,[2] which addresses only motions for reconsideration and vacatur of a dismissal, but not the due process

1 "Washington courts turn to federal courts for guidance...when faced with a circumstance not previously addressed in Washington decisions. Barr v. MacGugan, 119 Wash.App. 43, 47, 78 P.3d 660 (2003) (looking to federal decisions on lawyer mental illness or disability as a basis for relief from judgment under the catch-all provision)." Tatham. v. Rogers, 170 Wn.App. 76, 100, 283 P.3d 583 (2012)

2 "A motion for reconsideration and motion to vacate a dismissal are to be decided by the trial court in exercise of its discretion and its decision will be overturned only if the court abused its discretion." Rivers v. Wash. State Conf. of Mason Contractors, 145 Wn.2d 674, 685 (2002), *Respondent's Brief* at 5.

questions raised by the four judges' pecuniary interest in this case. "The due process clause incorporated the common law rule that judges must recuse themselves when they have 'a direct, personal, substantial pecuniary interest' in a case." Tatham v. Rogers,170 Wn.App. 76, 90, 283 P.3d 583 (2012), citing Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927). In Tumey, the U.S. Supreme Court determined that **$12.00 was too substantial a pecuniary interest** and that judge was disqualified.[3] Though Tatham and Kok[4] were decided under the abuse of discretion standard, in those cases no pecuniary interests of the judge were involved and therefore no due process violation questions arose there under the Tumey standard as they do here.

2. **A judge's pecuniary interest as a shareholder in Chase is *prima facie* proof of the "bias or prejudice" sufficient to disqualify the judge under Tatham and Withrow.**

"A party asserting a violation of the [appearance of fairness] doctrine must produce sufficient evidence demonstrating bias, such as **personal or pecuniary interest** on the part of the decision maker..." Tatham v. Rogers, 170 Wn.App. 76, 87, 283 P.3d 583 (2012). "In certain instances **the duty to recuse is nondiscretionary** because **the probability of actual bias on the part of the judge or decisionmaker is too high to**

3 Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927), *Brief of Appellant* at 18, fn. 6

4 Kok v. Tacoma School District No. 10, 179 Wn.App. 10, 25-26 (2013) as referenced in *Respondent's Brief* at 5; further addressed on page **11** of this Reply Brief.

be constitutionally tolerable...These instances include where the adjudicator has a **pecuniary interest** in the outcome..." Tatham at 91, quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L.Ed.2d 712 (1975) (emphases added). Other courts have also determined a judge's shareholder interest disqualifies the judge:

> "It is settled that a **stockholder of a corporation has a 'pecuniary interest'** in an action in which the corporation is interested in its individual capacity...and it follows that [the judge] is disqualified to sit in this cause." Thomson v. McGonagle, 33 Haw. 565, 566 (1935)(emphasis added)

> "[I]f a judge has a direct financial interest in the outcome of the case, **such as stock ownership in a company who is a party to litigation**, the judge is disqualified. Thus, **it is the nature of the judge's financial interest, rather than its potential value**, that determines whether the interest is disqualifying." Fuelberg v. State, 410 S.W.3d 498, 504 (2013)(emphasis added)

A Florida court determined that a case in which a receiver was collecting assets for a bank also disqualified that judge:

> "The case now pending, in which the receiver is suing [defendant]...**was instituted for the purpose of collecting assets of the bank. The result of this suit will affect the value of the assets of the bank, and will necessarily affect the value of the shares of the capital stock of the bank**...It is true that the degree in which the value of the stock of the corporation in which the judge is a majority stockholder will be affected may be very small, but the degree of the interest of the judge is immaterial. '**The interest which disqualifies a judge is a direct pecuniary or a direct property interest** or one which involves some individual right or privilege in the subject-matter of the litigation whereby a liability or pecuniary gain must occur on the event of the suit. If the interest is of such a nature, **he is disqualified, and the degree of the interest is immaterial; it need not be large; it will debar him from sitting in the cause no matter how small or trifling it may**

> **be;** the court will not inquire into the effect it will have upon his ruling.' We conclude that the judge is disqualified..." State v. Chillingworth, 116 So. 633, 635 (Fla. 1928) (emphasis added, internal citations omitted).

Facts establishing that a judge held pecuniary shareholder interests in Chase therefore satisfy the burden of showing a "bias or prejudice" sufficient to disqualify a judge under Tatham and Withrow.

3. Chase does not dispute the public record facts that the four judges had pecuniary shareholder interests in Chase at the same time they issued decisions in favor of Chase, and that the judges did not disclose those interests on the record of the case.

In its brief, Chase does not dispute the public record facts of the existence of the four judges' pecuniary interests in Chase, and that: (1) Judge Erlick owned between $11,129.00 and $18,888.79 in Chase securities during this same time period,[5] (2) Judge Erlick did not disclose these $11,129.00 to $18,888.79 interests on the record of the case,[6] (3) the panel of three Division I judges also owned Chase securities during the

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5 The Personal Financial Affairs Statements of Judge Erlick list among his personal investments which public records indicate each involve a percentage of securities invested in plaintiff Chase: Vanguard Balanced Index (Asset Value A; "$1 to $3,999"), SPDR ETF Trust (AssetValue B; "$4,000 to $19,999"), 2020 Retirement Strategy (Asset Value D; "$40,000 to $99,999"), US Large Cap Equity Index (Asset Value C; "$20,000 to $39,999"), Global Equity Index (Asset Value C; "$20,000 to $39,999"), Dreyfus Disciplined Stock (Asset Value D; "$100,000 or more"), Dreyfus S&P 500 Index (Asset Value A; "$1 to $3,999"), National Financial Services (Asset Value C; "$20,000 to $39,000"), Columbia Balanced (Asset Value D; "$40,000 to $99,000"), Judicial Retirement Account (Asset Value D; "$40,000 to $99,000"), Dreyfus Premier Balanced (Asset Value D; "$100,000 or more") *CP 120-147; 2014 Personal Financial Affairs Statements requested for judicial notice Appendix 11-46* The public record portfolio holdings indicate the percentages of each securities invested in Chase *CP 77-85;* totals derived and summarized on chart at *CP 204.*

6 *CP 1226, Decl. at ¶ 12-13, 17-18* and docket listing for King County Superior Court case number 11-2-06768-8 SEA, no disclosures made.

same time period that they affirmed Judge Erlick's judgment, awarded attorney fees, and issued a mandate in favor of Chase, *CP 49-75,* and (4) the three Division I judges did not disclose these interests on the record of the case prior to issuing their decisions during the prior appeal in case 70295-5-I.[7] Because Chase in its brief does not dispute the facts of the existence of the four judges' pecuniary shareholder interests in Chase, the required showing of a "bias or prejudice" sufficient to disqualify each of these four judges under the Tatham and Withrow standard has been met.

4. Chase does not dispute the public record fact that Chase's CEO confirmed that Chase's claims to control of the billions in Washington Mutual-related assets directly benefits the present and future value of Chase's shares to its shareholders.

Chase does not dispute that Chase, through its CEO James Dimon, has publicly confirmed that the value of Chase's shares to its shareholders has been increased by its control of the Washington Mutual-related assets, and that Chase expects the value to continue to increase, *CP 104 ¶ 3-4.* Chase's position throughout this case is that its control of the $307.02 billion in Washington Mutual-related assets relies upon a single operative document, the "Washington Mutual Purchase and Assumption Agreement" ("PAA") executed September 25, 2008. Case law searches on Lexis and Westlaw and public databases confirm that this PAA is the same key document upon which Chase *universally* relies in its litigation regarding

7 See docket listing of COA case number 70295-5-I; no disclosures made.

Chase's claims to control of any of the Washington Mutual-related assets. As this case requires a judge to determine the legal effect of the "all right, title, and interest" language contained within this same PAA, as is *specifically preempted* by Washington's RCW 62A.3-203, Official Comment 1,[8] a judge's decision in this case substantially impacts Chase's position regarding other Washington Mutual-related assets in other cases due to Chase's universal reliance upon the legal effect of this same PAA.

A judge's decision on Ms. Stehrenberger's counterclaims, including her Consumer Protection Act violation under RCW 19.86 seeking damages and injunctive relief related to an alleged widespread pattern of deceptive business practices, thus far profitable to Chase, expands the scope of the case beyond a dispute over just a single negotiable instrument and also stands to impact Chase's bottom line. A judge's decision on both the PAA and the counterclaims therefore results in either a gain or a loss to Chase, and thereafter impacts the value of its shares to its shareholders – thereby disqualifying the four judges who are shareholders in Chase.

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8 Ms. Stehrenberger's motions for reconsideration previously addressing the RCW 62A.3-203 issues, see *CP 1169-1170*, and filed May 19, 2014 in COA case number 70295-5-I. RCW 62A.3-203, Official Comment 1: "For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying **all of X's right, title, and interest** in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is **not** a person entitled to enforce the instrument until Y obtains possession of the instrument. **No transfer of the instrument occurs under Section 3-203(a) until it is [physically] delivered to Y.**" (emphasis added)

5. **The four judges' "common investment fund" interests in Chase constitute disqualifying "economic interests" that are *not* excepted from the definition under CJC Rule 2.11(A)(3), cmt. 6 because these interests "could be substantially affected" by decisions regarding the Purchase and Assumption Agreement.**

Respondent's Brief at 6: "Notably, the phrase 'economic interest' means 'ownership of more than a de minimis or equitable interest,' and it does not include "an interest in the individual holdings within a mutual fund or common investment fund."

But Chase overlooks CJC Rule 2.11, cmt. 6's complete definition of an "economic interest" which creates an exception-to-the-exception regarding common investment funds, thereby bringing a "common investment fund" back under the definition of an "economic interest" that disqualifies a judge:

> CJC Rule 2.11, cmt. 6: "'Economic interest' means ownership of more than a de minimis legal or equitable interest. **Except for situations in which** the 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**...." *CJC Rule 2.11, cmt. 6; CJC Terminology; Brief of Appellant, Appendix 3.* (emphasis added)

Distilled down: "except for situations...in which the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include...an interest in..within..a..common investment fund..." Put another way, an interest in a "common investment fund" is not a disqualifying economic interest *unless* the interest could be substantially affected by the judge's decision, as it could be here. Note that the

definition does not require that the interest absolutely *shall* be substantially affected, only that the interest in the common investment fund potentially *could* be substantially affected in the future. In Aetna Life Insurance Co. v. LaVoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823, 54 USLW 4381 (1986), Justice Brennan clarified in his concurring opinion that it is the existence of the the opportunity to advance the judge's interests that disqualifies, even if the effect could occur later, outside the immediate scope of the case:

> "[A]n interest is sufficiently "direct" if the outcome of the challenged proceeding substantially advances the judge's **opportunity** to attain some desired goal **even if that goal is not actually attained in that proceeding**." (emphasis added)

Because a judge's rulings on the legal effect of the language in the PAA (as specifically modified by the RCW 62A.3-203 Official Cmt. 1) and RCW 19.86 CPA counterclaims have the ability to impact Chase's ability to collect on a bulk of other Washington Mutual-related assets – beyond just the individual negotiable instrument in this case – the four judges' shareholder interests in Chase through a "common investment fund" do not meet the CJC Rule 2.11, cmt. 6 exception and therefore *do* constitute disqualifying "economic interests" because these interests "could be substantially affected" by Chase's universal reliance upon the PAA for its claims to the revenue supporting the value of its share prices.

Respondent's Brief at 7: "Nor did Judge Erlick's connections with Chase require disclosure or recusal. **The Code of Judicial Conduct states that general interests in retirement accounts and individual holdings in mutual funds do not require disclosure**. *CJC 2.11, cmt. 6*" (emphasis added)

Chase's assertion that cmt. 6 somehow allows a judge to keep his or her interests secret from the parties is false; nowhere does cmt. 6 actually "state that general interests in retirement accounts and individual holdings in mutual fund do not require disclosure."[9] Nor does the dollar value of a judge's shareholder interest in a "common investment fund" ever cancel out the requirement that those interests are still specifically required to be *disclosed* under CJC Rule 2.11 cmt. 5, "even if the judge believes there is no basis for disqualification,[10]" in order to allow the parties to separately seek disqualification as a matter of right under RCW 4.12.050. Because Ms. Stehrenberger would have sought disqualification

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9 The complete text of CJC Rule 2.11, cmt. 6 actually states: "'Economic interest.' as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situation 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; (2) an interest in securities held by educational, religious, charitable, fraternal, or civic organization in which the judge or the the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant; (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests' or 4) an interest in the issuer of government securities held by the judge." Contrary to Chase's assertion, there is no mention that these interests do not require *disclosure* under CJC Rule 2.11, cmt. 5.

10 CJC Rule 2.11, cmt. 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)

under RCW 4.12.050 motion had the disclosures been timely made, the failure to disclose voids all rulings by the peculiarity-interested judges.

6. Chase's *de minimis* argument fails: the existence of a judge's pecuniary interest, not the amount of its dollar value, is what requires the judge's disclosure and disqualifies the judge.

Respondent's Brief at 5."Judges are not required to disqualify themselves if they have insignificant economic interests in the parties to the proceeding. *See* CJC 2.11(A)(3); *see also Kok v. Tacoma Sch. Dist. No. 10,* 179 Wn.App. 10, 25-26 (2013)."

Chase starkly misrepresents the holding in Kok v. Tacoma Sch. Dist. No. 10, wherein it was not actually the judge herself alleged to have had any pecuniary interest in one of the parties, but rather the judge's *spouse* and his firm that had a former professional relationship with one of the parties in unrelated non-litigation real estate matters. It was that remote, third-party relationship and not any pecuniary interest of the judge herself, that the Kok court considered de minimis and too insignificant to disqualify that judge.[11] And under Tatham, Withrow, and Tumey, if the pecuniary interest connection is direct – between the judge and one of the parties, rather than a remote third-party connection such as through a spouse – then that pecuniary interest requires disqualification, or at the very least a timely disclosure on the record "even if the judge believes

11 "Neither the judge's spouse nor his firm has any interest in the outcome of this proceeding – they are not involved in any way in litigating the present case and they will not receive any fees relating to the case." Kok at 488.

there is no basis for disqualification," *CJC Rule 2.11, cmt. 5,* to then allow the parties to obtain disqualification under RCW 4.12.050.

Respondent's Brief at 6: "Judge Erlick's de minimis connections with Washington Mutual and Chase **did not even merit disclosure**, much less recusal." (emphasis added)

Again, Chase improperly asserts that a judge should somehow be entitled to keep a pecuniary interest secret from the parties, when Cmt. 5's specific requirement that a judge must openly disclose the information "even if the judge believes there is no basis for disqualification.

The Tumey court determined an amount of a judge's interest of just **$12.00 was too substantial an interest** and disqualified the judge; Chase in its brief does not dispute the fact of the amount of Judge Erlick's interests in Chase ranging from $11,129.00 to $18,888.79,[12] which far exceed the Tumey $12.00 de minimis threshold. Judge Erlick was likewise disqualified, and all of his rulings upon which the prior appeal decisions relied are void and must be vacated.

7. Chase does not dispute its assertion that "Washington Mutual is a Division of Chase," that Judge Erlick owned Washington Mutual stock, and that he did not disclose it on the record of the case.

"If the interest strongly resembles a direct interest, for example, **stock held in a subsidiary** (or parent) **of the corporate party, any amount should disqualify**, just as does any stock held in the party itself."

12 *Personal Financial Affairs Statements* and public records, see fn. 5 of this Brief at 5.

Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 753 (1973). Chase also does not dispute the facts that (1) Judge Erlick directly owned between $1 and $3,999 of Washington Mutual stock during the same time period that he issued a series of rulings and awarded attorney fees in favor of Chase, and that (2) Chase asserts that "Washington Mutual is a Division of JPMorgan Chase Bank, N.A." *CP 97-102.* Chase is therefore estopped from now arguing that Judge Erlick's direct interest in Washington Mutual stock was not a disqualifying interest in Chase, or at the very least was not required to have disclosed it on the record of the case under CJC Rule 2.11, cmt. 5.

Judge Erlick had specifically listed Washington Mutual stock as among his assets.[13] Chase's Complaint, on the trial court record since February 15, 2011, attaches as its Exhibit 1 a promissory note upon which Washington Mutual is the named payee. *CP 1.* Ms. Stehrenberger's January 28, 2013 motion seeking declaratory relief regarding Chase's correspondence to Ms. Stehrenberger asserting that "Washington Mutual is a Division of JPMorgan Chase Bank, N.A." was properly before Judge Erlick several weeks prior to his dispositive rulings. Yet for some reason, Judge Erlick still declined to disclose the fact of his interests in both

13 The *Personal Financial Affairs Statements* of Judge Erlick state that his ownership of Washington Mutual stock is the dollar value range of "Asset Value A" ("$1-$3,999") *CP 120-147; Brief of Appellant, Appendix 11-4 (2014)*

Washington Mutual and Chase to the parties on the record of the case before issuing an uninterrupted string of rulings in favor of Chase.

CJC Rule 2.11(B) requires that "a judge shall keep informed about the judge's personal and fiduciary economic interests," and in Liljeberg, the U.S. Supreme Court held that a judge's 'forgetfulness' was not deemed 'the sort of objectively ascertainable fact that can avoid the appearance of partiality.'" Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860, 108 S.Ct. 2194 (1988). Judge Erlick was therefore additionally disqualified by his ownership of the Washington Mutual stock and should have disclosed those interests as required under Cmt. 5 before making a string of void rulings in favor of Chase, upon which the Division I judges later relied.

8. Under CJC Rule 2.11(A)(1), Judge Erlick was additionally disqualified from hearing the CR 60 motions because of his personal knowledge of the undisclosed dollar value of his interests while the parties disputed whether or not the undisclosed value of his interests were actually *de minimis*.

Under CJC Rule 2.11(A)(1) it was improper for Judge Erlick to have watched the parties debating whether or not the undisclosed dollar amount of his interests constituted a de minimis interest, and to then make his ruling stating that there is "no evidence" regarding his interests in Washington Mutual being a part of Chase – when the judge himself had

withheld that very same evidence from disclosure to the parties for over three years in spite of CJC Rule 2.11, cmt. 5's disclosure requirements.

Respondent's Brief at 7: "Whatever interests Judge Erlick may have had in Washington Mutual stock are presumably worthless...Stehrenberger introduced no evidence 'that Washington Mutual securities held by Judge Erlick were ever converted to any equity interest in Chase securities."

Though Chase speculates that Judge Erlick's Washington Mutual stock were "probably worthless," Judge Erlick actually valued his stocks during the relevant time period as between $1 and $3,999.[14] As Chase had claimed that different Washington Mutual subsidiaries were assumed by Chase under Section 3.1 of the Purchase and Assumption Agreement, information regarding Judge Erlick's Washington Mutual-related stock was directly relevant to a motion for disqualification, "even if the judge believes there is no basis for disqualification." *CJC Rule 2.11, cmt. 5.*

9. A a judge's failure to comply with the Code of Judicial Conduct satisfies CR 60(b)'s "extraordinary circumstances" requirement for this Court to vacate the prior rulings.

Respondent's Brief at 9: "Stehrenberger was also not entitled to relief under CR 60(b) because she did not provide evidence of the extraordinary circumstances necessary to justify relief."

Chase is incorrect. The four judges' failure to disclose information relevant to a motion for disqualification in violation of the Code of Judicial Conduct is *precisely* the "extraordinary circumstance" described in Tatham and Liljeberg: "the basis for a relief where a...court fails to

14 *CP 120-147; Brief of Appellant, Appendix 11-46 (2014)*

> "It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. **The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.**"
> Aetna, 475 U.S at 830-831 (emphasis added)

As Justice Blackmun wrote in that case, in his opinion, concurring:

> "**The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose** that his vote and his views, potentially tainted by his interest... would influence the votes and views of his colleagues. The remaining events -- that another justice switched his vote and that Justice Embry wrote the court's opinion -- illustrate, but do not create, the constitutional infirmity that requires us to vacate the judgment..." Aetna, 475 U.S. at 832. (emphasis added)

The rulings and mandate of the disqualified Division I judges were void and cannot be relied upon as the law of the case, and therefore should also be vacated so as not to re-infect the impartiality of new proceedings.

Respondent's Brief at 8: "The facts here are far different from the facts in the cases cited by Stehrenberger. For example, in Tatham v. Rogers, the trial court should have disclosed that the judge and one of the party's attorneys had been partners in a law firm, that the attorney served as the judge's campaign manager, and that the judge and the attorney had continuing personal business with each other. 170 Wn.App. 76, 85 (2012). That is much different from the de minimis connections identified in Stehrenberger's motion."

While each case may have different facts, Chase chooses to overlook the clear parallels between this case and Tatham – that of each

judge's failure to disclose information relevant to a motion for disqualification, and the resulting violation of Washington's Code of Judicial Conduct that formed the "extraordinary circumstance" that justify vacatur and new proceedings under CR 60(b).

The Tatham trial court judge violated the Code of Judicial Conduct by his failure to disclose a non-pecuniary interest (and therefore a non-due process violation), and the Tatham court vacated his rulings and granted new proceedings to the parties. The four judges in this case likewise violated the Code of Judicial Conduct with their failure to disclose their pecuniary interests, thereby implicating additional constitutional due process concerns, which also interfered with the rights of the parties to obtain a different judge under RCW 4.12.050. Under the clear parallels to Tatham pertaining to each of the judge's failures to disclose, this Court should likewise vacate the void decisions and grant the remedy of new proceedings and cure those defects here.

11. No Rule of Necessity applies: A judge can cure a pecuniary interest disqualification by divesting himself or herself of those interests prior to taking part in decisions in the case.

Respondent's Brief at 7: "If the rule [cmt. 6] were otherwise, there probably would not be a single judge in the state of Washington that could hear Stehrenberger's case, insofar as each would have a similar interest in the judicial retirement system."

But no Rule of Necessity applies here: Chase's argument ignores the remedies available under CJC Rule 2.11(A)'s "requirement of

impartiality" companion federal statute, 28 U.S.C. § 455 and § 455(f),[15] which allows a judge simply to divest himself or herself of the disqualifying interest prior to taking part in decision-making in the case to avoid violating the appearance of impartiality:

> "[I[f any...judge,...to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him..., that he...has a financial interest in a party..., disqualification is not required if the...judge...divests himself...of the interest that provides the grounds for the disqualification." Kidder, Peabody & Co., Inc. v. Maxus Energy Corp., 925 F.2d 556, 561 (2nd1991) (omission sections in original); *28 U.S.C. § 455(f)*

Each of the four judges therefore could have timely cured the disqualifications by divesting themselves of the disqualifying interests, rather than continuing to take part in rendering a void decision that cannot now be relied upon as the law of the case.

12. **Under Lindgren, the service by email deviation from CR 60(e) was harmless because Chase timely received notice and timely opposed the CR 60 motion, and thereby suffered no prejudice.**

Respondent's Brief at 9: "Stehrenberger also failed to comply with CR 60(e), which requires a CR 60 motion to be served "in the same manner as in the case of summons in a civil action...." As reflected in her certificate of service, Stehrenberger e-mailed a copy to Chase's attorneys. There is no evidence that they agreed to accept service of process under CR 4 – by e-mail or otherwise – on behalf of Chase."

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15 "Washington courts turn to federal courts for guidance...when faced with a circumstance not previously addressed in Washington decisions." Tatham. v. Rogers, 170 Wn.App. 76, 100, 283 P.3d 583 (2012), referencing Barr v. MacGugan, 119 Wash.App. 43, 47, 78 P.3d 660 (2003).

Throughout this case, the parties by mutual agreement have regularly served each other through both email and through their voluntarily opt-in to the King County Superior Court's official E-file and E-service functions. As this Court determined in Lindgren v. Lindgren:

> "The apparent purpose of the [CR 60(e)] rule is purely to provide notice to an opposing party...**As long as the party has a meaningful opportunity to be heard and adequate time to prepare, this technical deviation from proper procedure is inconsequential**...[and] is a harmless deviation from CR 60(e)(3)." Lindgren v. Lindgren, 58 Wn.App. 588, 591-94, 94 P.2d 526, 530-31 (1990)(emphasis added, internal citations omitted)

Chase filed its Notice of Appearance in response to the emailed motion to vacate on February 5, 2015, *case docket, item #214*, thereby acknowledging receipt of notice of the CR 60 motion, and on March 24, 2015 Chase timely filed its opposition to the motion, *docket #240.* Under Lindgren, therefore, the deviation from the technicalities of CR 60(e)'s CR 4 service requirement was "inconsequential" and harmless, as Chase has suffered no prejudice by having received service electronically.

13. **Under Molski, Judge Erlick's final order restricting further filings was improper and allowed Ms. Stehrenberger no notice or opportunity to be heard on the newly introduced issue.**

A survey of cases show that "vexatious litigant" status typically only pertains to *plaintiffs* who file large volumes of entirely new lawsuits, but not to a *defendant* such as Ms. Stehrenberger – who did not ask to be sued – who pursues a diligent good faith defense in reliance upon relevant

case law. Judge Erlick's final order mentions no court rule that was violated related to any limits on the number of filings a party may make in pursuing a defense in their case, yet restricted filings on the basis of filings in large part made in 2013, *over two years ago*, with no warning, notice, or opportunity to be heard on the newly-introduced number of filings issue.

"[P]re-filing orders are an extreme remedy that should rarely be used...because such sanctions can tread on a litigant's due process right of access to the courts." Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007).

In addition to Judge Erlick's final order improperly restricting future filings without notice, or opportunity to be heard, it was also based upon his own erroneous findings: "Defendant had filed several dozen motions and pleadings with this Court prior to summary judgment." *CP 262.* Yet the docket reflects only six new motions and one pleading filed (for a total of seven filings) by Ms. Stehrenberger prior to summary judgment, a reasonable amount compared to the six new filings by Chase during the same time frame. The final order also states: "She filed over a dozen motions and pleadings after judgment was entered." *CP 262.* Yet the case docket shows the number of motions filed after judgment as only **9**.[16]

16 Filings of new motions by Ms. Stehrenberger during the relevant time period: docket #s 96, 113, 136, 141, 150 (motion to consolidate all motions into one hearing and to appear by telephone), 152, and Answer/Aff. Defenses/Counterclaims docket #22. Filings of new motions by Chase during relevant time period: docket #s 97, 101, 108, 120, 128, and Complaint docket #1, *CP 1*. Duplicate filings and

Even if Judge Erlick's alleged number of filings been factually correct, it still would not have supported a showing of vexatiousness against a defendant *defending* in a single case; in Zavodnik v. Harper, 17 N.E.3d 259 (Ind. 2014), for instance, the court only declared that plaintiff a "vexatious litigant" after he had filed 123 *entirely new* lawsuits and an additional new 34 appeals.

Judge Erlick's final order also entirely failed to consider any other guidelines set forth by other courts regarding a reasonable analysis in support of a "vexatious litigant" determination against a party, such as in Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007):

> "A request to declare a party a vexatious litigant entails consideration of four factors: **(1) the party must have had adequate notice and a chance to be heard; (2) there must be an adequate record for review, including a list of all cases and motions that led the court to conclude that a vexatious litigant order was necessary; (3) the court must make a substantive finding as to the frivolous or harassing nature of the litigant's actions; and** (4) the order must be narrowly tailored to fit the particular problem involved." Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007)
>
> "Under the third factor ["Frivolous and Harassing Nature of Actions"], courts must examine 'both the number and content of the filings as indicia of the frivolousness of the litigant's claims.' Molski, 500 F.3d at 1059 (quotations omitted). **'An injunction cannot issue merely upon a showing of litigiousness. The**

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versions of filings later corrected by amended filings by both parties, for which no working copies were submitted for decision, are not counted as they were not before the judge. Declarations and Exhibits accompanying the new motions had to be re-filed to correct captions, requested by the court clerk.Ms; Stehrenberger's post-judgement motions, docket #s172, 181B, 182, 215, 262, 270, 277, 280, 283.

plaintiff's claims must not only be numerous, but also be patently without merit.'" (quotations omitted in original)

Judge Erlick's final order restricting filings bears no indication that he engaged in this type of reasoned analysis; nor did he cite any court rule or other authority that specifically limits the number of filings allowed to defend a defendant's case that was violated.

Notably, Judge Erlick's final order restricting all further filings came *only after* Ms. Stehrenberger had brought Judge Erlick's own undisclosed interests in Chase to his attention through her CR 60(b)(11) motion and thereby requested to have her case heard by a different judge.

And because Chase in its brief does not dispute that Judge Erlick had a pecuniary interest in Chase at the same time he issued his final order (thereby satisfying the evidence requirement of the disqualifying "bias and prejudice" under Tatham and Withrow), Judge Erlick was already disqualified and his final order was void. A court's improper conclusions of vexatiousness and abuse of process are disparaging on the public record and cause a risk of harm and prejudice beyond just the scope of this specific case. Because Judge Erlick's potentially retaliatory final order was issued while he was already disqualified, this Court should specifically vacate Judge Erlick's final order and have all reference to "vexatiousness" and "abuse of process" stricken from the public record to reverse and remove these risks.

14. **The prior decisions and mandate must also be vacated under the alternate appearance of fairness doctrine "potential bias" standard under Kok, Tatham, and Bilal.**

Even if this Court were to determine that all of the judges acted without "actual bias or prejudice" under the pecuniary interest standard, this Court must nevertheless vacate the prior decisions under the alternate appearance of fairness "potential bias" standard for the Appearance of Fairness doctrine under Tatham, Kok, and Bilal:

> "A judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties received a fair, impartial, and neutral hearing...[t]he asserting party does not have to show actual bias; it is enough to present evidence of potential bias." Kok v. Tacoma Sch. Dist. No. 10, 179 Wn.App. 10 (2013), citing Tatham v. Rogers, 170 Wn.App. 76, 96, 283 P.3d 583 (2012), citing State v. Bilal, 77 Wash. App. 720, 733, 893 P.2d 674 (1995)

The alternate Appearance of Fairness doctrine "potential bias" standard has already been met by the third-party "reasonably prudent person" declarations on the record, *CP 77-86.*[17]

15. **Chase is not entitled to attorney fees on appeal.**

Chase is not entitled to attorney fees and costs on appeal because the underlying awards that form the basis of its RAP 18.1 request were made by disqualified judges and are therefore also void.

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17 *CP 77-86, Declarations of independent third-parties* state: "...I would absolutely question whether the defendant received an impartial court proceeding from judges who owed either Washington Mutual stock or owned securities holdings in JPMorgan Chase during the exact same time period that those judges then ruled in favor of Chase."

CONCLUSION

"The law requires both an impartial judge and a judge that *appears* impartial," State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972), and "no matter what the evidence was against [the party], he had the right to have an impartial judge," Tumey v. Ohio at 535. As this Court emphasizes in Chrobuck v. Snohomish County:

> "[T]he evil sought to be remedied lies not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, general misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate." Chrobuck v. Snohomish County, 78 Wn. 858, 868, 480 P.2d 489 (1971)

For the foregoing reasons, Ms. Stehrenberger asks this Court to vacate the judgment and all decisions and mandate in this case and prior appeal, to specifically vacate and strike the final order and its improper conclusion of vexatiousness to prevent harm and prejudice outside the scope of this case, and to remand for new proceedings before a different judge with instructions that a new trial schedule be set.

November 2, 2015, a*mended November 8, 2015.*

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 4th day of November, 2015, I served a true and correct copy of the **Appellant's Motion for Leave to File Amended Reply Brief of Appellant**, **Amended Reply Brief of Appellan**t, and **Appellant's Notice of Updated Contact Information** upon the Respondent, JPMorgan Chase Bank, N.A., by prepaid first-class mail, upon its counsel, Mr. Hugh McCullough and Mr. Fred Burnside, of the law firm Davis Wright Tremaine, LLP, at the following mailing address:

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

Dated November 8, 2015, at Clarkston, WA.

Michiko Stehrenberger