To be Argued by:
ARTHUR J. GIACALONE
(Time Requested: 20 Minutes)

Appellate Division Docket Nos. CA 13-00539, CA 13-00540
Erie County Clerk's Index No. I 2011-3883

New York Supreme Court

Appellate Division—Fourth Department

AFFINITY ELMWOOD GATEWAY PROPERTIES LLC,

Plaintiff-Respondent,

– against –

AJC PROPERTIES LLC,

Defendant,

EVELYN BENCINICH, SUSAN M. DAVIS, STEVEN GATHERS, ANGELINE C. GENOVESE, SANDRA GIRAGE, LORENZ M. WUSTNER,

Defendants-Appellants,

and ARTHUR J. GIACALONE,

Appellant.

(Appeal No. 1)

(For a continuation of caption, see inside cover.)

BRIEF FOR APPELLANTS

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STATEMENT OF QUESTIONS INVOLVED

1. Does a trial court's wide discretion to regulate discovery and the course of the proceedings before it empower the court to issue a protective order pursuant to CPLR 3103 that imposes a prior restraint on a lawyer's speech without first establishing good cause for the restriction? Answer of the Court below: Yes.

2. Does a protective order that imposes a prior restraint on an attorney's speech violate the First Amendment where that the information generating the IAS Court's concern was not obtained through pretrial discovery, and the order precludes all communications with a non-party/ non-witness entity "concerning the subject matter of this litigation" without regard to the information's source? Answer of the Court below: No (by implication).

3. Does the IAS Court possess the authority under CPLR 3103 to restrain in advance communications by appellants' attorney with an entity that is not a party or a potential witness in the pending litigation out of concern that the business relationship between the principals of the respondent limited liability company and the non-party/non-witness entity might be harmed by such communications? Answer of the Court below: Yes (by implication).

4. Does the appeal from that portion of the February 21, 2013 Order denying appellants' CPLR 6314 motion to vacate the IAS court's November 20, 2012 Temporary Restraining Order (hereinafter, "TRO") fall within the exception to the doctrine of mootness and, for that reason, warrant preservation for review? Answer of the Court below: Not addressed.

5. Did the IAS court violate the constitution by granting and twice extending the TRO restraining counsel's free speech based on concern for the business relationship between respondent Affinity's principals and non-party/non-witness Kaleida Health without first determining that counsel's statements presented a substantial risk of materially prejudicing the trial of respondent's civil action? Answer of the Court below: No (by implication).

6. Is it proper under CPLR Article 63 for a court to treat the primary concern expressed

by respondent's counsel, that is, the alleged adverse impact of appellants' attorney's speech on the business relationship between non-party/non-witness Kaleida Health and the principals of respondent Affinity, as "an act in violation of the plaintiff's rights respecting the subject of the action," where the business relationship involves a development project totally unrelated to the underlying action to extinguish restrictive covenants? Answer of the Court below: Yes (by implication).

7. Did the IAS Court err in ruling that appellants' counsel had violated Rule 3.6 (trial publicity) of the Rules of Professional Conduct where counsel was not provided an opportunity to be heard on the charge, the "extrajudicial statements," if any, fell within Rule 3.6(c)'s "safe harbor" provisions, and the record lacks substantial evidence to support a finding that counsel knew or should have known that such statements would have a substantial likelihood of materially prejudicing an adjudicative proceeding? Answer of the Court below: No (by implication).

8. Did the IAS Court abuse its discretion in denying appellants' request for an award of costs and sanctions against plaintiff-respondent Affinity and its attorneys for engaging in frivolous conduct, pursuant to 22 NYCRR Subpart 130-1.1, where Affinity's application for injunctive relief restraining opposing counsel's speech, accusations of unethical conduct, and request for costs and sanctions, were undertaken primarily to harass or maliciously injure appellants' counsel, and were pursued despite the absence of any potential harm to the business relationship between respondent's principals and Kaleida Health? Answer of the Court below: Not addressed.

9. Did the IAS Court Judge apply the incorrect standard in response to appellants' request, pursuant to 22 NYCRR 1003(E)(1), that he disqualify himself in the action below, where he "searched his conscience and perceived no bias or prejudice," but failed to ask whether his "impartiality might be reasonably questioned" as a result of the court's handling of respondent's application for injunctive relief? Answer of the Court below: Not addressed.

STATEMENT OF THE NATURE OF THE CASE

[Citations preceded by the letter "R" refer to page numbers in the Consolidated Record on Appeal – Papers related to "Appeal No. 2" begin at R353.]

This is a consolidated appeal from two orders of the Supreme Court, Erie County, granted by the Hon. John A. Michalek, J.S.C., in an action entitled Affinity Elmwood Gateway Properties LLC vs. AJC Properties LLC, et al., Index No. I 2011-3883. [R440-41] Both Notices of Appeal were filed and served on March 18, 2013. [R6, 356] This Court's Order consolidating the two appeals "for the purposes of perfecting and arguing the appeals" was entered April 12, 2013. [R440-41] The underlying action was brought by plaintiff-respondent, pursuant to § 1951 of the Real Property Actions and Proceedings Law, seeking the extinguishment of certain restrictive covenants encumbering eleven (11) parcels of land that it owns in the City of Buffalo. [R38-43] The defendants-appellants are owners of five residences adjacent to plaintiff's real property who oppose the extinguishment of the restrictive covenants and seek their enforcement. [R78-80]

"*Appeal No. 1*" is taken from Justice Michalek's February 21, 2013 Order which issued a CPLR 3103 protective order precluding appellants' counsel, Arthur J. Giacalone, Esq., from communicating with Kaleida Health, an entity that is neither a party, nor a potential witness, "concerning the subject matter of this litigation." The order also denies appellants' CPLR 6314 motion to vacate a November 20, 2012 TRO which contained a similar prior restraint, as well as appellants' motion for sanctions against plaintiff-respondent and its counsel for engaging in frivolous conduct in seeking the injunctive relief. [R8-10] Appellants appeal from each and every part of said Order except for that part denying plaintiff-respondent's motion for sanctions. [R6] "*Appeal No. 2*" is taken from Justice Michalek's March 7, 2013 Order which, among other things, denied appellants' cross-motion, pursuant to 22 NYCRR § 100.3(E), for an Order by the Hon. John A. Michalek disqualifying himself from the underlying proceeding. [R360-361] Appellants appeal from only that portion of the March 7, 2013 Order that denies their cross-motion for an Order by the Hon. John A. Michalek disqualifying himself. [R356]

STATEMENT OF THE FACTS

Kaleida Health is a major health care provider in the Western New York area (hereinafter, at times referred to as "Kaleida" or the "health care provider"). [R374] It is neither a party, nor a witness, in the underlying lawsuit, and has no apparent interest in the mixed-use development project plaintiff-respondent Affinity Elmwood Gateway Properties LLC (hereinafter, "Affinity" or "respondent") would like to build on the southeast corner of Elmwood and Forest avenues in the City of Buffalo. [R15, 146] In the spring of 2012, Kaleida issued a Request for Proposals ("RFP") for a re-use design and development competition for the former Millard Fillmore Hospital complex at Gates Circle in the City of Buffalo, located three-quarters of a mile from the Elmwood/Forest intersection. According to the health care provider's press release, "the competition aim[s] to get the best ideas and the most capable developers to do something great with Millard Fillmore Gates Circle Hospital – great for the neighborhood and city, great for the developer, and great for Kaleida Health." [R296]

On August 28, 2012, the health care provider announced that a real estate development group informally known as the "Chason Affinity Companies" had won its competition for the Gates Circle site with a proposal for a new School of Veterinary Medicine. The project's cost is estimated at $65 million. Kaleida Health's press release noted that "the designated developer status is contingent upon Chason Affinity securing financing for the project and securing the veterinary tenant for the site." [R296] Coincidentally, the principals of the Chason Affinity Companies, Mark Chason and P. Jeffrey ("Jeff") Birtch, are the principals of respondent Affinity, although respondent is not involved in the Gates Circle project. [R373]

Arthur J. Giacalone, appellants' attorney in the underlying litigation and on this appeal, is a Western New York ("WNY") lawyer who once lived and worked in Buffalo within walking distance of the now vacant Millard Fillmore Hospital site, and who served for a number of years on the City of Buffalo's Environmental Management Commission. [R290, 374] He has long advocated for responsible development in the City of Buffalo and throughout WNY, calling upon

municipalities to fully comply with land use and environmental laws. [R220] Mr. Giacalone has regularly expressed his personal opinion on development and environmental concerns in letters-to-the-editor and op-ed pieces submitted to local newspapers. [R332-337, 426] His critics have at times portrayed Mr. Giacalone as "anti-development" [R426], a sentiment reflected in the following allegation made by Kevin J. Cross, Esq., one of respondent's attorneys: "*Mr. Giacalone [is] well known in this community for his repeated efforts to stall commercial development in Western New York*…" [R146]

On August 28, 2012, after hearing and reading media reports concerning Kaleida's selection of the Chason Affinity Companies to develop the Gates Circle site, Mr. Giacalone did what he has done many times over the years, that is, he wrote a letter-to-the-editor. [R374, 293] More specifically, he prepared and sent to *The Buffalo News* the following letter in response to Kaleida Health's announcement:

> *August 28, 2012*
>
> ***Re: <u>Affinity is a risky choice for Kaleida/Gates Circle</u>***
>
> *Dear Editor:*
>
> *Chason Affinity's proposal to re-use the Millard Fillmore Gates Circle Hospital site as a veterinarian teaching hospital may well be "visionary." But more than an inspired idea will be needed if Kaleida Health is to reach its laudable goals for re-use of the prominent landmark.*
>
> *The expressed purpose of Kaleida's million-dollar development competition was to "get the best ideas and the most capable developers to do something great" with the hospital site – great for the neighborhood, city, developer and Kaleida. For that goal to be met, Chason Affinity will need to substantially up its game from its performance the past several years at the southeast corner of Elmwood and Forest avenues.*
>
> *In 2007, with vague plans to construct student housing, a Chason Affinity subsidiary signed a contract to buy several century-old buildings at Elmwood and Forest. A year-and-a-half later, despite a risky financial market, a group of unhappy neighbors, and deed restrictions prohibiting "any business establishment," Affinity proceeded with the purchase, spending nearly $2 million for eleven parcels. When the developer subsequently announced its vision for the "gateway to the Elmwood Village," it proposed construction of a 6-story, 175,000 square-foot "mixed use" project poorly suited for the neighborhood, rather than the creative re-use of the quintessential "Elmwood Village" properties.*

Unable to convince the adjoining owners to approve its project, Affinity is now in court seeking to extinguish the restrictive covenants that protect its neighbors. During the intervening years, the developer's properties have been allowed to deteriorate in plain sight of residents, commuters and tourists. Affinity has been recently cited for code violations at eight of its properties.

Chason Affinity may have won the competition, but Kaleida may want to think long and hard before designating it the developer of the Gates Circle site.

Sincerely,

Arthur J. Giacalone

[R293, 220]

Mr. Giacalone wrote and disseminated the above-quoted submission in his personal capacity as a concerned citizen and former resident of the City of Buffalo, and not as a representative of the answering defendants or any other client. [R220, 350] Not knowing whether *The Buffalo News* would be publishing his letter, Mr. Giacalone went to the Kaleida Health web site the following day, August 29, 2012, and sent the text of his letter-to-the-editor as a comment to Kaleida Health's President/CEO, James Kaskie, at the web site's "Contact Us" page. [R168-169, 220, 374-75] On August 30, 2012, Kaleida Health's Vice-President/Chief Marketing Officer, Michael Hughes, sent the following reply to Mr. Giacalone: "*Thank you for your comment & input. MIKE*." [R297, 375]

Michael Hughes also forwarded Mr. Giacalone's August 29, 2012 comment to his boss, James Kaskie, Kaleida's President & CEO, and to Edward F. ("Ted") Walsh, a former Chair of the Kaleida Health Board of Directors, and chair of Kaleida's advisory committee established to find a developer for the Millard Fillmore Gates Circle Hospital. [R405, 384-85] Mr. Hughes' 8/30/12 email to Mr. Kaskie and Mr. Walsh stated the following:

FYI .. Email from the attorney who led the fight to block Bass Pro as well the move of Children's. He is also leading the fight against Chason at their Elmwood & Forest development.

[R405] The Kaleida Vice-President's description of Mr. Giacalone as "the attorney who led the fight to block Bass Pro" is accurate. He did represent a group of Buffalo residents who

challenged the use of State money to subsidize the proposed Bass Pro-centered development at the Erie Canal Harbor. However, Mr. Hughes' statement that Mr. Giacalone led the fight against the move of Children's hospital is false. He never opposed or had any involvement in the question of whether Children's Hospital should move from its current Elmwood Village location. [R385]

On August 31, 2012, Kaleida's Ted Walsh sent an email regarding Mr. Giacalone's August 29, 2012 comments to Mark Chason, one of the two principals of the "Chason Affinity Companies." [R405, 385] Mr. Walsh's email stated the following:

> *Mark,*
> *Just a heads up that Arthur Giacalone is stirring the pot.*
> *Ted*

[R405] The Walsh message to Mr. Chason and Mr. Hughes' email to his boss and Walsh reflect a view of Mr. Giacalone similar to the one expressed *supra* by attorney Cross, that is, that he is anti-development. [R146]

The Buffalo News published Mr. Giacalone's letter-to-the-editor on September 10, 2012. [R331] On that same day, Mark Chason forwarded the email that he had received ten days earlier from Kaleida's Ted Walsh to his Chason Affinity colleague, Jeff Birtch. [R405] If Mr. Birtch and Mr. Chason took the time to carefully read the letter-to-the-editor and the forwarded email, they would have noted the following:

- With the exception of inconsequential editorial changes made by the newspaper's staff, the comment Mr. Giacalone left at the Kaleida Health web site on August 29 was identical to the letter printed in *The Buffalo News* on September 10. [R297, 331]

- The background facts in Mr. Giacalone's letter-to-the-editor regarding respondent Affinity's activities at the southeast corner of Elmwood and Forest avenues were matters previously addressed by Mr. Birtch and/or Mr. Chason in newspaper articles that were published following Affinity's announcement that it was interested in acquiring the Elmwood Village properties. A February 2, 2009 article published in *Business First* had reported that respondent

Affinity "paid a combined $1.86 million" for several properties at the Elmwood Avenue and Forest Avenue intersection. It also noted that, "Possible development plans include student housing units, apartments or a hotel," and quoted Mr. Birtch as saying, "We're getting closer to our plans, but we're not there yet." [R129] An April 8, 2009 *Business First* article described Chason Affinity's announced plans to "replace 11 existing buildings already purchased by the company for a total of $2.1 million" with a proposed 75-foot tall hotel/retail/condominium development, and noted that neighbors voiced complaints regarding "the height of the structure" and "the proximity of the complex to the back-end of some Granger Place yards." The April 2009 article also reported that Chason Affinity "can't move forward with its $30 million mixed-use project … unless it gets approval from all the residents that live in the immediate area" due to "current deed restrictions." [R115]

- Mr. Giacalone's letter-to-the-editor and Kaleida "comment" express his personal opinion, in non-inflammatory terms, that Kaleida's lofty goals for the re-use and redevelopment of the Millard Fillmore Hospital complex were unlikely to be attained if the Chason Affinity team does not do a better job at the Gates Circle site than it has done at the Elmwood Forest properties:

> *… For[Kaleida's] goal to be met, Chason Affinity will need to substantially up its game from its performance the past several years at the southeast corner of Elmwood and Forest avenues.*
>
> ...
>
> *Chason Affinity may have won the competition, but the Kaleida may want to think long and hard before designating it the developer of the Gates Circle site.*

[R321, 297, 331]

- Only one sentence in the August 29, 2012 communication to Kaleida Health and the September 10, 2012 letter-to-the-editor refers to the underlying lawsuit brought by respondent to extinguish the restrictive covenants burdening the Affinity properties:

> …
> *Unable to convince the adjoining owners to approve its project, Affinity is now in court seeking to extinguish the restrictive covenants that protect its neighbors.*
>
> ….

[R297, 331, 375-76]

- Mr. Giacalone's letter-to-the-editor and communication with Kaleida contained the following comment regarding the physical condition of the Affinity properties and property code violations:

> *... During the intervening years, the developer's properties have been allowed to deteriorate* ***in plain sight of residents, commuters and tourists****. Affinity has been recently cited for code violations at eight of its properties.*
>
> ...

[R297, 331, 376] [Emphasis added.]

As implied by the "in plain sight" reference in the above quote, the dilapidated condition of the Elmwood Avenue structures was clearly visible from the public street and sidewalk. Roofing material had blown away, exposing large, unprotected surfaces. Gutters were rotting. Gaping holes in soffits allowed pigeons to roost. Paint was excessively peeling. [R402-404, 188-193] In February 2012, Mr. Giacalone wrote to the City of Buffalo's Permits and Inspection Services Bureau ("inspections office") on behalf of appellant Susan Davis urging the City to inspect Affinity's Elmwood Avenue properties "to address chronic code violations and substantial deterioration adversely impacting the desirable character of the properties and the adjoining neighborhood." He also submitted photographs that he had taken from the public right-of-way. [R238] When conditions did not improve, Mr. Giacalone stopped by the City's inspections office on March 23, 2012, and again on July 10, 2012, with photos depicting the dilapidated condition of Affinity's Elmwood Avenue properties, asking the City to enforce the local and State property maintenance code provisions. [R215]

By letter dated August 2, 2012, Mr. Giacalone made a request to the City, pursuant to the State's Freedom of Information Law ("FOIL"), for copies of all notices of violation issued in 2012 relating to the Affinity properties. [R243, 216, 247] Five days later, he received documents from the City which showed that on July 16, 2012 Affinity had been sent "Notices of Violation" by the inspections office regarding property maintenance code violations at seven of its Elmwood

Avenue properties. [R249] The code violations included, without limitation, deteriorated roofs that Affinity was ordered to replace, gaping holes in soffits and gutters that Affinity was ordered to repair, peeling houses that Affinity was ordered to repaint, and "pigeon infestation" that Affinity was ordered to eliminate. Each Notice of Violation instructed Affinity that "the items noted above must be corrected by 8-16-12." [R250-56, 402-404] Unwilling to objectively assess the extent of deterioration, one of respondent's lawyers, Kevin J. Cross, Esq., subsequently characterized the conditions as mere "technical violations." [R307]

Despite the City's July 16, 2012 Notices of Violation advising Affinity that the identified code violations at its Elmwood Avenue properties had to be corrected by August 16, 2012, the repairs had not taken place by the first week of October 2012. On October 5, 2012, Mr. Giacalone emailed to the Director of the City's inspection office, Patrick Sole, Jr., a message advising him that the identified code violations had not been corrected, and forwarding photographs of the existing conditions. [R263-272, 217] He also sent a copy of the email to City of Buffalo Councilmember Michael Locurto. [R263, 242, 245] Additionally, realizing that that receipt of City of Buffalo notices of code violations was not sufficient incentive for Affinity to make the needed corrections, and hoping that Kaleida's business relationship with Chason Affinity's principals would motivate it to give Mark Chason a "nudge" to correct the code violations, Mr. Giacalone sent a copy of his October 5, 2012 email to Kaleida Health's Michael Hughes. [R319-320, 376, 381, 297]

Later that same day, Kaleida's Vice President/Chief Marking Officer forwarded Mr. Giacalone's October 5, 2012 email to Mark Chason and Jeff Birtch (with copies to Mr. Kaskie and Mr. Walsh), adding the following message:

> *Mark/Jeff – We are getting copied on complaints re: your Elmwood project.* ***I am sure you are aware of Mr. Giacalone, but if not, FYI*** *...*
> *Hope all is well.*
> *MIKE*

[R407] [Emphasis added.] Within a half hour, Mark Chason sent an email message to Mr. Hughes and Affinity's Jeff Birtch (with copies to Kaleida's Kaskie and Walsh) indicating that Chason Affinity's lawyers would be taking steps to "curtail this type of nonsense," and blaming Mr. Giacalone for the absence "of a beautiful development on Elmwood":

> *Mike,*
> *Thanks for sending this over.* ***We are discussing Mr. Giacalone's actions with our council [sic], who believe he is way over the line and will take steps to hopefully curtail this type of nonsense. Of course, if it wasn't for him there would be a beautiful development on Elmwood****. Sorry for this … Have a great weekend!*
> *Mark*

[R407] [Emphasis added.] Michael Hughes immediately emailed the following reply to Mark Chason and Jeff Birtch (with copies, once again, to Mr. Kaskie and Mr. Walsh):

> ***No need to apologize. We are aware of who he is.***

[R407] [Emphasis added.]

The first step that Mark Chason's counsel took to "curtail [Mr. Giacalone's] nonsense" occurred a mere six days later. By correspondence dated October 11, 2012, attorney Kevin Cross sent a "cease and desist" letter to Mr. Giacalone contending that the September 10, 2012 letter-to-the-editor [R293] and a November 15, 2011 op-ed piece published in the "Another Voice" column of *The Buffalo News*, entitled "City's Green Code threatens prominent Elmwood area," [R292] violated Rule 3.6 and/or Rule 4.4(a) of the Rules of Professional Conduct. [R182-84] Mr. Cross concluded his letter threatening to hold Mr. Giacalone "personally liable for any and all loss suffered, direct or consequential, economic or otherwise" in the event Chason Affinity were to "lose[ ] its ability to develop the property at Gates Circle," noting that he was "copying Judge Michalek on this correspondence to make him aware of these concerns." [R183]

Mr. Giacalone promptly replied to Mr. Cross' threatening correspondence, denying any wrongdoing. On October 13, 2012, he sent a letter responding in detail to each accusation asserted by Affinity's counsel concerning the November 15, 2011 op-ed piece, the September 10, 2012 letter-to-the-editor, emails to Kaleida Health, and the claim of tortious interference with

Chason Affinity's contractual relationship with Kaleida. [R289-98] Mr. Giacalone's letter also expressed the following sentiment regarding Mr. Cross' decision to forward a copy of his October 11, 2012 correspondence to Justice Michalek:

> ...
> *It is regrettable that you have chosen to involve Justice Michalek in this matter, rather than initially discussing the issue with me, and that you have chosen not to provide the Court with the documents that you reference in your letter. You appear more interested in embarrassing me or harming my clients' interests than resolving the issues that you raise. [It brings to mind your sworn and baseless accusations that someone other than my clients is paying my legal bills and is, somehow, the real party of interest.]*
>
> *I will reply below to the points you have raised, and will enclose, for the Court's information and convenience, copies of the papers you reference…*
> ...

[R289] Consistent with his belief that his activities were not improper, Mr. Giacalone forwarded his 10/13/12 letter and all supporting documentation to the IAS court. [R291]

Mr. Giacalone's October 13, 2012 letter also advised Affinity's counsel that he had absolutely no basis to believe that a November 2011 op-ed piece concerning Buffalo's proposed new zoning code, or a September 10, 2012 letter-to-the-editor concerning Chason Affinity's selection as developer of the Gates Circle project, could have "a substantial likelihood of materially prejudicing" a potential trial in the restrictive covenant lawsuit scheduled for November 2013. Mr. Giacalone also provided Mr. Cross with the following explanation for writing the letter-to-the-editor concerning the Millard Fillmore Hospital site:

> …
> *Despite your accusations, I have no animus towards Affinity or Mr. Chason, and my purpose was not to embarrass or harm anyone. As someone who lived in Buffalo for 20 years, served on its Environmental Management Commission, and who had both a residence and an office within walking distance of Gates Circle, I possess a strong personal interest in seeing the neighborhood preserved and the former Millard Fillmore Hospital site appropriately developed. Having witnessed up-close the situation at Elmwood and Forest for the past five years or so, I have reason to be concerned that the Chason Affinity team is not up to the task. Additionally, my reference to code violations (information contained in a public record) was done in hopes of motivating plaintiff to promptly make the repairs to the Elmwood Avenue structures to prevent further deterioration.*
>
> …

[R290] Neither Mr. Cross, nor the IAS Court, responded to Mr. Giacalone's October 13, 2012 correspondence.

On November 15, 2012, Mr. Giacalone sent an email to Mr. Sole at the inspections office advising him that there was still no sign of "any noticeable repairs" at the Affinity properties, attaching photographs of the then-current conditions. [R274-286] Once again, a copy of the email was simultaneously sent to Councilmember Locurto and Kaleida Health's Michael Hughes. [R274] The following afternoon, Mr. Hughes forwarded Mr. Giacalone's November 15, 2012 email to Mark Chason with a one-phrase message: "*Mark – FYI …"* [R408]

Four days later, the attorneys at respondent's law firm took the next step, a drastic one, to "curtail [Mr. Giacalone's] nonsense." On November 20, 2012, Brendan H. Little, Esq., of the Lippes firm, appeared on behalf of respondent Affinity in Justice Michalek's chambers to present an OSC/TRO [R141-43] seeking the following relief:

(a) A temporary restraining order temporarily restraining Mr. Giacalone and his agents from communicating with Kaleida Health, the City of Buffalo, and their respective agents/employees concerning the subject litigation until further Order of the Court.

(b) An order precluding and/or enjoining Mr. Giacalone and his agents from engaging in communication with unrelated third-parties concerning the subject litigation that violates Rule 4.4(a) of New York's Rules of Professional Conduct" ["RPC"]. RPC Rule 4.4(a) provides the following:

> *Rule 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS:*
>
> *(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such person.*
>
> …

(c) An order precluding and/or enjoining Mr. Giacalone from engaging in communication concerning the subject litigation that violates Rule 3.4(e) of the RPC. RPC Rule 3.4(e) provides the following:

> *Rule 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL:*
>
> *A lawyer shall not:*
>
> ...
>
> *(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.*

(d) An order, pursuant to 22 NYCRR § 130-1.1, imposing financial sanctions against Mr. Giacalone in the amount of $10,000, and awarding plaintiff costs and reasonable attorneys' fees, for repeated violations of NY's RPC and engaging in "frivolous conduct." Affinity's November 20, 2012 application did not accuse Mr. Giacalone of having violated Rule 3.6 of the Rules of Professional Conduct. [R141-43]

During a brief conference in chambers on November 20, 2012, Mr. Little told Justice Michalek, in the presence of appellants' counsel and Commercial Division Court Attorney Anne S. Rutland, Esq., that his firm had received a phone call from an angry client on Friday, November 16, 2012, in response to Mr. Giacalone's November 15, 2012 email to the City of Buffalo and Kaleida Health. [R314] Mr. Little did not identify the angry caller or the person at his firm who received the call. Mr. Little also failed to explain why the client was angry, or state whether the client was angry at the Lippes law firm, the City of Buffalo, Kaleida Health, and/or Mr. Giacalone. Justice Michalek did not inquire into any of these matters. [R378]

The OSC/TRO was supported by one affirmation, submitted by Attorney Cross (hereinafter, "Cross Affirmation"). [R144-154] The Cross Affirmation makes two primary accusations against Mr. Giacalone, parroting the language in the RPC provisions appellants' counsel was alleged to have violated [R378-79]:

(a) In support of Affinity's claim that RPC Rule 4.4(a) had been violated, Mr. Cross alleges that Mr. Giacalone had communicated with Kaleida Health with "no substantial purpose other than to embarrass or harm the Plaintiff, Mr. Chason, Mr. Birtch or the Chason Affinity companies," to destroy their business relationship with Kaleida Health, and, thereby, to prevent the Chason Affinity companies from re-developing the Gates Circle site. Plaintiff's purported

"proof" that the purpose of Mr. Giacalone's communications with Kaleida Health was to destroy Chason Affinity's business relationship with the health provider was the last sentence in Mr. Giacalone's August 29, 2012 comment to Kaleida: "… *Chason Affinity may have won the competition, but the [sic] Kaleida may want to think long and hard before designating it the developer of the Gates Circle site.*" [R148-150]

(b) In support of Affinity's claim that RPC Rule 3.4(e) had been violated, Mr. Cross alleges that Mr. Giacalone had communicated with the City of Buffalo regarding property code violations at the Affinity properties for the sole purpose of "gain[ing] an advantage in the subject litigation." At no time does Mr. Cross describe what possible "advantage" defendants might hope to gain in this lawsuit by bringing property code violations to the attention of the City inspectors. [R150-51]

Neither the motion papers submitted to the IAS court on November 20, 2012 in support of plaintiff's application for the above-described relief, nor the papers subsequently filed with Court by the Lippes law firm on behalf of Affinity, include an affidavit or any other admissible evidence from Mark Chason, Jeff Birtch, or any other person affiliated with the Chason Affinity companies to address: (a) what, if any, communications were exchanged between Kaleida Health and Chason Affinity as a result of Mr. Giacalone's three communications with Kaleida Health; or, (b) in what way, if any, their relationship with Kaleida Health had been harmed, or might be harmed, if Mr. Giacalone was allowed to continue his communication with Kaleida. At no time did Justice Michalek ask plaintiff's counsel to explain this omission, and at no time did plaintiff's counsel offer an explanation for the absence of a client affidavit. [R379, 389]

Justice Michalek granted the TRO restraining Mr. Giacalone's communications with Kaleida Health on November 20, 2012, making the show cause order returnable on November 30, 2012. [R380, 141-43] Mr. Giacalone filed a cross-motion on behalf of the appellants on November 27, 2012, requesting the imposition of sanctions against Affinity and/or its counsel for engaging in frivolous conduct, that is, plaintiff's frivolous motion against Mr. Giacalone for costs

and sanctions under 22 NYCRR Subpart 130-1. [R202-03] The affirmation in support of appellants' cross-motion and opposition to plaintiff's application raised a number of issues, including, without limitation, plaintiff's subversion of the purpose of the Rules of Professional Conduct ("RPC") and the integrity of the judicial process, the total absence of evidentiary proof to support plaintiff's request for preliminary relief, and Affinity's failure to distinguish between the subject of the underlying lawsuit (whether or not the deed restrictions burdening the Affinity properties should be extinguished) and appellants' desire to have property maintenance violations at plaintiff's Elmwood Avenue properties corrected. [R204-225]

The TRO against Mr. Giacalone was subsequently extended on November 30, 2012, and again on December 14, 2012. [R381, 418, 429] Mr. Giacalone advised Justice Michalek at the November 30, 2012 proceeding that his strategy of notifying Kaleida Health of the uncorrected code violations, in hopes that they would give Affinity "a nudge" to do the repairs, was apparently working, and provided photographs to the IAS court showing that Affinity had begun repairs at its Elmwood Avenue properties within several days of the November 15, 2012 email. [R381] In response, Justice Michalek stated that the Court's concerns regarding Mr. Giacalone's intent were "*not vitiated by the pictures or even the fact that those problems exist*." [R418, 381] At no time prior to granting the TRO on November 20, 2012, or extending the restraining order on November 30, 2012 and December 14, 2012, did Justice Michalek ask Mr. Giacalone whether he intended to continue his communications with Kaleida Health, or whether he would voluntarily refrain from such contact while plaintiff's application was under consideration. [R381]

Justice Michalek appeared unfazed, both in chambers on November 20, 2012 and at Special Term on November 30, 2012, by the absence of proof that the failure to issue the TRO would result in immediate and irreparable harm to plaintiff or the Chason Affinity companies. [R381] When Mr. Giacalone expressed his concern that the OSC/TRO was being signed by the Court before counsel had an opportunity to address the merits of plaintiff's legal claims, Justice

Michalek sharply replied, "*I will not debate this*." [R381-82] At the end of oral argument on November 30, 2012, Justice Michalek noted that the TRO would be continued, and, for no obvious reason, raised his voice and sternly warned Mr. Giacalone, "Do not play games with a Supreme Court Judge on a TRO." [R418]

On December 6, 2012, the Hon. Karen S. Smith, retired Acting Justice of the State Supreme Court (New York County), submitted a motion by OSC to the IAS court on Mr. Giacalone's behalf to vacate the TRO pursuant to CPLR 6314. [R310-11, 382] Judge Smith's supporting affirmation reminded the IAS court of a movant's significant burden when requesting the "drastic remedy" of preliminary relief, and of plaintiff's failure to allege, much less prove, "immediate and irreparable injury" absent the requested TRO. It also argued in detail how the facts and the law made it difficult, if not impossible, for plaintiff to demonstrate "a likelihood of success on the merits." [R312-329] Affinity's responding affirmation was submitted, not by Mr. Cross, but by former New York State Attorney General, Dennis C. Vacco, Esq. [R337-344, 427] In an apparent effort to address Judge Smith's point that respondent had not even bothered to allege irreparable and immediate harm if the TRO were not granted, [R314] and despite the collegial tone of the messages exchanged by Kaleida representatives and Mr. Chason between August 30 and November 16, 2012, Mr. Vacco's sworn affirmation included the following unsubstantiated allegation that the Chason Affinity principals would have incurred "irreparable harm" without preliminary relief:

...

> *17. If Mr. Giacalone was permitted to communicate with Kaleida Health while the application for a permanent injunction was pending, it was established that Mr. Chason, Mr. Birtch and the [sic] Chason Affinity's rare and unique opportunity to develop the Gates Circle [sic] would have been in jeopardy causing them irreparable harm.*

…

[R342]

Justice Michalek made the OSC/motion to vacate the TRO restraining Mr. Giacalone's communication with Kaleida returnable at 9:30 A.M. on December 14, 2012, the same time the

IAS court intended to announce its decision on plaintiff's application and the answering defendants' cross-motion. [R417, 310, 382] During oral argument on December 14, 2012, plaintiff's counsel, Mr. Vacco, made two unsupported and unsupportable assertions that had not been alleged in plaintiff's three sworn affirmations: first, that Mr. Giacalone's communication with Kaleida Health was "scurrilous" and "untrue" [R426, 382]; and, second, that Mr. Giacalone's August 29, 2012 comment to Kaleida "had one intent, one purposeful intent, and that was to scuttle the deal or to get Kaleida to threaten to scuttle the deal unless [Affinity] settled or resolved this matter." [R426] Following oral argument, Justice Michalek "reserved decision" and, once again, continued the TRO. [R429, 382]

On January 8, 2013, the IAS court issued its Memorandum Decision determining respondent's application and appellants' cross-motion. [R11-30] Justice Michalek agreed with Judge Smith's argument that the court lacked authority to grant the relief requested by plaintiff under any of the provisions asserted by Affinity's counsel, that is, RPC Rules 4.4(a) and 3.4(e), and 22 NYCRR Part 130. [R18-19, 348-352] However, rather than deny Affinity's motion, the Memorandum Decision explores legal principles relating to "restraint of libel" [R19-20], "case law standards on speech by litigating attorneys concerning subject matter of litigation" [R20-25], and "protective orders" [R25-27], and then makes the following pronouncement under the subheading "The Instant Case":

> …
>
> Virtually none of the law relied on in the court's decision came from the parties, which is not all that surprising, as the instant situation does not fall neatly into any precedent, rather invokes both [Rules of Professional Conduct] Rule 3.6 and case law concerning protective orders. However, the order to be issued hereafter will be exceptionally narrowly tailored so as to limit defendants' counsel's speech only so as to prevent abuses those rules aim to countermand.
>
> …

[R27]

Neither RPC Rule 3.6, nor the issue of discovery-related protective orders under CPLR 3103, was raised by respondent's counsel in its motion papers, addressed in appellants' motion

papers, or referenced by either party or the IAS court during any proceeding below. [R391] However, they were utilized by the IAS court to justify enjoining Mr. Giacalone's communications with Kaleida Health. [R19, 27] More specifically, the Memorandum Decision makes the following statement immediately after it provides the text of RPC Rule 3.6(a) & (b)(1):

> …
>
> The court determines that Mr. Giacalone's emails to Kaleida are "extrajudicial statement[s]" that he knew or reasonably should have known would be disseminated by means of public communication (by email) and "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" at issue.
>
> …

[R24-25] In reaching its determination, the IAS court fails to provide any factual support for its conclusion that appellant's counsel knew or should have known that his emails to Kaleida "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter", and does not identify which "adjudicative proceeding" in the pending civil action was likely to be prejudiced. [R24-25]

The Memorandum Decision, which had earlier referenced the IAS court's "wide discretion to regulate discovery and the course of the proceedings before it," [R19] replaces the TRO initially granted November 20, 2012 with a "protective order" issued pursuant to CPLR Article 31 (Disclosure) [rather than Article 63 (Injunction) as requested by Affinity]. The protective order "bar[s] both parties' counsel and their agents and employees from communicating directly or indirectly with Kaleida Health or any officer, agent or affiliate of Kaleida Health concerning the subject matter of the litigation, absent further order of this court." [R29] By its terms, the IAS court's CPLR 3103(a) protective order is not limited to information gained through the pretrial discovery process, but applies to any communication "concerning the subject matter of the litigation." [R29] Without providing its rationale, and despite appellants' objections, the Memorandum Decision treats "code violations on improvements on plaintiff's properties" as "the subject matter of this litigation." [R15, 209-210, 393]

The disclosure-related protective order of CPLR 3103 was utilized by the IAS court on its own initiative despite the fact that Affinity had never alleged in its motion papers, or claimed at oral argument, that Mr. Giacalone had abused the discovery process, [R391-93] and despite the fact that the information Mr. Giacalone possessed regarding the property code violations was obtained pursuant to FOIL, not the lawsuit's disclosure process. [R238, 240, 242-245, 247, 249-256, 392] In order to justify the issuance of a "protective order" pursuant to CPLR 3103, Justice Michalek refused to grant any credence to the explanation for sending the various communications to Kaleida Health that Mr. Giacalone provided by sworn affirmation and at oral argument:

> ...
>
> *As noted, Mr. Giacalone has attempted to state other reasons for his communications with Kaleida besides the intent to "materially prejudice" the outcome of the instant proceeding. ... [T]he court is concerned that, despite his argument otherwise, Mr. Giacalone is seeking to obtain an advantage in the litigation by emailing the President and CEO of Kaleida. Although Mr. Giacalone asserts that he is merely interested in ensuring that his clients' neighbor's property is up to code (see Giacalone Affirm, paragraph 11), there is no evidence that, prior to commencement of this hard-fought litigation, Mr. Giacalone sent any communications to Kaleida concerning his efforts to correct code violations at the properties at issue… Further, Chason Affinity was awarded chosen developer status in August 2012 – and it was not until that event, that Mr. Giacalone emailed Kaleida about the code violations…*

[R27-28] In rejecting Mr. Giacalone's stated motivation, the Memorandum Decision bases the issuance of a "protective order" on what the IAS court refers to as *"the elephant in the room":*

> *… Although Mr. Giacalone argues that he seeks only as a long-time activist to communicate his opinions on development in a City in which he used to live and work and in which his clients live, such statements ignore the* ***"elephant in the room"*** *– that* ***Mr. Giacalone's intent is to continue to push Kaleida to withdraw from the Gates Circle deal unless plaintiff settles or resolves the instant litigation****…*

[R28] [Emphasis added.] Notably, the IAS court's "elephant in the room" sounds remarkably similar to the words Mr. Vacco used during oral argument on December 14, 2012 when he insisted that Mr. Giacalone's August 29, 2012 comment to Kaleida "had one intent, one purposeful intent, and that was to scuttle the deal or to get Kaleida to threaten to scuttle the deal unless [Affinity] settled or resolved this matter." [R426]

On January 18, 2013, appellants filed an application with the IAS Court asking Justice Michalek to enter an order disqualifying himself in the underlying action in accordance with 22 NYCRR 100.3(E)(1), which requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." [R369-70] Appellants' supporting affirmation contends that the IAS court's impartiality might reasonably be questioned in light of its handling of respondent Affinity's request for injunctive relief. [R3671-401] Attached to the affirmation are the email messages (discussed in detail above) that had been exchanged between Kaleida Health and Mark Chason in response to Mr. Giacalone's communications with Kaleida, and which belie any suggestion that Chason Affinity's working relationship with Kaleida was in jeopardy as a result of the August 29, October 5 and/or November 15, 2012 messages. [R405-408, 383-387]

By order granted March 7, 2013, the IAS court denied appellants' disqualification request. [R360-61] Justice Michalek provided the following explanation for the denial in a post-argument colloquy on February 1, 2013:

> …
> … I have searched my conscience and I perceive no bias or prejudice against Mr. Giacalone or his clients, or in favor of the plaintiff or its counsel.
>
> Again, Court would assert that, again, counsel as advocates are certainly entitled to their own opinions and to voice their opinions and/or proceed to appeal, et cetera. However, they're not entitled to their own facts. Those are before the Court, those are in the record and the Court's confident the record can stand on its own.
>
> …
> At any rate, Court's competent it can fairly and justly preside over this matter. The cross-motion is denied…

[R366-67] The IAS court did not acknowledge the existence of the emails that were exchanged between Kaleida and Mark /Chason in response to the Giacalone communications, or the fact that the emails do not reflect any deterioration in the business relationship between the health care provider and Chason Affinity. [R366-67]

ARGUMENT

POINT I: Three actions of the IAS court implicated the freedom of speech rights of appellants' counsel, and, for that reason, obligated the court to balance a lawyer's First Amendment interests against the State's legitimate interest in regulating the activities in question – the 11/20/2012 issuance of a TRO barring counsel from communicating with non-party/non-witness Kaleida Health concerning the subject litigation; a 01/08/2013 finding that counsel had engaged in conduct prohibited by the "trial publicity" provision of the Rules of Professional Conduct by contacting Kaleida Health prior to the 11/20/2012 TRO; and, the 02/21/2013 issuance of a CPLR 3103 protective order barring counsel from communicating with Kaleida Health.

As a result of a lawyer's status as an "officer of the court" and "an instrument of justice," In re Cohen, 7 NY2d 488, 495 (1960) *affd* 366 US 117 (1961), the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens or on the press. Gentile v. State Bar of Nevada, 501 US 1030, 1073-74 (1991); U.S. v. Salameh, 992 F2d 445, 447 (CA2 1993). However, while attorneys have a professional responsibility to protect the fairness and integrity of the judicial process, lawyers do not surrender their First Amendment rights as they exit the courtroom. National Broadcasting Co. v. Cooperman, 116 AD2d 287, 292 (AD2 1986). Limitations on attorney speech are not allowed to be broader than necessary to protect the integrity of the judicial system and a party's right to a fair trial. Gentile, *supra* 501 US at 1075; Salameh, *supra* 992 F2d at 447; National Broadcasting, *supra* 116 AD2d at 294. As the U.S. Supreme Court has held, "[E]ven those lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding." Gentile, *supra* 501 US at 1077.

The Hon. John A. Michalek, J.S.C., took three actions in the underlying proceeding that directly implicate the First Amendment speech rights of appellants' counsel, Arthur J. Giacalone. The initial action took the form of a temporary restraining order signed on November 20, 2012, and extended orally on November 30, 2102 and December 14, 2012. The TRO included the following "prior restraint":

…

ORDERED, that Defendants and Arthur J. Giacalone, Esq. and his agents are temporarily restrained from communicating to [sic] Kaleida Health and their respective agents/employees concerning the subject litigation until further Order of this Court;

…

[R142] The second action taken by the IAS court implicating the freedom of expression of appellants' counsel was the determination in Justice Michalek's January 8, 2013 Memorandum Decision that Mr. Giacalone had violated the "trial publicity" provision of the Rules of Professional Conduct, Rule 3.6:

…

The court determines that Mr. Giacalone's emails to Kaleida are "extrajudicial statement[s]" that he knew or reasonably should have known would be disseminated by means of public communication (by email) and "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" at issue.

…

[R24-25] The third action taken by the IAS court directly implicating the First Amendment rights of appellants' counsel was granted on February 21, 2013, is fashioned a protective order pursuant to CPLR 3103, and remains in effect today. That order provides, *inter alia*, the following:

…

ORDERED, that Lippes Mathias Wexler Friedman LP and Arthur J. Giacalone, Esq., together with each of their agents and employees, are precluded from communicating directly or indirectly with Kaleida Health or any officer, agent or affiliate of Kaleida Health concerning the subject matter of this litigation, absent further order of this Court;

…

[R10, 29]

The U.S. Supreme Court has consistently held that where, as here, state action implicates First Amendment rights, the court "must balance [the First Amendment] interests against the State's legitimate interest in regulating the activity in question," and must make certain that any limitation on First Amendment freedoms is no greater than is necessary to protect the governmental interest involved. See, *e.g.*, Gentile, *supra* 501 US at 1075; Seattle Times Company v. Rhinehart, 467 US 20, 32 (1984). As addressed below, the IAS court failed to meet its constitutionally-mandated obligations for each of its actions implicating the First Amendment.

<u>POINT II</u>: The IAS Court's CPLR 3103 protective order barring appellants' counsel from communicating directly or indirectly with non-party/non-witness Kaleida Health constitutes an unconstitutional prior restraint where entry of the order was not based on a showing of good cause, the information generating the Court's concern was obtained outside of pretrial discovery, and the protective order prohibits dissemination of information without regard to its source.

Justice Michalek clearly understood that respondent Affinity's request for injunctive relief against appellants' counsel, Arthur J. Giacalone, would constitute a "prior restraint" on speech, and that such restraints "are the most serious and the least tolerable infringement on First Amendment rights." [R21] The IAS court also recognized the significant burden our constitution places on anyone requesting such relief:

> ….
>
> Any imposition of prior restraint, whatever the form, bears a "heavy presumption against its constitutional validity" [internal quotation marks and citation omitted], and a party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition [citations omitted].

[R21]

Nevertheless, rather than directly acknowledging respondent's failure to bear its heavy burden to justify the requested prior restraint, the lower court's Memorandum Decision performs what can diplomatically be characterized as a "sleight of hand," converting *sua sponte* respondent's application for injunctive relief based on purported violations of Rules 3.4 and 4.4 of the Rules of Professional Conduct and alleged "frivolous conduct" [R141-42], into a "situation … invok[ing] both Rule 3.6 and case law concerning protective orders." [R27, 19] Fueled by nothing more than respondent's anger over Mr. Giacalone's expression of his personal opinion concerning an unrelated development project [R14], and the IAS court's speculation regarding an *"elephant in the room"* [R28]), Justice Michalek issued a "prior restraint" in the guise of a CPLR 3013 protective order that bars appellants' lawyer (as well as respondents' counsel) from communicating directly or indirectly with Kaleida Health "concerning the subject matter of this litigation." [R29, 10] Appellants and their counsel were provided no opportunity to be heard on the new legal theories and case law. Such action does not meet the high standards mandated by

the First Amendment.

To date, the U.S. Supreme Court has not rendered a decision that directly addresses the constitutional issues that are raised when a lawyer participating in pending civil litigation is subjected to prior restraints by issuance of a discovery-related protective order. However, two decisions of our nation's highest court, Gentile, *supra*, and Seattle Times, *supra*, provide meaningful guidance to this Court as it considers whether the First Amendment rights of appellants' counsel have been violated by the IAS court's actions.

The question addressed by the U.S. Supreme Court in Gentile is whether a lawyer who represents a criminal defendant may be disciplined for public pronouncements about the case under less demanding criteria than the "clear and present danger" standard for regulation of the press established in Nebraska Press Association v. Stuart, 427 US 539 (1976). See Gentile, *supra* 501 US at 1070-1071. The "state regulation" implicating a lawyer's First Amendment rights in Gentile is *Nevada Supreme Court Rule 177*, that state's equivalent of Rule 3.6 of the ABA Model Rules regarding "trial publicity." The pertinent provision of Rule 177 uses words almost identical to the language in Rule 3.6 of New York's Rules of Professional Conduct, and prohibits a lawyer from making a publicly disseminated extrajudicial statement "if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Gentile, *supra* 501 US at 1033.

The legitimate state interest Nevada's Rule 177 is designed to protect is the "fundamental" constitutional right to a fair trial by an "impartial" jury. Gentile, *supra* 501 US at 1075. The majority of the Gentile court, in an opinion by Chief Justice Rehnquist, provides the following rationale for its conclusion that the standard for disciplining a lawyer for extrajudicial speech expressed by Nevada's Rule 177 (and, as of 02/24/2009, NY's Rule 3.6), "substantial likelihood of material prejudice to an adjudicative proceeding," constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials:

> … The "substantial likelihood" test embodied in *Rule 177* is constitutional under this analysis, for it is designed to protect the integrity and fairness of a state's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found…
>
> … The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorney's comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.
>
> … Rule 177 is no broader than necessary to protect the State's interests. It applies only to lawyers involved in the pending case at issue, and even those lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding…

Id, 501 US at 1075-77.

In the Seattle Times case, our nation's highest court considers whether parties to civil litigation, and, in particular, two newspaper publishers, have a First Amendment right to disseminate information gained through the pretrial discovery process in advance of trial. *Id*, 467 US at 22. The "state regulation" under consideration in Seattle Times, Washington Superior Court Civil Rule 26(c), authorizes a trial court, "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown," to issue an order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Seattle Times, *supra* 467 US at 26 n7. New York's "protective orders" provision, CPLR 3103(a), while similar in function and breadth to the rule considered in Seattle Times, differs in two notable ways: a New York trial court may issue an order pursuant to CPLR 3103(a) "on its own initiative"; and, CPLR 3103(a) does not expressly state that "good cause" must be shown prior to issuance of an order.

The request by the Seattle Times plaintiffs for restrictions on the use of information obtained through the discovery process implicated "substantial governmental interests" unrelated to the suppression of expression, that is, the prevention of potential abuse that can attend the

coerced production of information under a state's liberal discovery rule, and the rights of privacy and religious association of the plaintiff religious group and its members. Seattle Times, *supra* 467 U.S. at 34-36 (majority opinion), 38 (Brennan, J., concurring). With these legitimate state interests in mind, the Seattle Times majority expressed the following rationale and holding:

> …
>
> *The facts in this case illustrate the concerns that justifiably may prompt a court to issue a protective order.* As we have noted, the trial court's order allowing discovery was extremely broad. It compelled respondents—among other things—to identify all persons who had made donations over a 5-year period to Rhinehart and the Aquarian Foundation, together with the amounts donated. In effect the order would compel disclosure of membership as well as sources of financial support. *The Supreme Court of Washington found that dissemination of this information would "result in annoyance, embarrassment and even oppression."* 98 Wash.2d, at 257, 654 P.2d, at 690. It is sufficient for purposes of our decision that the highest court in the State found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law. *We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.*

Id, 467 US at 36-37. [Emphasis added.]

While the U.S. Supreme Court determined that "heightened First Amendment scrutiny" was not required when a protective order was being issued *under the State of Washington's discovery rules*, Seattle Times, 467 US at 36, the above-quoted holding demonstrates that three factors must be present so as not to offend the First Amendment: (1) entry of the protective order must be based on "a showing of good cause"; (2) the protective order must be "limited to the context of pretrial civil discovery"; and, (3) the protective order must "not restrict the dissemination of the information if gained from other sources." *Id.* Furthermore, as underscored by Justice Brennan's concurring opinion, a court considering entry of a pretrial protective order must engage in a balancing process to ensure that the state's interest in regulating the information obtained through the discovery process is "sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment." Seattle Times, *supra* 467 US at 37-38 (J. Brennan, concurring opinion).

The pretrial protective order entered by the IAS court in the instant matter offends the First Amendment and contradicts the ruling in Seattle Times in several significant ways:

A. Entry of the IAS court's protective order was not based on a showing of good cause. The January 8, 2013 Memorandum Decision expressly notes that, "CPLR 3103 does not include language requiring a showing of 'good cause." [R26 n] In doing so, it failed to recognize that the requirement in Washington's Rule 26(c) that "good cause" be shown, and the finding by the Supreme Court of Washington "that dissemination of [disclosed] information [regarding plaintiff's membership and sources of financial support] would 'result in annoyance, embarrassment and even oppression,'" were prerequisites to the holding in Seattle Times that the particular protective order "does not offend the First Amendment." Seattle Times, *supra* 467 US at 37-38. Whether or not CPLR 3103 expressly requires a showing of good cause, "good cause" or, in other words, sufficient justification for the restrictions on freedom of expression created by the protective order, must be shown in order to avoid offending the First Amendment. *Id.*

B. The IAS court's protective order is not limited to the context of pretrial civil discovery. The Memorandum Decision below recognized the significance of the fact that the Seattle Times decision involved "information gained through pretrial discovery," and apparently was so committed to finding a way to issue a "prior restraint" limiting Mr. Giacalone's communication with Kaleida Health that it made the following unsupportable assertion:

> … The information at issue in the present matter also stems from pretrial discovery, i.e. the presence of alleged code violations at improvements located on plaintiff's property on Elmwood Avenue, and the state of the improvements in general.

[R26] It is beyond dispute, however, that the information appellants' counsel possessed regarding the property code violations and the conditions of Affinity's Elmwood/Forest Avenue properties did not "stem from pretrial discovery," as the IAS court claims. It was obtained by Mr. Giacalone from the City of Buffalo pursuant to a Freedom of Information Law request, and while observing and photographing the exterior of the Affinity properties from the public right-of-way. [See, *e.g.*, R238, 240, 243, 249-256, 392, 402-404.] Therefore, in sharp contrast to the protective

order in Seattle Times, Justice Michalek's 2/21/2013 order is not "limited to the context of pretrial civil discovery," and, as such, offends the First Amendment. Seattle Times, *supra* 467 US at 37.

C. The IAS court's protective order prohibits the dissemination of information gained from sources other than pretrial discovery. The Seattle Times decision clearly states that a protective order restricts a party's First Amendment rights "to a far lesser extent than would restraints on dissemination of information in a different context*" only* to the extent that the protective order "*prevents a party from disseminating only that information obtained through use of the discovery process*." Seattle Times, *supra* 467 US at 33-34. In other words, an order prohibiting dissemination of discovered information before trial escapes "exacting First Amendment scrutiny" only if "*the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes.*" *Id*. Consistent with these principles, the protective order affirmed by the U.S. Supreme Court in Seattle Times expressly prohibited dissemination or publication of "information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, [and] the names and addresses of Aquarian Foundation members, contributors or clients," and concluded with the following caveat:

> *… This protective order has no application except to information gained by the defendants through the use of the discovery processes*.

Seattle Times, *supra* 467 US at 23 n2.

In sharp contrast, the protective order issued by Justice Michalek, while self-described by the IAS court as "exceptionally narrowly tailored" [R27], broadly precludes Mr. Giacalone "from communicating directly or indirectly with Kaleida Health … concerning the subject matter of this litigation," without distinguishing between information gained through or outside of the discovery process. [R10, 29] Absent such distinction, the instant protective order goes beyond the restriction of information obtained through the discovery process, and unconstitutionally restricts

information even if gained from other sources. Seattle Times, *supra* 467 US at 37; also see, Salameh, *supra* 992 F2d at 447 (order restraining attorney's speech "is not narrowly tailored; rather, it is a blanket prohibition that extends to any statements that 'have anything to do with this case' …"); New York Times Co. v. Rothwax, 143 AD2d 592 (AD1 1988) (*sua sponte* gag order overly broad where prior restraint not limited solely to information or statements which might be likely to impugn the fairness and integrity of the trial). Ironically, the IAS court's failure to narrowly tailor its protective order, as promised, triggers the "exacting First Amendment scrutiny" it was hoping to avoid when, on its own initiative, it ventured beyond the issues raised by respondent and issued an order "under CPLR 3103, not under article 63 on injunctions." [R19] Seattle Times, *supra* 467 US at 33-34.

D. The record before the IAS court would not support a finding of "good cause" for the 2/21/2013 protective order. Even if the IAS court had expressed a finding that "good cause" existed for issuing the protective order on its own initiative, the record before the Court would not have provided evidentiary proof that would justify such a finding. Affinity failed to submit affidavits from either its principals or Kaleida Health representatives to demonstrate a likelihood of any harm absent an order restraining Mr. Giacalone's communications with Western New York's largest health care provider. Respondent did not accuse appellants' counsel of abusing the discovery process. Moreover, in sharp contrast to the circumstances in Seattle Times where defendant newspaper publishers "stated their intention to continue publishing articles about respondents and this litigation, and their intent to use information gained through discovery in future articles,." Seattle Times, *supra*, 467 US at 25, respondent has never alleged that appellants' counsel has expressed an intention to disseminate information gained through discovery. Under these circumstances, this Court, in contrast to our nation's highest court in Seattle Times, does not have a record before it that "illustrate[s] the concerns that justifiably may prompt a court to issue a protective order." Seattle Times, 467 US at 36-37. As the Appellate Division, Second Department, has stated, "[A] trial court may not impose prior restraints upon

attorneys and other participants in a trial without the requisite showing of a necessity for such restraint…" National Broadcasting, *supra* 116 AD2d at 293. Without a showing of good cause, that is, "the requisite showing of a necessity for such restraint," the protective order under review by this Court cannot be sustained under the First Amendment. Seattle Times, *supra* 467 US at 36-37; National Broadcasting, *supra* 116 AD2d at 293.

For all the above reasons, the IAS court's February 21, 2013 protective order violates the First Amendment rights of appellants' counsel, and should be reversed.

POINT III: The IAS Court exceeded the authority granted to it by CPLR 3103, and abused the broad discretion vested in a trial court in supervising disclosure, when it issued the February 21, 2013 protective order barring appellants' counsel from communicating with Kaleida Health despite the absence of any allegation or proof that the pretrial discovery process had been, or was likely to be, misused.

It appears that the IAS court mistakenly equates the broad discretion a trial court has in supervising discovery, and the authority CPLR 3103(a) grants a court to issue a protective order "on its own initiative," with a grant to the IAS court of unbridled discretion in the issuance of a protective order. [R19, 29] While the breadth of a trial court's discretion in supervising disclosure is universally acknowledged, this Court has joined the other New York appellate courts in reminding lower court judges that the discretion "is not unlimited." *E.g.*, Button v. Guererri, 298 AD2d 947 (AD4 2002); Capoccia v. Spiro, 88 AD2d 1100, 1101 (AD3 1982); Allen v. Crowell-Collier Publishing Co., 21 NY2d 403, 406 (1968). The significance of that caveat is confirmed by this Court's willingness to reverse an IAS Court when its discretion in supervising the discovery process is improvidently exercised. *E.g.* Nero v. Kendrick, 100 AD3d 1383 (AD4 2012) (IAS court's denial of protective order reversed); Amherst Synagogue v. Schuele Paint Co., 30 AD3d 1055 (AD4 2006) (IAS court's order compelling discovery reversed); Button, *supra* (IAS court's denial of protective order reversed).

A trial court's broad authority to regulate the disclosure process stems from a court's obligation to insure that "each of the parties receives a fair trial." Ash v. Bd. of Managers of the 155 Condominium, 44 AD3d 324, 325 (AD1 2007). As this Court stated in Button, *supra*, "The court may issue a protective order to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice' (citations omitted)." *Id.* The Appellate Division, Second Department, has expressed a similar sentiment:

> … When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper (citations omitted).

Barouh Eaton Allen Corp. v. IBM, 76 AD2d 873, 874 (AD2 1980); also see Seaman v. Wyckoff Heights Medical Center, 25 AD2d 598, 599 (AD2 2006); Jones v. Maples, 257 AD2d 53, 56

(AD1 1999). These cases reflect an expectation that the trial court's decision to issue a protective order has been motivated by a calm and objective review of facts and a determination that the discovery process has been, or is likely to be, abused by participants in the pending litigation. *Id*. It is the existence of past or threatened misuse of the disclosure process, or information obtained through pretrial discovery, and the resultant threat that a party may not receive a fair trial, that renders issuance of the protective order proper. Button, *supra*; Maples, *supra*; Ash, *supra*.

In the instant matter, the IAS court disregards the fact that plaintiff's application for injunctive relief did not allege or attempt to prove abuse of the disclosure process or misuse of information obtained through discovery. Where, as here, the disclosure process has not been used to harass or unduly burden a party, issuance of a protective order is neither "necessary," nor "proper," Barouh Eaton, *supra*; Seaman, *supra*; Maples, *supra*, but, an abuse of discretion. The improvident nature of the IAS court's protective order is heightened by the fact Justice Michalek's concern in issuing the protective order was not based on a fear that communications between Mr. Giacalone and Kaleida Health would adversely impact the parties' right to a fair trial. Ash, *supra*; also see Lowinger v. Lowinger, 264 AD2d 763 (AD2 1999) ("Orders restraining extrajudicial comments by the parties or their attorneys are not generally permitted unless there is a reasonable likelihood of the existence of serious threat to the right to a fair trial."). To the contrary, the IAS court's primary motivation for issuing its order was concern for the business relationship between the principals of the respondent limited liability company and non-party/non-witness Kaleida Health. [R418, 417, 146-47, 149] None of the cases relied upon by the IAS court in its Memorandum Decision supports use of a CPLR 3013 protective order under these circumstances.

For all the above reasons, the IAS court exceeded its authority under CPLR 3013 and abused its discretion by issuing its February 21, 2013 protective order, and, consequently, the order should be reversed.

<u>POINT IV</u>. Given its likelihood of repetition, the fact that a TRO typically evades review, and the significance of the questions raised, the appeal from that portion of the 02/21/2103 Order denying appellants' CPLR 6314 motion to vacate the IAS court's TRO falls within the exception to the doctrine of mootness and should be reviewed.

On December 6, 2012, Karen S. Smith, Esq., representing Mr. Giacalone, submitted an Order to Show Cause pursuant to CPLR 6314 to the IAS court seeking to vacate the TRO that had been granted on November 20, 2012 and extended on November 30, 2012. [R310-11] Justice Michalek made the OSC returnable at 9:30 a.m. on December 14, 2012, the same time the court below intended to render its determination on plaintiff's application for injunctive relief and appellants' cross-motion for sanctions. [R417, 9] Following oral argument on December 14, 2102, the IAS court reserved decision, announced that it intended to write a decision within two to three weeks (or, perhaps less), and once again extended the TRO restraining Mr. Giacalone's communication with Kaleida Health. [R428-29] Justice Michalek's Memorandum Decision was filed on January 8, 2013, advising the parties of the Court's determination to vacate the previously issued TRO, issue a CPLR 3013 protective order "in its place," deny all requests for sanctions, and deny Mr. Giacalone's motion to vacate the TRO "as moot." [R11, 29-30] Although it was already clear by January 18, 2013 (the day appellants filed its motion requesting Justice Michalek's to disqualify himself) that the parties were not in agreement on a proposed order implementing the January 8, 2013 Memorandum Decision [R369, 383], the conference to settle the order and the IAS court's grant of the Order in "Appeal No. 1" was delayed until February 21, 2013 [R8-10], postponing by more than a month appellants' ability to file a motion for leave to reargue/renew and/or commence the appeal process. CPLR 2221, 5513.

Although the issues raised by the IAS court's TRO and the CPLR 6314 motion to vacate the twice-extended temporary restraining order have been rendered moot by the February 21, 2013 Order, this controversy falls within the recognized exception to the mootness doctrine and should be preserved for review by this Court. A case falls within the exception to the mootness doctrine where three common factors are present: (1) a likelihood of repetition, either between the

parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues. Hearst Corporation v. Clyne, 50 NY2d 707, 714-715 (1980); McGrath v. Noto, 245 AD2d 1081, 1081-1082 (AD4 1997); also see U.S. v. Quattrone, 402 F3d 304, 308-309 (CA2 2005) ("Despite this general rule of mootness, the instant appeal [from an order prohibiting media organizations from publishing jurors' names during the pendency of a criminal trial] … remains justiciable, because the underlying dispute is capable of repetition, yet evading review [internal quotes and citations omitted].").

The first factor identified in Hearst and McGrath, "a likelihood of repetition, either between the parties or among other members of the public," has already been clearly demonstrated in the underlying litigation. The IAS court was willing (and, seemingly anxious) on November 20, 2012 to grant a TRO with a prior restraint limiting Mr. Giacalone's freedom of expression although presented with an OSC/TRO unsupported by any evidentiary proof of harm. [R381-82] Ten days later, on November 30, 2012, despite receiving opposing papers that detailed both this Court's strict standards for granting the "drastic remedy" of a TRO, and legal and factual reasons why respondent's application lacked merit, the lower court not only extended the temporary restraining order, it also warned Mr. Giacalone, : "*... Do not play games with the Supreme Court Judge on a TRO...*" [R418] Similarly, two weeks later, following argument on the motion to vacate the TRO, and despite the continuing absence of proof of harm, Justice Michalek once again extended the TRO against appellants' counsel. [R428-29] Given its past actions, it is highly likely that the IAS court will continue to restrain Mr. Giacalone's freedom of expression unless and until a higher authority instructs otherwise.

The second factor, "a phenomenon typically evading review," is a description that accurately describes TROs and CPLR 6314 motions to vacate temporary restraining orders. By their very nature, TROs are intended to be short, that is, "temporary," in duration, with the hearing for the preliminary injunction set by the court "at the earliest possible time." CPLR

6313(a). The time periods detailed above between the initial grant of the subject TRO, the two extensions, and the filing of the IAS court's decision, 10 days, 14 days, and 25 days, respectively, are clearly "too short in duration" to allow for a full appeal. Quattrone, *supra* 402 F3d at 309.

The final factor, "a showing of significant or important questions not previously passed on, i.e., substantial and novel issues," is also met in this case. The First Amendment interests implicated by the IAS court's issuance and extension of a TRO constituting a "prior restraint" of appellants' counsel are not the typical issues raised in an appeal of a lower court's grant of a TRO. For example, appellants are unaware of any decision that directly or indirectly analyzes the interplay between the standards announced by the U.S. Supreme Court for assessing the free speech rights of lawyers involved in a pending court case, on the one hand, and the requirements that must be met under CPLR Article 63 before a TRO may be issued, on the other.

Moreover, setting aside the constitutional issues, an important question, so far not directly addressed by New York's appellate courts, is at the core of Affinity's request for preliminary relief application: Is it proper, under CPLR Article 63, for a court to treat the primary concern expressed by respondent's counsel, the alleged adverse impact of Mr. Giacalone's speech on the business relationship between non-party/non-witness Kaleida Health and the principals of the Chason Affinity companies, as an act (a) "*in violation of the plaintiff's rights respecting the subject of the action*" (that is, respondent's lawsuit to extinguish the Elmwood/Forest covenants), and (b) "*tending to render the judgment ineffectual*"? CPLR 6301, 6312. After all, the business relationship involves a development project unrelated to, and three-quarters of a mile away from, the properties that are the subject of Affinity's lawsuit.

An answer from this Court on the substantial and novel TRO-related issues raised in "Appeal No. 1" would play a useful purpose for the legal community, providing instruction and guidance for IAS courts and attorneys, whether the lawyers are "activists" or "crusaders" who wish to comment on issues of public interest, or lawyers whose aggressive clients want their legal counsel to find a way to silence a voice they do not wish to hear. Hearst, *supra;* McGrath, *supra*.

POINT V: Injunctive relief pursuant to CPLR Article 63 that restrains the extra-judicial speech of an attorney involved in civil litigation in advance of its expression is unconstitutional unless the attorney's statement presents a substantial risk of material prejudice to the adjudicative proceeding, and the prior restraint is necessary to serve a significant state interest and narrowly tailored to achieve that end.

The U.S. Supreme Court views prior restraints on speech and publication as "the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press, *supra* 427 US at 559. A party, such as respondent Affinity, seeking to prevent speech in advance of its expression "carries a heavy burden of showing justification for its imposition," and enactment of a prior restraint, no matter its form, bears a "heavy presumption" against its validity. Organization For A Better Austin v. Keefe, 402 US 415, 419 (1971); also see, Metropolitan Opera Assoc. v. Local 100, Hotel Employees etc., 239 F3d 172, 176 (CA2 2001); Children's Village v. Greenburgh Eleven Teachers' Union, 258 AD2d 610, 611 (AD2 1999) *appeal dismissed*, 93 NY2d 953 (1999). The "barriers to prior restraint remain high" in recognition of the harsh impact prior restraints have on a speaker's freedom of expression:

> … A prior restraint … has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

Nebraska Press, *supra* 427 US at 559, 570; Metropolitan Opera, *supra* 239 F3d at 176.

When a prior restraint takes the form of a court-issued injunction, such as the TRO issued and twice extended by the IAS court, the risk of infringing on speech protected under the First Amendment increases. In the words of the U.S. Supreme Court, "Injunctions … carry greater risks of censorship and discriminatory application than do general ordinances." Madsen v. Women's Health Ctr., 512 U.S. 753, 764 (1994); also see, Metropolitan Opera, *supra* 239 F3d at 176. The fact that an injunction's unconstitutionality is no defense to disobedience, and that it must be obeyed until modified or dissolved, exacerbate the chilling effect court-ordered injunctions have on freedom of expression. See Walker v. Birmingham, 388 U.S. 307, 314-21 (1967). The U.S. Court of Appeals, Second Circuit, recognized that reality when it stated, in the context of a labor dispute:

> … [T]he Union risks contempt sanctions for speech that may ultimately, after full appellate review, be found constitutionally protected. The risk of contempt sanctions may thus "freeze" the Union's attempts to exert what it perceives as legitimate social pressure on the Met, rather than simply "chill" the Union's speech, as might result from the threat of a subsequent damage award.

Metropolitan Opera, *supra*, 239 F3d at 176. In the instant case, the IAS court appeared well aware on November 30, 2012 of the harsh impact of court-ordered injunctive relief when, without an apparent reason, it admonished Mr. Giacalone in open court on: "*... Do not play games with the Supreme Court Judge on a TRO...*" [R418, 425]

This Court recognized nearly four decades ago the potential threat to First Amendment interests inherent in a trial court's issuance of a TRO when freedom of speech rights are involved:

> … *Cases involving freedom of expression and of speech are subject to special due process rules with respect to the application of prior restraint*, that is, the enjoinder of acts before an opportunity for hearing as to their propriety. *It has long been held that the government must bear a heavy burden in showing justification for such prior restraint* (New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822; Organization for a Better Austin v. Keefe, 402 U.S. 415; Bantam Books, Inc. v. Sullivan, 372 U.S. 58; and see, A Quantity of Books v. Kansas, 378 U.S. 205, 213.

Gaetano v. Erwin, 46 AD2d 735, 736 (AD4 1974) (emphasis added). The insistence in Gaetano that a party seeking a prior restraint "bear a heavy burden in showing justification" for its request, *id*, is consistent with the approach taken by the U.S. Supreme Court in cases such as Nebraska Press, *supra* 427 US at 570, and Madsen, *supra* 512 U.S. at 764. Moreover, as noted at Point I *supra*, our nation's highest court has consistently held that where, as here, state action or regulation implicates First Amendment rights, the court "must balance [the First Amendment] interests against the State's legitimate interest in regulating the activity in question," and must make certain that any limitation on First Amendment freedoms is no greater than is necessary to protect the governmental interest involved. See, *e.g.*, Gentile, *supra* 501 US at 1075; Seattle Times, *supra* 467 US at 32. Furthermore, when a lawyer's free speech rights are involved, the court must make certain that any prior restriction on extrajudicial statements only restrain statements that "present a substantial risk of material prejudice to an adjudicative proceeding."

Gentile, *supra* 501 US at 1077; Salameh, *supra* 992 F2d at 447.

In the instant case, the February 21, 2103 Order precluding appellants' counsel "from communicating directly or indirectly with Kaleida Health or any officer, agent or affiliate of Kaleida Health concerning the subject matter of this litigation," falls woefully short of the constitutional prerequisites for the "prior restraint" of an attorney's speech:

A. The IAS court failed to determine whether counsel's speech presented a substantial risk of material prejudice to an adjudicative proceeding. Contrary to its duty under pertinent U.S. Supreme Court rulings, the IAS court never asked respondent's counsel, either in chambers on November 20th prior to signing the TRO, or during oral argument on November 30, 2012 and December 14, 2012, the question mandated by the First Amendment whenever a party seeks to enjoin the extrajudicial speech of a lawyer in involved in litigation: "Is there a substantial risk that opposing counsel's speech will materially prejudice an adjudicative proceeding in the pending action?" Gentile, *supra* 501 US at 1077; Salameh, *supra* 992 F2d at 447. This question was especially pertinent here given the fact that jury selection and trial in the underlying civil action were not scheduled to occur until the end of 2013, and the only reference to Affinity's lawsuit in Mr. Giacalone's three emails to Kaleida was the following neutral statement:

> *Unable to convince the adjoining owners to approve its project, Affinity is now in court seeking to extinguish the restrictive covenants that protect its neighbors…*

[R297, 401]

Rather than make the constitutionally-mandated inquiry, Justice Michalek embraced respondent's obsession with the last sentence in Mr. Giacalone's August 28, 2012 letter-to-the-editor and August 29, 2012 email comment to Kaleida's President/CEO, "*Chason Affinity may have won the competition, but Kaleida may want to think long and hard before designating it the developer of the Gates Circle site."* [R146-47, 149] Despite the relatively bland nature of Mr. Giacalone's comment (one would hope, after all, that a major business entity such as Kaleida Health would "think long and hard" before making an important decision impacting a $65 million

project), respondent's attorneys characterized it as "direct evidence" and "dispositive" proof of Mr. Giacalone's intention "to destroy the business relationship" between respondent's principals and Kaleida Health and "prevent them from re-developing the Gates Circle site." [R149, 417] The following statement made by Justice Michalek during the IAS court's post-argument colloquy on November 30, 2012 reflects the lower court's focus on Mr. Giacalone's purported "intent" regarding the business relationship between respondent's principals and Kaleida Health, rather than on the "two principal evils" the "substantial risk of material prejudice" standard was meant to address, that is, "comments that are likely to influence the actual outcome of the trial" and "comments that are likely to prejudice the jury venire" (Seattle Times, *supra* 501 US at 1075-77):

> *... I said this at the TRO, the Court's concern ... and which Mr. Little's asserting, and that's not vitiated by the pictures [of housing code violations] or even the fact that those problems exist, is [Mr. Little's] concern that he's indicated twice about intent, what was the intent, i.e., the contact by counsel with Kaleida, which, again, has no real direct relationship with Affinity as a landlord on these matters. And what the intent is there and the aim, again ...*

[R418]

The IAS court's focus on counsel's "intent," rather than the impact, if any, of his statements on the parties' right to a fair trial in the restrictive covenant lawsuit, is insufficient justification for granting injunctive relief that imposes restrictions on counsel's freedom of speech that go beyond those contained in the Rules of Professional Conduct. See New York Times Co. v. Regan, 878 F2d 67, 68 (CA 2 1989).

B. The IAS court's TRO failed to serve a significant governmental interest. The Gentile and Seattle Times decisions, *supra*, illustrate the type of governmental interest the IAS court was obliged to identify prior to restraining Mr. Giacalone's freedom of expression. In Gentile, the U.S. Supreme Court balanced an attorney's freedom of expression against the state's desire "to protect the integrity and fairness" of its judicial system by ensuring a criminal defendant's fundamental right "to a fair trial by 'impartial' jurors." Gentile, *supra*, 501 US at 1075. In

Seattle Times, prior to holding that parties to civil litigation did not have a First Amendment right to disseminate in advance of trial information gained through the pretrial discovery process, our nation's highest court confirmed that "substantial governmental interests" were involved, that is, the state's desire to prevent the abuse that can attend the coerced production of information under liberal discovery rules, and plaintiff religious group's rights of privacy and religious association. Seattle Times, *supra* 467 US at 37 n24, 35 (majority opinion), 38 (Brennan, J., concurring).

When compared to the "important" and "substantial" governmental interests identified in the Gentile and Seattle Times cases, the interests asserted by respondent Affinity and embraced by the IAS court in the instant matter appear lightweight and insubstantial. The purported "concern" asserted by Affinity's principals, Mark Chason and Jeff Birtch, a desire not to be embarrassed by a description of how one of their limited liability companies has handled its properties at a highly visible City of Buffalo intersection, lacks the "gravity" of the "governmental interests" implicated in Gentile and Seattle Times. As the U.S. Supreme Court has advised:

> … No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices … warrants use of the injunctive power of a court.

Better Austin, *supra*, 402 US at 419. Likewise, Affinity's purported fear that it might lose the financial benefit of developing the Gates Circle site if Mr. Giacalone is allowed to communicate with Kaleida is not a "legitimate" or "substantial" governmental interest. In the words of the Appellate Division, Second Department:

> No compelling state interest is served by banning free speech because of speculation about the financial impact the speech may have… (citation omitted).

Children's Village, *supra* 258 AD2d at 611-612.

By failing to demand that respondent demonstrate an important or substantial governmental interest to justify the requested prior restraint, and to objectively assess the likelihood of the purported harm, the IAS court neglected its duty to balance an attorney's First

Amendment interests against the State's legitimate interest in regulating the activity in question. Gentile, *supra* 501 US at 1075 (1991); Seattle Times, *supra* 467 US at 32. It also disregarded the "*heavy burden"* this Court said must be met to justify use of injunctive powers to restrain freedom of expression. Gaetano, *supra* 46 AD2d at 736.

C. The IAS court's TRO was not narrowly tailored to achieve a legitimate end. Even assuming, *arguendo*, that respondent Affinity had somehow met its heavy burden to justify the requested prior restraint, *id*, the IAS court's blanket prohibition against any communication with Kaleida Health "concerning the subject litigation" falls far short of the constitutionally mandated duty to "make certain that any limitation on First Amendment freedoms is no greater than is necessary to protect the governmental interest involved." Gentile, *supra* 501 US at 1075; Seattle Times, *supra* 467 US at 32; Children's Village, *supra* 258 AD2d at 612.

For the above reasons, the TRO granted by the IAS court on November 20, 2012 violated the First Amendment, and should be reversed.

POINT VI: The IAS Court abused its discretion and exceeded its authority under CPLR Article 63 (Injunction) by granting, and twice extending, respondent's motion for preliminary relief barring appellants' counsel from communicating with Kaleida Health, where respondent Affinity's "rights respecting the subject of the action" were in no way violated or threatened by counsels communications with Kaleida Health, and where Affinity's counsel failed to allege, much less prove, that "immediate and irreparable injury, loss or damages will result" unless such speech was temporarily restrained.

It takes little more than a casual reading of the pertinent sections of CPLR Article 63 to reveal a number of fundamental flaws in respondent's counsel's request for injunctive relief and the IAS court's granting of the TRO that enjoined the extrajudicial speech of appellant's counsel:

> New York Civil Practice and Rules - Article 63 (Injunction)
>
> § 6301. Grounds for preliminary injunction and temporary restraining order. *A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual*, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. *A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.*
>
> Rule 6312. Motion papers; undertaking; issues of fact. (a) Affidavit; other evidence. *On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual*; …
>
> § 6313. Temporary restraining order. (a) *Generally. If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had*, a temporary restraining order may be granted without notice. *Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time*. …

CPLR 6301, 6312, 6313 (emphasis added).

The opening sentence of CPLR 6301, which is titled "Grounds for preliminary injunction and temporary restraining order", clearly and precisely provides the factual predicate for an order granting preliminary relief: "A preliminary injunction may be granted in any action where it appears that *the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual*…" CPLR 6301. [Emphasis added.] The significant role played by the above-italicized words of CPLR 6301 is underscored by the opening sentence of CPLR 6312(a), which provides in pertinent part: "*On a motion for a preliminary injunction the plaintiff shall show,* by affidavit and such other evidence as may be submitted, that there is a cause of action, and either *that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual…*" CPLR 6312(a). [Emphasis added.] Accordingly, to justify the filing of a motion for preliminary relief, the defendant must have allegedly engaged in conduct "in violation of plaintiff's rights respecting the subject of the action."

Appellants are unaware of any case law that analyzes CPLR 6301 and 6312 in a factual context similar in any way to the instant matter. The absence of such precedent most likely reflects the extent to which respondent's counsel were overreaching as they took steps "to curtail" what their client described as "nonsense," that is, Mr. Giacalone's unwanted communications. [R407] Prof. David A. Siegel has provided this concise description of the proper scope of a motion under CPLR 6301:

> … The plaintiff is seeking some kind of relief with respect o a particular "subject matter", and it is in respect of that very subject matter that the plaintiff needs an injunction lest the defendant do something to make a potential judgment "ineffectual."

D. Siegel, *New York Practice*, § 327 (3rd Edition). This Court, in a context entirely different from the instant matter, affirmed an IAS court's "Decision and Order" explaining the function of a motion for preliminary injunction in a manner consistent with Prof. Siegel's assessment *supra*:

> A preliminary injunction is a provisional remedy designed to maintain the status quo between the parties until litigation is concluded. (Citations omitted.) *A preliminary injunction prevents the defendant from violating plaintiff's rights with respect to the subject of the underlying action.* (Citation omitted.)
>
> …
>
> *New York Civil Practice Law and Rules §6301 authorizes preliminary injunctions in two circumstances. First, when the defendant threatens to violate, or actually violates, plaintiff s rights respecting the subject of the underlying action and the threatened or actual violation tends to render a judgment ineffectual…*

Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp., 24 Misc3d 1222 [A], 2009 NY Slip Op 51550 [U] (Sup. Ct., Onondaga Co. 2009) (emphasis added) *affd* 69 AD3d 212 (AD4 2009).

In the instant matter, the subject of plaintiff-respondent Affinity's action is the extinguishment of certain restrictive covenants encumbering eleven properties that it owns on the southeast corner of Elmwood and Forest Avenue in the City of Buffalo. [R31-44]. The "Wherefore" clause in respondent's complains seeks a judgment against defendants (including the appellants) granting the following relief: a declaration forever extinguishing the restrictive covenants; a declaration forever releasing Affinity's property from the restrictive covenants; a decree that respondent Affinity and its successors "have the right to use said premises for business purposes"; and a decree that defendants and their respective successors are barred from asserting any claims with respect to the restrictive covenants described in the complaint. [R43]

Two pertinent facts are indisputable. First, the focus of respondent's underlying action is narrow, the restrictive covenants encumbering the Affinity properties on Elmwood and Forest avenues. Second, Kaleida Health is not a party or potential witness and has absolutely no involvement with the subject litigation. [R146, 15] Nonetheless, the IAS court granted the drastic remedy of a TRO despite the absence of any allegations, much less proof, that appellants' counsel "*threaten[ed] or [was] about to do, or [was] doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual*." CPLR 6301, 6312(a). Furthermore, although the business

relationship between respondent's principals and Kaleida Health involves a development project unrelated to, and three-quarters of a mile away from, the properties that are the subject of Affinity's lawsuit, the preliminary relief granted in the November 20, 2012 TRO precludes Mr. Giacalone "from communicating directly or indirectly with Kaleida Health … concerning the subject matter of this litigation" [R10] Appellants are not aware of any rational nexus or connection between the relief granted by the IAS court and the sole purpose of a preliminary injunction, that is, "*prevent[ing]the defendant from violating plaintiff's rights with respect to the subject of the underlying action.*" Destiny USA, *supra*; CPLR 6301, 6312(a). In light of the above, the grant of the November 20, 2012 TRO was unauthorized by CPLR Article 63 and an abuse of discretion. *Id*; also see Sutherland Global Services v. Stuewe, 73 AD3d 1473 (AD4 2010) (plaintiff in action seeking to enforce non-competition agreement failed to demonstrate need for a preliminary injunction, a drastic remedy, "to protect its legitimate interests").

Disregard of CPLR 6301 and 6312's provision requiring "an act in violation of the plaintiff's rights respecting the subject of the action" is not the only fundamental flaw in the IAS court's grant of respondent's request for a TRO. Respondent's counsel and the court below also ignored the prerequisite for the grant of a TRO, that is, a showing that "immediate and irreparable injury, loss or damages will result unless the defendant is restrained before the [preliminary injunction] hearing can be held." CPLR 6301, 6313(a). The attorney affirmations submitted on behalf of respondent failed to allege, much less prove, the predicate for a TRO, the potential for immediate and irreparable harm to plaintiff's rights with respect to Affinity's restrictive covenant lawsuit absent the TRO. See Tesone v. Hoffman, 84 AD3d 1219, 1221 (AD2 2011); A.D. Bedell Wholesale Co. v. Philip Morris Inc., 272 AD2d 854 (AD4 2000) (by implication). The holding in a recent Appellate Division, Second Department, decision applies equally to the instant appeal:

> … [O]n this record, the plaintiff[ ] ha[s] not demonstrated a right to a temporary restraining order since [its] submissions did not show the danger of 'immediate and irreparable injury, loss or damages' if the temporary restraining order were not granted [CPLR 6313(a)].

Tesone, *supra* 84 AD3d at 1221.

In additional to the above-described errors, Justice Michalek granted the TRO requested on behalf of Affinity despite respondent's failure to demonstrate any of the requisites for preliminary relief: a likelihood of success on the merits, irreparable injury in the absence of injunctive relief, and a balance of equities in its favor. See, *e.g.*, Eastman Kodak Co. v. Carmosino, 77 AD3d 1434 (AD4 2010). Furthermore, the IAS court chose to ignore, not once, but three times, the principle repeatedly expressed by this Court that conclusory allegations alone are inadequate to support a party's claim that it will suffer irreparable harm if preliminary relief is not granted. See, *e.g.*, Glazer v. Brown, 55 AD3d 1385 (AD4 2008); Genesis II Hair Replacement Studio v. Vallar, 251 AD2d 1082 (AD4 1998); Sutton, DeLeeuw, Clark & Darcy v. Beck, 155 AD2d 962 (AD4 1989).

For all the above reasons, the TRO granted by Justice Michalek on November 20, 2012 and twice extended exceeded the IAS court's authority under CPLR Article 63, and was an improvident exercise of its discretion.

<u>POINT VII</u>: The IAS Court erred when it ruled that appellants' counsel had violated Rule 3.6 (Trial Publicity) of the Rules of Professional Conduct where counsel was not provided an opportunity to be heard on the charge, the "extrajudicial statements," if any, fell within Rule 3.6(c)'s "safe harbor" provisions, and the record lacks substantial evidence to support a finding that counsel knew or should have known that such statements would have a substantial likelihood of materially prejudicing an adjudicative proceeding.

As noted at "Point I" above, Justice Michalek took three actions in response to respondent's application for injunctive relief that directly implicate the First Amendment speech rights of appellants' counsel: the grant of respondent's TRO on November 20, 2013; the February 21, 2013 issuance of a CPLR 3103 protective order in place of the twice-extended TRO; and, the following determination in the January 8, 2013 Memorandum Decision that Mr. Giacalone had violated the "trial publicity" provision of the New York Rules of Professional Conduct ["RPC"], Rule 3.6:

> *The court determines that Mr. Giacalone's emails to Kaleida are "extrajudicial statement[s]" that he knew or reasonably should have known would be disseminated by means of public communication (by email) and "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" at issue.*

[R24-25] The argument that follows will show that the court below unfairly and improperly reached its finding that appellants' counsel had breached a lawyer's ethical obligation under Rule 3.6 without first providing him an opportunity to address the misconduct charge, and failed to meet its obligation under the constitution to balance counsel's freedom of expression rights against the State's legitimate interest in regulating the activity in question. <u>Gentile</u>, *supra* 501 US at 1075; <u>Seattle Times</u>, *supra* 467 US at 32.

The November 20, 2012 OSC/TRO submitted to the IAS Court alleges that appellants' counsel had violated Rules 3.4(e) and 4.4 (a) of the RPC, and, in doing so, had engaged in "frivolous conduct" as defined at 22 NYCRR Part 130. In reply, appellants presented arguments to the IAS court in support of their contention that the court lacked the authority to rule that Mr. Giacalone had violated the RPC provisions. The primary argument was based on the following principle expressed by the U.S. Court of Appeals for the Second Circuit:

…

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. Lefrak v. Arabian American Oil Co., supra, 527 F.2d at 1141. Plaintiff has failed to establish that taint here in our judgment. If the Liebman firm is guilty of professional misconduct, as to which we express no view, *the appropriate forum is the Grievance Committee of the bar association*. Whatever sanction if any that is imposed there will not affect the rights of a plaintiff long since embarked upon serious litigation.

…

… The canons of ethics are properly comprehensive and the heat of litigation easily provokes claims of misconduct…

See W.T. Grant Co. v. Haines, 531 F2d 671, 677 (CA2 1976) (emphasis added); U.S. v. Dennis, 843 F2d 652, 657 (CA2 1988). Appellants' second argument was premised on this Court's rule establishing the Attorney Grievance Committee structure which grants the grievance committees, and not the IAS courts, the authority to initially consider, investigate and determine the disposition of a complaint that a lawyer has engaged in misconduct: "The attorney grievance committee shall: (1) consider and investigate all matters involving allegations of misconduct by an attorney engaged in the practice of law in the respective judicial district…" 22 NYCRR 1022.19(b)(1).

The January 8, 2013 Memorandum Decision below states that the IAS court "*does not disagree*" with appellants' argument that it lacked the authority to grant the relief requested in respondent's application for injunctive relief under the Rules of Professional Conduct. [See R18-19's reference to R350-52.] However, rather than denying respondent's application, the IAS court, on its own initiative, proceeded to find that Mr. Giacalone had violated Rule 3.6. In stark contrast to the procedures established for grievance committees at 22 NYCRR 1022.19 *et seq.*, appellants' counsel was not given an opportunity to defend against the IAS court's *sua sponte* charge of misconduct. Had such an opportunity been provided, the following arguments would have been made:

(a) As argued in the affirmation submitted by Karen S. Smith, Esq., in support of Mr. Giacalone's motion to vacate the TRO, the IAS court lacked the authority to rule that appellants' counsel had violated the RPC provision. W.T. Grant, *supra*; U.S. v. Dennis, *supra*; 22 NYCRR 1022.19(b)(1).

(b) The Memorandum Decision's conclusion that Mr. Giacalone's "emails" to Kaleida are "extrajudicial statements" is legally and factually incorrect. Two of the three "emails" (sent October 5, 2012 and November 15, 2012, respectively) make no reference of any kind to the litigation pending before Justice Michalek. [R263, 274] Furthermore, only one sentence in the August 29, 2012 communication to Kaleida Health (a comment made at the "Contact Us" page of Kaleida's website) refers to the underlying lawsuit brought by respondent to extinguish the restrictive covenants burdening the Affinity properties: "… *Unable to convince the adjoining owners to approve its project, Affinity is now in court seeking to extinguish the restrictive covenants that protect its neighbors*." [R297, 331, 375-76] The three statements may have been made outside of Justice Michalek's courtroom, but they are not "extrajudicial statements" for purposes of Rule 3.6.

(c) Even if one were to presume, for the sake of argument, that Mr. Giacalone's August 29, 2012 comment to Kaleida is an "extrajudicial statement" for purposes of Rule 3.6, the reference to the existence of the lawsuit falls within the "safe harbor" provisions set forth at Rule 3.6(c)(1), that is, "a lawyer may state the following without elaboration: the claim… and, except when prohibited by law, the identity of the persons involved." Similarly, even if we were to presume, *arguendo*, that the reference to property code violations in the August 29, 2012 communication is somehow "the subject of this litigation," the code violations constitute "information contained in a public record," having been obtained pursuant to FOIL, and, therefore, fall within "safe harbor" of Rule 3.6(c)(2). Therefore, the communications sent by Mr. Giacalone to Kaleida Health do not justify the imposition of any disciplinary sanction or admonition, informal or formal, and any determination by Justice Michalek concluding otherwise

should be vacated. Markfield v. Association of the Bar of the City of New York, 49 AD2d 516 (AD1 1975).

(d) There is no basis in the record to support the IAS court's conclusion that Mr. Giacalone "knew or should have known" that his communications with Kaleida "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter":

(i) Kaleida has no involvement or known interest in the lawsuit pending before the IAS court.

(ii) Appellants' counsel had no reason to believe or predict at the time he forwarded each communication to Kaleida Health that he had any significant influence amongst the movers-and-shakers in Western New York's business community.

(iii) Any suggestion by respondent's counsel that Mr. Giacalone could materially prejudice the proceedings or adversely impact the relationship between the Chason Affinity principals and Kaleida Health is belied in the very first document submitted to the IAS court in support of respondent's OSC/TRO. In that document, Mr. Cross characterizes appellants' counsel in the following fashion: "… Mr. Giacalone, well known in this community for his repeated efforts to stall commercial development in Western New York…" [R146]

(iv) The emails exchanged between Kaleida Health and Mark Chason following each communication sent by Mr. Giacalone, which appear to reflect Kaleida Health and Mark Chason's perception of appellants' counsel as, at best, an irritant or foe, reinforce the reasons that Mr. Giacalone would not have predicted that his statements could materially prejudice Affinity's adjudicative proceeding. They also demonstrate that, in fact, there was no harm. There is no logical or rational reason for Affinity's counsel, or the IAS Court, to believe that the sophisticated officials running Kaleida Health would make a $65 million development decision based on a letter-to-the-editor or two

forwarded emails from an individual purportedly "well known" as an anti-development crusader.

(e) Mr. Giacalone's communications were sent between 08/29/12 and 11/25/12, approximately a year prior to the date jury venire and trial are scheduled to occur in the pending action, and, therefore, were highly unlikely to have any impact on the trial process.

(f) The "material prejudice" the Memorandum Decision has in mind is not one of the two "principal evils" that, according to the U.S. Supreme Court, Rule 3.6 aims to prevent, that is, "comments that are likely to influence the actual outcome of the trial," and "comments that are likely to prejudice the jury venire." Gentile, *supra* 501 US at 1075. Instead, the IAS court treats its "concern" that Mr. Giacalone is pushing for "a settlement or a change of plans for development of plaintiff's property" as the equivalent of an adverse impact on "the actual outcome of the trial." [R16, 28] Nothing in Gentile or any of the cases cited in the Memorandum Decision reflects such an expansive view of the role of Rule 3.6, or provides legal support for Justice Michalek's treatment of a party's decision to settle a lawsuit as a "material prejudice to an adjudicative proceeding." Throughout the Gentile majority opinion, the justification for allowing use of the less demanding "substantial likelihood of material prejudice" standard when disciplining a lawyer for extrajudicial statements is a desire to preserve the fundamental right to a fair trial. *Id*. As noted in a sentence borrowed by Chief Justice Rehnquist, "The very word 'trial' connotes decisions on the evidence and arguments advanced in open court." Gentile, *supra* 501 US at 1070 *quoting* Bridges v. California, 314 US 252, 271 (1941).

For the above-stated reasons, the IAS court lacked the authority to stigmatize appellants' counsel with a ruling that he had engaged in professional misconduct, erred in treating Mr. Giacalone's communications with Kaleida Health as prohibited conduct, and reached its determination without due process or the requisite substantial evidence. Furthermore, the IAS court's ruling offended the First Amendment in the following ways:

(a) Despite its conclusory statement that appellants' counsel "knew or should have known" that his communications with Kaleida "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter," the IAS court failed to objectively and judiciously balance the First Amendment rights of appellants' counsel against the State's legitimate interest in regulating the extrajudicial statements of a lawyer engaged in civil litigation, as required by Gentile, *supra*.

(b) By treating its "concern" that Mr. Giacalone is pushing for "a settlement or a change of plans for development of plaintiff's property" as the equivalent of a material adverse impact on "the actual outcome of the trial," the IAS court restricted the First Amendment rights of appellants' counsel without furthering a substantial governmental interest. Gentile, *supra* 501 US at 1075 (1991); Seattle Times, *supra* 467 US at 32.

(c) In failing to distinguish between the October 5, 2012 and November 15, 2012 statements and the website comment made on August 29, 2012, and by not expressly identifying which portions of the August 29, 2012 communication purportedly contradict a lawyer's duties under Rule 3.6, the IAS court failed to meet its obligation to insure that any limitation on Mr. Giacalone's First Amendment freedoms is no greater than is necessary to protect the governmental interest involved. Gentile, *supra* 501 US at 1075; Seattle Times, *supra* 467 US at 32; Children's Village, *supra* 258 AD2d at 612.

In light of the above, the IAS court's determination that appellants' counsel engaged in conduct contrary to a lawyer's responsibilities under RPC Rule 3.6 should be nullified.

POINT VIII: The IAS Court abused its discretion in denying appellants' request for an award of costs and sanctions against respondent Affinity and its attorneys for engaging in frivolous conduct, pursuant to 22 NYCRR Subpart 130-1.1, where Affinity's application for injunctive relief restraining opposing counsel's speech, accusations of unethical conduct, and request for costs and sanctions, were undertaken primarily to harass or maliciously injure appellants' counsel, and were pursued despite the absence of any potential harm to Affinity's business relationship with Kaleida Health.

On November 20, 2012, Justice Michalek granted respondent's request for a TRO prohibiting appellants and their counsel from communicating with Kaleida Health "concerning the subject litigation." [R141] Seven days later, on November 27, 2012, appellants cross-moved for costs and sanctions (including reasonable attorney's fees) against respondent's counsel and/or respondent Affinity, pursuant to 22 NYCRR 130-1.1, for engaging in the frivolous act of filing its application for injunctive relief, costs and sanctions. [R202-203] Rather than address the parties' "frivolous conduct" motion and cross-motion substantively, the January 8, 2013 Memorandum Decision merely states the following: "All requests for sanctions are denied…" [R29-30] The IAS court abused its discretion by denying appellants' application for costs and sanctions.

Conduct is frivolous under 22 NYCRR 130-1.1 if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" or "it asserts material factual statements that are false." 22 NYCRR 130-1.1[c][1], [2], [3]. Making colorable claims may constitute frivolous conduct if the primary purpose is to delay or prolong the resolution of the litigation, or to harass or maliciously injure the other party. Kaygreen Realty Co. v. IG Second Generation Partners, 78 AD3d 1008, 1009 (AD2 2010); Ofman v. Campos, 12 AD3d 581, 582 (AD2 2004); Gordon v. Marrone, 202 AD2d 104, 109-110 (AD2 1994). Whether respondent's November 20, 2012 motion was "completely without merit" or somehow can be construed as asserting "colorable claims," the IAS court's denial of appellants' application for costs and sanctions was an improvident exercise of its discretion in light of the following circumstances and legal principles:

(a) Respondent's counsel, motivated by the anger of its clients and a desire to harass, intimidate and embarrass appellants' counsel, [R314, 407] sought preliminary relief, declarations that Mr. Giacalone had violated two specific Rules of Professional Conduct, and costs and sanctions, without providing the IAS court with either legal support for their contentions, or evidentiary proof of injury to their clients. Even if the claims were "colorable', the filing of Affinity's application for the primary purpose of retribution or to harass or maliciously injure appellants' counsel constitutes "frivolous conduct." See Kaygreen, *supra*; Mascia v. Maresco, 39 AD3d 504, 506 (AD2 2007).

(b) Respondent' counsel abused a lawyer's authority to report professional misconduct [RPC Rule 8.3(a)], and wrongfully used the Rules of Professional Conduct as a "procedural weapon" to harass and intimidate, and to silence communication that displeased respondent and the principals of the Chason Affinity companies. In doing so, they subverted the purpose of the Rules of Professional Conduct and the integrity of the judicial process. The New York State Bar Association's Committee On Professional Ethics provides this pertinent warning:

> …
> It bears emphasis that this right to report misconduct … in unquestionably susceptible to abuse by attorneys seeking to gain advantages or concessions from other lawyers in the course of litigation … or by attorneys acting purely out of spite… [I]t would be patently improper for a lawyer to make a report of misconduct and subject another lawyer to investigation without having a reasonable basis for doing so. [Citations omitted]

NYSBA Committee on Professional Ethics, Opinion #635 09/23/1992 [R226-228]. Similarly, the Preamble to the New York RPC (effective 04/01/2009) includes the following caveat: "[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." NYRPC, Preamble, Comment12 [R233].

(c) Respondent's counsel continued to affirm under oath that Mr. Giacalone's communications had been made for the sole purpose of embarrassing and harming their clients despite the fact that the City of Buffalo had issued notices of property maintenance code

violations for seven of Affinity's properties in response to legitimate complaints, and in the face of the photographic proof of the severity of the existing conditions of Affinity's Elmwood Avenue properties. [R250-256, 402-404]

(d) Respondent's counsel continued to pursue the drastic remedy of preliminary relief and a prior restraint against appellants' counsel without submitting any evidentiary proof of immediate and irreparable harm, as required by CPLR Article 63 and this Court's precedent, at a time "when its [application's] lack of legal or factual basis was apparent [or] should have been apparent, [and had been] brought to the attention of counsel." 22 NYCRR 130-1.1(c); also see Astrada v. Archer, 71 AD3d 803 (AD2 2010). [R207-208, 313-315]

(e) Respondent's counsel's submission and continued pursuit of Affinity's meritless application constitute a significant waste of judicial resources. As the Appellate Division, Second Department, has stated:

> Litigants who use our court system for improper purposes, such as for retribution and harassment, may be sanctioned under the rules designed to deter frivolous conduct.
>
> … Enforcement of the sanctions rule is essential to deter conduct that wastes judicial resources and inhibits the proper administration of the court system…

Gordon, *supra* 202 AD2d at 105, 111; also see New Jerusalem (West) v. NYS Electric & Gas, 19 AD3d 823 (AD3 2005) *lv to app denied* 5 NY3d 713 (2005).

(f) As reflected in the IAS court's January 8, 2013 Memorandum Decision, the gravamen of respondent Affinity's November 20, 2012 application is its claim that Mr. Giacalone's communications with Kaleida Health had resulted in substantial harm to Affinity, Mark Chason, Jeff Birtch and the Chason Affinity companies. :

> … *Plaintiff asserts that certain conduct engaged in by defense counsel has violated Rules of Professional Conduct (the RPC)* ***to plaintiff's detriment****.* [Emphasis added.]

[R11-12] Respondent's counsel, Dennis C. Vacco, Esq., in response to multiple reminders in appellants' motion papers that Affinity had failed to support its request for preliminary injunctive relief with proof that Mr. Giacalone's communications with Kaleida Health had or would cause

immediate and irreparable injury if preliminary relief were not granted [R207-208, 313-316], made the following unsupported assertion to the IAS Court in his December 11, 2012 affirmation in opposition to the motion to vacate the TRO:

> *17. If Mr. Giacalone was permitted to communicate with Kaleida Health while the application for a permanent injunction was pending, it was established that Mr. Chason, Mr. Birtch and the Chason Affinity's [sic]* ***rare and unique opportunity to develop the Gates Circle [sic] would have been in jeopardy causing them irreparable harm***. [Emphasis added.]

[R342] The false and deceptive nature of Mr. Vacco's belated claim of "irreparable harm" [the first use of that term in any of respondent's motion papers] is demonstrated by the series of email messages that were exchanged between Kaleida Health officials and Mark Chason in response to Mr. Giacalone's communications with Kaleida Health. [See R405-408] Conduct constituting the assertion of "material factual statements that are false" is "frivolous conduct" under 22 NYCRR Subpart 130-1. 22 NYCRR 130-1.1(c)(3).

For all the above reasons, it was an abuse of discretion for the IAS court to deny appellants' application for costs and sanctions.

<u>POINT IX</u>: The IAS court Judge applied the incorrect standard in response to appellants' request, pursuant to 22 NYCRR 1003(E)(1), that he disqualify himself in the underlying proceeding, where he "searched his conscience and perceived no bias or prejudice," but failed to ask whether his "impartiality might be reasonably questioned" as a result of the court's handling of respondent's application for injunctive relief.

By Notice of Cross-Motion dated January 18, 2013, appellants' applied to the IAS court, pursuant to Section 100.3(E)(1) of the Rules of the Chief Administrator, asking Justice Michalek to disqualify himself in the proceeding below. [R369-370] "Appeal No. 2" in this consolidated appeal is taken from the IAS court's March 7, 2013 Order denying that application. Justice Michalek provided the following explanation for the denial in his post-argument colloquy on February 1, 2013:

> …
> … I have searched my conscience and I perceive no bias or prejudice against Mr. Giacalone or his clients, or in favor of the plaintiff or its counsel.
> Again, Court would assert that, again, counsel as advocates are certainly entitled to their own opinions and to voice their opinions and/or proceed to appeal, et cetera. However, they're not entitled to their own facts. Those are before the Court, those are in the record and the Court's confident the record can stand on its own.
> …
> At any rate, Court's competent [sic] it can fairly and justly preside over this matter. The cross-motion is denied…

[R366-67]

It is appellants' contention that Justice Michalek, in denying the cross-motion, failed to apply the standard mandated by 22 NYCRR 100.3(E)(1), that is, "Might his impartiality be reasonably questioned in the proceeding pending before him?" Alternatively, if the IAS court did, in fact, apply this standard, its denial of the disqualification motion should be reversed as an abuse of discretion in light of the bias, either in favor of respondent's counsel or respondent, or against appellants or their counsel, reflected in the IAS court's one-sided handling of respondent's application for injunctive relief. [See Brief for Appellant, *supra*.]

In pertinent part, Section 100.3(E)(1) provides the following:

> **Rules of the Chief Administrator of the Courts**
> **Part 100. <u>Judicial Conduct</u>.**
> …

§ 100.3. A Judge Shall Perform the Duties of Judicial Officer Impartially and Diligently

…

(E) Disqualification.

(1) A Judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a)(i) the judge has a personal bias or prejudice concerning a party..

22 NYCRR 100.3(E)(1). Additionally Part 100 defines "impartiality" as follows:

§ 100.0. Terminology

The following terms used in this Part are defined as follows:

…

(R) "Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

…

22 NYCRR 100.0(R).

Appellants are unaware of any facts that would require mandatory disqualification of Justice Michalek pursuant to Section 14 of the State's Judiciary Law. In the absence of grounds for mandatory disqualification, a judge, generally, is "the sole arbiter of recusal," and recusal is considered "a matter of personal conscience. " See In the Matter of Murphy, 82 NY2d 491, 495 (1993); People v. Smith, 63 NY2d 41, 68 (1984).

Although appellants have not identified any Fourth Department decision that addresses this issue, at least two other Appellate Division departments have recognized exceptions to this "general rule." In Johnson v. Hornblass, 93AD2d 732 (AD1 1983), the First Department expressed the principle that bias or prejudice will not be grounds for disqualification "*unless shown to affect the result*":

…

In the absence of a violation of express statutory provisions, bias or prejudice or unworthy motive on the part of a judge, unconnected with an interest in the controversy, will not be a cause for disqualification, *unless shown to affect the result*. [Emphasis added.]

…

Id. While the court in Hornblass concluded that the record did not establish "such an abuse of discretion" in the denial of recusal "to warrant our intervention," it did "suggest that the

'appearance of justice' might be better served by [the judge's] recusal." *Id*; also see Murphy, *supra*, 82 NY2d at 495 ("Judges should strive to avoid even the appearance of partiality," and that "the 'better practice' would be to err on the side of recusal in close cases.").

The First Department based its ruling in Hornblass on the language in Canon 2 of the Code of Judicial Conduct, that a judge shall "avoid impropriety and the appearance of impropriety," and the provision of Canon 3(C)(1) which states: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party…" Hornblass, *supra*. Notably, the language of Canon 3(C)(1) is identical to 22 NYCRR 100.3(E)(1) except for one word. Whereas the Canon makes disqualification discretionary by use of the word "should," Section 100.3(E)(1) uses "shall" to indicate that disqualification is mandatory when "impartiality might reasonably be questioned."

The First Department was recently asked, in Orr v. Yun, 95 AD3d 237 (AD1 2012), to reverse a Supreme Court judge's denial of a recusal motion based on the "impartiality might reasonably be questioned" standard in 22 NYCRR 100.3(E)(1). Consistent with its decision nearly three decades earlier in Hornblass, the First Department acknowledged that a denial of a recusal request can only be reversed if there is "an abuse of discretion" or if the judge's ruling "demonstrates bias." Orr, *supra* 95 AD3d at 661. Echoing the language in Hornblass quoted above, "*unless shown to affect the results*," the Second Department, on a motion to set aside a jury verdict based on the alleged bias of the judge, recently explained, "The inquiry on appeal is limited to whether the judge's bias, if any, unjustly affected the result to the detriment of the complaining party." Schwartzberg v. Kingsbridge Heights Care Center, 28 AD3d 465 (AD2 2006).

The following is a non-exhaustive list of examples, in no particular order, of actions taken by Justice Michalek in response to Affinity's November 20, 2012 OSC/TRO that might reasonably place his impartiality into question:

(1) Justice Michalek granted and twice extended a TRO restricting Mr. Giacalone's speech without any proof of immediate and irreparable injury. [R207-08, 313-15, 388-390]

(2) For no obvious reason, Justice Michalek admonished Mr. Giacalone in open court, on November 30, 2012: "*Do not play games with a Supreme Court Judge on a TRO*." [R418]

(3) The IAS court provided appellants' counsel no opportunity to be heard regarding the Memorandum Decision's conclusions he had violated RPC Rule 3.6 (trial publicity), and that it was constitutional to restrain his speech by way of a protective order issued pursuant to CPLR 3103(a), despite the fact that such legal arguments had not been asserted by respondent, addressed by the parties in writing or orally, or previously raised by the Court. [R27, 391]

(4) Despite the fact that Mr. Giacalone asked the City of Buffalo to inspect the Affinity properties for violations, and obtained copies of the 7/16/12 notices of violation through FOIL, the Memorandum Decision claims such information "stems from pretrial discovery." [R25]

(5) In order to justify the issuance of a "protective order" pursuant to CPLR 3103, Justice Michalek rejects Mr. Giacalone's explanation for sending the various communications to Kaleida Health, and fabricates a so-called "'*elephant in the room' - that Mr. Giacalone's intent is to continue to push Kaleida to withdraw from the Gates Circle deal unless plaintiff settles or resolves the instant litigation…*" [R28]

(6) Justice Michalek's "concerns" regarding Mr. Giacalone's "intent" were so strong that they were "*not vitiated by the pictures [of dilapidated houses] or even the fact that those problems exist*." [R418, 381, 402-404]

(7) Justice Michalek never asked respondent's counsel to explain the discrepancy between their claims that Mr. Giacalone's emails to Kaleida were harming Chason Affinity's business relationship with Kaleida, and the friendly emails exchanged between them. [R405-08]

In light of the above, Justice Michalek's denial of the disqualification motion should be reversed, or, in the alternative, the matter should be remanded for consideration of the motion under the standard expressed in 22 NYCRR 100.3(E)(1).

CONCLUSION

For the reasons stated above, defendants-appellants respectfully ask this Court, in "Appeal No. 1", to reverse Justice Michalek's February 21, 2013 Order (except for that portion that denied respondent's motion for costs and sanctions), to vacate the CPLR 3103 protective order precluding appellants' counsel, Arthur J. Giacalone, Esq., from communicating with Kaleida Health, to grant appellants' application for costs and sanctions, and to declare that the denial of appellants' motion to vacate the TRO was improper, and such other and further relief as to this Court seems proper, including the costs and disbursements of this appeal; in "Appeal No. 2," to reverse Justice Michalek's denial of the disqualification motion, or, in the alternative, remand the matter to the IAS court for consideration of the motion under the standard expressed in 22 NYCRR 100.3(E)(1), and such other and further relief as to this Court seems proper, including the costs and disbursements of this appeal.

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East Aurora, New York

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