

Burt Neuborne
40 Washington Square South
New York, New York 10012
212 998-6172
burt.neuborne@nyu.edu

February 14, 2014

Hon. Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U. S. Courthouse
40 Foley Square
New York, New York 10007

Re: *David Floyd v. City of New York*, 13-3088
Jaenean Ligon, et al. v. City of New York, et al., 13-3123

Dear Ms. Wolfe:

The undersigned, as proposed *amici curiae*, write to seek clarification of the relationship between and among: (1) the Court's Order of Abeyance, issued on November 25, 2013; (2) the Motion Panel's order, issued on January 31, 2014, requesting submissions from proposed-intervenors in connection with the parties' joint motion for a limited remand filed on January 31 2014; and (3) submissions filed on behalf of five-proposed intervenors on February 7, 2014.

We offer the following brief procedural summary in order to place our request for clarification in context. The undersigned filed a motion with the en banc court on November 18, 2013 (supplemented on November 25, 2013), seeking leave to appear as *amici curiae* in connection with en banc reconsideration of the order of a three-judge Motion Panel of the Court ("the Motion Panel"), dated November 13, 2013, directing the prospective removal of Hon. Shira A. Scheindlin (hereafter "the District Judge") as presiding judge in *David Floyd v. City of New York*, 13-3088 and *Jaenean Ligon, et al. v. City of New York, et al.*, 13-3123. We argued in our motion that the Motion Panel's order raised three questions of exceptional importance to the administration of justice warranting en banc reconsideration:

1. Was the Motion Panel empowered to grant proposed *amici curiae* leave to appear in order to present legal and factual objections to a *sua sponte* order directing removal of a District Judge pursuant to 28 U.S.C. §2106? Proposed *amici* argued unsuccessfully that the Motion Panel was empowered to utilize the procedures set forth in Rule 21(b)(4) F. R. App. Proc. that authorize *amici curiae* to seek leave to appear in connection with appellate review of a motion to recuse a District Judge under 28 U.S.C. §455.
2. What is the substantive standard for *sua sponte* judicial removal of a District Judge under 28 U.S.C. §2106? The Motion Panel applied the standard governing motions for recusal under 28 U.S.C. §455. Proposed *amici* argued unsuccessfully that where parties fail to seek recusal under §455, *sua sponte* removal under 28 U.S.C. §2106 should be reserved for egregious settings.
3. Did the Motion Panel's failure to afford proposed *amici* any opportunity to explain the context of the District Judge's actions and/or to inform the Motion Panel concerning the application of the related case rule in the Southern District of New York deprive the panel of crucial information needed to assess whether an objective observer *in possession of all the facts* might reasonably question the impartiality of the District Judge? The Motion Panel has insisted that, despite its refusal to permit *amici* to explain the context of the District Judge's actions, it was in possession of the necessary information to act *sua sponte* and without notice.

The undersigned noted, as well, that the Circuit has acted collectively in setting the substantive and procedural standards in connection with the removal of a District Judge under 28 U.S.C. §2106. See *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (collective per curiam).

On November 25, 2013, the Court issued an Order of Abeyance, a copy of which is annexed hereto, designed to “maintain and facilitate the possibility that the parties might request the opportunity to return to the District Court for the purpose of exploring a resolution.” The Order of Abeyance deferred consideration of the undersigned's request for en banc reconsideration, and also deferred consideration of motions for en banc reconsideration filed by the appellees in *Floyd* and *Ligon* challenging orders of the motion panel: (a) retaining jurisdiction over all aspects of the pending appeals, including the merits and disposition of motions to intervene; (b)

staying the orders of the District Court; and (c) removing the District Judge. The Order of Abeyance deferred, as well, consideration of pending motions to intervene filed by several labor unions representing police officers.

On January 31, 2014, acting pursuant to the Order of Abeyance, the parties in *Floyd* and *Ligon* filed a joint motion on consent with the Motion Panel for a limited remand to the District Court to permit approval of a settlement that has apparently been reached in both cases. The Motion Panel immediately issued an order, dated January 31, 2014, deferring consideration of that motion pending submissions by proposed intervenors on or before February 7, 2014, and responses by the parties on or before February 14, 2014. On February 7, 2014, several proposed intervenors filed submissions with the Motion Panel objecting to the limited remand. Despite the Order of Abeyance, proposed intervenors' submissions seek vacatur of the District Court's decisions in both *Floyd* and *Ligon* on grounds of judicial misconduct and mootness, and urge the Motion Panel to decide their pending motions to intervene.

The relief sought by the proposed intervenors appears to be beyond the scope of the power to remand for settlement purposes under the Order of Abeyance. Accordingly, the undersigned request guidance as to the current status of the Order of Abeyance. If the Order of Abeyance remains in full force and effect, the undersigned recognize that no action is necessary or appropriate in connection with the various pending motions for en banc reconsideration. If, however, the Order of Abeyance is to be modified to authorize the Motion Panel to consider requests by proposed intervenors to vacate the decisions below or to intervene as formal parties without resolving the parties' pending requests for en banc review, the undersigned request that the Order of Abeyance be modified, as well, to permit immediate consideration by the full Court of the pending motions for en banc review.

We respectfully request that copies of this letter be provided to the members of the en banc court.

Respectfully submitted,

Burt Neuborne
Norman Dorsen
Arthur R. Miller
Judith Resnik
Frederick A. O. Schwarz, Jr.

Proposed *Amici Curiae*

cc: all counsel of record

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**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of November, two thousand thirteen,

Jaenean Ligon, et al.,

Plaintiffs-Appellees,

ORDER
13-3123

v.

City of New York, et al.,

Defendants-Appellants.

David Floyd , et al.,

Plaintiffs-Appellees,

13-3088

v.

City of New York, et al.,

Defendants-Appellants.

Plaintiffs, separately in these two consolidated cases, moved for *en banc* consideration of the Court's October 31, 2013 decision and supplemented those motions with requests for *en banc* review of the Court's November 13, 2013 decisions.

Defendants and *amici curiae* who were granted leave to participate in the oral argument of the stay motion on October 29, 2013 were invited to respond to the motions for *en banc* consideration. Other *amici curiae* have moved for permission to be heard on the *en banc* motions. All the motions related to *en banc* consideration are pending before the Court.

In addition, two motions to intervene in the appeal are pending before the Court.

On November 21, 2013 the Court denied Defendant's motions to vacate the district court orders dated February 14, 2013 and August 12, 2013 "without prejudice to consideration as part of the appeal on the merits, or any application to us for a return of the cases to the District Court for the purpose of exploring a resolution."

To maintain and facilitate the possibility that the parties might request the opportunity to return to the District Court for the purpose of exploring a resolution, IT IS HEREBY ORDERED, that the motions for en banc consideration, the related FRAP 29 motions and the motions to intervene are held in abeyance pending further order of the Court. Papers due to be filed in the motions to intervene should be filed as directed by order dated November 19, 2013. The briefing schedule set in the October 31, 2013 decision remains in effect.

For the Court:
Catherine O'Hagan Wolfe
Clerk of Court

 Catherine O'Hagan Wolfe

