UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-- x

UNITED STATES OF AMERICA

- v - Criminal Case No. 23-00082 (EK)

CARLOS WATSON and
OZY MEDIA, INC.,

Defendants.

-- x

REPLY MEMORANDUM OF LAW ON BEHALF OF THE DEFENDANTS IN FURTHER SUPPORT OF THEIR MOTION TO DISQUALIFY THE HONORABLE ERIC R. KOMITEE

Andrew J. Frisch
The Law Offices of Andrew J. Frisch, PLLC
40 Fulton Street, 17th Floor
New York, New York 10038
(212) 285-8000
afrisch@andrewfrisch.com

Attorney for Carlos Watson and OZY Media, Inc.

November 3, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-- x

UNITED STATES OF AMERICA

- v - Criminal Case No. 23-00082 (EK)

CARLOS WATSON and
OZY MEDIA, INC.,

Defendants.

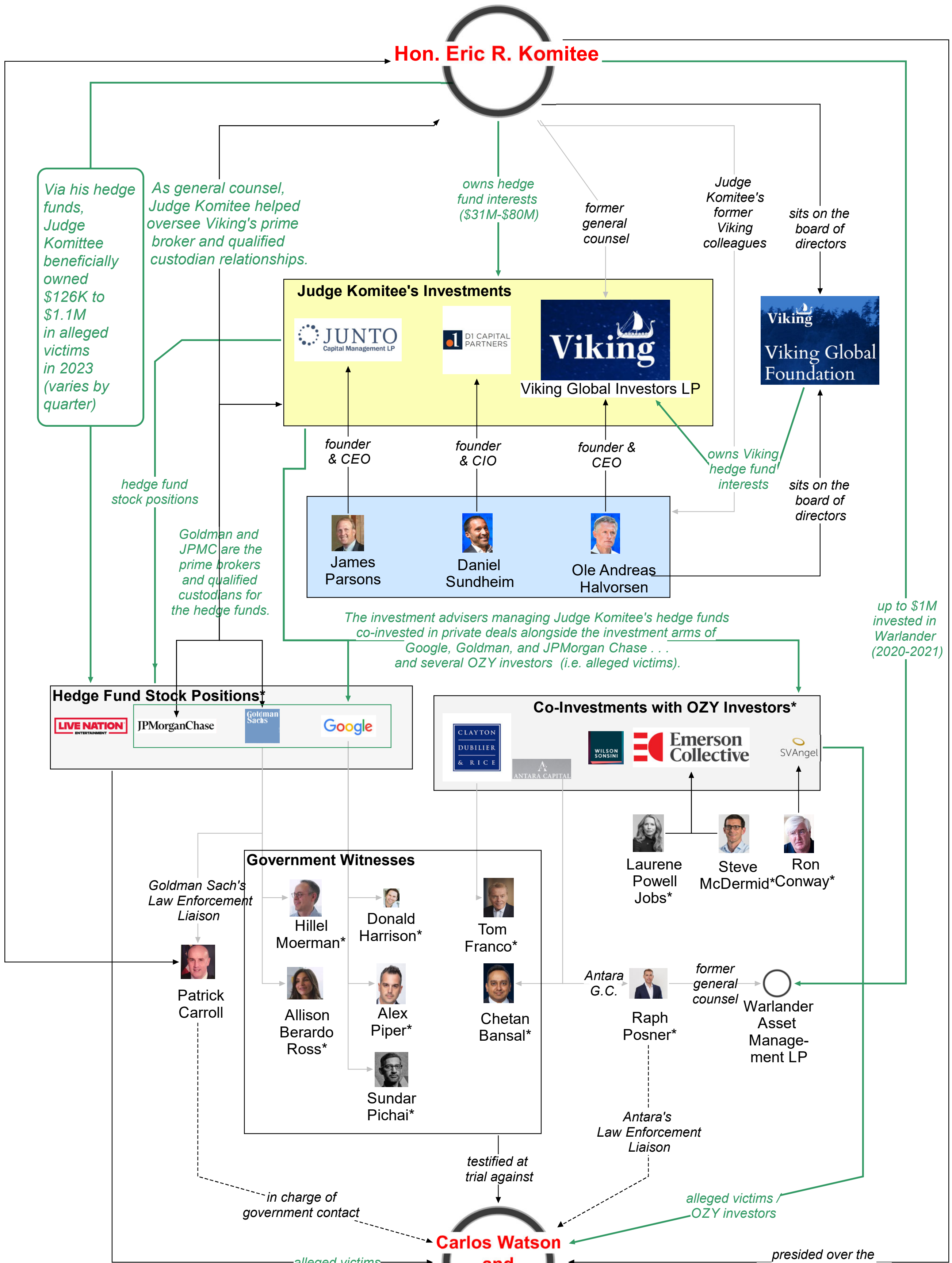
-- x

REPLY MEMORANDUM OF LAW ON BEHALF OF THE DEFENDANTS IN FURTHER SUPPORT OF THEIR MOTION TO DISQUALIFY THE HONORABLE ERIC R. KOMITEE

This Reply Memorandum of Law is respectfully submitted on behalf of Defendants Carlos Watson and OZY Media, Inc. ("OZY") in further support of their motion for an order disqualifying the Honorable Eric R. Komitee from this case, vacatur of the convictions of the Defendants, and dismissal of the indictment.

The government's opposition ignores the letter, spirit, and purpose of 28 U.S.C. § 455 and Judge Komitee's multi-layered entanglements with this case, demonstrated on the chart that follows on the next page.

Judge Komitee's Case Overlap 2023



GREEN arrows represent ownership or financial interests

BLACK arrows represent control or institutional relationships

GRAY arrows represent employment relationships

* ASTERISK indicates an individual or company named in ECF No. 141 (Gov't's List of Persons, Entities, and Places)

A. This motion is timely.

The government claims that this motion for recusal is untimely (Gov't Br at 6-9), but such motions are untimely only where the grounds for recusal were known to the defendants long before seeking recusal. *See In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995). A motion is timely where, as here, it is filed "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *See Gil Enters. v. Delvy*, 79 F.3d 241, 247 (2d Cir. 1996). The grounds warranting recusal here were uniquely known to Judge Komitee when he was assigned to this case and not known to the defense until last month.

The judge and the government gave the defense no reason to believe that any actual conflict or appearance of partiality could be of concern. In advance of a conference on March 6, 2023, just twelve days after the Indictment was filed, the government filed its "List of Interested Parties" pursuant to Fed. R. Cr. P. 12.4 and did so *ex parte* and under seal. At the conference, Judge Komitee said that he "didn't see any *overlap* between the people and entities listed there [the disclosure pursuant to Rule 12.4] on the one hand, and my bio on the other hand" and asked the government "to confirm that [it didn't] see anything along those lines either." *See* Transcript of Mar. 6, 2023 ("Tr of Mar 6, 2023," Docket No. 29) at 7 (emphasis added). Judge Komitee said that it would be "meaningful" if the government saw "the name Viking in anything" and asked if anyone had seen "[a] current list of investors [in Defendant OZY Media Inc.] and their percentage ownership." *Id.* at 8-9.

Judge Komitee in March 2023 had unique access to his overlap with this case and an obligation to "inform himself about his personal and fiduciary financial interests," *see* 28 U.S.C. 455(c), to avoid an "objective appearance of a conflict of interest requiring disqualification under Section 455(a)." *See Chase Manhattan Bank v. Affiliated FM Ins. Co*, 343 F.3d 120, 129 (2d Cir. 2003). Judge Komitee knew or should have known that he held positions in Alleged Victims through D1 and Junto in addition to Viking, he knew of his professional relationships with Goldman and JPMC as Viking's prime brokers and qualified custodians, and he knew or should have known of Viking's co-investments with OZY's investors and Alleged Victims beginning when he was Viking's General Counsel. Judge Komitee disclosed none of it and did not adequately discharge his obligation to "inform himself" about his interests just by reviewing the government's notice pursuant to Rule 12.4 and asking the government if it had seen the name "Viking in anything," such as a list of investors in OZY. The government, of course, was presumably not privy to facts about Judge Komitee's financial, professional, and personal relationships to which he had unique actual or constructive knowledge. While Judge Komitee at the conference asked the defense if it had "[a]ny questions or comments" on the subject (Tr of Mar 6, 2023 at 9), the defense had no reason to question Judge Komitee's assurances nor has the defense *ever* been privy to the government's filing pursuant to Rule 12.4, which remains *ex parte* and under seal.[1]

"[L]awyers do not routinely search judges' financial disclosure forms - - the only information available on a particular judge's financial holdings - - but even if they did, those forms are generally a minimum of four months out-of-date, i.e., the forms are filed by May [15] and report holdings and transactions for the previous calendar year. Judges therefore bear the

[1] Despite the government's representation to defense counsel via email on October 17, 2024, that it would internally discuss counsel's request for disclosure of the sealed filing and also determine whether a court order was needed to share it, the government has not since responded, nor does it mention the filing in its opposition. The Court should immediately unseal the filing, make it available, and permit the defense to address it in support of this motion.

principal burden of compliance" with Section 455. *Chase Manhattan Bank*, 343 F.3d at 130-31. *See* Andrew L. Wright, *"Invested in the Outcome: When the Judge Owns Stock in the Victim of the Crime,"* University of Chicago Legal Forum: Vol. 1998: Issue 1, Article 20, at 495[2] ("[A] defendant reasonably might want to know how long a judge who refuses to recuse himself has owned the stock in question, what percentage of the judge's entire investment portfolio the stock constituted, or why the judge invested in that company in the first place. Yet a defendant is not entitled to this information. The judge is neither subject to any voir dire procedure nor permitted to testify in court.").

Even then, neither the 2023 Disclosure nor any other of Judge Komitee's disclosures themselves established his multi-layered entanglements with this case. *See Chart, supra.* They were revealed only after the 2023 Disclosure was made available and only by happenstance when the defense elected to conduct an analysis over the last month, which the law exclusively required Judge Komitee to conduct almost two years ago. *See* Wright, *"Invested in the Outcome"* at 495 n 88 ("Most judges, thinking themselves capable of objectively evaluating a case, react poorly when someone questions their impartiality . . . . Moreover, a lawyer may hesitate to challenge a lifetime-tenured federal judge before whom he is likely to appear again because he may fear the judge will dislike him. *See also* David C. Hjelmfelt, Statutory Disqualification of Federal Judges, 30 U Kan L Rev 255, 256 (1982) ('[B]oth lawyers and clients recognize the potentially disastrous effects on their case of unsuccessfully seeking to disqualify a judge.').").

---

[2] *Available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1263&context=uclf*

But even if a defendant has an independent obligation to scrutinize a judge's representation of no actual conflict or appearance of partiality, Judge Komitee's assurance on the record at the conference on March 6, 2023, coupled with the unavailability of the 2023 Disclosure until after trial (and the continuing unavailability of Judge Komitee's disclosure for 2024) constitute good cause for any untimeliness, which the government acknowledges is a relevant factor. *See* Gov't Br at 3-4; *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333-34 (2d Cir. 1987) ("[I]n considering the question of timeliness, the actual time elapsed between the events giving rise to the charge of bias or prejudice and the making of the motion is not necessarily dispositive . . . . A number of factors must be examined, including whether . . . . the movant can demonstrate good cause for delay.").

The government claims that the defense nonetheless had no good cause for the timing of this motion because (1) Judge Komitee's financial disclosure for 2021 established that he held positions in unspecified investments through Viking; and (2) the government began to provide discovery on April 21, 2023, identifying alleged victims. *See* Govt Br. at 8-9; Docket No. 55. The state of Judge Komitee's finances in 2021 - - two years before the Indictment in this case - - was not apparently relevant to his representations at the conference in 2023, which he never corrected or modified as the case proceeded through pretrial proceedings, the government's filing of its list of names and witnesses as part of *voir dire* (Docket No. 141), and trial. The defense never had a window into Judge Komitee's financial, professional, and personal relationships, which likely remains only partially opened. For precisely this reason, Section 455 burdens judges with identifying potentially and apparently conflicting relationships and does not expect defendants to figure it out on their own.

The government's view of timeliness, if adopted, would upend Section 455 and the cases that interpret it, untenably encourage litigants to question judges about their representations, and require litigants to conduct their own independent investigations into judges, potentially including engagement of private investigators and experts on private capital markets, and the type of sophisticated financial analysis conducted here for which the lion's share of defendants lack the wherewithal. Section 455 keeps that Pandora's Box closed by putting the burden on judges to "carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *See Litovich v. Bank of Am. Corp.*, 106 F.4th 218, 226-27 (2d Cir. 2024) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988)).

B. The Defendants did not waive their motion for recusal.

A judge's knowledge about and unique access to his or her financial, professional, and personal interests underscore Section 455(e), which provides that a defendant can *never* waive a violation of Section 455(b) and can only waive a violation of Section 455(a) *after* full disclosure:

> No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455(e). *See Gil Enters. v. Delvy*, 79 F.3d at 247; *In re Kensington Int'l, Ltd.*, 368 F.3d 289, 294 (3d Cir. 2004) ("The evil that a timeliness requirement is intended to prevent - - namely, holding in reserve a recusal demand until such time that a party perceives a strategic advantage - - is served by requiring actual knowledge. Because the Petitioners did not themselves learn about the Advisors' conflict of interest . . . until shortly before they moved for disqualification, their motions were timely."); *Summers v. Singletary*, 119 F.3d 917, 921 (11th

Cir. 1997) ("We hold that a motion to disqualify filed under § 455(b) must be filed within a reasonable time after the grounds for the motion are ascertained."); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) ("While there is no *per se* rule that recusal motions must be made at a fixed point in order to be timely, see *Preston* (section 455 motion timely even though made 18 months after assignment to district court judge and shortly after an adverse discovery ruling), such motions 'should be filed with reasonable promptness after the ground for such a motion is ascertained.'" (quoting *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991)).

Waivers are found only where a judge had previously disclosed the conflict to the parties on the record, and recusal is denied where a judge's financial interest was relatively negligible. *See, e.g., United States v. Lauersen*, 348 F.3d 329, 333 (2d Cir. 2003) (judge affirmatively disclosed holdings in multiple companies all of negligible value); *United States v. Ravich*, 421 F.2d 1196, 1205 (2d Cir. 1970) ("the judge remembered and disclosed that he owned some 325 shares of stock" in bank worth between $10,000 and $15,000). Here, Judge Komitee never affirmatively disclosed the extent of his financial interests in the victims (measuring at least into six and seven figures) nor the extent of his related professional and personal relationships.

C. Judge Komitee's overlap with this case requires recusal.

The government in its opposition to recusal declines fulsomely to address all of Judge Komitee's multi-layered entanglements with this case, demonstrated in the summary chart, *supra*.

The government refuses to see the forest for the trees. While each of Judge Komitee's connections may itself require recusal, this motion is based on a multiplicity of inter-related connections, including, but not limited to, the extent of Judge Komitee's interests in alleged victims through Viking, D1, and Junto; Viking's and D1's co-investments with alleged victims; Viking's co-investments with investors in OZY; Judge Komitee's relationships with victims; his ongoing friendships; his membership on the board of Viking's Foundation with current principals of Viking and former colleagues; and the potential that Judge Komitee could benefit from restitution. Here, a forest shadows this case even as the government takes an axe to any one of its trees. Not one of the cases on which the government relies presents the multiplicity of Judge Komitee's connections, which constitute a disqualifying interest under Section 455(b), an appearance of partiality which might reasonably be questioned under Section 455(a), or both. *See* Wright, *"Invested in the Outcome"* at 488-90 ("[A] judge who owns stock in a bank which is robbed might realize a substantial financial benefit by ordering restitution or meting out particularly harsh sentences that send a message to others contemplating similar crimes against the bank" . . . . "The judge may possess another type of prohibited interest in the disposition of a case beyond the mere fiscal. For example, a judge's sense of loyalty to the company in which he owns stock may influence him to punish more severely those who harm the company. Such feelings can infect a judge's decisionmaking in spite of the judge's best efforts to maintain impartiality.").

As for particular trees in this case, the government cannot persuasively force the square peg of Judge Komitee's entanglements into the round hole of the safe harbor of Section 455(d)(4)(I). *See* Gov't Br at 9-14. Unlike *United States v. Teman*, No. 21-1920-cr, 2023 U.S.

App. LEXIS 14247 at *9-10 (2d Cir. June 8, 2023), in which a judge actually disclosed an isolated holding in Berkshire Hathaway which in turn held a *de minimis* position in a victim, Judge Komitee personally certified dozens of filings with the SEC when he managed the funds at Viking which held positions in alleged victims; continued positions through Viking while presiding over a case in which the alleged victims testified or were otherwise presented as victims; maintained membership on a board with Viking's managers (his former colleagues), who controlled the funds and co-invested with the victims and made co-investments in OZY itself; and developed substantial relationships with victims who served (and serve) Viking as prime brokers and qualified custodians.

As for another of the trees, the government claims that Judge Komitee had no cause to disqualify himself based on his friendship with Patrick Carroll, Goldman's Global Head of the Monitoring and Assurance Group and Law Enforcement/Regulatory Liaison for Federal Crime Compliance, even though Judge Komitee's friendship with Carroll is so close that Carroll accompanied then nominee-Komitee to his confirmation hearing before the United States Senate Judiciary Committee in 2018. *See* Govt Br at 16-17.

But Judge Komitee appears to have recused himself when such a close friendship was his *only* connection to a case. Carroll was one of three of Judge Komitee's close friends to attend his confirmation hearing. Judge Komitee singled out Carroll in his testimony as well as attorney Paul Schoeman, described by Judge Komitee as a "longtime friend[] from the US Attorney's Office. I've known Paul for almost two decades now . . . . Paul was the Chief

Assistant in the US Attorney's Office while I was there."[3] Two days after Schoeman filed his notice of appearance to join a team of defense lawyers in *United States v. Levy, et al.*, Case No. 22-cr-00281 (E.D.N.Y.), Judge Komitee *sua sponte* recused himself, citing 28 U.S.C. § 455(a), without elaborating. *See Levy*, Docket Nos. 41 and 44.

Judge Komitee's overlap with this case is too extensive and multi-layered to be considered analogous to *Teman, Ravich,* or other similar cases. In *United States v. Rechnitz*, 75 F.4th 131 (2d Cir. 2023), the circuit held that Section 455(a) required recusal where the judge maintained a "remarkably close" relationship with a person who was directly involved in the defendant's case, and where the interests of the judge and the defendant were "plausibly adverse" on the issue of restitution even though Section 455(b) was not technically violated, and even though any financial interest may have been minimal. *Id.* at 144-45. And unlike cases relied on by the government, the motion in this case *does not* even purport to present the universe of relevant facts and circumstances, presents only conservative estimates of Judge Komitee's financial interests, and lacks sufficient information to itemize all of his financial, professional, and personal connections.

United States Attorneys have day-to-day relationships with district courts that may inhibit their support of recusal in any particular case. Perhaps some of the government's more fanciful arguments here are rooted in that inhibition. But the prosecutors dishonor their fidelity to fair justice by trotting out their "blame-the-defendant" trope on this type of motion on the undisputed facts on which it is based. *See e.g.* Gov't Br at 1-2 ("the defendants have attempted

---

[3] *Available at https://www.judiciary.senate.gov/committee-activity/hearings/08/01/2018/ nominations (testimony beginning at 1:11:36).*

to avoid responsibility by deflecting blame onto others."). It is never a defendant's obligation to investigate possible violations of Section 455 absent judicial disclosure, and the defendants did so here only after Judge Komitee's financial disclosure for 2023 became publicly available just last month. The defendants then did so only because they elected to look under the hood of Judge Komitee's assurance in 2023 that he saw no "overlap" with this case, not because the law required it. Public confidence in the courts should far outweigh any particular prosecutor's pursuit of any particular defendant.

The intrusion of wealth into our institutions has greatly increased as of late, raising new challenges for journalism, politics, and the media. *See Sarah C. Baldwin, "The dark side of extreme wealth,"* Brown University's Watson Institute for International & Public Affairs, Nov. 3, 2011[4] ("Great wealth threatens democracy itself. Billionaires have a disproportionate influence on politics. Through political donations, the wealthy can affect the outcome of elections. They alter the political world by reshaping the institutions that support democracy, such as newspapers and media. The very wealthy distort the entire political system by tilting policy away from the needs of the majority. And there's a more insidious effect: great wealth changes the culture. It feeds the sense that ordinary people – and politics itself – can't really get anything done. Why participate if government can't deliver?").

Wealth also threatens public confidence in the judiciary. The government acts at its own peril by attempting to sweep the types of overlaps in this case under the rug or kick them down the road for some other prosecutors to resolve in some other case. Foreseeing such folly,

---

[4] *Available at https://home.watson.brown.edu/news/2021-11-03/dark-side-extreme-wealth*

the circuit in *Litovich* concluded that the injustice created by inaction "is that federal judges will fail to recuse themselves in future cases, which . . . may increas[e] the likelihood that conflicts [] go unnoticed and unremedied." *Id.* (quotation marks and citation omitted) (we hope to "prevent a substantive injustice in some future case" by urging our peers "to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.") (quoting *Liljeberg*, 486 U.S. 868.).

But for serendipity, the overlaps in this case would have gone "unnoticed and unremedied," permitting the challenges created by wealth in the judiciary to continue to mestastasize. The issues presented by this case are far too important to prioritize the government's interest in one case ahead of public confidence in the courts.

Dated: November 3, 2024

/s/ Andrew J. Frisch
The Law Offices of Andrew J. Frisch, PLLC
40 Fulton Street, 17th Floor
New York, New York 10038
(212) 285-8000
afrisch@andrewfrisch.com

Attorney for Carlos Watson and OZY Media, Inc.