UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBRA MAX, Plaintiff, -against- DEBORAH KAPLAN, Deputy Chief Administrative Judge for the New York City Courts, in her official and personal capacities, Defendant.	No. ___Civ. ___(___) (___) **COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Libra Max ("Plaintiff" or "Libra"), by and through her attorneys, Emery Celli Brinckerhoff Abady Ward & Maazel LLP and Jonathan Gerald Martinis, LLC, for her Complaint against Deborah Kaplan, Deputy Chief Administrative Judge for the New York City Courts ("Administrative Judge"), alleges as follows:

PRELIMINARY STATEMENT

1. This case is about the denial of one of the most fundamental federal rights in the American justice system, the bedrock right—in every case from the lowest village tribunal to the highest court in the land—to hear and respond to all evidence your adversary presents to the court. In an adversarial judicial system like ours, the rule against *ex parte* communications is the essential guarantor of fair play: it ensures that both sides to a dispute get to see the evidence presented to the court and there is no secret evidence; that such evidence is tested under fire via competing evidence, argument, and/or cross-examination; and that courts are protected from unreliable and inaccurate information by a system that mandates that opposing parties have a right to challenge whatever is presented.

2. Libra Max has been repeatedly deprived of that right, in violation of her constitutional right to due process, due to the actions or inactions of the Defendant, Deborah Kaplan, the administrative judge who oversees the Guardianship Part of the Supreme Court of the State of New York, New York County. For more than three years, Libra has petitioned the court to free her elderly father from isolation and from the strict control of his life by a court-appointed personal-needs guardian. Throughout this period, the guardianship court has engaged in repeated improper *ex parte* communications with the personal-needs guardian on the matters in dispute, including whether the personal-needs guardian herself should be removed. These communications were substantive, outcome-influencing if not outcome-determinative, undisclosed, uncorrected, and undiscovered until well after they had infected the judicial process. Libra received no notice that the personal-needs guardian of her father had secretly submitted information, evidence, and arguments to the court, and she was offered no opportunity by the court to respond to them.

3. This case is not about an idiosyncratic judge who flouts the time-honored rules of our judicial system; it is about a *system*, overseen by the Defendant, that tolerates and encourages systemic constitutional violations. Guardianship judges in New York County regularly communicate with guardians *ex parte* even concerning matters that are hotly disputed—depriving parties like Libra, who believe that the guardians are not acting in their family member's best interests, of their rights under the Due Process Clause of the United States Constitution. In Libra's case alone, multiple guardianship judges expressly acknowledged on the record that such *ex parte* communications are standard practice: one went as far as to call *ex parte* communications a "right of the guardianship judge"; and another similarly pronounced that

"it is not *ex parte* for the guardian to speak to the Judge," confirming that that is "what [she has] been told from the minute [she] stepped into [her] position" as a guardianship judge.

4. Libra's father is Peter Max ("Peter"), the iconic American artist, who is now 84 years old and in failing health. Peter's personal-needs guardian dictates who he is allowed to have contact with, including whether he sees his family and friends; his medical treatment; his specific daily routine down to the minute; and where and how he lives.

5. As Peter's only daughter, Libra has asked the guardianship court in New York County to remove her father's court-appointed personal-needs guardian—but she has had to do so handicapped by the fact that the personal-needs guardian can and has submitted evidence and arguments to a number of guardianship judges presiding over the matter *ex parte*, without notice to Libra or without affording Libra an opportunity even to see what has been submitted, much less to respond to or rebut it. Blindfolded and thus blindsided, Libra's right to contest the guardianship of her father in court has proven to be all but illusory—and that was *before* the situation got even worse. Late last year, the personal-needs guardian, acting in her own personal capacity, sued Libra for money damages, alleging that Libra's advocacy for her father and opposition to the guardianship amounts to defamation of the guardian's character. Such a personal lawsuit by a guardian against a ward's family is highly unusual, if not entirely unprecedented. And to add insult to injury, Libra has come to learn that Lissner received *ex parte* approval from the guardianship court to launch her personal lawsuit against Libra. Hardly a more contested and adversarial situation can be imagined between the guardian and a ward's family. Yet the guardianship court permitted the guardian to submit to the court an ethics opinion apparently asserting that the guardian's personal lawsuit does not constitute a conflict of

interest for the guardian—and refused to disclose that ethics opinion to Libra and her counsel so that they could review it, respond to it, and rebut it. Kafka would blush.

6. The harm from the *ex parte* communications between guardians and judges in contested guardianship matters is significant: in the case of Libra Max and her elderly father, it has resulted in denying Libra the ability to fairly advocate for her father's freedom from the control of an overbearing guardian who has separated him from loved ones at the end of his life—for over three years now—and Libra has been deprived of her constitutionally protected right to care for and be with her father.

7. At a minimum, these communications gave the court-appointed guardian—to whose conduct Libra has objected—an unfair tactical advantage and an opportunity to provide the court with arguments and purported facts not disclosed to an adversary in a contested matter, with the ultimate result that Libra was deprived of her constitutional right to her intimate family relationship with and care of her 84-year-old father. As guardianship judges have stated that such *ex parte* communications are standard operating procedure in that court, they represent a corruption of the entire process, as guardians who are focused on maintaining their lucrative positions and the favor of the court are permitted to submit secret evidence behind closed doors and unfairly bias the judge against an adversary—in this case, the ward's only daughter.

8. After three years of litigation in the guardianship court, Libra, to this day, is *still* not apprised of the full record in the very court proceeding that is keeping her separated from her own father. She is a litigant forced to fight in the dark—and a daughter whose father's time on this planet is limited.

9. Libra has been repeatedly denied a right so basic that it is (and should be) taken for granted: a fair hearing before a fair judge in a fair court. Fairness is the beating heart of our judicial system, and "can rarely be obtained by secret, one-sided determination of facts."[1] The need for exposure and reform in this context, where the constitutional, civil and human rights of vulnerable persons and their families hang in the balance, is all the more urgent.

10. Plaintiff brings this action against the Defendant for her failure to properly oversee the guardianship court system and for allowing continued violations of Plaintiff's rights, seeking declaratory and injunctive relief and out-of-pocket and related damages, to establish that, (1) as a litigant seeking to challenge her father's guardianship, she has a constitutional right secured by the Due Process Clause to an unbiased judge who does not discuss the matters in dispute *ex parte* with her adversary, and that (2) the system-wide policy or practice, overseen by Defendant, of encouraging and allowing such *ex parte* communications that traverse the rule, violates her constitutional rights.

PARTIES

11. Plaintiff Libra Max is a natural person and the only daughter of Peter Max, the world-famous painter. She maintains a home in California and, to be close to her father, she also maintains an apartment in New York City.

12. Defendant Deborah Kaplan is, and has been since October 1, 2021, the Deputy Chief Administrative Judge for all trial courts in New York City, including the New York County Civil Branch of the Supreme Court (the "Administrative Judge"), with offices at 111 Centre Street, New York, New York. From January 2018 until January 17, 2022, Defendant

[1] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170–72 (Frankfurter, J., concurring) (1951).

Deborah Kaplan was the Administrative Judge for the Civil Branch of the Supreme Court of the State of New York, New York County, with offices at 60 Centre Street, New York, New York.

13. In both of her roles since January 2018, Defendant Kaplan is and has been responsible for supervising the administration and day-to-day operations of the Guardianship Part of the Supreme Court of the State of New York, New York County.

14. Defendant Kaplan is currently responsible for the administration and day-to-day operations of all of the trial courts in New York City, including the New York County Civil Branch of the Supreme Court, and she works with the administrative judges of the various courts in New York City in order to manage their operations.[2]

15. From January 2018 until January 17, 2022, as the Administrative Judge for the Civil Branch of the Supreme Court of the State of New York, New York County, Defendant Kaplan was responsible for supervising the administration and day-to-day operations of the New York County Civil Branch of the Supreme Court.[3] In such role, she was "responsible

[2] The Chief Judge is required by § 249 of the New York Judiciary Law to establish a system of "internal control" for the New York Courts, defined as "a process that integrates the activities, plans . . . systems, resources and efforts . . . and that is designed to provide reasonable assurance that the organization will achieve its objectives and mission. The objectives of an internal control system include . . . promoting the effectiveness and efficiency of operations." N.Y. Judiciary Law §§ 249(1), 249-a(1). The Chief Judge, in turn, delegates much of his or her authority to the Chief Administrative Judge, who is responsible for the administration and operation of the New York Court System. N.Y. Jud. Law § 212. The Chief Administrative Judge has supervisory authority over all of the New York Court System's administrative activities, including the temporary reassignment of judges and the formation of the courts. 22 N.Y. Comp. Codes R. & Regs. § 80.1. In the City of New York, the Chief Administrative Judge further delegates much of his or her authority to the Deputy Chief Administrator of all trial courts and to various administrative judges of each court, including the Supreme Court in New York County. N.Y. Comp. Codes R. & Regs. tit. 22, § 80.2(a)(1). The Deputy Chief Administrator, who may be a judge, "shall be responsible generally for the orderly administration of the courts within the area of their administrative responsibility, as set forth in their orders of designation." *Id.* 80.2(d). *See also Executive Officers*, NYCourts.gov, http://ww2.nycourts.gov/admin/execofficers.shtml (last visited July 18, 2022).

[3] The Administrative Judge is "responsible generally for the orderly administration of the courts within the" New York County Supreme Court Civil Branch. N.Y. Comp. Codes R. & Regs. tit. 22, § 80.2(b). The Administrative Judge's authority is delegated from the Chief Administrative Judge under N.Y. Comp. Codes R. & Regs. tit. 22, § 80.2(a)(1). The Chief Administrative Judge's authority is itself delegated under N.Y. Judiciary Law § 212 by the Chief Judge of the State of New York, who is required to establish a system of "internal control" for the New York Courts including efforts to "promot[e] the effectiveness and efficiency of operations" in the court system. N.Y. Judiciary Law §§ 249(1), 249-a(1).

for the performance, efficiency, and productivity of every part of [the] court," and "constantly develop[ed] programs and strategies to address case delays, enhance case management and improve the administration of justice."[4]

16. Defendant Kaplan's responsibility included and continues to include, at all relevant times, the administration of the courts who hear and decide guardianship matters and, upon information and belief, she had and continues to have the power to issue orders concerning the procedures to be followed in the trial courts in New York County Supreme Court.[5]

17. The Administrative Judge is sued in her official capacity as to Plaintiff's declaratory judgment claim and claim for injunctive relief, and in her individual capacity as to Plaintiff's damages claim.

JURISDICTION AND VENUE

18. This action arises under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §§ 1983 and 1988. In addition, the Court has jurisdiction to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

19. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

20. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because the acts complained of occurred in the Southern District of New York.

JURY DEMAND

21. Plaintiff demands trial by jury.

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[4] Dean Moses, *Speaking with Manhattan Administrative Judge Deborah Kaplan*, AM New York Metro (Sept. 2, 2020), https://www.amny.com/new-york/manhattan/speaking-with-manhattan-administrative-judge-deborah-kaplan/.

[5] *See, e.g.*, Deborah A. Kaplan, *Administrative Order of the Administrative Judge, Supreme Court New York County Civil Branch*, Unified Court System First Judicial District Supreme Court, Civil Branch (Mar. 18, 2020), https://nysba.org/app/uploads/2020/03/cn_ny_covid_03181.pdf (setting COVID-19 procedures for guardianship proceedings: "Regarding guardianship matters, MHLS staff shall work with guardianship judges to identify only essential matters that must go forward. . . .").

FACTUAL ALLEGATIONS

I. THE COURT APPOINTED TWO GUARDIANS FOR PETER MAX, PLAINTIFF'S FATHER

22. Peter Max is a father, a New Yorker, and a world-famous artist, now 84 years of age and in failing health. Peter has been a ward—a person under guardianship—since 2015.[6] Peter's now-deceased wife, Mary Max, originally petitioned for guardianship over Peter's property; the court ultimately appointed both a property and a personal-needs guardian, both of whom had no relationship to the Max family.

23. Barbara Lissner is the current personal-needs guardian for Peter Max; a second individual is his current property guardian. Both were appointed by the court, both are lawyers, and both charge Peter for their services at their hourly rate as lawyers. In addition, both Lissner and the property guardian have lawyers appointed by the court to represent them in the guardianship proceeding—all at Peter's expense.

24. The personal-needs guardians who preceded Lissner in the position abided by the original order of the court—which remains in place today—that they shall not "[d]eny [Peter] contact with his . . . children." They did not interfere with or impede Peter's access to his daughter, or her access to him.

25. That all changed in June 2019, when Mary Max died by suicide and, the very next day, Lissner was commissioned as Peter's personal-needs guardian.

26. Since assuming the role of personal-needs guardian, Lissner has used her position to isolate Peter from his loved ones and undermine Libra's relationship with her father. Her actions have run from the extreme (*e.g.*, totally barring Libra from visiting Peter in his

[6] The term "ward" is generic in this context. As a technical matter, Peter Max has been designated a "Person in Need of a Guardian"—or "PING." He has not been adjudged or determined to be incapacitated.

home—the home where Libra was raised; now restricted to a very limited number of heavily supervised hours with her father per week); to the frightening (*e.g.*, failing to inform Libra of her father's medical setbacks and refusing even to disclose to Libra who Peter's doctors are); to the intrusive (*e.g.*, installing video cameras in Peter's apartment to monitor activities from afar); to the bizarrely petty and spiteful (*e.g.*, taking away Peter's rescued cats, even though he loved them and was a well-known advocate for animals throughout his life).

27. Worst of all, Lissner has flatly ignored Peter's pleas that he be allowed to see his daughter when and where they wish.

II. NEW YORK SUPREME COURT JUSTICES, UNDER THE SUPERVISION OF DEFENDANT, HAVE ENGAGED IN IMPROPER *EX PARTE* COMMUNICATIONS WITH PETER MAX'S GUARDIAN, INFLUENCING THEM TO RULE AGAINST LIBRA AND DEPRIVING LIBRA OF HER CONSTITUTIONAL RIGHTS

28. Libra has opposed Lissner's oppressive control over Peter's life, bringing her concerns to the attention of the guardianship court, which has been comprised of a number of judges who have cycled into and then out of the guardship case, all under the supervision of Defendant. This is the appropriate way to object to the conduct of a court-appointed guardian and to seek the guardian's removal or to end the guardianship altogether.

29. In order to defeat these efforts—which would have the effect of ousting Lissner from her lucrative role as personal-needs guardian—Lissner, directly and through her attorney, has engaged in improper *ex parte* communications with *four* different New York County Supreme Court justices charged with overseeing the guardianship on hotly-contested matters, with two of those guardianship judges expressly stating on the record that *ex parte* communications are appropriate even in contested matters.

30. That these *ex parte* communications have occurred with multiple different judges is evidence that the issue is systemic, not idiosyncratic to one judge, and resulted from the failure of Defendant to ensure that the system complies with basic due process requirements.

31. Upon information and belief, there is a common practice within the New York Supreme Court, New York County, of guardians and judges engaging in improper *ex parte* communications regarding contested matters in ongoing guardianship proceedings.

32. That engaging in *ex parte* communications in guardianship proceedings is standard practice in the court system Defendant oversees—even in contested matters where a family member has formally sought the guardian's removal—has also been confirmed by statements of the guardianship judges themselves, who have pronounced that *ex parte* communications are a "right of the guardianship judge," and that "it is not *ex parte* for the guardian to speak to the Judge."

33. To be sure, *ex parte* communications are sometimes permissible under New York law, where a party or his or her lawyer must communicate with the court for "scheduling or administrative purposes . . . that do not affect a substantial right of any party." But judges in every court are strictly forbidden from engaging in *substantive* communications with one side of a disputed matter without the other side being present.[7] The rule is clear: judges may *not* "initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers

[7] To the extent that *ex parte* communications are sometimes allowed in cases of extreme emergency or exigency—with follow-on disclosures required to minimize any prejudice to the excluded party—no such emergency or exigency has been alleged with respect to the communications described herein.

concerning a pending or impending proceeding" except in certain narrow circumstances not applicable here.[8]

34. Defendant Administrative Judge is responsible for overseeing the day-to-day operations of all of the trial courts in New York City, including the Civil Branch of the Supreme Court of New York County, including instituting necessary procedures for the civil judges of that court, including judges who oversee guardianship matters.

35. Defendant Administrative Judge, upon information and belief, is aware of the regular practices of guardianship judges in New York County having *ex parte* communications in contested matters, and the lack of any systems in place to protect against such unconstitutional *ex parte* communications.

[8] N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3 (6):

> (6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:
>
> > (a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.
> >
> > (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.
> >
> > (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
> >
> > (d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.
> >
> > (e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

36. In the context of law guardians (*i.e.*, attorneys for a child), the Advisory Committee on Judicial Ethics has made clear that such guardians may not have *ex parte* communications with judges on substantive contested legal issues before the court.[9]

37. Clear line-drawing between proper and improper *ex parte* communications in contested guardianship proceedings is therefore crucial. The widespread practice of *ex parte* communications between guardians (and their counsel) in contested matters in the court system Defendant oversees creates a significant risk that—in the absence of training, policies, and procedures specifically addressing when *ex parte* communications are impermissible—Supreme Court justices in New York County will improperly engage in *ex parte* communications on contested legal matters, such as, as here, challenges to the guardian's own actions or to the guardianship itself.

38. Yet the Administrative Judge has instituted no policies and provided no training to protect against such unlawful *ex parte* communications. She has not acted to prevent improper *ex parte* communications in contested matters. She has failed to ensure that the justices do not engage in *ex parte* communications on contested legal matters.

39. Plaintiff is aware of four separate incidents where a court-appointed guardian of Peter Max, either directly or through counsel, had *ex parte* communications with a judge in New York County concerning hotly-contested matters. Because the very nature of *ex parte* communications is that they occur outside the presence of the adverse party, Libra and her

[9] *See, e.g.*, Opinion 95-29, Advisory Comm. on Judicial Ethics (Mar. 9, 1995), nycourts.gov/ipjudicialethicsopinions/95-29.htm ("[T]here should be no discussion with the law guardian as to the latter's position with regard to the interests of the minor, outside of the presence of the parties to the proceeding, the parents or their counsel, unless there is consent to such discussion by all parties. Otherwise, such discussion would constitute an impermissible ex parte communication, under section 100.3(a)(4) of the Rules of the Chief Administrator.").

attorneys have learned of these breaches only by happenstance. There are almost certainly more, undiscovered, *ex parte* communications that occurred in the Max guardianship case.

40. Under New York's Rules of Judicial Conduct, "[a] judge shall perform judicial duties without bias or prejudice against or in favor of any person."[10]

41. Courts around the country have accordingly suggested that improper *ex parte* communications may constitute violations of the Due Process Clause where they, as here, improperly prejudiced a judge against the party excluded from such communications.[11]

[10] N.Y. Comp. Codes R. & Regs. tit. 22, §§ 100.3(A), (B)(4).

[11] For example, in *Hamilton v. Arnold*, the First Circuit Court of Appeals accepted plaintiff's argument that *ex parte* communications between opposing counsel and the judge in a divorce proceeding *could*, in some circumstances where there is evidence that *ex parte* communications caused actual prejudice, violate the plaintiff's right under the Due Process Clause to a fair and impartial hearing: "[Plaintiff] forcefully argues that the due process clause of the Fourteenth Amendment guarantees him 'an impartial and disinterested tribunal' in his divorce proceeding. Therefore, trials require an absence of actual bias. Redress for such a violation is available under 42 U.S.C. § 1983 when the constitutional right is violated under color of state law." 29 F. App'x 614, 616 (1st Cir. 2002) (cleaned up). The court ultimately held that, in that case, "[t]here [wa]s simply no evidence of any *ex parte* communications regarding [plaintiff]'s divorce case," but it did not reject the notion that such communications could violate due process. *Id.* at 618.

In *Dunsmore v. Chester County Children & Youth Services*, foster parents (who were also the paternal grandparents) brought suit against county youth services alleging that its solicitor violated their due process rights by, *inter alia*, having *ex parte* communications with the custody master. No. CIV. A. 92-3746, 1993 WL 101200, at *1–*2 (E.D. Pa. Apr. 6, 1993). The court dismissed the procedural due process claims, finding that sufficient procedural safeguards were in place despite the *ex parte* communications; but it stated that because grandparents, especially those acting as foster parents, "may enjoy [ ] a constitutionally protected interest" in the "care, custody and management" of their foster and grand-children, and "[g]iven the allegations that defendants acted with malice and vindictiveness, it cannot be said as a matter of law that plaintiffs' substantive due process rights were not violated."

See also Ward v. U.S. Postal Serv., 634 F.3d 1274, 1279 (Fed. Cir. 2011) ("[E]x parte communications that introduce new and material information to the deciding official violate due process." (quoting *Stone v. F.D.I.C.*, 179 F.3d 1368, 1377 (Fed. Cir. 1999) (internal quotation marks omitted)); *Lopez v. United States*, No. 16-CR-20004-JES, 2022 WL 476235, at *13 (C.D. Ill. Feb. 16, 2022) (suggesting that *ex parte* communications may constitute a due process violation where "there exist[s] a sufficient probability of actual bias" (citing *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994))).

A. Guardianship Judge 1 Denies Motion to Remove Lissner as Guardian Following Three Hour Undisclosed *Ex Parte* Call with Lissner

42. In September 2019, Lissner, herself a lawyer, submitted a letter to the guardianship court requesting permission to hire an attorney to represent her (at Peter's expense) in matters related to Peter's guardianship.[12]

43. Lissner sought appointment of a lawyer for herself as guardian because she wanted a lawyer to advocate for her own interests. Peter himself already had an attorney selected and appointed by the guardianship judge—also at Peter's expense.

44. Lissner sought appointment of a lawyer for herself as guardian because she wanted a lawyer to oppose positions taken by her ward's daughter (Libra).

45. Lissner sought appointment of a lawyer for herself as guardian because she recognized the proceedings were adversarial.

46. Also in September 2019, Libra filed a proposed order to show cause seeking to terminate the guardianship of Peter altogether—and terminate Lissner as guardian specifically. The issues raised in Libra's petition were scheduled to be addressed on the merits at a conference on September 25, 2019, before a New York County Supreme Court Justice ("Guardianship Judge 1").[13]

47. As a trial judge in New York County, Guardianship Judge 1 was subject to and required to follow policies and procedures that the Administrative Judge promulgated for that court.

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[12] It is worth noting that, in addition to the two court-appointed guardians, the court had already appointed a lawyer to serve as Peter's lawyer in the proceedings—again at Peter's expense.

[13] Plaintiff recognizes that guardianship judges, like all judges acting in their judicial capacity, are shielded from suit by judicial immunity. Plaintiff therefore does not name the judges involved in *ex parte* communications as defendants in this case.

48. On September 25, 2019, the very same day of the conference to discuss the precise issue of Lissner's removal, Lissner had a three-hour *ex parte* conversation during a private phone call with Guardianship Judge 1, prior to the scheduled hearing later that day.

49. During that *ex parte* conversation Guardianship Judge 1 told Lissner she was going to rule in her favor, without any input from or notice to Libra.

50. Specifically, Lissner's time entry reads:

> 9/25/2019 – 3.00 units – Guardian has telephone call with [Guardianship Judge 1] regarding PING. *Court will issue an Order to support Guardian*. (Emphasis added).

51. Later that same day, September 25, 2019, Lissner has a further time entry for an additional three hours in connection with the actual hearing which states "Guardian participates in court conference."

52. Lissner's billing records demonstrate that she understood when she spoke *ex parte* with Guardianship Judge 1—prior to the hearing later the same day before the same judge —that the judge would decide the contested issue of her continuing role as guardian in her favor, and thereby deny Libra's request for Lissner's removal.

53. The September 25, 2019 *ex parte* conversation between Lissner and Guardianship Judge 1 was not disclosed to Libra or her counsel during the hearing that day.

54. Libra had no knowledge of this secret and improper *ex parte* conversation until she saw the billing records Lissner submitted—almost a year later.

55. Going into the hearing, neither Libra nor her attorneys knew that Guardianship Judge 1 had already held a three-hour substantive *ex parte* discussion with Lissner about the contested matter of Libra's request to terminate the guardianship or remove Lissner as

personal-needs guardian, and had already stated she would rule in Lissner's favor during that *ex parte* discussion.

56. At a minimum, the September 25, 2019 hearing was impermissibly infected by the three-hour *ex parte* communication that occurred earlier that day; at a maximum, the hearing itself was a sham. Because Libra and her counsel were not allowed to attend and participate in the pre-hearing call between Guardianship Judge 1 and Lissner, they cannot know which is the case. Neither is tolerable in a system built on the promise of due process.

57. At the September 25, 2019 conference, Guardianship Judge 1 stated on the record that the court had *not* predetermined the issues, saying, "I want to be clear because the Court hasn't made a determination yet," and "[w]hen you said the Court is against your client, the Court hasn't made any determination." Lissner's billing records directly contradict this statement.

58. Guardianship Judge 1 did, in fact, support the guardian by issuing an order after the September 25 hearing finding that Libra's application to remove Lissner was "moot" (stating that Peter's court-appointed counsel apparently stated that Peter was not seeking Lissner's termination), strongly suggesting that the three-hour *ex parte* communication was both substantive and impactful on the judge's decision-making.

59. Beyond the damning description in Lissner's billing records, the precise contents of the call between Guardianship Judge 1 and Lissner remain unknown.

B. Guardianship Judge 2 Denies Motion to Remove Lissner as Guardian Based on *Ex Parte* Communications with Unsworn Fact Witnesses, Facilitated by Lissner and/or Her Counsel

60. On May 4, 2020, Libra, through her counsel, filed a second motion to abate the guardianship of Peter entirely or, at a minimum, to remove Lissner as guardian.

61. By that time, the matter of Peter's guardianship was no longer before Guardianship Judge 1 (who was, herself, the second judge in the courthouse to be assigned the matter); instead, a different judge ("Guardianship Judge 2") had been assigned to preside over the Max guardianship. By this point, Lissner had been in the role of personal-needs guardian for eleven months.

62. As a trial judge in New York County, Guardianship Judge 2 was subject to and required to follow policies and procedures that the Administrative Judge promulgated for that court.

63. On August 7, 2020, Guardianship Judge 2 issued a decision denying Libra's motion to terminate the guardianship and/or remove Lissner as guardian.

64. In his decision, Guardianship Judge 2 stated that Peter's "*health care aides have informed the court*" of certain information. (Emphasis added).

65. But no evidence had ever been presented in court from Peter's "health care aides"—at least not in the presence of Libra and her counsel.

66. Indeed, neither Libra nor her attorneys were ever made aware of *any* information that "health care aides" are alleged to have "informed the court." There are no affidavits, declarations, or even emails which have been served on or otherwise received by Libra or her attorneys which included any information which the health care aides provided to Guardianship Judge 2.

67. Significantly, however, billing records that were later submitted to the court by Lissner's counsel stated that he had drafted affidavits on behalf of Peter's health care aide, his Geriatric Care Manager, and the home care agency responsible for Peter's care. Neither

Lissner nor her counsel ever filed these affidavits with the court, or provided Libra or her counsel with these affidavits—a fact Lissner's counsel admitted.

68. Upon information and belief, the explanation for Guardianship Judge 2's statement in his decision concerning the health care aides is that Lissner and/or her counsel facilitated *ex parte* discussions, meetings, submissions or other communications between the judge and the health aides (and likely Lissner). Even if that is not the case, what is clear is that *ex parte* information was provided to Guardianship Judge 2, which directly aided Lissner and was relied upon by the judge in denying Libra's motion.

69. Libra, through her counsel, never had an opportunity to review the information provided to Guardianship Judge 2 on an *ex parte* basis, much less rebut it, examine any witnesses with respect to it, or develop an appeal from it.

70. Guardianship Judge 2 relied on this *ex parte* information when making his decision to deny Libra's removal motion, resulting, upon information and belief, in a continuation of an unnecessary guardianship, the continued separation of an elderly father from his daughter, and the continued appointment of a guardian who should have been removed.

C. Guardianship Judge 3 Pronounces that Engaging in *Ex Parte* Communications "Is the Right of the Guardianship Judge" and Proceeds to Provide *Ex Parte* Approval to Lissner to Personally Sue Libra

71. By December 2020, the Peter Max guardianship had again been transferred within the Supreme Court, New York County—this time, to Guardianship Judge 3.

72. As a trial judge in New York County, Guardianship Judge 3 was subject to and required to follow policies and procedures that the Administrative Judge promulgated for that court.

73. During a hearing on December 1, 2020, Libra's counsel raised concerns to Guardianship Judge 3 about Lissner's three-hour *ex parte* communication with Guardianship Judge 1, which had only recently come to light. Guardianship Judge 3 declared: "[I]f I need to speak to the court-appointed guardian's attorneys, I will. That is the right of the guardianship judge. Just so everyone is clear, it doesn't equal *ex parte* conversations."

74. True to her word, Guardianship Judge 3 appears to have done just that.

75. Upon information and belief, Guardianship Judge 3 had an *ex parte* conversation with Lissner prior to Lissner filing her Defamation Action against Libra (defined and discussed below) and provided permission, *ex parte*, for Lissner to sue Libra.

D. Guardianship Judge 4 Has Failed to Remove Lissner as Guardian Based on an *Ex Parte* Expert Opinion Submitted by Lissner

76. On September 16, 2021, Libra filed her third application to, *inter alia*, remove Lissner as her father's guardian. By this point, Lissner had been in the role of personal-needs guardian for Peter for more than two years, and her conduct in sharply restricting Libra's access to her elderly and declining father, and him to her, was continuing. Guardianship Judge 3 scheduled an evidentiary hearing on Libra's motion to be heard on November 30, 2021, but then recused herself from the guardianship proceeding. Guardianship Judge 4 was assigned to preside over the case. To date, Guardianship Judge 4 has not rescheduled the evidentiary hearing that was previously scheduled to take place eight months ago.

77. As a trial judge in New York County, Guardianship Judge 4 is subject to and required to follow policies and procedures that the Administrative Judge promulgated for that court.

78. On December 13, 2021, Lissner, in her personal capacity, brought an action against Libra for defamation in a publicly-filed complaint launched in the civil part of

New York County Supreme Court. *See Barbara H. Urbach Lissner v. Libra Max et al.*, N.Y. Sup. Ct. Index No. 161133/2021 (the "Defamation Action"). In the Defamation Action, Lissner asserts that certain statements attributed to Libra are false and defamatory; she seeks money damages from Libra for injuries to her reputation that she claims to have suffered.

79. The first conference before Guardianship Judge 4 was set down for March 17, 2022.

80. Prior to the March 17, 2022 conference, Libra filed papers supplementing her pending petition for Lissner's removal, informing the guardianship court of the Defamation Action. She argued that the Defamation Action—wherein Peter's personal-needs guardian has, in her personal capacity, launched a civil litigation against Peter's daughter—gives rise to a conflict of interest for Lissner as guardian, and thus is an additional basis for her removal.

81. At the March 17, 2022 conference, in light of the issues raised in Libra's supplemental papers, Guardianship Judge 4 directed Lissner to consult with ethics counsel about her potential conflict of interest and suggested that briefing on the ethical issue may be necessary.

82. Between March 17, 2022 and the next conference before Guardianship Judge 4 on April 22, 2022, Libra's counsel did not receive any briefing from Lissner concerning her conflict of interest, nor any opinion resulting from the ethics counsel Lissner was directed to consult.

83. On April 22, 2022, a second conference was held before Guardianship Judge 4. There, to Libra's and her counsel's surprise, Guardianship Judge 4 disclosed that she had indeed received a copy of the "results" from Lissner's ethics counsel.

84. Guardianship Judge 4 stated during that conference that "it is not *ex parte* for the guardian to speak to the Judge."

85. Guardianship Judge 4 stated during that conference that she has been "told from the minute [she] stepped into this position" that guardians and guardianship judges can have *ex parte* conversations.

86. Guardianship Judge 4 stated during that conference that she has been "counseled by quite a bit of people on this issue."

87. Despite the fact that Libra's counsel had not been provided with a copy of Lissner's ethics opinion, Guardianship Judge 4 granted Libra permission to file "opposition" papers on the issue.

88. Given the impossible task of "opposing" papers that one has not seen, Libra's counsel twice wrote to Guardianship Judge 4 requesting a copy of Lissner's ethics opinion that had been submitted *ex parte* to the court.

89. Guardianship Judge 4 responded on April 29, 2022, declining to provide Libra or her counsel with a copy of Lissner's ethics opinion.

90. As a result, Libra was forced to submit "opposition" papers from her "opposing" expert, without ever having seen Lissner's expert opinion. Libra submitted her "opposition" papers concerning Lissner's conflict of interest on May 9, 2022.

91. On May 9, 2022, Libra also submitted a further expert opinion explaining that *ex parte* communications in contested guardianship matters are improper.

92. Libra's expert detailed that the Defamation Action brought by Lissner against Libra further highlighted the adversarial nature of the guardianship proceedings, making *ex parte* communications improper.

93. Libra submitted her expert opinions to all parties, even though Lissner did not.

94. On May 9, 2022, the parties appeared again before Guardianship Judge 4.

95. Guardianship Judge 4 again confirmed that she "believe[s] that judges are entitled to speak to guardians and the court evaluators, as they are their court appointees."

96. Guardianship Judge 4 further informed the parties that she intended to procure her own ethics opinion on the issue.

97. While Guardianship Judge 4 stated at that conference—after Libra's counsel again pressed the issue—that "going forward" she would not engage in communications with Lissner without "everyone [being] copied," she did not provide Libra with Lissner's ethics opinion regarding Lissner's conflict of interest that had been submitted *ex parte* to the court.

98. During the May 9, 2022 conference, Guardianship Judge 4 stated that she would address Lissner's conflict of interest at a conference scheduled for June 15, 2022. On June 15, 2022, Guardianship Judge 4 declined to address the issue.

99. A further conference was held before Guardianship Judge 4 on July 5, 2022. During that conference, Guardianship Judge 4 again refused to provide a copy of Lissner's expert opinion to Libra or her counsel, despite a further direct request from Libra's counsel for a copy. Guardianship 4 also again declined to address the issue of Lissner's conflict.

100. In sum, the question of whether Lissner is legally conflicted from continuing in her role as Peter's guardian is currently *sub judice*, based on an ethics opinion from Lissner that Guardianship Judge 4 has refused to disclose to Libra, an adverse party in a contested matter. Having taken no action to remove Lissner based on her conflict, it appears that

Guardianship Judge 4 is relying on the *ex parte* ethics opinion that Lissner submitted in allowing Lissner to continue as Peter's guardian.

101. Without being able to review this *ex parte* submission, Libra has been prejudiced by it, as it appears to have served as the unrefuted basis for Guardianship Judge 4 permitting Lissner's continued service as Peter's personal-needs guardian. Furthermore, without being able to review the submission, Libra will have insufficient ability to appeal any order issued by Guardianship Judge 4 as to Lissner's appointment.

102. The *ex parte* communications in Peter Max's guardianship have robbed Libra of her ability to fairly advocate for her father's freedom, and, upon information and belief, ultimately robbed Peter of precious years with his loved ones that neither he nor his loved ones can ever get back.

103. As Guardianship Judge 4 acknowledged just last month, "Peter is at the end of his life" and "could pass away tomorrow." This month marks the beginning of Peter's fourth year of isolation. Given that the Due Process Clause is designed, in part, to protect the integrity of both tribunals and families, the stakes of this case could hardly be higher.

FIRST CLAIM FOR RELIEF

28 U.S.C. § 1983

(Violation of Due Process under the Fourteenth Amendment)

104. Plaintiff realleges and incorporates by reference the foregoing paragraphs.

105. Guardianship Judges 1, 2, 3, and 4 are state actors for purposes of 42 U.S.C. § 1983; they are not sued here because they enjoy judicial immunity.

106. The Administrative Judge, acting under the color of law, has enforced, promoted, encouraged, and/or sanctioned a policy, practice, and/or custom of *ex parte*

communications between judges and court appointed guardians, even in disputed matters or proceedings where the guardian's own actions or the need for a guardianship are being contested.

107. The Administrative Judge, acting under the color of law, has failed to institute policies or provide training concerning unlawful *ex parte* communications. Given the systemic practice of *ex parte* communications between guardianship judges and guardians, upon information and belief, the Administrative Judge knew that there was a significant risk guardianship judges would engage in improper *ex parte* communications. Yet she deliberately, or at least recklessly, disregarded that risk and did not provide the training, or institute the policies, that a reasonable Administrative Judge would have.

108. The policy, practice, and/or custom of *ex parte* communications between judges and court appointed guardians in disputed matters or proceedings, has resulted in decisions against Plaintiff based on biased, one-sided information.

109. The policy, practice, and/or custom of *ex parte* communications between judges and court appointed guardians in disputed matters or proceedings has deprived Plaintiff of her ability to oppose or refute substantive information communicated *ex parte* and of her ability to appeal actions taken by the guardianship judges based on biased, one-sided information.

110. The Administrative Judge has injured Plaintiff by depriving her of her due process right to a fair and impartial hearing, as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

1. Declaring that Defendant, in her official capacity, has violated the Due Process clause of the United States Constitution, as alleged in this action;

2. Enjoining Defendant, in her official capacity as the Deputy Chief Administrative Judge for all trial courts in New York City, including the New York County Civil Branch of the Supreme Court, to take such steps to ensure that litigants and judges in the guardianship part in Supreme Court, New York County do not engage in a pattern or practice of unconstitutional *ex parte* communications;
3. Awarding Plaintiff, against Defendant, in her personal capacity, her out-of-pocket damages for the attorneys' fees and related time and expenses incurred as a result of the unconstitutional *ex parte* communications;
4. Awarding Plaintiff reasonable attorneys' fees, together with the costs and disbursements of this action; and
5. Awarding Plaintiff such other and further relief that may be just and proper.

Dated: July 20, 2022
New York, New York

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