UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LESLIE BAILEY, MARIE THELOT, SARAH RODRIGUEZ, LORRAINE PADRO, DHANASAR RAMAN, TOBY MARLOW, as court-appointed guardian for JUDITH BLUMENSOHN, CARMEN DURAN, JOHN EDWARDS, ERNESTA GUTIERREZ, JULIA JUAN, and JANE DOE, individually and on behalf of all others similarly situated, Plaintiffs, v. MICHAEL J. ASTRUE, as COMMISSIONER OF SOCIAL SECURITY, Defendant.	11-CV-1788 (CBA) (RLM)

DECLARATION OF TROY G. ROSASCO IN SUPPORT OF PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY

TROY G. ROSASCO, ESQ., hereby affirms the following under penalty of perjury:

1. I am a Senior Partner in the Law Firm of Turley, Redmond, Rosasco & Rosasco, LLP and have been duly licensed to practice law in the State of New York since 1990. I respectfully submit this affirmation in support of Plaintiffs' Motion for Expedited Discovery.

2. Since December 1990, I have represented over 5,000 claimants in disability claims before the Social Security Administration (the "SSA"). I am currently one of two elected Second Circuit Representatives on the Board of Directors of the National Organization of Social Security Claimants' Representatives. I also am on the Executive Committee of the

Board of Directors of the New York State Injured Workers' Bar Association. I successfully argued the important Social Security seizure disorder case of *Brown v. Apfel*, 174 F.3d 59 (1999) before the Second Circuit Court of Appeals.

3. My practice includes representing claimants for Social Security benefits in administrative law judge ("ALJ") hearings and in federal court in their individual claims. I represent primarily working men and women with both physical and/or mental impairments in Title II SSDI claims. Although my practice is primarily concentrated in the tri-state area, I have also represented claimants in administrative hearings across the nation, which has given me the opportunity to observe the legal acumen and judicial temperament of a wide range of Social Security ALJs over the course of my over 20-year career.

4. I have represented claimants in all of the SSA's Office of Disability Adjudication and Review ("ODARs") in New York City, including the Queens ODAR. I have personally represented claimants in hearings before the five named ALJs in this lawsuit on numerous occasions over the course of my career.

5. Because I have had the most objectionable experiences before Hearing Office Chief ALJ David Z. Nisnewitz and ALJ Seymour Fier, my affirmation is limited to my knowledge of cases appearing before these ALJs.

ALJ David Z. Nisnewitz

6. I, and other attorneys in my office, have represented claimants in numerous cases in which ALJ Nisnewitz has presided at a hearing and issued a decision.

7. Based upon my 20-year career appearing before ALJs in other New York area ODARs, and indeed in ODARs around the country, by comparison ALJ Nisnewitz is routinely disrespectful to both claimants and attorneys alike.

8. ALJ Nisnewitz is routinely "combative," "adversarial," and "intimidating" in his questioning of both claimants and the SSA expert witnesses he himself calls to testify at hearings.

9. ALJ Nisnewitz is openly scornful and dismissive of any attorney who objects to his mistreatment of claimants and regularly positions his remarks during the hearing in such a way as to give the impression to the claimant that his anger has been caused by the claimant's attorney, thus undermining the confidence of the client in the attorney's representation.

10. Likewise, any attorney who has the audacity to object to ALJ Nisnewitz's legal rulings or challenge his knowledge of the Social Security law faces either immediate hostile opposition or a statement such as, and I paraphrase, "You have a standing open objection, Counselor, to all past and future rulings in this hearing, so please don't interrupt me anymore."

11. During the course of hearings, ALJ Nisnewitz consistently interrupts either claimant or expert testimony, or the claimant's attorney's questions. This happens so often that the hearing disintegrates into a dust cloud of confusion, intimidation, and frustration. This purposeful conduct by ALJ Nisnewitz distracts not only the participants in the hearing from pursuing relevant lines of inquiry, but it also prevents reviewing courts from divining the truth of the evidence even from a thorough reading of the hearing transcript.

12. One particularly egregious hearing that I personally handled (the claimant has specifically requested in writing that I keep his name anonymous out of fear that ALJ Nisnewitz will interfere with his now hard-won benefits) encapsulates the entirety of the long-standing problems with ALJ Nisnewitz, who as Chief ALJ sets the tone for the entire office. This

hearing occurred more than ten years ago, and ALJ Nisnewitz's actions and judicial decorum did not change until the filing of this lawsuit.1

13. "John Doe" was a hero New York City firefighter who suffered second and third degree burns over 30% of his body while fighting a house fire in Jamaica, Queens. He spent 35 days in the Cornell Burn Unit and subsequently was also treated by fire department psychiatrists for post-traumatic stress disorder and depression. He did not work due to his significant injuries for over two years while awaiting his hearing date before ALJ Nisnewitz. As is NYC Fire Department contractual policy, firefighter "Doe" was paid full base salary while awaiting a determination on his disability pension.

14. At the onset of the hearing, ALJ Nisnewitz asked me to inappropriately (and potentially illegally) amend the claimant's alleged disability onset date to a date after he was no longer receiving full salary. As there was no basis in law to do so, and this would have adversely impacted the claimant's eligibility for Medicare benefits, I refused. ALJ Nisnewitz expressly questioned me in the transcript: "Even though he was getting paid by the fire department all that time?" (TR-43.) ALJ Nisnewitz rolled his eyes, as if to say, "so that's the way you are going to pursue this claim."

15. From that point began a tortuous, almost two-hour long administrative hearing (most Social Security hearings outside the Queens ODAR average 30-45 minutes in length) before the "combative" ALJ Nisnewitz, in which he interrupted (or spoke over) the claimant, the Vocational Expert and myself over 100 times.

[1] Very soon after this law suit was filed, ALJ Nisnewitz's behavior changed. He has become more hospitable and commits fewer legal errors. This demonstrates that ALJ Nisnewitz is more than incompetent. He is systematically biased against Social Security Disability applicants. He knows—and has known all along—how to properly apply the relevant Social Security laws and regulations. For years he has simply chosen not to do so because of his bias against claimants. Only when called-out for his misbehavior did he begin to fairly and accurately apply the law.

16. The 133-page transcript of this hearing (which I keep in my possession to this day to show young attorneys in my firm what to expect when faced with hearings before ALJ Nisnewitz), is eerily similar to the transcript in *Ginsberg v. Astrue*, No. 05-CV-3696, 2008 WL 3876067 (E.D.N.Y. Aug. 18, 2008). In my case, ALJ Nisnewitz repeatedly interrupted his own Vocational Expert and would not allow her to finish answering questions. He repeatedly asked leading questions geared towards seeking the testimony he wanted to hear, until the Vocational Expert relented under pressure. Finally, as is often the case with ALJ Nisnewitz, he sought to essentially offer his own testimony regarding the claimant's vocational background, based upon his "superior knowledge," despite the presence of the true Vocational Expert.

17. During the course of direct examination, ALJ Nisnewitz asked the claimant if he had made any trips out of state. The claimant forthrightly stated that he had promised his wife and four-year-old daughter a trip to Disney World when he was feeling well enough to travel (some 15 months after the fire), and that he had just returned from this trip the prior month. The ALJ did not ask the claimant any questions about how he did or did not manage the trip to Florida. Knowing that the ALJ was setting a "trap" for the claimant, on direct examination I elicited further direct testimony from the claimant that he in fact had often stayed back at the hotel while his wife and daughter went to the Magic Kingdom.

18. Despite the clarification of this testimony in the record, ALJ Nisnewitz subsequently wrote in his unfavorable decision (issued over seven months later) that: "His [the claimant's] daily and social activities appear to be within normal limits as he was able to travel to Disneyland [actually Disney World] with his daughter. The fact that he travelled over 5,000 miles [the flight from New York's JFK to Orlando is in fact less than 1,000 miles], with his daughter, to a place which usually requires people to stand in line to purchase tickets, to be

standing and walking for prolonged periods of time and other activities typical of large recreation facilities such as Disneyland, is quite inconsistent with allegations of constant pain." (ALJ Decision, pg. 3.). Not only did the ALJ incorrectly and detrimentally assert that the claimant flew to California rather than Florida, he essentially enunciated his "Disneyland Test" of disability. The "Disneyland Test" is now famous among the Social Security Bar in the New York area, and we must prepare our clients accordingly prior to a hearing: "If you can go to Disneyland, you can't be found disabled under Social Security rules according to Judge Nisnewitz!"

19. Such misapplication of incorrect facts to undermine the credibility of claimants and bolster his own unfavorable decisions is a well-known tactic of ALJ Nisnewitz. The John Doe transcript is replete with additional examples of ALJ Nisnewitz's abuse of power, improper judicial decorum, failure to adequately develop the evidentiary record, and misapplication of the law, similar to the allegations in this lawsuit.

20. On appeal to the U.S. District Court for the Eastern District of New York, the case was assigned to Judge Raymond J. Dearie. The U.S. Attorney's Office offered to remand the case to ALJ Nisnewitz for him to correct his obvious errors. Given ALJ Nisnewitz's egregious conduct in this case, I refused the offer for a remand and proceeded to prepare for full briefing before Judge Dearie on the matter. At that point, further negotiations with the U.S. Attorney resulted in a negotiated Stipulation and Order signed by Judge Dearie to remand the case back to Social Security solely for the calculation and payment of benefits.

21. In a different case before ALJ Nisnewitz, I represented a Latino cleaning woman in her 50s with a limited education in her home country. She had a solid work history in the U.S. and spoke in broken English. She could no longer do heavy office cleaning due to a back

condition. As a result of her inability to fully comprehend the rapid fire and combative questioning of ALJ Nisnewitz, the ALJ quickly became frustrated and enraged at both the claimant and me. The claimant quickly decompensated and began crying. I asked the ALJ for a short break for the claimant to step outside the hearing room to compose herself. The ALJ denied my request. My further attempts to defend my client from the ALJ's onslaught during the course of the hearing were met with increasing anger toward me, which poisoned any chance that the claimant would receive a full and fair hearing. After the hearing, in an all too familiar refrain, the trembling claimant asked me, "[w]hat did I ever do to that man?"

22. The above two examples are unfortunately all too common, not just with lawyers from my firm, but with almost all attorneys who regularly appear before ALJ Nisnewitz in the Queens ODAR. I am aware that ALJ Nisnewitz has certain favored representatives who may not always suffer his wrath. In addition, I have seen him "turn on the charm" outside the hearing room in such a way as to make some wonder if he has a "Jekyll and Hyde" type personality. It is undeniable that he possesses a keen intellect. It is this intellect, combined with intimidation, which has protected him from being exposed long ago.

23. I am also aware that many practicing attorneys who regularly appear at the Queens ODAR (and indeed the entire metropolitan area) have long been afraid to speak out due to fear of economic retribution from not just from these ALJs, but also from ALJs around the region who will "circle the wagons" to protect five of their own. In conversations with my colleagues since the filing of this lawsuit, sadly, this still remains true. Based upon my personal knowledge of the integrity of the vast majority of ALJs in our region, and their own knowledge that these five were often disdainful of their higher approval rates, I do not choose to be so

cynical. Hopefully, they will see these ALJs for what they are – bad apples that need to be culled from an otherwise healthy orchard.

24. In my practice, we have experienced less than a 50% approval rate in cases before ALJ Nisnewitz. This is despite our office having a much higher threshold for the types of disability claims we take in Queens (all other things being equal, and due to the contingency nature of attorneys' fees in Social Security cases, I would estimate that before we take a case in Queens, the claimant must be at least 25-50% more disabled than a similar client's case in other boroughs). I know of other experienced attorneys who simply refuse to take on clients with claims in Queens given the economic realities of cases that can sometimes take 10 years to complete. This obviously results in an unequal balance of justice between the various boroughs.

25. The bias shown by ALJ Nisnewitz and the other Queens ALJs named in this lawsuit has impacted our practice negatively in that we simply are unable to assist certain claimants with what we believe are meritorious cases but perhaps not as strong as others. For example, we must always think twice prior to taking auto-immune cases (rheumatoid arthritis, lupus, fibromyalgia, Lyme disease), whose symptoms are largely subjective, because we know of the bias against such claims in Queens. When we do take such cases in Queens, our sole mission at the ALJ hearing stage is simply to develop the record completely for future federal court review.

26. Simply put, due to anti-claimant bias, an aversion to due process, and a consistent disregard for the applicable law, claimants who appear before the five ALJs named in this lawsuit are subjected to a different standard of justice than those living in other boroughs in New York City.

ALJ Seymour Fier

27. Over the course of many years I, along with other attorneys in our firm, have represented numerous disabled claimants before ALJ Seymour Fier.

28. ALJ Fier is well known for his utter legal incompetence in both the hearing room and in his decision-making.

29. Upon information and belief, there was a time in the past when Social Security ALJs were still hearing Medicare appeals that ALJ Fier was assigned by the SSA solely to this function so that he would not have to deal with claimants directly. This was based on prior complaints about his conduct in hearings and aberrant decision-making.

30. One particular Title II disability case involving a mentally retarded young woman to whom Judge Fier denied benefits is instructive of purposeful disregard for facts and applicable Social Security law.

31. The claimant in this case was 38 years old, had a 59 full-scale IQ, and could not read. She was simple yet charming, and got along well with others. Her mother, with whom she lived, was a long-time blue-collar worker in a small Queens non-profit hospital. With the assistance of her mother and the support of the hospital where her mother worked, the claimant admirably obtained employment as a cleaner, mopping the floors at the hospital.

32. This supportive employment continued for a number of years, and the claimant was able to accrue enough Social Security earnings credits to be eligible for regular Title II disability benefits. Unfortunately, mid-career she developed chronic asthma, which no longer allowed her to work with the cleaning supplies necessary to perform her regular job.

33. Given her long employment with the hospital, the hospital tried to accommodate her by transferring her to the dietary department, where she was asked to place certain food items on patient trays for delivery to hospital rooms. Unfortunately, as the claimant testified at

the hearing, due to her illiteracy, she was unable to fill food orders. For example, she was unable to read labels on milk cartons, and frequently mixed up skim milk orders with regular milk orders, potentially putting patients with dietary restrictions at risk.

34. As a result, the hospital informed the claimant that there were no other jobs in the hospital that she could perform given both her mental disability and her environmental restrictions. Both the claimant and her mother were crushed, as they both believed that working was the best thing for her, and applying for disability benefits, which she easily could have done years earlier, was tantamount to giving up and taking "welfare."

35. Having lost her employment with the hospital and unable to find another supportive work environment, the claimant applied for Title II disability benefits. Her initial application was denied, and she requested a hearing and review by an ALJ.

36. The claimant's case was assigned to ALJ Fier, and a hearing was held at which both the claimant and her mother testified. Also present was a Social Security Medical Advisor called to testify by the ALJ. At the hearing, ALJ Fier asked the Social Security Medical Advisor if the claimant either met or equaled one of Social Security's Listed Impairments. The "Listings" are a list of severe medical and psychiatric conditions which the SSA recognizes as presumptively disabling absent extraordinary circumstances. If a claimant meets or equals a "Listing," the ALJ need not inquire any further whether the claimant can do her past relevant work. If the ALJ accepts the Medical Advisor's opinion that a claimant meets a Listing, the claimant is automatically deemed disabled under the SSA's five-step sequential evaluation process.

37. At the hearing, the Social Security Medical Advisor testified that the claimant met Social Security Listing 12.05B – Mental Retardation, based upon her full scale IQ Score of 59

on an IQ test administered by an SSA psychologist. The Medical Advisor noted that the claimant had been diagnosed as mentally retarded as far back as 1978, almost 30 years prior to the hearing. At any other hearing, in my experience, the ALJ would have concluded the hearing at that point, understanding that the Medical Advisor had just testified that the claimant was entitled to benefits.

38. Despite the Medical Advisor's opinion, ALJ Fier continued on a course of bizarre questioning which clearly indicated his intention to ignore the Medical Advisor's expert opinion. When we tried to explain to the ALJ that this area of inquiry was now irrelevant, ALJ Fier angrily dismissed our suggestions stating something to the effect, and I paraphrase, "I decide what is relevant or not in my courtroom."

39. After the hearing, the claimant's mother received an Unfavorable Decision from ALJ Fier. This decision was strewn with legal errors, misrepresentations of facts, fabrications of facts, and omissions of relevant facts in the case. Astonishingly, ALJ Fier's decision omitted any reference to the opinion of the Medical Advisor that the claimant was disabled. In fact, the ALJ did not even note his appearance at the hearing.

40. The conduct of ALJ Fier in fabricating and omitting relevant facts was so egregious that we took the unusual step of filing a formal written complaint against him with SSA's Office of the Inspector General. Other than a form acknowledgment letter from the Inspector General's "Allegation Management Division" we received on September 14, 2006, neither the claimant nor my office ever received any information on what, if any, action was taken against Judge Fier. His conduct in this case requiring delicate handling was an utter disgrace.

41. After receiving ALJ Fier's unfavorable decision and without waiting for transcripts from the hearing, given the strength of the case, we immediately requested review by the Social Security Appeals Council. We asked the Appeals Council for the extremely rare remedy of full reversal solely for the calculation of benefits (on the rare occasions that the Appeals Council does disturb an ALJ decision, in my experience, it remands the case 90% of the time to the same ALJ for him or her to correct their errors).

42. The Appeals Council granted our request and reversed ALJ Fier, awarding this young disabled woman the benefits she so rightly deserved.

43. ALJ Fier consistently ignores controlling Social Security law, including even federal regulations, as evidenced above, to achieve the outcome he personally desires in a particular case, all to the detriment of Queens claimants.

44. Based upon my law firm's experience appearing before ALJ Fier, he denies more than 50% of our claims, which results in monumental delays for deserving claimants. Due to our rigorous client screening process, we regularly win over 90% of our claims at the ALJ level in other ODARs in the tri-state area. Once again, this unfortunately means that Queens residents have more difficulty obtaining representation from the private bar, and face an uneven playing field when compared to other ODARs regardless of whether they are represented or not.

45. Simply put, ALJ Fier has a long history of anti-claimant bias and should have no place on the bench. The injustice he has already caused will require review and clean-up, at a massive cost to the taxpayer and the SSA, for years to come.

46. Unfortunately, the SSA has a long history of impotence in dealing with bad ALJs. In fact, on May 11, 2011, I attended the semi-annual conference of the National Organization of Social Security Claimant Representatives ("NOSSCR") in Baltimore. One of the seminars was

entitled: "Complaining About ALJ Behavior: Is Anyone Listening?" and was presented by the former President of NOSSCR and three New York attorneys, one of whom was from Queens legal services. The seminar was widely attended by hundreds of Social Security attorneys across the country, given the interest in this case nationwide. The vast majority of the seminar was spent discussing the Queens case against SSA and these five ALJs. At the end of the seminar, the former President of NOSSCR publicly saluted the Queens legal services attorney who spoke.

47. A similar seminar has been presented at least once per year since I joined NOSSCR 20 years ago. To date, given the apparent strength of the ALJ union, little has been done to curb ALJ abuses. The only case I am aware of in which an ALJ has been removed (eventually resigned) for cause was the case of a male ALJ physically attacking a fellow female ALJ.

EXECUTED this 30th day of August 2011

Troy G. Rosasco