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Charleston, WV 25305

VOICE: 304-720-0342

TTY: 304-558-4219

FAX: 304-558-1212

To: Chris Dickerson
WV Record

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Fax #: ~~1-800-861-4963~~
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From: Kandi Greter
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Subject:

COMMENTS:

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLGAN AIR, INC.,

Appellant,

v.

**Appeal No.: 070285v
(West Virginia Human Rights
Commission Docket No.
ERRELNOANCSREP-391-02)**

**WEST VIRGINIA HUMAN RIGHTS
COMMISSION, RAO ZAHID KHAN,**

Appellees.

**To: Honorable Larry V. Starcher
Justice of the Supreme Court of Appeals of West Virginia
Capitol Complex, Building 1, Room E-307
Charleston, West Virginia 25305**

MOTION FOR DISQUALIFICATION OF JUSTICE STARCHER

Pursuant to Rule 29 of the West Virginia Rules of Appellate Procedure, Colgan Air, Inc. (hereinafter referred to as "Colgan Air"), by counsel, respectfully moves to disqualify Justice Larry V. Starcher from participating in any decision related to the above-captioned litigation. Facts from the record demonstrate that Justice Starcher has a personal bias or prejudice, either actual or objectively perceivable by a reasonable person, concerning Appellant Colgan Air in this litigation, and should therefore recuse himself.

I. CONTROLLING LEGAL PRINCIPLES

The principles that govern this motion are straightforward and succinct. “A justice shall disqualify himself or herself, upon proper motion or *sua sponte*, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct” Rule 29(b), W. Va. R. App. P. “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party” Canon 3(E)(1)(a), W. Va. Code Jud. Conduct; Liljeberg v. Health Services Acquisition Corp., 486 U.S. 487, 860-61, 108 S. Ct. 2194, 2203, 100 L. Ed. 2d 855, 872-73 (1998); Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 108, 459 S.E.2d 374, 385 (1995).

II. FACTS

In this appeal, Colgan Air seeks review of the West Virginia Human Rights Commission’s decision to modify the Administrative Law Judge’s ruling, and determination that Colgan Air is liable to Khan for harassment and discrimination based on his Pakistani and Muslim heritage.

On September 18, 2007, during Colgan Air’s oral argument in support of its appeal in this matter, Justice Larry V. Starcher posed an inappropriate and irrelevant question regarding the national origin/ancestry of Ms. Shaleeza Altaf, one of the attorneys representing Colgan Air in this matter, and then proceeded to make an unwarranted comment which reflected bias and/or prejudice.

Specifically, during Colgan Air's rebuttal argument, Justice Starcher asked Colgan Air lead counsel Mark Dombroff if Colgan Air co-counsel in this case, Ms. Shaleeza Altaf, is of Pakistani origin.¹ When Mr. Dombroff responded in the affirmative, Justice Starcher replied, "That's what I thought." Notably, this comment was made in the presence of a large public audience, which included attorneys, parties, members of the public, and many local students attending the session as part of a class field trip.

Justice Starcher's words strongly imply the presence of impermissible bias and/or prejudice, and as such, per Canon 3(E)(1)(a) of the West Virginia Code of Judicial Conduct, he should disqualify himself in these proceedings.

III. ARGUMENT

JUSTICE STARCHER'S COMMENTS CREATE, AT THE VERY LEAST, AN APPEARANCE OF IMPROPRIETY FOR WHICH RECUSAL IS THE APPROPRIATE REMEDY.

Justice Starcher's conduct during the oral argument of this matter violated Canons 1 and 3 of the West Virginia Code of Judicial Conduct, and creates, at the very least, a serious appearance of impropriety that disqualifies Justice Starcher from deciding any matter in this appeal. See, e.g., *Judith R. v. Hey*, 185 W. Va. 117, 123, 405 S.E.2d 447, 454 (1990) (finding that a circuit court judge had departed from his neutral role by making scurrilous aspersions about a party's character and therefore would be disqualified on remand).

¹ Although Ms. Altaf has been admitted pro hac vice in this matter, she was not orally presenting Colgan Air's argument to the Court during this session. Ms. Altaf was simply seated at counsel's table.

Justice Starcher's voluntary and public question/comment regarding the national origin of Appellant's counsel strongly suggests that he will be unable to render an impartial decision in this case, which involves allegations of discrimination by Appellee Khan based on his Pakistani and Muslim heritage, and thus is required to disqualify himself.

Even if Justice Starcher does not hold an actual bias against Colgan Air, he has created an appearance of partiality with his question/statement, and according to West Virginia law, ". . . avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself." Tennant, 194 W. Va. at 108, 459 S.E.2d at 385. This appearance of impropriety compels disqualification.

IV. CONCLUSION

Colgan Air has provided a factual basis, through Justice Starcher's own biased statements, for questioning the Justice's impartiality. See id. at 384. Now, the determination of whether he is disqualified focuses not on the Justice's subjective perception of his ability to act fairly, but on "whether an objective assessment of the judge's conduct produces a reasonable question about impartiality." Leslie W. Abramson, Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct 15-16 (2d ed. 1992) (quoted in State ex rel. Brown v. Diétrick, 191 W. Va. 169, 174 n.9, 444 S.E.2d 47, 52 n.9 (1994)).²

² Indeed, "[t]he appearance of impropriety may 'sometimes bar [participation] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" Id.

Justice Starcher's comments undermine public confidence in the integrity, independence, and impartiality of the West Virginia judiciary. To support its allegation that Justice Starcher's impartiality may reasonably be questioned, Colgan Air has presented Justice Starcher's own words, leaving no room for rumor or suspicion as to what his bias is. For these reasons, Colgan Air respectfully requests that Justice Starcher recuse himself from consideration of the matters at issue in this appeal.

COLGAN AIR, INC.
By Counsel



Brian J. Moore, Esq. (WVSB # 8898)
Jackson Kelly PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, West Virginia 25322
(304) 340-1000

Mark A. Dombroff, Esq. (Admitted *Pro Hac Vice*)
Shaleeza Altaf, Esq. (Admitted *Pro Hac Vice*)
DOMBROFF GILMORE JAQUES & FRENCH, P.C.
1676 International Drive, Penthouse
McLean, VA 22102
(703) 336-8800
(703) 336-8750 facsimile
Counsel for Appellant Colgan Air, Inc.

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Commission Docket No.
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**WEST VIRGINIA HUMAN RIGHTS
COMMISSION, RAO ZAHID KHAN,**

Appellees.

**VERIFIED CERTIFICATE OF COUNSEL OF RECORD
REGARDING COLGAN AIR, INC.'S MOTION FOR DISQUALIFICATION OF
JUSTICE STARCHER**

COMES NOW, Mark A. Dombroff, counsel for Appellant Colgan Air, Inc., and pursuant to Rule 29 of the West Virginia Rules of Appellate Procedure, certifies the following:

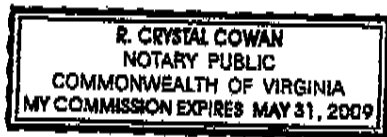
1. I have read Colgan Air, Inc.'s Motion for Disqualification of Justice Starcher.
2. To the best of my knowledge, information and belief, formed after reasonable inquiry, the motion is well grounded in fact and is warranted by existing law and is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Dated: September 20, 2007

I declare under penalty of perjury that the foregoing is true and correct.

By: *[Signature]*
MARK A. DOMBROFF, ESQUIRE

This day personally appeared before me Mark D. Dombroff, who being by me first duly sworn, says, upon his oath, that he knows the contents of this Verified Certificate of Counsel of Record Regarding Colgan Air, Inc.'s Motion for Disqualification of Justice Starcher; and that the facts and allegations set forth therein are true to the best of his information, knowledge and belief.



R. Crystal Cowan
NOTARY PUBLIC # *359700*

My Commission Expires: *May 31, 2009*

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COLGAN AIR, INC.,

Appellant,

v.

**WEST VIRGINIA HUMAN RIGHTS,
COMMISSION; RAO ZAHID KHAN,**

**APPEAL NO.: 070285
(WEST VIRGINIA HUMAN RIGHTS
COMMISSION DOCKET NO.:
ERRELNOANCSREP-391-02)**

Appellees.

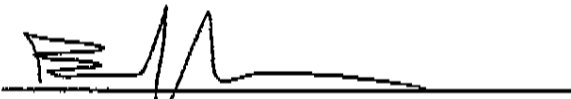
CERTIFICATE OF SERVICE

I, BRIAN J. MOORE, counsel for Appellant Colgan Air, Inc., certify that service of Colgan Air, Inc.'s *Motion for Disqualification of Justice Starcher and Verified Certificate of Counsel of Record Regarding Colgan Air, Inc.'s Motion for Disqualification of Justice Starcher* has been served on the parties, by U.S. Mail, postage prepaid, on this 20th day of September, 2007, as follows:

Dwight J. Staples, Esq.
Henderson, Henderson & Staples
711 ½ 5th Avenue
Huntington, WV 25701

Ivin B. Lee, Executive Director
West Virginia Human Rights
Commission
1321 Plaza East, Rm. 108A
Charleston, WV 25301-1400

Paul R. Sheridan
Senior Assistant Attorney General
Post Office Box 1789
Charleston, WV 25326-1789


BRIAN J. MOORE (WVSB: 8898)