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Statement of Center for Judicial Accountability Director Elena Ruth Sassower in Opposition to Senate Confirmation of the Nomination of Michael Garcia as Associate Judge of the New York Court of Appeals

February 8, 2016

This is to vigorously protest the sham, unconstitutional manner in which this Committee is holding today's hearing to confirm the nomination of Michael Garcia as an associate judge of New York's highest court. The Committee's webpage hearing notice states "Oral testimony by invitation only", falsely implying that members of the public with evidence germane to the question of Mr. Garcia's fitness will be able to secure an "invitation". In fact, the ONLY witnesses being permitted to testify are the bar associations which favorably rated him.

My own request to testify, in opposition, was denied – without any inquiry as to its basis. That basis was and is Mr. Garcia's litigation misconduct in the declaratory judgment action against the Commission to Investigate Public Corruption which he purported to bring on behalf of both the Senate and former Temporary Senate President Dean Skelos, by an unverified November 22, 2013 complaint, in tandem with counsel purporting to represent the Assembly and former Assembly Speaker Sheldon Silver, and counsel purporting to represent Temporary Senate President Jeffrey Klein.[1]

So egregious was Mr. Garcia's litigation misconduct with his fellow counsel, as well as the litigation misconduct of the Commission's counsel, the State Attorney General – both sides injecting material falsehoods into the proceeding, detrimental to the public's rights, and ultimately colluding to close the case so as to wrongfully deprive the public of the determination to which they were entitled and for which they paid with their tax dollars – that, by order to show cause dated April 23, 2014, I moved to intervene in the declaratory judgment action, on behalf of the Senate and Assembly, seeking:

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[1] The full title of the declaratory action, commenced in Supreme Court/New York County, under Index #16094/13, is:

> New York State Senate, New York State Assembly, Dean G. Skelos and Jeffrey D. Klein, as members and as Temporary Presidents of the New York State Senate, and Sheldon Silver, as member and as Speaker of the New York State Assembly,
>
> v.
>
> Kathleen Rice, William J. Fitzpatrick, and Milton L. Williams, Jr. in their official capacities as Co-Chairs of the Moreland Commission to Investigate Public Corruption.

"(a) to oppose its dismissal for 'mootness'[fn]; and

(b) to secure a summary judgment declaration as to the unconstitutionality of Governor Andrew Cuomo's still-live Executive Order #106, whose establishment of the Commission to Investigate Public Corruption violated separation of powers, as *written and as applied*, including by the December 2, 2013 Preliminary Report it left behind, on which the public has been detrimentally led to rely."

The order to show cause additionally sought "a direction that plaintiffs and defendants respectively identify the amount of taxpayer monies expended in bringing and defending this declaratory judgment action and the related proceedings", as well as a TRO "to stay the plaintiffs and defendants from filing a stipulation of discontinuance or agreed dismissal of plaintiffs' declaratory judgment action on the ground of mootness".[2]

My 41-page moving affidavit particularized the situation, beginning as follows:

"2. Like CJA's many New York members and supporters, I am among the public whose trust in government defendant Commission to Investigate Public Corruption was established to restore and whose hundreds of thousands of tax dollars have been used by both plaintiffs and defendants in bringing and defending this declaratory action, as well as the related proceedings to quash the Commission's subpoenas, for protective orders, and intervention motions. As hereinafter demonstrated, neither plaintiffs nor defendants are protecting the public or the interest of the state by their submissions to this Court, filled with material deceits, prejudicial to proper determination of the important separation of powers constitutional issues.

3. Indeed, by reason of the true facts misrepresented and concealed by the parties, there is a question as to whether the individual plaintiffs, Temporary Senate Presidents Skelos and Klein and Assembly Speaker Silver, have standing to raise the separation of powers issue which belongs to the institutional plaintiffs, the New York State Senate and the New York State Assembly – and whether their divergent interests, including as to mootness, make it improper for Michael J. Garcia, Esq., of Kirkland & Ellis, LLP, to be representing both plaintiffs Senate and Skelos, and Marc E. Kasowitz, Esq., of Kasowitz, Benson, Torres & Friedman, LLP, to be representing both plaintiffs Assembly and Silver.

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[2] See my April 23, 2014 moving affidavit, ¶1, and order to show cause, with TRO, posted, with the entire litigation record, on CJA's website, www.judgewatch.org, accessible *via* the prominent homepage link: "What's Taking You So Long, Preet? CJA's Three Litigations Whose Records are Perfect 'Paper Trails' for Indicting New York's Highest Public Officers for Corruption". The litigation record is also accessible from CJA's webpage for Mr. Garcia's confirmation that can be reached *via* the sidebar panel "Judicial Selection-State-NY", with a menu choice for "'Merit Selection' Appointment to NY's Highest State Court".

4. Certainly, it deserves note, as a threshold matter, that Mr. Garcia and Mr. Kasowitz have not established that they are entitled to represent the Senate and Assembly, let alone 'those bodies' individual members'[fn]. They have not alleged or furnished a resolution of either chamber[fn] – notwithstanding *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001). Tellingly, they have furnished no statement, sworn or otherwise, for their failure to do so. That Mr. Garcia relies, exclusively, on Senate Rule III, §5 authorizing the Temporary Senate President to engage legal representation on behalf of the Senate to enforce and defend the rights, privileges, and prerogatives of the Senate only reinforces that where the interests of the Temporary Senate Presidents diverge from those of the Senate – as at bar – the client is the Senate[fn].

5. Despite my phone messages for Mr. Garcia on December 12 and 16, 2013, offering 'valuable information', and my phone messages for Mr. Kasowitz on December 16, and 17, 2013, neither they nor anyone on their behalf returned my calls.

…

No Relevant Sworn Statements Support the Parties' Submissions, Except for the Affirmation of the Commission's Chief of Investigations Reflecting the Commission's Violation of Executive Order #106 in the Authorization of Investigations

…

14. By contrast to this sworn affidavit and my proposed verified complaint with its substantiating exhibits – all of which I incorporate by reference and whose recitations, where written by me, I swear to as true – the parties have essentially submitted no sworn statements attesting to the truth of the factual recitations their counsel have placed before the Court. Presumably, this is to avoid the penalties of perjury for factual assertions they know to be false.

15. Plaintiffs' November 22, 2013 complaint initiating this declaratory judgment action, signed by its three counsel, is not verified. No affidavits or affirmations have been filed by plaintiffs or their counsel attesting to the truth of the complaint's factual assertions or of the factual assertions in counsel's February 21, 2014 memorandum of law in opposition to defendant Commission's dismissal motion.

…

The Legislative Course of the Governor's 'Clean-Up Albany Package', whose Supposed Rejection by the Legislature Underlies his Establishing the Commission

21. Plaintiffs' constitutional, separation of powers argument with respect to the Commission is largely focused on the assertion that because the Legislature did not pass the Governor Cuomo's reform legislation, the Governor established the Commission in retaliation, tasking it with investigating the Legislature in such

fashion as would compel its passage of the legislation it had determined not to pass. Thus, at the very outset of the complaint:

> 'Frustrated with the Legislature's exercise of its exclusive constitutional responsibilities and prerogative of passing only legislation deemed appropriate by its democratically-elected members, the Governor took the extraordinary step of empanelling a Moreland Commission to, by his own admission, 'investigate the Legislature.'' (¶2, underlining added).

22. Countless paragraphs of the Complaint are of this ilk:

> '…punishing a legislature for considering the necessity and propriety of legislation prior to enactment, which is a legislator's constitutional obligation.' (¶8);
>
> '….bald attempt to eviscerate the Legislature's law making responsibilities' (¶9);
>
> '…the 2013 Proposed Bills, which the Legislature…had determined were not in the best interests of New York and its citizens.' (¶28);
>
> '…to punish the Legislature for failing to pass legislation…' (¶49);
>
> 'blatant attempt to encroach on the Legislative function and coerce a legislative result in clear violation of the separation of powers doctrine and, if not halted, would provide the Executive Branch with an unprecedented and constitutionally impermissible role in the democratic process.' (¶50);
>
> '…if the Legislature does not pass legislation through the constitutionally prescribed mechanism…' (¶55);
>
> '…the Legislature in its judgment determined not to pass [the proposed bills] before adjournment in June…
> the Legislature…opting not to pass the legislation the Governor demanded…
> interference in the discharge of the Legislature's own functions and particular duties in violation of the Constitution.' (¶56);
>
> '…to punish and harass the Legislature for its decision to exercise its Constitutional responsibilities and not pass the 2013 Proposed Bills. The actions of the Commission amount to interference in the discharge of the Legislature's own functions and particular duties.'

(¶57);

'…impinging on the legislative process' (¶58);

'…to punish and harass the Legislature for exercising its constitutional function in deciding which laws to pass and not to pass. The Commission's actions amount to an unconstitutional interference in the discharge of the Legislature's functions and particular duties…' (1st cause of action: separation of powers violation: ¶62);

'…to harass and punish legislators for actions taken in their official capacity as duly-elected representatives of the People of this State….' (2nd cause of action: separation of powers violation: ¶68).

23. All this is materially false. The Legislature played NO part in the fate of the Governor's 2013 reform legislation. Upon the Governor's delivery of his Program Bills # 3, #4, #5, and #12 to the Legislature, plaintiffs Skelos, Klein, and Silver prevented 'the duly-elected representatives of the People of this State' from undertaking any consideration of the bills by neither introducing them nor circulating them for introduction. As a consequence, the bills had no legislative sponsors, were never assigned bill numbers, were never introduced in either the Senate or Assembly, never debated in committee or on the Senate and Assembly floor, and never voted upon. (Exhibit B-1, pp. 2-3; Exhibit G-2, pp. 6-7).

24. Plaintiffs' counsel may be presumed knowledgeable of this. Certainly plaintiffs Skelos, Klein, and Silver knew that within two weeks of the Governor's establishment of the Commission, I had already uncovered that they had aborted the legislative process by withholding all four of the Governor's program bills from the Legislature, for which I sought appropriate documentation by FOIL/records requests to them and the Governor (Exhibits C, D, E).

25. Tellingly, no specifics of the 'legislative process' pertaining to the Governor's Program Bills #3, #4, #5, and #12 appear in plaintiffs' complaint. Rather, there are a mere two paragraphs, each of two sentences (¶¶26, 27). ¶27 is especially laced with misleading, contradictory, and outrightly false claims. …

26. Obviously, if what plaintiffs Skelos, Klein, and Silver did in withholding the Governor's program bills from the Legislature could support plaintiffs' separation of powers constitutional argument, their complaint would not conceal it. However, the actual separation of powers violation is in what plaintiffs Skelos, Klein, and Silver did, in collusion with the Governor, in depriving the 'democratically-elected members' of the Senate and Assembly of their 'constitutionally-ordained legislative function'[fn] – and in the Governor's out-sourcing

to a commission 'duties of a properly-functioning legislature, discharging its oversight and law-making functions.' (Exhibit G-2, p. 1, underlining in the original). Having colluded with the Governor to deprive the Senate and Assembly of their constitutional role – and bearing primary responsibility for the Legislature's dysfunction – plaintiffs Skelos, Silver, and Klein are without standing to raise the Senate and Assembly's separation of powers constitutional objection.

27. Normally, in an adversarial system, opposing counsel would expose misrepresentations and supply the true facts and corresponding law. Defendants were fully knowledgeable as to what plaintiffs Skelos, Klein, and Silver did in aborting the legislative process, as I provided them with this information repeatedly….

28. Here, however, the Commission did not take exception to plaintiffs' false presentation because the true facts would require it to expose the Governor's collusion with plaintiffs Skelos, Klein, and Silver in withholding his separate Program Bills #3, #4, #5, and #12 from the Legislature, as well as his collusion with Co-Chair Fitzpatrick in conflating his rhetorical 'clean-up Albany package', whose components are not specified, with his Public Trust Act, to make it appear that all 62 district attorneys endorsed the 'package', when what they endorsed was limited to his Program Bill #3.[fn]"

My accompanying proposed verified complaint opened as follows:

"1. This verified complaint seeks adjudication of the important separation of powers constitutional issues presented, but materially misrepresented by plaintiffs' unverified complaint."

The proposed verified complaint then continued with 100 fact-specific, document-supported paragraphs, culminating in three causes of action. So important are these three causes of action to the People of the State of New York that I herein quote them, in full:

"AS AND FOR A FIRST CAUSE OF ACTION
For a Declaration that the Governor's Still-Live Executive Order #106 Establishing the Commission to Investigate Public Corruption is, *As Written*, an Unconstitutional Violation of Separation of Powers

101. Sassower repeats, realleges, and reiterates ¶¶1-100 with the same force and effect as if more fully set forth herein.

102. To preserve separation of powers and the independence of the Legislature, the Constitution imposes a duty on the Governor to refrain from arrogating to himself powers residing in another branch of government.[fn]

103. The purposes the Governor conferred upon the Commission are

actually 'duties of a properly-functioning legislature, discharging its oversight and law-making functions.' (Exhibit G-2, pp. 1-2, underlining in original).

104. For the Governor's Executive Order #106, to be constitutional, *as written*, it would have had to recite the Legislature's failure and refusal to discharge its oversight and law-making functions concerning the matters whose investigation and recommendations its ¶II directs (Exhibit A-1).

105. Yet, the Governor's Executive Order #106 did not identify that the Legislature 'failed to act' in any of its seven WHEREAS paragraphs.

106. The Governor's verbal statements that the Legislature 'failed to act' are false. Plaintiffs Skelos, Klein, and Silver aborted the legislative process with respect to each of the Governor's program bills comprising his 'clean-up Albany package'. (Exhibit B-1, pp. 2-3; Exhibit G-2, pp. 6-8).

107. There is no evidence that the Governor could not have readily secured passage of his Public Trust Act, Program Bill #3, had he availed himself of legitimate legislative process, rather than, as he did, engaging in behind-closed-doors dealing-making governance with plaintiffs Skelos, Klein, and Silver. Likewise, there is no evidence that he could not have secured passage of key components of the other program bills that were part of his 'clean-up Albany package' through legitimate legislative process. Sassower's August 21, 2013 letter to the Governor sets this forth convincingly, and without contradiction from the Governor. Such only reinforces the unconstitutionality of Executive Order #106, *as written*, encroaching as it did upon the Legislature without just cause.

108. Had Executive Order #106 been constitutionally-drafted, it would have had to additionally direct the Commission's investigation and recommendations with respect to the Legislature's purported 'fail[ure] to act'.

109. That such direction is further requisite for Executive Order #106 to be constitutional, *as written*, is reinforced by the fact that the Commission was so insensitive and disrespectful of separation of powers concerns as to not have independently recognized its duty, in the first instance, to have examined why the Legislature 'failed to act' so as to evaluate the facts and circumstances and whether there might be some reasonable justification.

110. Had the Commission examined the Governor's verbally-stated reason for establishing the Commission, it would have ascertained the same true facts as Sassower had – and that the Governor's actual separation of powers violation was his colluding with plaintiffs Skelos, Klein, and Silver to deprive the Senate and Assembly's 'democratically-elected members' of their constitutionally-ordained legislative function, altogether preventing them from exercising their 'functional

responsibility to consider and vote on legislation', such that each 'legislator and the thousands of New Yorkers he or she represents [were] unlawfully precluded from participating in the governmental process', *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001).

111. The Commission would also have confirmed that the overriding cause of public corruption, including corruption in the Legislature, is this kind of 'three men in a room', behind-closed-doors governance, enabled by Senate and Assembly rules vesting the Temporary Senate President and Assembly Speaker with autocratic powers, emasculating committees and rank-and-file members and reducing the Legislature to a rubber-stamp, such that neither house remotely discharges its oversight and lawmaking functions (Exhibit G-2, pp. 3-6).

112. Indeed, the Commission would have discovered that so many of the varied proposals that its Preliminary Report would be putting forward – for example, closing the LLC 'loophole' – in addition to public campaign financing, etc. – had, year, after year, after year, again and again, failed to result in any legislative enactment solely because of the stranglehold of leadership, cutting off legitimate legislative process. And it would have discovered that so emasculated are committees and rank-and-file members that the Temporary Senate President and Assembly Speaker have been able to seize control of the legislative budget – unauthorized by legislative rules and violative of the state Constitution – and craft for themselves a slush-fund of countless millions of taxpayer dollars with which to exponentially fortify their power: 'rewarding the faithful and punishing the dissident' (Exhibit T-2, p. 6).

113. Senate and Assembly rules that foster such blatant unconstitutionality by conferring autocratic powers in the Temporary Senate President and Assembly Speaker – and do so not just here, but as a *modus operandi* of governance – are themselves unconstitutional.

AS AND FOR A SECOND CAUSE OF ACTION
For a Declaration that the Governor's Still-Live Executive Order #106 Establishing the Commission to Investigate Public Corruption is, *As Applied,* an Unconstitutional Violation of Separation of Powers

114. Sassower repeats, realleges, and reiterates ¶¶1-113 with the same force and effect as if more fully set forth herein.

115. Even were the Governor's Executive Order #106 not unconstitutional, *as written*, it is unconstitutional, *as applied*, by reason of the Commission's non-compliance with its terms.

116. Sassower's intervention affidavit highlights the many safeguarding

provisions of Executive Order #106 that would have prevented the Commission from invidiously and selectively targeting the Legislature to coerce its passage of legislation in accordance with the Governor's agenda and objectives of 'good government' groups, with whom the Governor was materially aligned. All were wilfully violated by the Commission in furtherance of that targeting. These are:

> Executive Order #106, ¶II(c): requiring the Commission to investigate and make recommendations with respect to 'weaknesses in existing laws, regulations and procedures relating to addressing public corruption, conflicts of interest, and ethics in State Government'. (intervention affidavit, ¶43);
>
> Executive Order 106, ¶V: vesting the investigative powers of Executive Law §§6 and 68.3 on 'the Commissioners', not on the three Co-Chairs who appear to have usurped this critical power, enabling the Governor and Attorney General to more easily influence the Commission's investigative course (intervention affidavit, ¶¶18-20, 43);
>
> Executive Order #106, ¶VI: requiring the Commission to 'promptly' communicate 'evidence of a violation of existing laws' obtained 'in the course of its inquiry…to the Office of the Attorney General and other appropriate enforcement authorities…and take steps to facilitate jurisdictional referrals.' (intervention affidavit, ¶¶45, 47, 54-57);
>
> Executive Order #106, ¶VIII: requiring that after the Commission's 'preliminary policy report on or before December 1, 2013', that it 'further issue an additional report or reports on or before January 1, 2015, or on or before a date to be determined.' (intervention affidavit, ¶¶43, 69);
>
> Executive Order #106, ¶IX: requiring the Commission to 'conduct public hearings around the State to provide opportunities for members of the public and interested parties to comment on the issues within the scope of its work.' (intervention affidavit, ¶¶44-46, 48-52).

117. The Commission's wilful and deliberate violation of these safeguarding provisions of Executive Order #106 to target the Legislature was a manifestation of its actual bias and interest, on which it knowingly acted in flagrant defiance of the most basic conflict of interest rules and obligations of disclosure and disqualification.

AS AND FOR A THIRD CAUSE OF ACTION

For a Declaration that the Commission's Refusal to Disclose its 'Procedures and Rules' for Conflicts of Interest and to Respond to Complaints Raising Disqualification on Grounds of Interest, Vitiates, if not Voids, the Recommendations of its December 2, 2013 Preliminary Report, *as a Matter of Law*, with a Further Declaration that the Commission's Preliminary Report Manifests Actual Bias and Interest, Endangering the Public in Material Respects

118. Sassower repeats, realleges, and reiterates ¶¶1-117 with the same force and effect as if more fully set forth herein.

119. The Commission's wilful and deliberate refusal to disclose its 'procedures and rules' with respect to conflict of interest and to respond to complaints raising issues of disqualification by reason of conflicts of interest, suffice to vitiate, if not void, the recommendations of its December 2, 2013 Preliminary Report, *as a matter of law*.

120. The Commission lives on by its December 2, 2013 Preliminary Report on which the public is being detrimentally led to rely.

121. As demonstrated herein and by Sassower's accompanying intervention affidavit, the Commission, collectively and by its members, special advisors, and staff, acted wilfully and deliberately in furtherance of its self-interests and bias with respect to the 'tips', 'comments', testimony, and evidence it received.

122. The December 2, 2013 Preliminary Report manifests the Commission's interest and actual bias. It is materially false and deceitful – and ¶¶58-68 of Sassower's accompanying intervention affidavit furnishes illustrative particulars.

123. A declaration is required to protect the public from such a Preliminary Report, whose most endangering aspect is its praise of 'Federal prosecutors like United States Attorneys Preet Bharara and Loretta Lynch' as 'root[ing] out and punish[ing] illegal conduct by our public officials' (p. 87) and of district attorneys as 'up to the job' (p. 86) – when the very opposite was attested to, again, and again, and again, by the ordinary citizens who managed to testify in the last 1-1/2 hours of the Commission's September 17, 2013 Manhattan hearing and, with respect to district attorneys, by former assistant district attorney Marc Sacha at the Commission's September 24, 2013 Albany hearing – and evidentiarily-proven by Sassower's July 19, 2013 corruption complaint.

124. To date, Albany County District Attorney Soares has been 'sitting on' Sassower's July 19, 2013 corruption complaint (Exhibit B-1). Likewise, all other

investigative, supervisory, and prosecutorial authorities have been 'sitting on' the corruption complaints that Sassower filed with them (Exhibits B), including three federal prosecutors: U.S. Attorneys, Bharara, Lynch, and Hartunian (Exhibits B-2, B-3, B-4).

125. The Governor's forceful, unequivocal directive to the Commission at his July 2, 2013 press conference was:

> '…Your mission is to put a system in place that says, A. we're going to punish the wrongdoers and to the extent that people have violated the public trust they will be punished. Two, there is a system in place so that the public should feel confident that if there is wrongdoing going on, there's a system in place that will catch those people and make sure it doesn't happen again.
> …
> there is no substitute for enforcement. …there is no substitute for effective enforcement. And any system, and any set of laws are only as good as the enforcement mechanism behind them.' (Exhibit A-2).

126. The Commission – filled with district attorneys; former assistant district attorneys, former federal prosecutors, assistant and deputy attorneys general, all having personal and political relationships with Governor Cuomo, himself a former state Attorney General, and with its current occupant, Attorney General Schneiderman – were duty bound to investigate and report on the efficacy of those offices with respect to public corruption complaints. Instead, and to cover-up the nonfeasance, misfeasance, and actual corruption of those primary 'enforcement mechanisms' in their handling of public corruption complaints – to which the September 17, 2013 hearing witnesses gave voice – they put their names to a Preliminary Report that misled the public as to what it most needed to know, betraying not only their trust, but well-being."

Mr. Garcia did not deny or dispute the accuracy of any aspect of my April 23, 2014 order to show cause with TRO and my accompanying proposed verified complaint. Rather, he engaged in sharp-practice with the Attorney General and his two fellow plaintiffs' counsel. This included their filing, on April 24, 2014, of a stipulation of discontinuance, which they sought to have so-ordered by the assigned judge, Supreme Court Justice Alice Schlesinger – while before her was my April 23, 2014 order to show cause with TRO. Without explanation, he then absented himself from the oral argument before her, on April 28, 2014, sending no attorney to appear on behalf of the Senate and Temporary Senate President Skelos.

I detailed this further misconduct by Mr. Garcia, his fellow counsel, and the Attorney General by my June 17, 2014 motion to vacate the five-sentence April 30, 2014 decision of Justice Schlesinger that had accepted their stipulation, without addressing ANY of the facts, law, or legal argument I had presented either at oral argument or by my order to show cause, and by falsely making it appear that

the filing of their stipulation had preceded my order to show cause. Additionally, the motion sought to vacate the stipulation for "fraud, misrepresentation, or other misconduct of an adverse party", pursuant to CPLR §5015(a)(3), and to refer the parties and their counsel "to disciplinary and criminal authorities for investigation and prosecution of their litigation fraud and conflict of interest", pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.

To substantiate all this relief, my moving affidavit furnished a 12-page analysis demonstrating that Justice Schlesinger's decision was "insupportable, factually and legally, substantively and procedurally – and that no fair and impartial tribunal could have rendered it" (at ¶7). Similarly, her lack of impartiality was demonstrated by her cover-up of the attorney misconduct before her, as to which my affidavit stated:

> "10. Certainly, any fair and impartial tribunal reading my order to show cause would have reacted, strongly, to its particularized showing that counsel for both plaintiffs and defendants had materially deceived the Court by their unsworn court submissions in a manner 'prejudicial to proper determination of the important separation of powers constitutional issues' (moving affidavit, ¶2) – and raising threshold issues as to the propriety of Michael Garcia, Esq., of Kirkland & Ellis, LLP, to be representing both plaintiffs Senate and Temporary Senate President Skelos and Marc Kasowitz, Esq., of Kasowitz, Benson, Torres & Friedman, LLP, to be representing both plaintiffs Assembly and Assembly Speaker Silver because of the divergent interests of their individual and collective clients on the constitutional, separation of powers issues – and mootness (moving affidavit, ¶3).
>
> 11. Yet, at the oral argument the Court did not comment, let alone condemn, the litigation fraud of counsel for plaintiffs and defendants, laid out by nearly the entirety of my 41-page moving affidavit in support of my order to show cause. Nor did the Court make the slightest inquiry whether 'all the parties' were represented and about counsel's conflicts of interest – even as the appearances and non-appearances of counsel before it offered dramatic substantiation of the questions I had raised as to the parties and their counsel (Exhibit 14, pp. 3, 6-7, 16). Instead, the Court chastised me for 'impugn[ing] the motives of the attorneys', asserting they were 'doing their job' and that it held them in 'respect' and 'regard'. (Exhibit 14, p. 34). No fair and impartial tribunal could do this – and fail to recognize that no stipulation of discontinuance could be 'accept[ed]' where '[c]ounsel for all the parties' had not, in fact, signed it or where signing counsel suffered from disqualifying conflicts of interest, including as to the mootness of the constitutional, separation of powers issues. Such now, additionally, constitutes grounds for vacatur of the so-ordered stipulation of discontinuance, pursuant to CPLR §5015(a)(3) for 'fraud, misrepresentation, or other misconduct of an adverse party'.[fn] In this regard, it must also be recognized that the Attorney General is more than defense counsel. He is, in fact, part of the defendant Commission, which was empowered and operated through his office."

Mr. Garcia's sole response to this comprehensive motion was a flimsy three-page memorandum of law, which he submitted jointly with Temporary Senate President Klein's counsel. Under a title heading "NO GROUNDS EXIST TO REFER THE PARTIES OR THEIR ATTORNEYS TO DISCIPLINARY OR CRIMINAL AUTHORITIES", they baldly purported that my request for this relief was "meritless" and that I "[did] not and cannot offer any support…[and] No grounds exist to support [my] request, which should be denied." All the while, his joint memorandum – just as the responses of the Kasowitz firm and the Attorney General – concealed virtually the entire content of my June 17, 2014 motion, including my 12-page analysis of Justice Schlesinger's decision and my threshold question as to whether the Senate and Assembly were, in fact, plaintiffs and the propriety of Kirkland & Ellis' supposed dual representation of the Senate and Temporary Senate President Skelos and the Kasowitz firm's supposed dual representation of the Assembly and Assembly Speaker Silver.

My reply, consisting of a 26-page memorandum of law and 18-page affidavit, demonstrated my entitlement to all the relief sought by my June 17, 2014 motion, *as a matter of law*. Indeed, my reply affidavit annexed the results of extensive FOIL/records requests to the Senate, to the Assembly, to the Attorney General, and to the Comptroller, establishing that counsel for the so-called plaintiffs had no authorization to bring the declaratory judgment action. The single contract that had been produced – for the Kasowitz firm representing the Assembly – did not cover litigation. As for the not-produced contracts for Kirkland & Ellis and Loeb & Loeb, I surmised that either they had not been submitted for approval to the Attorney General and Comptroller, as required – or, if submitted, were not approved:

> "because the Legislature had no reason to retain more than a single special counsel inasmuch as the positions of the Senate and Assembly are perfectly aligned, with the consequence that the Kasowitz firm could represent both chambers without conflict of interest. So, too, the same special counsel as was representing Temporary Senate President Skelos – Kirkland & Ellis – could, without conflict, represent Temporary Senate President Klein, without need of a further counsel, Loeb & Loeb." (my September 26, 2014 reply affidavit, at ¶31).

I noted (at ¶32) that the Senate's April 1, 2008 contract with the law firm Lewis & Fiore, Esqs. for representation in the judicial compensation lawsuit brought by then Chief Judge Kaye asserted, at its very outset, as if in resolution form, "WHEREAS, the Senate in defense of said action has different legal positions, defenses and arguments than the Assembly and the Governor" – and that it annexed the proposal of Lewis & Fiore, Esqs., expressly stating:

> "The Senate has an objective separate from the other defendants. Unlike the Assembly and the Governor, the Senate in the closing days of last year's session passed a bill providing for exactly what the suit seeks to compel. To that end, our interest and our position in this litigation is in conflict with the Assembly which failed to adopt the Senate bill, and the Governor who, of course, was not then the Governor and had no power to act institutionally without the Assembly passing the pay raise bill." (at p. 3, underlining added).

I pointed out:

> "33. At bar…there is conflict of interest. However, it is not between the Senate and Assembly, but between Skelos, Klein, and Silver, on the one hand, and the Senate and Assembly, on the other – and involves the very gravamen of the declaratory judgment action, namely, the facts giving rise to the establishment of the Commission and the Legislature's function and prerogatives, here impinged not only by the Governor, as purported by plaintiff's complaint, but by Skelos, Klein, and Silver, in collusion with him, as demonstrated by my April 23, 2014 order to show cause (moving affidavit: ¶¶3-4, 21-31) and verified complaint: ¶¶45-48, 106-111)."

The absence of any retainers was featured in my reply memorandum of law, under the title heading:

"**Counsel Conceals that Hundreds of Thousands of *Unlawfully-Obtained* Taxpayer Dollars were Used to Commence and Prosecute this Declaratory Judgment Action – and that, Pursuant to CPLR §3217(b), by Appropriate 'Terms and Conditions', the Proposed Intervening Plaintiff Can Secure for the Taxpayers and People of the State of New York the Summary Judgment *for Which They Paid and to Which They Are Entitled***".

It stated:

> "The threshold issue on this motion, as it was on [my] order to show cause, is whether Kirkland & Ellis and the Kasowitz firm are entitled to represent the Senate and Assembly, let alone those bodies' individual members. This issue is concealed by counsel's submissions. Likewise, they conceal the further threshold issue as to whether the divergent interests of the Legislature and its leaders, Temporary Senate Presidents Skelos and Klein and Assembly Speaker Silver, on the very separation of powers questions as are the subject of the declaratory judgment action make the dual representation of the Senate and Temporary President Skelos by Kirkland & Ellis and the dual representation of the Assembly and Assembly Speaker Silver by the Kasowitz firm improper.
>
> Plainly, if the law firms are not authorized to represent the plaintiffs, their opposition submissions are entitled to no consideration.
>
> As shown by the FOIL/records requests, summarized at ¶¶7-33 of the accompanying reply affidavit, the proposed intervening plaintiff has uncovered a situation far more lawless and improper than previously presented. Not only are there no resolutions by the Senate and Assembly authorizing this declaratory judgment action – or any of the other litigation commenced and engaged in by Kirkland & Ellis, the Kasowitz firm, and by Loeb & Loeb, representing Temporary Senate President Klein – but there are no contracts with these three firms retaining

them for these litigations, let alone contracts approved by the Comptroller. The consequence is that these three law firms have had no authorization for these litigations, for which they have been illegally paid with hundreds of thousands of taxpayer dollars.

In *Silver v. Pataki*, 96 N.Y.2d 532, 538 (2001), cited at ¶4 of [my] April 23, 2014 order to show cause and, thereafter, by [my] analysis [of the April 30, 2014 decision] (Exhibit 17, p. 4), the Court of Appeals stated:

> 'The Constitution [] does not give the Speaker representative authority for the body over which he presides. Nor has the Assembly passed a resolution expressing its will that the Speaker engage in this litigation.
>
> The Assembly Speaker is nominally a constitutional officer (NY Const, art III, §9), but his express statutory powers are circumscribed (*see, e.g.*, Legislative Law §§7, 12 [appointment of employees and expenditure authorizations]). Other duties are merely administrative, and include preserving order and decorum, appointing committee members and chairpersons, allocating staff, administering internal rules, and promulgating a budget adoption schedule (*see*, Rules of Assembly of State of NY, 1997-1988, rule I). None of these specific responsibilities are broad enough to confer on the Speaker any special implied authority to seek judicial review on behalf of the interests of the Assembly in general. Accordingly, as Speaker, plaintiff has no special authority to maintain this action.' (at p. 538, underlining added).

As for Senate Rule III, §5, authorizing the Temporary Senate President to:

> 'represent the Senate, or engage legal representation on behalf of the Senate, in any legal action or proceeding involving the interpretation or effect of any law of the federal, state or local government or the constitutionality thereof or with regard to the enforcement or defense of any right, privilege or prerogative of the Senate',

it does not necessarily dispense with the necessity of a Senate resolution where, as here, a legal action is commenced in the Senate's own name. Especially is this so when the Senate's interests diverge from those of its Temporary Senate President. Counsel does not dispute such divergence and that it pertains to the very constitutional, separation of powers issues as gave rise to the Commission's establishment and this declaratory judgment action.

Certainly, too, when the engagement of 'legal representation' is outside counsel, as at bar, such must conform with legal requirements and established procedures for retention. As stated in the Appellate Division, First Department's decision in *Silver v. Pataki*, 274 A.D.2d 57, 62 (2000):

> '…the legislative power to financially obligate the State is limited to those 'claims…audited and allowed according to law' (NY Const, art III, §19). In furtherance of this clearly defined grant of legislative fiscal authority, Legislative Law §21 commands that '[n]either house shall, without the consent of the other…incur any expense whatever except as provided by this chapter.' There is no authorization contained in the Constitution or the Legislative Law for a legislator, even one of the chosen leaders of either house, to unilaterally initiate and conduct litigation or even authorize a debt for attorneys' fees when backed by a resolution of one house (*Carr v. State of New York*, 231 NY 164).

Yet, neither the Senate nor Assembly appear to have followed any of the requisite procedures for authorizing this and other litigations against the Commission, including in contracting for the services of outside counsel. As such, the Senate and Assembly are not lawfully plaintiffs – and if Temporary Senate Presidents Skelos and Klein and Assembly Speaker Silver are lawfully plaintiffs, they are not being lawfully represented by law firms having contracts with the state entitling them to compensation.

Having had no authorization to commence this declaratory judgment action, the law firms are without authorization to seek to discontinue it. Nor can plaintiffs, who may not be plaintiffs – and who unlawfully used hundreds of thousands of taxpayer dollars in bringing and prosecuting this action – seek to discontinue it when the proposed intervening plaintiff, acting on her own behalf and on behalf of the People of the State of New York, is ready to step in and secure for the taxpayers the summary judgment resolution of the declaratory judgment issues to which they are entitled and for which they paid. …" (at pp. 4-6)

On December 3, 2014, Justice Schlesinger held oral argument on my June 17, 2014 motion. This time, Mr. Garcia appeared. However, his brief presentation offered no facts and law in support of his conclusory statements that my motion be denied. I argued extensively as to the state of the record and the law pertaining thereto. I also reiterated the requests presented by both my June 17, 2014 motion and reply papers as to Justice Schlesinger's obligation to disqualify herself and absent that, to make disclosure based on her demonstrated actual bias and interest, including of her $40,000 financial interest in covering up the corruption of the Commission to Investigate Public Corruption, arising from the issue I had presented to it of the collusion of the three government branches in the fraudulent, statutorily-violative, and unconstitutional judicial salary increases recommended by the

Commission on Judicial Compensation.[3] My summation was as follows:

> "I will conclude by saying what I said when I testified before the Commission to Investigate Public Corruption on September 17, 2013. I said 'cases are perfect papers trails. So it's easy to document judicial corruption.' Your Honor, I rest on the record here. I was actually quite astonished that you calendared this motion for oral argument, because the record before the Court on this motion, left you nowhere to go, *as a matter of law*. Your duty, your duty, based upon the record before you on the motion, which apparently you are not familiar with, was not only to have vacated your decision, but also, as to the further relief that was being sought, to refer counsel to disciplinary and criminal authorities for their fraud, misconduct, both in connection with the underlying litigation and in opposing this intervention and reargument motion. (audio clip, at 5:50 minutes)[4]

By decision dated December 23, 2014, Justice Schlesinger again – as she had by her April 30, 2014 decision – rendered a fraudulent decision demonstrating her actual bias. Once again, her decision identified NONE of the facts, law or legal argument I had presented. She denied the motion "in its entirety", not even identifying what that "entirety" consisted of, *to wit*, not only reargument and renewal pursuant to CPLR §2221, but my relief against counsel for their demonstrated fraud, misconduct, and misrepresentation, entitlement to which I had established by a mountain of particularized evidence, all uncontested by Mr. Garcia and his fellow counsel and the Attorney General.

The record of my intervention and reargument motions documentarily establishes the combination of judicial misconduct and attorney misconduct that completely eviscerated any cognizable judicial process, robbing the People of the State of New York of hundreds of thousands of their taxpayer dollars paid to Mr. Garcia and other lawyers who had no lawful, approved contracts for what they were doing and who were defrauding them of the declarations to which they were entitled and for which they paid – declarations that would have given rise to a tsunami of real reforms to restore the kind of functioning, responsible, and accountable government that we do not have, remotely.

Mr. Garcia – the predecessor U.S. Attorney for the Southern District of New York to Preet Bharara, who ironically is coming to Albany today for a full day of speaking about ethics and fighting government corruption – could have easily been a hero to the People simply by acting with the honesty and integrity that New York's Rules of Professional Conduct require of every attorney. This, even without blowing the whistle on the strangling mass of government corruption of which

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[3] See, my June 17, 2014 moving affidavit, ¶¶6-13, as well as ¶¶14-18 under the title heading "Disclosure of the Court's Interest & Relationships"; my September 26, 2014 reply affidavit: ¶¶38-44, under the title heading "The Further Evidence of this Court's Demonstrated Actual Bias", and my reply memorandum of law, pp. 21-25 under the title heading "This Court's Duty to Disqualify Itself for Actual Bias and Interest & to Vacate its April 30, 2014 Decision by Reason Thereof – and, if Denied, to Confront the Particularized Facts, Law, & Argument Presented by the Motion and to Make Disclosure".

[4] The audio clip is posted on CJA's website, on the webpage pertaining to the oral argument.

the proposed verified complaint furnished him with the most breathtaking evidentiary proof – which New York's Rules of Professional Conduct also required him to do.

Can a lawyer who so violated his professional duties, not to mention a multitude of provisions of New York's penal law pertaining to corruption, fraud, larceny, conspiracy – to the profound injury of the People of the State of New York – be seated on the state's highest court? In New York, where, thanks to him, the Legislature continues its abandonment of all respect for evidence and rules of procedure, substituting a "rubber stamp" for its "advice and consent", he sure can.