SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

CENTER FOR JUDICIAL ACCOUNTABILITY, INC., and ELENA RUTH SASSOWER, individually and as Director of the Center for Judicial Accountability, Inc., acting on their own behalf and on behalf of the People of the State of New York & the Public Interest,

Plaintiffs,

-against-

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York, DEAN SKELOS in his official capacity as Temporary Senate President, THE NEW YORK STATE SENATE, SHELDON, in his official capacity as Assembly Speaker, THE NEW YORK STATE ASSEMBLY, ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, and THOMAS DiNAPOLI, in his official capacity as Comptroller of the State of New York,

Defendants.

Index No 1788-14

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR LEAVE TO SUPPLEMENT THE COMPLAINT AND FOR PRELIMINARY INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

This action was commenced by the filing of a summons and complaint, by plaintiffs Center for Judicial Accountability, Inc. ("CJA") and Elena Ruth Sassower, on or about March 28, 2014. See Kerwin aff. at Exhibit A. In the complaint, plaintiffs challenge the negotiation of the 2014-2015 Legislative and Judiciary budgets. See id. A motion to dismiss made on behalf of defendants Governor Andrew M. Cuomo, Dean Skelos, the New York State Senate, Sheldon Silver, the New York State Assembly, Attorney General Eric T. Schneiderman and Comptroller Thomas DiNapoli was granted in part, and denied in part, by a decision and order of the court dated October 9, 2014. See Kerwin aff. at Exh. B. The court's decision and order (1) dismissed all claims against Attorney General Schneiderman and Comptroller DiNapoli, and (2) dismissed plaintiff's First, Second and Third Causes of Action for failing to state a claim. See id. Defendants Governor Cuomo, Temporary President of the Senate Skelos, Assembly Speaker Silver, the New York State Senate and the New York State Assembly answered the complaint on or about November 6, 2014. See Kerwin aff. at Exh. C.

On or about March 31, 2015, plaintiffs sought leave to supplement their complaint. See Kerwin aff. at ¶4. Leave was granted, and a supplemental complaint was served. See Kerwin aff. at Exhs. D, E. Defendants simultaneously moved to dismiss Causes of Action Five, Six, Seven and Eight contained in supplemental complaint pursuant to CPLR 3211, and for summary judgment on plaintiff's Fourth Cause of Action contained in the original complaint. See Kerwin aff. at ¶8. Those motions remain pending. See id.

Plaintiffs now seek leave to file a second supplemental complaint containing allegations and causes of action (Nine through Twelve) relating to the 2016-2017 Legislative and Judiciary budgets that are identical to those contained in the original complaint relating to the 2014-2015 Legislative and Judiciary budgets, and in the supplemental complaint relating to the 2015-2016 Legislative and Judiciary budgets. Cf. Kerwin aff. at Exhs. A, E and Plaintiffs' Proposed Second Supplemental Complaint. The proposed second supplemental complaint also challenges (1) the constitutionality of Legislative/Judiciary Budget Bill S.6401/A.9001; (2) the actions of the Commission of Legislative, Judicial and Executive Compensation; and (3) the "behind-closed-doors, three-men-in-a-room budget deal making" of the Governor, Temporary President of the Senate and Assembly Speaker. See Plaintiffs' Proposed Second Supplemental Complaint at Causes of Action Thirteen through Sixteen.

This memorandum of law is submitted on behalf of all defendants in opposition to plaintiffs' order to show cause.

ARGUMENT

POINT I

PLAINTIFFS' EFFORT TO SUPPLEMENT THE COMPLAINT WITH THE PROPOSED NINTH, TENTH, ELEVENTH AND TWELFTH CAUSES OF ACTION WOULD BE FUTILE

A motion for leave to supplement a pleading is considered under the same standard that applies to motions for leave to amend under CPLR 3025. Maulella v. Maulella, 90 AD2d 535, 537 (2d Dept 1982). When a party seeks to amend or supplement a pleading that would be dismissed on a motion to dismiss, any effort to amend or supplement would be futile. Under such circumstances, a motion for leave to amend of supplement a pleading should be denied.

Deep v. Boise, 16 Misc3d 1121(A) (Sup. Ct. Albany Co. 2007)(leave to amend should be denied when the proposed amendment would be futile, citing Saferstein v. Mideast Systems, 143 AD2d82[2d Dept 1988]).) See also South Bronx UNITE! v. New York City Industrial Development Agency, 2014 NY Misc LEXIS 3329, *16 (Sup. Ct. Bronx Co. 2014)(court is not required to permit an amendment that lacks merit); UBS Securities, LLC v. Angioblast Systems, Inc., 2013 NY Misc LEXIS 6200, *9 (Sup. Ct. New York Co. 2013)(motion to amend denied because court already determined allegations were insufficient to state a cause of action).

In this case, the court has already determined that the allegations in plaintiffs' proposed Ninth, Tenth and Eleventh Causes of Acton are legally insufficient to state a claim, since they are identical to plaintiffs' First, Second and Third Causes of Action already dismissed by the court. See Kerwin aff. at Exh. B. Since these claims would be dismissed in the same way that the First, Second and Third Causes of Action in the original complaint were dismissed, plaintiffs' motion for leave to supplement the complaint with these claims should be denied.

Additionally, the court now has pending before it a full record that supports the dismissal of plaintiffs' Fourth and Eighth Causes of Action. See Kerwin aff. at ¶8. In connection with that record, defendants established that Legislative Law §32-a was not violated, which was the only claim that survived defendants' motion to dismiss the original complaint. The court now has before it irrefutable proof that the requirements of Legislative Law §32-a were not violated in 2014 and 2015. Submitted herewith are copies of (1) the 2016-2017 press release and schedule of budget hearings; (2) the agenda for the February 4, 2016 Public Protection hearing; and (3) the transcript from the February 4, 2016 Public Protection hearing. See Kerwin aff. at Exhs. F, G & H. Since these documents establish that Legislative Law 32-a was not violated in 2016, permitting plaintiffs to add their Twelfth Cause of Action would be futile.

POINT II

PLAINTIFFS SHOULD NOT BE GRANTED LEAVE TO SUPPLEMENT THE COMPLAINT WITH THE PROPOSED THIRTEENTH, FOURTEENTH, FIFTEENTH AND SIXTEENTH CAUSES OF ACTION

Plaintiff's proposed Thirteenth, Fourteenth, Fifteenth and Sixteenth Causes of Action arises out of materially different facts than those contained in plaintiff's original complaint and first supplemental complaint. Koenig v. Action Target, Inc., 76 AD3d 997 (2d Dept 2010) (amendment that arises out of materially different facts prejudices the opposing party). As a result, allowing plaintiffs to add these claims two years after the commencement of the present action would prejudice the defendants. While the original and first supplemental complaints related only to the procedures surrounding the submission of the Legislative and Judicial Budgets, and their inclusion in the proposed 2014-2015 and 2015-2016 executive budgets, the proposed Thirteenth, Fourteenth, Fifteenth and Sixteenth Causes of Action relate to (1) the constitutionality of Chapter 60, Part E, of the Laws of 2015; (2) the actions of the Commission of Legislative, Judicial and Executive Compensation; and (3) the alleged "three-men-in-a room budget dealing" of the Governor, Temporary President of the Senate, and Assembly Speaker.

These proposed causes of action, and the alleged factual assertions contained in the proposed second amended complaint, are completely different from, and unrelated to, those contained in the original and first supplemental complaints. Dispositive motions on all of the plaintiffs' existing claims have been pending before the court since November 2015. To permit the plaintiffs to essentially piggy-back a new, unrelated case onto one that was originally commenced in March 2014, and is now awaiting a decision on dispositive motions, would necessarily prejudice the defendants. As a result, plaintiffs' motion to file and serve a second supplemental complaint should be denied.

POINT III

PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTIVE RELIEF SHOULD BE DENIED IN ITS ENTIRETY

Preliminary injunctive relief is a "drastic remedy" which is not routinely granted. Marietta Corp. v. Fairhurst, 301 AD2d 734, 736 (3d Dept. 2003). Indeed, in "order to obtain the extraordinary relief of a preliminary injunction, the moving party must demonstrate, by clear and convincing evidence, that: (1) there exists a likelihood of ultimate success on the merits of the underlying action; (2) the movant will suffer irreparable injury absent the granting of the preliminary injunction; and (3) a balancing of the equities favors the moving party." Concerned Home Care Providers, Inc. v. New York State Department of Health, 41 Misc3d 278, 289 (Sup. Co. Suffolk Co. 2013) (citing Doe v. Axelrod, 73 NY2d 748, 750 (1988)). See also Reuschenberg v. Town of Huntington, 16 AD3d 568, 569 (2d Dept. 2005); Pantel v. Workmen's Circle, 289 AD2d 917, 918 (3d Dept. 2001). A plaintiff bears the ultimate burden of proof as to each and every element of the claim for injunctive relief. W. T. Grant Co. v. Srogi, 52 NY2d 496, 517 (1981). Plaintiffs have failed to submit any evidence to establish that (1) they are likely to succeed on the merits of the causes of action contained in their proposed second supplemental complaint, (2) they will be irreparably harmed in the absence of the preliminary injunctive relief sought or (3) the balance of equities tips in their favor.

In support of their order to show cause, the plaintiffs submitted only their proposed second supplemental complaint with thirty exhibits, and a twelve paragraph affidavit of plaintiff Elena Ruth Sassower with two exhibits. The exhibits attached to plaintiff Sassower's affidavit are (1) an email between plaintiff Sassower and defense counsel relating to the second supplemental complaint and (2) this court's June 24. 2015 and October 9, 2014 decisions. This

alleged "evidentiary proof" is entirely insufficient to satisfy plaintiffs' substantial burden of demonstrating their entitlement to relief by clear and convincing evidence. Further, plaintiffs seek preliminary injunctive relief that is unrelated to their proposed underlying claims. For instance, plaintiffs seek an order:

> (4) enjoining defendants Senate and Assembly's General Budget Conference Committee and its subcommittees from proceeding further in resolving differences between eight of their respective budget bills:
>
> > (i) State Operations: Budget Bill #S.6400-B/A.9000-B;
> > (ii) Aid to Localities: Budget Bill #S.6403-B/A.9003-B;
> > (iii) Capitol Projects: Budget Bill #S.6404-B/A.9004-B;
> > (iv) Public Protection and General Government: Budget Bill #S.64-5-B/A.9005-B;
> > (v) Education, Labor and Family Assistance: Budget Bill #S.6406-B/A.9006-B;
> > (vi) Health and Mental Hygiene: Budge Bill #S.6407-B/A.9007-B;
> > (vii) Transportation, Economic Development & Environmental Conservation: Budget Bill #S.6408-B/A.9008-B; and
> > (viii) Revenue: Budget Bill #S.6409-B/A.9009-B,
>
> absent a showing of how the amendments giving rise to the differences could have been passed on dates the Legislature was not in session (March 11/12, 2016), who introduced the amendments, where they were introduced, and the debate and voices thereon, if any...

See Plaintiffs' Emergency Order to Show Cause. This relief is unrelated to plaintiffs' proposed Causes of Action Twelve through Sixteen. Since preliminary injunctive relief may only be granted to enjoin conduct "respecting the subject of the action," see CPLR 6301, plaintiffs are not entitled to any of the requested preliminary injunctive relief that is not related to their underlying claims.

A. Likelihood of Success on the Merits[1]

To the extent that plaintiffs seek to enjoin the defendants and/or committees/ subcommittees of the Legislature from "proceeding on" or "enacting" any bill, such relief is unavailable as moot since the 2016-2017 state budget has been enacted. New York Public Interest Group, Inc. v. Regan, 91 AD2d 774, 775 (3d Dept 1982) (since the challenged appropriation bills were enacted with the budget, plaintiffs/ claims were moot). Accordingly, since the plaintiffs seek preliminary injunctive relief related to moot claims, their application for relief should be denied.

Additionally, plaintiff's proposed Thirteenth and Fourteenth Causes of Action allege that Chapter 60, Part E of the Laws of 2015 is unconstitutional both as written and as applied. See Plaintiff's Proposed Second Supplemental Complaint at ¶¶385-452. Where, as here, a plaintiff asserts that a statute is unconstitutional, courts are mindful that enactments of the Legislature – a coequal branch of government – may not casually be set aside by the Judiciary. The statutes in issue enjoy a strong presumption of constitutionality, grounded in part on "an awareness of the respect due the legislative branch." Dunlea v Anderson, 66 NY2d 265, 267 (1985). On the merits, a plaintiff bears the heavy burden of establishing the statute's unconstitutionality "beyond a reasonable doubt." Matter of E.S. v. P.D., 8 NY3d 150, 158 (2007).

Plaintiffs' submissions in support of their application for a preliminary injunction are wholly devoid of evidence sufficient to support a finding that Chapter 60, Part E of the Laws of 2015 is unconstitutional beyond a reasonable doubt. As has been true throughout the pendency of this

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1 Since "a preliminary injunction may not issue where the underlying action is dismissed...," County of Orange v. MTA, 71 Misc2d 691, 693 (Sup Ct. Orange Co. 1971), plaintiffs are not entitled to preliminary injunctive relief since their motion to supplement the complaint should be denied.

case, plaintiffs have submitted, almost exclusively, only copies of letters or communications from plaintiffs to state officials. See Plaintiffs' Proposed Second Supplemental Complaint at Exhs. 37-54. Despite their apparent belief to the contrary, plaintiffs own documents do not constitute "evidence" sufficient to establish the alleged unconstitutionality of an enacted statute. As a result, plaintiffs have failed to establish that they are likely to succeed on the merits of proposed causes of action Thirteen or Fourteen.[2]

Plaintiff's proposed Fifteenth Cause of Action alleges that the Commission of Legislative, Judicial and Executive Compensation violated the statutory requirements of Chapter 60, Part E, of the Laws of 2015. See Plaintiffs' Proposed Second Supplemental Complaint at¶¶453-457. In support of this proposed cause of action, plaintiffs attached Exhibits 39 and 40 to their proposed second supplemental complaint. Again, these exhibits are documents authored by the plaintiffs, which are insufficient "evidence" to support a cause of action. Additionally, the text of the proposed second supplemental complaint also fails to include any factual allegations to support a cause of action that the Commission on Legislative, Judicial and Executive Compensation – which is not a party in this action – violated Chapter 60, Part E, of the Laws of 2015. Accordingly, plaintiffs are unable to establish by clear and convincing evidence that they are likely to succeed on the merits of their Fifteenth proposed cause of action, and their application for preliminary injunctive relief should therefore be denied.

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2 Notwithstanding plaintiffs' failure to submit any evidence to establish that they are likely to succeed on the merits of proposed causes of action Thirteen and Fourteen, those proposed claims would fail as a matter of law. The Commission on Legislative, Judicial, and Executive Compensation – which replaced the Commission on Judicial Compensation – was modeled on the Berger Commission (Commission on Health Care Facilities in the 21st century). A challenge to the legitimacy of the Berger Commission failed in McKinney v. Commissioner of NY State Department of Health, 15 Misc. 3d 743 (Bronx County), aff'd., 41 AD3d 252 (1st Dep't.), appeal dismissed, 9 NY 3d 891 (2007). Accordingly, plaintiffs' similar claims concerning the legitimacy of the Commission on Legislative, Judicial, and Executive Compensation contained in proposed cause of action Thirteen and Fourteen would fail for the same reasons articulated by the court in McKinney.

Finally, plaintiff's proposed Sixteenth Cause of Action alleges that the "three-men-in-a room budget dealing" of the Governor, Temporary President of the Senate and Assembly Speaker is unconstitutional "as unwritten and as applied." See Plaintiffs' Proposed Second Supplemental Complaint at ¶¶458-470. Plaintiffs' claims concerning the manner in which the budget was being negotiated are moot, since budget negotiations ended with the enactment of the 2016-2017 state budget. Further, the manner in which the Legislature and Executive negotiate a budget[3] is not governed by the holding of the Court of Appeals in King v. Cuomo, as plaintiffs suggest. In a desperate attempt to support their unsupportable theory, and argue that the Governor meeting with the leaders of the Legislature about terms of the State budget is unconstitutional, the plaintiffs resort to changing the words of a significant Court of Appeals case. See Plaintiffs' Proposed Second Supplemental Complaint at ¶463. Such an effort cannot be credited.

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3 Public Officers Law §103 requires that every meeting of a public body, which is defined as "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state," see Pub. Off. Law §102(2), be open to the public. Moreover, case law has determined that in absence of a quorum, one cannot establish a violation of the Open Meetings Law. See e.g., Matter of Halperin v. City of New Rochelle, 24 AD3d 768, 777 (2005) (and cases cited). There are no allegations in the complaint, however, that a meeting between the Governor and two Legislative leaders constituted a "quorum" of any sort sufficient to conduct public business. Accordingly, if, *arguendo*, the court reads plaintiffs' Sixteenth Cause of Action as alleging a violation of the Open Meetings Law, the proposed second supplemental complaint fails to allege such a claim as a matter of law.

In King, the plaintiffs alleged that the Legislature pulling back a bill, which it had passed and submitted to the Governor for consideration, violated article IV, §7 of the New York State Constitution. 88 NY2d at 250. In the present case, the plaintiffs allege that Governor Cuomo meeting with the Temporary President of the Senate and Assembly Speaker violates article IV, §7 and article VII §§ 3 and 4 of the New York State Constitution.[4] See Plaintiffs' Proposed Second

Supplemental Complaint at ¶461. The issues in the present case are completely unrelated to those at issue in King, and plaintiffs' attempt to convince the court otherwise should fail.

Section 7 of article IV relates to actions that may be taken by the Governor after the Senate has passed a bill. There are no allegations in the second supplemental complaint that the alleged meetings occurred after the passage of budget bills by the Legislature. Instead, the plaintiffs describe the alleged unconstitutional conduct as the Governor, Temporary President of the Senate and Assembly Speaker "hudd[ling] together for budget negotiations and the amending of budget bills." See id. at ¶461. Accordingly, article IV, section 7 is inapplicable to plaintiffs' claims.

Sections 3 and 4 of article VII provide as follows:

> §3. At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein.

4 To the extent that the plaintiffs, again, allege that the Legislature violated its own rules, defendants again state that, as this court has already held, such a claim is not reviewable by the court. Heimbach v. State, 59 NY2d 891, 893 (1983), app. dismissed 464 US 956 (1983)(determining whether a legislative roll call was incorrectly registered is a legislative matter beyond judicial review); Urban Justice Ctr. v. Pataki, 38 AD3d 20, 27 (1st Dept 2006), lv. denied 8 NY3d 958 (2007) (not the province of the courts to direct the Legislature on how to do its work particularly where the internal practices of the Legislature are involved).

> The governor may at any time within thirty days and, with the consent of the legislature, at any time before the adjournment thereof, amend or supplement the budget and submit amendments to any bills submitted by him or her or submit supplemental bills.
>
> The governor and the heads of departments shall have the right, and it shall be the duty of the heads of the departments when requested by either house of the legislature or an appropriate committee thereof, to appear and be heard in respect to the budget during the consideration thereof, and to answer inquiries relevant thereto. The procedure for such appearances and inquiries shall be provided by law,
>
> §4. The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. None of the restrictions of this section, however, shall apply to appropriations for the legislature or judiciary.
>
> Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that appropriations for the legislature and judiciary and separate items added to the governor's bills by the legislature shall be subject to approval of the governor as provided in section 7 of article IV.

See N.Y. Const. art. VII, §§ 3, 4. Despite plaintiffs' imaginations to the contrary, nothing in either of these constitutional provisions prohibits the Governor and leaders of the Legislature from meeting to discuss any aspect of the budget.[5] In light of plaintiffs' failure to provide any legal authority to support such a position, plaintiffs have failed to establish any likelihood of success on the merits of their proposed Sixteenth Cause of Action by clear and convincing evidence.

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5 Plaintiffs' claims in their, *inter alia*, Twelfth and Sixteenth Causes of Action, and any information related thereto, would also be barred/protected by the Speech or Debate Clause of the New York State Constitution. See N.Y. Const. Art. III § 11.

Based on the foregoing, plaintiffs have failed to meet their burden of establishing that they are likely to succeed on the merits of any of their proposed claims. Accordingly, plaintiffs' application for a preliminary injunction must fail as a matter of law.

B. Irreparable Harm

Despite criticizing the actions or inactions of the defendants in almost 500 paragraphs, the plaintiffs have failed to allege or support any claim that they will be irreparably harmed if preliminary injunctive relief is not granted.[6] For this reason alone, plaintiffs' application for preliminary injunctive relief should be denied. W.T. Grant Co., 52 NY2d at 517 (plaintiff bears the ultimate burden of proof as to each and every element of the claim for injunctive relief).

C. Balancing of the Equities

For all of the reasons discussed above, equitable considerations weigh in favor of denying plaintiffs' request for preliminary injunctive relief. Some of the injunctive relief sought is completely unrelated to plaintiffs' underlying causes of action. Plaintiffs have not presented any claims or evidence sufficient to justify imposing preliminary injunctive relief in a case nearing its completion. The relief sought relates to claims that should not be added to this ongoing action, since to do so would greatly prejudice the defendants. Finally, plaintiffs have provided absolutely no evidence that they would be irreparably harmed if an injunction is not issued. Accordingly, the equities require that plaintiffs' request for preliminary injunctive relief be denied.

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6 In fact, nowhere in plaintiff Sassower's twelve page affidavit submitted in support of her application for a preliminary injunction does the phrase "irreparable harm" even appear.

CONCLUSION

For the reasons discussed above, plaintiffs' motion for leave to file a second supplemental complaint and for preliminary injunctive relief should be denied.

Dated: Albany, New York
April 9, 2015

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