"LEGAL AUTOPSY"/ANALYSIS
of Assistant Solicitor General Frederick Brodie's July 23, 2018 Letter to the Court, Thereafter Reiterated by his July 26, 2018 Letter to the Court

This analysis constitutes a "legal autopsy"[1] of the July 23, 2018 letter of Assistant Solicitor General Frederick Brodie, addressed to Appellate Division Clerk Robert D. Mayberger, requesting that it "be provided in advance to the Appellate Division Justice who will hear appellant's application". The referred-to application is appellants' order to show cause, with preliminary injunction and TRO – a draft of which appellant Sassower had e-mailed Court Attorney Jane Landes at 12:20 p.m. on Friday, July 20th (Exhibit S-1) and then again at 10:52 a.m. on Monday, July 23rd (Exhibit T-1) so that the Clerk's office could review it, solely as to form. Although not obligated to do so, appellant Sassower's two e-mails each cc'd Assistant Solicitor General Brodie and, additionally, supervisory/managerial attorneys at the attorney general's office, including Attorney General Barbara Underwood.

As hereinafter demonstrated, Assistant Solicitor General Brodie's July 23rd letter, which identified that it was based on those two e-mails, is materially false and misleading and is, from beginning to end and in virtually every line, a "fraud on the court", as that term is defined.[2] This is

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[1] As identified by appellants in their first "legal autopsy"/analysis [R.338] and in their last "legal autopsy"/analysis [R.9 (fn1)], the term "legal autopsy" is taken from the law review article "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*", 73 Albany Law Review 1 (2009), by Gerald Caplan.

[2] The definition of "fraud on the court" was repeatedly furnished by appellants at the very outset of their reply memoranda of law in both this citizen-taxpayer action [R.474-475; R.925-926; R.1331] and its predecessor [R.1126-1127], as follows:

> "'Fraud on the court' is defined by Black's Law Dictionary (7th ed. 1999) as:
>
> > 'A lawyer's or party's misconduct in a judicial proceeding so serious that it undermines or is intended to undermine the integrity of the proceeding.'
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> See, also the Court of Appeals' May 8, 2014 decision in *CDR Creances S.A.S. v Cohen, et al.*, 2014 N.Y. LEXIS 1002; 2014 NY Slip Op 3294:

IMMEDIATELY obvious upon comparing it to appellants' order to show cause and supporting papers. Presumably, it is to make it appear that his July 23rd letter accurately reflects these papers – which it does NOT – that his footnote 1 (at p. 1) states:

> "In this letter, for convenience, I have paraphrased appellant's arguments and have addressed only those I deem pertinent. For a full presentation of Ms. Sassower's contentions, I urge the Court to read her moving papers, appellate brief, and the record (available at her website, www.judgewatch.org)."

In any event, Assistant Solicitor General Brodie's footnote 1 is a deceit in purporting that the July 23rd letter has "paraphrased appellant's arguments". This, most certainly, it has NOT done. Instead, the letter recites – and incompletely so – the relief that the order to show cause seeks, furnishing NONE of appellants' supporting arguments. Indeed, there are ONLY two references in the letter to anything reassembling appellants' arguments – and they are so truncated as to enable Assistant Solicitor General Brodie to wholly conceal what the arguments actually are.[3]

> 'Fraud on the court involves wilful conduct that is deceitful and obstructionist, which injects misrepresentations and false information into the judicial process 'so serious that it undermines . . . the integrity of the proceeding' (*Baba-Ali v State*, 19 NY3d 627, 634, 975 N.E.2d 475, 951 N.Y.S.2d 94 [2012] [citation and quotations omitted]). It strikes a discordant chord and threatens the integrity of the legal system as a whole, constituting 'a wrong against the institutions set up to protect and safeguard the public' (*Hazel-Atlas Glass Co. v. Hartford-Empite,* 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 [1944]; *see also Koschak v Gates Const. Corp*., 225 AD2d 315, 316, 639 N.Y.S.2d 10 [1st Dept 1996]['The paramount concern of this Court is the preservation of the integrity of the judicial process'])."

[3] Thus, at p. 7, his letter states: "While appellant protests that Executive Law §63(1) authorizes the Attorney General to '[p]rosecute' actions (Sassower Aff. ¶17), the statute nowhere entitles private citizens to compel or direct such prosecutions." Concealed are the arguments presented by appellant Sassower's ¶17 – and in the relevant adjacent paragraphs: ¶¶11-16, ¶¶18-23.

Also, at p. 8, his letter states: "Appellant herself estimates that the salary increases resulting from Commission recommendations exceed $300 million. (Sassower Aff. ¶28)." Concealed is the context of this estimate, *to wit*, in support of an accelerated briefing schedule and preferential calendaring for oral argument and decision on the appeal – and for the preliminary injunction and other relief sought by this order to show cause" (at ¶27) because ("the need for expedition could not be more imperative" (at ¶28) as "No 'claw-back could ever fully recover" the "over $300 million – and growing" (at ¶29).

As for Assistant Solicitor General Brodie's claim that his letter has "addressed only those (arguments) [he] deem[s] pertinent", his letter in fact addresses NONE of appellant Sassower's arguments, NONE of which he has even revealed – and does not even identify, let alone address, the full range of relief sought by appellants' order to show cause – concealing, <u>entirely</u>, the relief sought by the fourth, sixth, and seventh branches – because, quite obviously, he can't contrive any basis for crafting opposition – *to wit*:

> "(4) issuing a subpoena *duces tecum* to the Albany County Clerk directing delivery to this Court of the record of this citizen-taxpayer action and of its incorporated record of the predecessor citizen-taxpayer action for purposes of confirming plaintiffs-appellants' evidentiary entitlement to summary judgment on each of their causes of action, as well as to the granting, in its entirety, of their March 29, 2017 order to show cause with preliminary injunction and TRO;
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> …
>
> (6) pursuant to §800.24-b of the Third Department Rules of Practice, directing that a pre-calendar conference be held 'to consider settlement, the limitation of issues and any other matter which…may aid in the disposition of the appeal or resolution of the action';
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> (7) granting such other and further relief as may be just and proper, including: (a) investigating the handling of plaintiffs-appellants' September 16, 2017 and October 14, 2016 attorney misconduct complaints, germane to this appeal and this order to show cause, filed with the Third Department Attorney Grievance Committee; and (b) $100 motion costs to plaintiffs-appellants pursuant to CPLR §8202."

Likewise, Assistant Solicitor General Brodie conceals the request in the second branch of appellants' order to show cause that Attorney General Underwood be directed to identify "how, if at all, she has address her own conflicts of interest" with respect to "the interest of the state' on this appeal".

Then, too, there is Assistant Solicitor General Brodie's failure to furnish the Court with the specific webpages or location on appellant CJA's website, www.judgewatch.org, from which it can access appellants' motion papers, as, for instance, *via* the prominent center link: "CJA's Citizen-

Taxpayer Actions to End NYS' Corrupt Budget 'Process' and Unconstitutional 'Three Men in a Room' Governance", as to which there appears the subtitle "A Paper Trail of Litigation Fraud by AG Schneiderman, Rewarded by Fraudulent Judicial Decisions".

It is by such thoroughly deceitful letter – essentially concealing the ENTIRE content of appellant Sassower's moving affidavit – that Assistant Solicitor General Brodie does not merely urge the Court to deny appellants the relief sought by their order to show cause, after signing it, but urges that the order to show cause "not be signed at all" (at p.1) – which is also his letter's conclusion: "The order to show cause should not be signed." (at p. 9). In so doing, Assistant Solicitor General Brodie furnishes no legal authority for the Court not to sign the order to show cause – which is understandable as not signing it flies in the face of State Finance Law §123-c(4):

> "An action under the provisions of this article shall be heard upon such notice to such officer or employee as the court, justice or judge shall direct, and shall be promptly determined. The action shall have preference over all other causes in all courts."

Obviously, only an order to show cause would enable the Court to "direct" the "notice" to respondents that is appropriate and consistent with the expedition the statute contemplates.[4] Obvious, too, is that the consequence of the Court's not signing the order to show cause would be to delay determination of the relief sought – all of which appellants would identically seek by notice of

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[4] "Whenever a statute or rule requires that a given motion be made "on such notice as the court may direct,' or uses words to that effect, that is another legislative way of requiring that the motion be brought on by order to show cause…" McKinney's Consolidated Laws of New York Annotated, Book 7B, Practice Commentaries by Patrick Connors: C2214:25 – "What is a Proper Case?"

"…in some instances, the law expressly requires that a given motion be brought on by show cause procedure… In certain instances, the use of show cause procedure is not explicitly required, but becomes necessary by implication because it requires that which only an order to show cause can accomplish. Notable in this category are those motions that have to be made on notice served in the 'manner the court shall direct,' or 'upon such notice' as the court may require, or words to that effect. …It is through the order to show cause that the court so directs." McKinney's Consolidated Laws of New York Annotated, Book 7B, Practice Commentaries by Patrick Connors: C2214:29 – "Show Cause Procedure Mandatory in Certain Cases" –

motion – excepting the TRO, which requires an order to show cause to bring on. As to the TRO, State Finance Law §123-e(2) deems it so important to the citizen-taxpayer action statute as to not only exempt it from the restrictions of CPLR §6313, but to make it available to a citizen-taxpayer plaintiff without necessity of an undertaking. [see pp. 28-30, *infra*.]

Assistant Solicitor General Brodie's letter then proceeds to a section entitled "Background" (at p. 2), followed by a seven-section argument, A-G (at pp. 2-8). As demonstrated hereinbelow, all eight sections are materially false and misleading – and knowingly so. His culminating one-sentence "Conclusion" (at p. 9), hereinabove discussed, ends it all.

Suffice to say that the fundamental legal principle – repeated by appellants' reply memoranda of law [R.477, R.928, R.1127], contained in the reproduced record on appeal to which Assistant Solicitor General Brodie stipulated – is as follows:

> "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party." Corpus Juris Secondum, Vol 31A, 166 (1996 ed., p. 339);
>
> "It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause…and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause." II John Henry Wigmore, Evidence §278 at 133 (1979).

For the convenience of all, a table of contents of this "legal autopsy"/analysis follows.

Table of Contents

The Letter's Fraudulent "Background" (at p. 2) 7

The Letter's Fraudulent Section A (at pp. 2-3) 11
"Appellant Has Not Shown, and Cannot Show,
a Probability of Success on the Merits"

The Letter's Fraudulent Section B (at pp. 3-5) 12
"Appellant Has Not Shown, and Cannot Show,
Immediate and Irreparable Injury"

The Letter's Fraudulent Section C (at p. 5)....................20
"Appellant's Own Delay Undermines Her Request
for Emergency Relief"

The Letter's Fraudulent Section D (at p. 6) 22
"CJA is Not Represented by Counsel,
and therefore is Not Properly Before the Court"

The Letter's Fraudulent Section E (at pp. 6-7) 23
"Other Relief Sought by Appellant Should be Denied"

"Attorney General representation" (at p. 7) 23

"Judicial disclosure" (at pp. 6-7) 25

The Letter's Fraudulent Section F (at pp. 7-8)....................28
"If Emergency Relief is Granted,
a Substantial Undertaking Should Be Required"

The Letter's Fraudulent Section G (at p. 8) 30
"The Briefing Schedule Should Not Be Accelerated"

CONCLUSION....................32

<u>The Letter's Fraudulent "Background" (at p. 2)</u>

Each of Assistant Solicitor General Brodie's three paragraphs under this heading are fraudulent.

<u>As to the first paragraph</u>, consisting of two sentences, the first reads:

> "Appellant appeals from a judgment of Supreme Court, Albany County (Hartman, J.), which granted summary judgment to defendants in her citizen taxpayer suit brought under State Finance Law 123 *et seq*."

Assistant Solicitor General Brodie provides no record reference for his assertion that the appealed-from judgment "granted summary judgment to defendants". This is not surprising, as the third ORDERING paragraph of Judge Hartman's appealed-from November 28, 2017 decision and judgment [R.40], reading "ORDERED that summary judgment is granted in favor of defendants", is – as pointed out by appellants' "legal autopsy"/analysis [R.30] –

> "overbroad. Judge Hartman granted defendants' cross-motion for summary judgment on plaintiffs' sixth cause of action – with this limited to sub-causes A-D because sub-cause E was allegedly dismissed by her December 21, 2016 decision for failure to state a cause of action."

Assistant Solicitor General Brodie's second sentence reads:

> "The complaint challenged the 2016-2017 budget, in particular pay increases for the Judiciary. (*See* Exhibit 1, Excerpts from Record on Appeal ['R'] at 87-89.)"

This is materially misleading in its inference – upon which his July 23rd letter pivotally rests – that appellants' challenge to the judicial pay increases relates only to pay increases within "the 2016-2017 budget". It does not and Assistant Solicitor General Brodie's record reference to "87-89", which are the introductory pages of appellants' September 2, 2016 verified complaint, make this obvious by its ¶2 [at R.88]:

> "2. Plaintiffs also seek declarations voiding the judicial salary increases recommended by the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation because they are

> statutorily-violative, fraudulent, and unconstitutional, with further declarations striking the budget statute establishing the Commission – Chapter 60, Part E, of the Laws of 2015 – as unconstitutional and itself fraudulent – and injunctions to prevent further disbursement of state money pursuant thereto."

The referred-to declarations are sought by appellants' sixth, seventh, and eighth causes of action, whose content makes obvious that they are each independent of any specific budget year – a fact just as evident from their titles:

AS AND FOR A SIXTH CAUSE OF ACTION
Chapter 60, Part E, of the Laws of 2015 is Unconstitutional, *As Written* – and the Commission's Judicial Salary Increase Recommendations are Null & Void by Reason Thereof [R.109-112; R.187-201]

A. Chapter 60, Part E, of the Laws of 2015 Unconstitutionally Delegates Legislative Power by Giving the Commission's Judicial Salary Recommendations "the Force of Law" [R.110 (¶¶61-62); R.188-193 (¶¶188-192)]

B. Chapter 60, Part E, of the Laws of 2015 Unconstitutionally Delegates Legislative Power Without Safeguarding Provisions [R.110-111 (¶¶63-65); R.192-193 (¶¶394-402)]

C. Chapter 60, Part E, of the Law of 2015 Violates Article XIII, §7 of the New York State Constitution [R.111 (¶66); R.193-194 (¶¶403-406)]

D. Chapter 60, Part E, of the Law of 2015 Violates Article VII, §6 of the New York State Constitution – and, Additionally, Article VII, §§2 and 3 [R.111 (¶67); R.194-196 (¶¶407-412)]

E. Chapter 60, Part E, of the Laws of 2015 is Unconstitutional because Budget Bill #4610-A/A.6721-A was Procured Fraudulently and Without Legislative Due Process [R.112 (¶¶68); R.197-201 (¶¶413-423)]

AS AND FOR A SEVENTH CAUSE OF ACTION
Chapter 60, Part E, of the Laws of 2015 is Unconstitutional, *As Applied* – & the Commission's Judicial Salary Increase Recommendations are Null & Void by Reason Thereof [R.112-114; R.201-213)]

A. *As Applied*, a Commission Comprised of Members who are Actually Biased and Interested and that Conceals and Does Not Determine the Disqualification/Disclosure Issues Before it is Unconstitutional [R.113 (¶73); R.202-203 (¶¶428-432)]

B. *As Applied*, a Commission that Conceals and Does Not Determine Whether Systemic Judicial Corruption is an "Appropriate Factor" is Unconstitutional [R.113 (¶74); R.203-204 (¶¶433-435)

C. *As Applied*, a Commission that Conceals and Does Not Determine the Fraud before It – Including the Complete Absence of ANY Evidence that Judicial Compensation and Non-Salary Benefits are Inadequate – is Unconstitutional [R.113 (¶75); R.204-209 (¶¶436-444)]

D. *As Applied*, a Commission that Suppresses and Disregards Citizen Input and Opposition is Unconstitutional [R.114 (¶76); R.209-212 (¶¶445-452)]

<u>AS AND FOR AN EIGHTH CAUSE OF ACTION</u>
The Commission's Violations of <u>Express</u> Statutory Requirements of Chapter 60, Part E, of the Laws of 2015 Renders its Judicial Salary Increase Recommendations Null and Void [R.114 (¶¶77-80); R.212-213 (¶¶453-457)].

<u>As for the second paragraph of "Background" (at p. 2)</u>, pertaining to the order to show cause, the only relief it identifies is the TRO pending a preliminary injunction – as to which it falsely states:

> "The proposed TRO <u>includes, among other requested relief</u>, an injunction prohibiting respondents from 'disbursing any further monies to pay the judicial salary increases' recommended by the Commission on Legislative, Judicial and Executive Compensation and the Commission on Judicial Compensation, and prohibiting respondents from reimbursing counties for the district attorney salary increases based thereon. (Proposed TRO ¶5)" (underlining added).

The phrase "includes, among other requested relief" does NOT belong. The TRO and preliminary injunction "include[]" NOTHING beyond enjoining disbursements pertaining to the judicial salary increases and district attorney salary increases.

<u>As for the third paragraph of "Background" (at p. 2)</u>, its single sentence reads:

> "Although she attempts to shift the burden to respondents (*e.g.*, Sassower Aff. ¶¶47-48), the burden of establishing her case rests solely on Ms. Sassower – as plaintiff, as appellant, and as the movant seeking emergency relief."

Such conceals and falsifies the true facts – which are that appellants have met their burden of establishing their entitlement to a TRO and preliminary injunction. This is OBVIOUS from the cited ¶¶47-48 of appellant Sassower's affidavit, which became ¶¶48-49 in her finalized affidavit. They read:

> 48. Suffice to say, with respect to the requested TRO and preliminary injunction pertaining to the commission-based judicial salary increases – and the district attorney salary increases based thereon – Attorney General Underwood must demonstrate that Judge Hartman's dispositions of appellants' sixth, seventh, and eight causes of action [R.109-112 (R.187-201), R.112-114 (R.201-212), R.114 (R.212-213), are defensible, which, based on the facts and law in the record before her – highlighted by the brief (at pp. 9-10, 14-17, 20, 26-27, 35-36, 37-38, 42, 44, 50-69) – she cannot do.
>
> 49. Indeed, in light of the enclosures to my May 16, 2018 NOTICE (free-standing Exhibit I (eye)), Attorney General Underwood should be expected to produce, at the oral argument of this TRO – at minimum:
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> - her findings of fact and conclusions of law as to the respects in which the Commission on Judicial Compensation's August 29, 2011 report, *on its face*, violates Chapter 567 of the Laws of 2010 – itemized by appellants' executive summary to their October 27, 2011 opposition report [*See* appellants' November 29, 2011 corruption complaint to public integrity bureau; March 2, 2012 letter: Exhibit A; March 30, 2012 order to show cause for a stay with TRO in declaratory judgment action];
>
> - her findings of fact and conclusions of law as to the respects in which the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation [R.1083-1105], *on its face*, violates Chapter 60, Part E, of the Laws of 2015 [R.1080-1082] – summarized by appellants' 12-page 'Statement of Particulars' and itemized by the fifteenth cause of action of their March 23, 2016 verified second supplemental complaint in the prior citizen-taxpayer action [R.212-213] on which the eighth cause of action of their September 2, 2016 verified complaint rests [R.114]. [*See* appellants' March 6, 2018 misconduct complaint against Albany District Attorney Soares, Exhibits B & C]."

The above-quoted ¶¶48-49 of appellant Sassower's moving affidavit – together with her three predecessor paragraphs, ¶¶44-47, all under her section heading "Appellants' Entitlement to a TRO and Preliminary Injunction" – reflect the true facts. Appellants have met their burden – and the burden now shifts to respondents to respond. This, respondents completely fail to do in the balance of Assistant Solicitor General Brodie's letter – and most relevant to this are his sections A and B, each fraudulently purporting that 'Appellant Has Not Shown, and Cannot Show…'" – without identifying, let alone confronting, the showing that appellants have made.

The Letter's Fraudulent Section A (at pp. 2-3):
"Appellant Has Not Shown, and Cannot Show,
a Probability of Success on the Merits"

Assistant Solicitor General Brodie's one-page argument under this heading is pure deceit – first and foremost because it conceals what appellant Sassower's moving affidavit has shown, *to wit*, that appellants have a 100% "probability of success on the merits" because – as demonstrated by their brief and its underlying "legal autopsy"/analyses" and as highlighted throughout appellant Sassower's moving affidavit – they are entitled to summary judgment on their sixth, seventh, and eighth causes of action pertaining to the commission-based judicial salary increases and the district attorney based thereon. This is what they have shown – and what Assistant Solicitor General Brodie does not confront, let alone deny or dispute – because it is indisputable.

It is to conceal that he has NO defense to appellants' showing that Assistant Solicitor General Brodie falsely asserts that appellants are seeking emergency injunctive relief for "the 2017-2018 budget", whereas their September 2, 2016 verified complaint is "directed against the 2016-2017 budget". Aside from the fact that the current budget is for fiscal year 2018-2019, Assistant Solicitor General Brodie's argument – and its subsidiary, pertaining to Judge Hartman's denial of appellants' March 29, 2017 order to show cause to supplement their September 2, 2016 complaint by a verified

supplemental complaint for fiscal year 2017-2018, that he misidentifies as being "to amend" their complaint[5] – has NOTHING to do with appellants' requested preliminary injunction and TRO, which rest on their summary judgment entitlement to declarations in their favor on their sixth, seventh, and eighth causes of action – and encompass every fiscal year budget embedding the commission-based salary increases, *to wit*, every budget from fiscal year 2012-2013 *in perpetuity*.

The Letter's Fraudulent Section B (at pp. 3-5): "Appellant Has Not Shown, and Cannot Show, Immediate and Irreparable Injury"

Assistant Solicitor General Brodie's 1-1/2-page argument under this heading is based on a succession of falsehoods – all concealing what appellant Sassower's moving affidavit has shown, *to wit*, the magnitude of monies being paid out for the commission-based judicial and district attorney salary increases: "tens, if not hundreds, of thousands of dollars" each day – monies that cannot be fully recovered by a "claw-back".

Thus, his paragraph that begins "First" (at p. 4) reprises the falsehood of his previous Section A, stating:

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[5] As for his argument that appellants' failure to perfect their August 5, 2017 notice of appeal from Judge Hartman's "denial of leave to amend (R61-62)" means that it is "deemed abandoned as a matter of law and "bar[s] [them] from appealing the issue now", such is frivolous. Appellants' right to appeal therefrom was extinguished upon Judge Hartman's November 28, 2017 decision and judgment, *See*, Connors, New York Practice, 6th edition (2018):

> "under the key 1976 decision of the Court of Appeals in *Matter of Aho*, 39 N.Y.2d 241, 383 N.Y.S.2d 285, 347 N.E.2d 647 (1976), *see* Siegel, New York Practice, 5th Ed, §532, the mere entry of the final judgment terminates the pending interlocutory appeal from the earlier order."

In re Aho, 39 N.Y.2d 241, 248 (1976):

> "The Appellate Division held, and correctly in our view, that [] any right of direct appeal from the [intermediate] order terminated with the entry of the [final] judgment (*Dayon v Downe Communications, 42 AD2d 889; Matter of New York Life Ins. Co. v Galvin, 41 AD2d 83, 86*). Appellate review of that intermediate order was thereafter available only on appeal from the final judgment on the ground asserted, namely that such order necessarily affected such judgment.".

> "as discussed above, the underlying lawsuit challenges the budget for 2016-2017. Because the authority to spend funds pursuant to the 2016-2017 budget appropriations has lapsed, no future expenditure will be paid pursuant to the 2016-2017 budget appropriation authority. Consequently, a TRO or preliminary injunction will not prevent any injury.".

This is absolutely untrue. The commission-based judicial salary increases which appellants seek to enjoin do NOT lapse. Each commission-based increase, upon taking effect "by force of law" since April 1, 2012, becomes an annually recurring expense, embedded in the budget – and such will continue, *in perpetuity*, until voided by a court of law.

Likewise, his paragraph that begins "Second" (at p. 4) is utter falsehood, stating:

> "to the extent appellant complains that judicial pay raises have increased her taxes (*see, e.g.*, Sassower Aff. ¶2), she has not shown irreparable harm. Salary expenses and the resulting taxes are expenditures of money. As this Court has observed, 'monetary damages simply are not irreparable and are an insufficient harm to support the issuing of an injunction.' *Winkler v. Kingston Housing Auth*., 238 A.D.2d 711, 712 (3d Dep't 1997).

No reading of appellant Sassower's ¶2 could support the view that it complains about "her taxes". Rather her ¶2 states, with underlining for emphasis, that the commission-based judicial salary increases – and the district attorney salary increases based thereon – "each day steal tens, if not hundreds, of thousands of dollars from New York taxpayers" – with further monetary details furnished by her ¶29, as follows:

> "29. Just in terms of the commission-based judicial salary increases and the district attorney salary increases linked thereto – whose unconstitutionality, fraud, and statutory violations are the subject of appellants' sixth, seventh, and eighth causes of action [R.109-112 (R.187-201); R.112-113 (R.201-212); R.114 (R.212-213)] – the cost to taxpayers, since April 1, 2012, has been over $300 million – and growing. No 'claw back' could ever fully recover this larceny of tax dollars."

Certainly, too, it is a further deceit for Assistant Solicitor General Brodie to cite *Winkler v. Kingston Housing Auth.,* 238 A.D.2d 711, 712 (3d Dep't 1997), for the proposition that "this Court

has observed, 'monetary damages simply are not irreparable and are an insufficient harm to support the issuing of an injunction'", when that pronouncement was in the context of the Court's appellate reversal of a preliminary injunction which allowed a single plaintiff to obtain compensation, whose amount, upon an ultimate judgment in her favor, could be "readily computed and…fully compensated". As the Court there stated:

> "It is for that reason that monetary damages simply are not irreparable and are an insufficient harm to support the issuing of an injunction…"

Indeed, it is evident from the two cases cited by *Winkler* that monetary loss constitutes irreparable injury where it cannot be fully recovered. Assistant Solicitor General Brodie makes NO claim that ANY, let alone ALL, of the monies disbursed for the commission-based judicial and district attorney salary increases can be recovered. Nor has he stated that respondents would consent to a "claw-back" (*NYPIRG v. Steingut*, 40 N.Y.2d 250, 260-261 (1978)[6]; *State Comtys Aid Ass'n v. Regan*, 112 A.D.2d 681, 683 (3rd Dept, 1985)[7]), were a TRO and preliminary injunction to be denied, and the Court, upon the appeal, to render declarations for appellants on their sixth, seventh, and eighth causes of action, compelled, *as a matter of law*.

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[6] "Since, as we conclude, some of the allowances provided in chapter 460 of the Laws of 1975 are unauthorized in whole or in part by virtue of section 6, we address and reject the demand that payments of such unauthorized allowances be restored either by reimbursement or withholding. In denying restitution we accept the rationale expressed by the Appellate Division – that [] restitution of moneys received under a statute subsequently declared to be unconstitutional is not always required (*Hurd v City of Buffalo, 41 AD2d 402* [wherein the explanation for such result is well stated], affd 34 NY2d 628), that the funds here disbursed – incident to the performance of essential legislative responsibilities – were not for an unconstitutional purpose but were merely improperly authorized, and that 'equitable interests of fairness and justice' mandate that no reimbursement be demanded from the recipients who, in good faith and supported by long-continued practice, relied on the disbursements as authorized and proper." (underlining added).

[7] "Cases analyzing whether retroactive reimbursement of funds should be made focus on the equitable interests of fairness and justice (*see, New York Public Interest Research Group v Steingut, 40 NY2d 250, 261*). Moreover, courts have not required restitution of moneys expended under laws subsequently declared void (*see, Lemon v Kurtzman, 411 U.S. 192; see also, Hurd v City of Buffalo, 41 AD2d 402, affd 34 NY2d 628*). Since the restitution ordered would not cure any inequity, it was improper to require it (*see, Stetler v McFarlane, 230 NY 400, 414; see also, Stevens v Califano, 448 F Supp 1313, 1324*)." (underlining added)

As to his paragraph that begins "Finally" (at p. 4), Assistant Solicitor General Brodie makes argument as to the balance of the equities – then continuing it in the three successive paragraphs that conclude his section B (at pp. 4-5).

He starts off with the assertion: "the harm from granting the TRO and injunction would far outweigh the alleged harm from continuing to operate under the 2017-2018 budget", when the state is operating under the budget for fiscal year 2018-2019 and it embeds all the commission-based judicial salary increases that have taken effect since April 1, 2012. He then concludes this "Finally" paragraph with the sentence:

> "Enactments are presumed to be constitutional, and litigants asserting that a statute is facially unconstitutional must surmount that presumption by proof 'beyond a reasonable doubt.' *Matter of Moran Towing Corp. v Urbach*, 99 N.Y.2d 443, 448 (2003) (internal quotation marks and citation omitted)."

Apart from being completely generic, this sentence is misleading by its implication that appellants seek injunctive relief based on facial unconstitutionality of "a statute" – this being Chapter 60, Part E, of the Laws of 2015 (the subject of the first three sub-causes of their sixth cause of action) – rather than, as they additionally are:

(1) on the unconstitutionality of Chapter 60, Part E, of the Laws of 2015 – by its enactment and including fraud (the subject of the last two sub-causes of their sixth cause of action);

(2) on the unconstitutionality of Chapter 60, Part E, of the Laws of 2015, as applied (the subject of their seventh cause of action); and

(3) on the violations of Chapter 60, Part E, of the Laws of 2015 by the Commission on Legislative, Judicial and Executive Compensation, including violations evident from the face of its December 24, 2015 report (the subject of their eighth cause of action).

Having concealed these additional challenges, Assistant Solicitor General Brodie then continues, as follows, by his next paragraph (at pp. 4-5):

> "Supreme Court has already rejected appellant's challenges, and set forth persuasive reasons for doing so. As the court held, the 'three men in a room' budget negotiation was legal because nothing prohibits the Governor and leaders of the Senate and Assembly from holding budget negotiations. (See R57.) The legislation creating a commission on legislative, executive and judicial compensation contained reasonable standards and provided for a legislative veto through the ordinary process for enacting a statute (See R35-36.) The measure simply implemented basic policy decisions already made by the Legislature (See R36.) The Constitution does not forbid increases in judicial salaries (See R.37.) By passing the budget legislation, the Legislature necessarily consented to its submission outside the 30-day window. (See R37-38.) Supreme Court's and counsel's disagreement with plaintiff's contentions, or even failure to address some of them, does not amount to a fraud. See *Abraham v. Wechsler*, 120 Misc. 811, 812 (Sup. Ct. N.Y. City. 1923), aff'd 201 A.D. 876 (1st Dep't 1924).[fn.4] (underlining added).

The "challenges" whose determinations Assistant Solicitor General Brodie fleetingly summarizes are appellants' ninth cause of action and the first four sub-causes of their sixth cause of action – and to have this Court rely, in any respect, on Judge Hartman's rejection of them and to purport that she "set forth persuasive reasons" for rejecting them is a flagrant fraud upon this Court – readily-verifiable as such from appellants' brief and from their "legal autopsy"/analyses of her decisions on which it is based [R.554-577; R.1002-1007 (¶¶5-8, 10-11); R.1293-1319; R.9-30].

Tellingly, Assistant Solicitor General Brodie's recap of Judge Hartman's "persuasive reasons" does not identify the causes of action so-dismissed – nor appellants' response thereto, summarized in their brief.

The cause of action pertaining to "three men in a room" is appellants' ninth cause of action – and as to its dismissal, by Judge Hartman's December 21, 2016 decision [R.56-57], appellants' brief (at pp. 12-13), quoting from their Exhibit U "legal autopsy"/analysis [R.571], had stated:

> "…As highlighted by plaintiffs' September 30, 2016 memorandum of law, plaintiffs' ninth cause of action (¶¶81-84) [R.115, R.214-219] does not challenge budget 'negotiation' by the Governor, Temporary Senate President, and Assembly Speaker. It challenges their budget dealmaking that includes the amending of budget bills – the unconstitutionality of which

> is compounded by the fact that they do it behind-closed-doors. Both are alleged by plaintiffs' ninth cause of action to unbalance the constitutional design – and, as set forth by the ninth cause of action, citing and quoting from the Court of Appeals' decision in *King v. Cuomo*, 81 N.Y.2d 247 (1993) – on which plaintiffs' ninth cause of action principally relies – and *Campaign for Fiscal Equity, Inc. v. Marino*, 87 N.Y.2d 235 (1995), also cited and quoted by plaintiffs' ninth cause of action – the standard for determining constitutionality of a practice is whether it unbalances the constitutional design. These two cases make plain that <u>because the Constitution does not prohibit a practice does not make it constitutional</u> – contrary to AAG Kerwin's deceit on her cross-motion – adopted by Justice Hartman.
>
> As with AAG Kerwin, Justice Hartman's decision does <u>not</u> address, makes <u>no</u> showing, and does <u>not</u> even baldly claim, that three-men-in-a-room 'budget negotiations and amending of budget bills' – all taking place out of public view – is consistent with the text of Article VII, §§3 and 4 – or Article III, §10 of the New York State Constitution, 'The doors of each house shall be kept open', and Senate and Assembly rules consistent therewith: Senate Rule XI, §1; Assembly Rule II, §1; and Public Officers Law, Article VI. Similarly, the decision does <u>not</u> address, makes <u>no</u> showing, and does <u>not</u> even baldly claim, that three-men-in-a-room governance accords with the constitutional design, including as to size, reflected by Zephyr Teachout's law review article '*The Anti-Corruption Principle*', <u>Cornell Law Review</u>, Vol 94: 341-413 – legal authority to which plaintiffs' ninth cause of action also cites [R.218]. As such, Justice Hartman's dismissal of the ninth cause of action is fraudulent."

Assistant Solicitor General Brodie's immediately following four sentences pertain to sub-causes A through D of appellants' five-part sixth cause of action – as to which Judge Hartman's November 28, 2017 decision granted summary judgment to respondents [R.35-40]. The fraudulence of this is summarized by appellants' brief (at pp. 50-69), with the further particulars set forth by the "legal autopsy"/analysis [R.9-30] appended to their notice of appeal, as part of their pre-calendar statement [R.3-8], as to which Assistant Solicitor General Brodie makes not the slightest rebuttal.

As to the final sentence: "Supreme Court's and counsel's disagreement with plaintiff's contentions, or even failure to address some of them, does not amount to a fraud. See *Abraham v.*

Wechsler, 120 Misc. 811, 812 (Sup. Ct. N.Y. City. 1923), aff'd 201 A.D. 876 (1st Dep't 1924)" –as to which his annotating footnote 4 reads:

> "'[T]he defendant represented that something was lawful, and the plaintiff claims it was unlawful. Such a representation does not amount to fraud.' *Abraham*, 120 Misc. at 812."

Assistant Solicitor General Brodie does not identify to what he is referring – reflective of the fact that, consistent with the requirements that allegations of fraud be particularized, appellants' brief and underlying "legal autopsy"/analyses particularized the fraud committed by Judge Hartman, in tandem with the attorney general's office, with respect to each of the ten causes of action of their September 2, 2016 verified complaint. This includes as to sub-cause E of their sixth cause of action, as well as their seventh and eighth causes of action – each sufficient, in and of themselves, and in multiple respects, to entitle appellants to the granting of a TRO and preliminary injunction, establishing, as they do, appellants' entitlement to summary judgment as to each cause of action.

The third of Assistant Solicitor General Brodie's four final paragraphs of this section reads (at p. 5):

> "The above are only a few of the points that respondents would advance in their brief on the merits, but they sufficiently illustrate that appellant cannot show the budget statute is unconstitutional 'beyond a reasonable doubt.'"

This is utter deceit. Assistant Solicitor General Brodie's "above…few…points" are each, as above-demonstrated, fraudulent – and illustrative of the fact that he has no "merits" to advance in his respondents' brief AND that appellants have shown, resoundingly, that "the budget statute" at issue – Chapter 60, Part E, of the Laws of 2015 – is "unconstitutional 'beyond a reasonable doubt'" – and not only facially, *as written*, but *as applied*, and by its enactment, and that, additionally, the Commission on Legislative, Judicial, and Executive Compensation's violation of express statutory requirements of Chapter 60, Part E, of the Laws of 2015 renders its judicial salary increase

recommendations null and void – as likewise the district attorney salary increases based thereon – these being all established by their sixth, seventh, and eighth causes of action.

The fourth of Assistant Solicitor General Brodie's four final paragraphs of this section reads (at p. 5):

> "Meanwhile, judges and other people throughout the State have conducted their lives in reliance on the salaries that were funded by the budget. It would be a grave mistake to deprive them of money owed for their work in accordance with legislative enactments, without full briefing and due consideration by a full panel of the Court."

The referred-to "other people throughout the State" are this state's 62 district attorneys who, like the judges, have been on notice, for years, that the commission-based judicial salary increases and district attorney salary increases resting thereon were NOT "in accordance with legislative enactments" – and that the two commission reports giving rise to the increases, are, *on their face*, violative of the statutes pursuant to which they purport to be rendered. Neither the judges, nor district attorneys denied that the commission reports, *on their face*, violate conditions precedent for salary raise recommendation – or any of the other statutory and constitutional violations and fraud that appellants brought to their attention, years ago and repeatedly, so that they could do their duty to take steps to override and vacate the pay raises and avoid the criminal consequences they would otherwise face for collusion in "grand larceny of the public fisc" with respect thereto and other aspects of the budget. No "full briefing" or "due consideration by a full panel of the Court" can change such devastating, dispositive facts – all proven by documentary evidence in the record – establishing that the judges and district attorneys have ZERO "equities" in their favor.

<u>The Letter's Fraudulent Section C (at p. 5)</u>:
"Appellant's Own Delay Undermines Her Request for Emergency Relief"

There was no "delay" on appellants' part – and Assistant Solicitor General Brodie's argument is frivolous.

Unlike the attorney general's office, which has more than 500 attorneys and a support staff of at least twice that, and all the machinery needed for printing, copying, and binding of submissions, in-house, with three floors of offices directly below this Court, making hand-delivery of its submissions to this Court an easy task, the perfecting of an appeal for the ordinary appellant is a time-consuming and expensive undertaking – and especially for a non-lawyer appellant, doing all the legal work, unassisted by any staff, and having none of the in-house equipment to print, copy, and bind thousands of pages, and for mailing to the Court.

Appellant's January 10, 2018 notice of appeal [R.1] is from Judge Hartman's final November 28, 2017 decision and judgment – and was filed within the nine-month span within which appellants had to perfect their June 10, 2017 and August 5, 2017 notices of appeal [R.42, R.61], both from interlocutory decisions and orders – which appellants understood to be subsumed within their January 10, 2018 notice of appeal of the judgment (CPLR §5501(a)(1)[8], *In re Aho*, 39 N.Y.2d 241, 248 (1976) [see fn. 5, *supra*]).

To avoid being put to the HUGE burden and cost of perfecting these appeals, appellants sought to obviate them entirely. Each notice of appeal was accompanied by the required pre-

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[8] "CPLR §5501. Scope of review.
(a) Generally, from final judgment. An appeal from a final judgment brings up for review:

1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken"

calendar statement, in which appellants requested a settlement conference, as "The speediest means to resolve the far-reaching, constitution-vindicating issues…and prevent further dissipation and theft of billions of dollars in taxpayer monies from a state budget that will have to be declared unconstitutional…" [R.47, R.66, R.6]. Meanwhile, appellants exhaustively pursued other avenues to protect the public fisc, safeguard the public's rights, and obviate the appeals. Among these, endeavoring to secure the Legislature's oversight and action, filing disciplinary complaints against Judge Hartman with the Commission on Judicial Conduct and against Attorney General Schneiderman and his attorneys with the First and Third Department Attorney Grievance Committees – and filing criminal complaints with Albany District Attorney Soares and Attorney General Underwood, which simultaneously sought their representation/intervention on this appeal and/or other steps to obviate it. This is evidenced by appellants' order to show cause, whose appended exhibits, beginning with their May 16, 2018 letter to Attorney General Underwood and subsequent correspondence reflect the vigor of these efforts, with the free-standing enclosures to the May 16, 2018 letter providing further proof (Exhibit I (eye)).

With all these efforts to secure emergency and other relief unsuccessful, the non-lawyer, unrepresented individual appellant, with yet three months within which to perfect the January 10, 2018 notice of appeal, not only perfected it, but, simultaneous with its filing on July 25, 2018, presented the Court with appellants' order to show cause with preliminary injunction and TRO, itself a huge effort and expense.

<u>The Letter's Fraudulent Section D (at p. 6)</u>:
"CJA is Not Represented by Counsel, and therefore is Not Properly Before the Court"

Assistant Solicitor General Brodie's argument that "Without legal counsel, CJA cannot be heard in this Court and its purported appeal must be dismissed" is shameful and frivolous.[9] It is the attorney general's duty to be representing both the corporate appellant and the individual appellant, pursuant to Executive Law §63.1 and State Finance Law 7-A, because there is NO "merits defense" to their appeal or to their order to show cause based thereon. This is embodied by the second branch of appellants' order to show cause, seeking an order:

> "directing that Attorney General Barbara D. Underwood identify who has determined 'the interest of the state' on this appeal – and plaintiffs-appellants' entitlement to the Attorney General's representation/intervention pursuant to Executive Law §63.1 and State Finance Law, §123 *et seq*., including *via* independent counsel, and how, if at all, she has addressed her own conflicts of interest with respect thereto".

As for Assistant Solicitor General Brodie's pretense that Judge Hartman "properly dismissed CJA's claims" because it was unrepresented by counsel, such dismissal was without adjudicating, or even identifying, CJA's asserted entitlement, pursuant to Executive Law §63.1 and State Finance Law Article 7-A, to the attorney general's representation and/or intervention. This threshold issue is embraced by the third of appellants' "Questions Presented".

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9 It also serves no practical purpose – as all claims would continue through appellant Sassower, including "on behalf of the People of the State of New York and the Public Interest" – a fact appellants pointed out to Judge Hartman, as they had to Judge McDonough, in the prior citizen-taxpayer action [R.508-609].

<u>The Letter's Fraudulent Section E (at pp. 6-7)</u>:
"Other Relief Sought by Appellant Should be Denied"

Beneath this heading are two subheadings relating to the first two branches of appellants' order to show cause.

<u>The second subheading is titled "Attorney General Representation" (at p. 7)</u> and in the first of the three paragraphs thereunder Assistant Solicitor General Brodie truncates the relief sought by appellants' second branch, identifying only that it:

> "asks the Court to direct Attorney General Underwood to 'identify who has determined 'the interests of the state on this appeal' and appellant's 'entitlement to the Attorney General's representation/intervention".

Materially omitted is that it also seeks to have the Court direct Attorney General Underwood to identify "how, if at all, she has addressed her own conflicts of interest" with respect to the appeal and order to show cause.

Assistant Solicitor General Brodie furnishes <u>no</u> argument as to why Attorney General Underwood should not be directed to respond to these two questions – making such direction all the more compelled. On top of this, he nowhere claims that Attorney General Underwood's representation of respondents on the appeal and in opposition to appellants' order to show cause is in "the interest of the state". Indeed, as "the interest of the state" is the ONLY basis upon which, pursuant to Executive Law §63.1, Attorney General Underwood can lawfully represent respondents, it is Attorney General Underwood who is not properly before the Court, representing respondents. Nor can she represent them, *as a matter of law*, in light of her conflicts of interest, itemized by appellant Sassower's May 30, 2018 letter to her (Exhibit J), which she has not contested and which Assistant Solicitor General Brodie has not contested.

Suffice to say that although ¶¶11-24 of appellant Sassower's moving affidavit furnish the particulars of appellants' arguments for the relief sought by the second branch of their order to show

cause – and the circumstances giving rise thereto – Assistant Solicitor General Brodie confronts none of it, including in stating:

> "Nor is she entitled to representation by the Attorney General as alleged (Sassower Aff. ¶11)";
>
> "While appellant protests that Executive Law §63(1) authorizes the Attorney General to '[p]rosecute' actions (Sassower Aff. ¶17), the statute nowhere entitles private citizens to compel or direct such prosecutions."

To the contrary, he brazenly regurgitates deceits already exposed by those very cited paragraphs. Thus, his second and third paragraphs (at p. 7) read, in full:

> "Under Executive Law 63(1), '[n]o action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality *of the state,* without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant.' (Emphasis added.) Because appellant is not an officer 'of the state,' the provision does not apply to her. While appellant protests that Executive Law §63(1) authorizes the Attorney General to '[p]rosecute' actions (Sassower Aff. ¶17), the statute nowhere entitles private citizens to compel or direct such prosecutions.
>
> Similarly, while State Finance Law 123-c(3) requires that citizen-taxpayer complaints be served on the attorney general, it does not require the attorney general to make a formal determination as to their merit or substitute herself as a plaintiff." (italics in the original).

This is a repeat of his June 27, 2018 e-mail to appellant Sassower (Exhibit N-3) – to which her ¶17 was the rebuttal, stating:

> "17. Such [e-mail] response is a deceit, as to both Executive Law §63.1 and State Finance Law §123 *et seq*. As to Executive Law §63.1, which is two sentences long, Assistant Solicitor General Brodie omits its first sentence because – as is clear therefrom – I and CJA do not have to be 'a part 'of the state'' in order to be entitled to representation by the Attorney General, whose duty, enunciated by that first sentence, is to:
>
> > '<u>Prosecute</u> and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any

> office thereof which requires the services of attorney or counsel, in order to protect the interest of the state, but this section shall not apply to any of the military department bureaus or military offices of the state.' (underlining added).

> As for State Finance Law §123, *et seq.*, Assistant Solicitor General Brodie does not quote the single provision to which he refers: §123-c(3), which reads:

> > 'Where the plaintiff in such action is a person other than the attorney general, a copy of the summons and complaint shall be served upon the attorney general'.

> In other words, in this section, as likewise in §123-a(3), §123-d, §123-e(2), it is expected that the attorney general will himself bring the citizen-taxpayer action. Certainly, the requirement that a plaintiff serve the attorney general with a copy of the summons and complaint would be meaningless if the attorney general did not then have to make a 'formal determination' as to it and other statutes that furnish the attorney general with ample means for safeguarding public monies, such as Executive Law §63-c and State Finance Law §187 *et seq.* ('New York False Claims Act'). And who in the attorney general's office makes the determination, 'formal' or otherwise? Did such person determine that in this citizen-taxpayer action, as well as in the previous one, the attorney general should not 'prosecute', but, instead, 'defend'? How could this be in 'the interest of the state', when defending cannot be done except by litigation fraud because there is NO legitimate defense." (capitalization in the original).

Assistant Solicitor General Brodie furnishes no answer.

As to the first subheading entitled "Judicial disclosure" (at p. 6), Assistant Solicitor General Brodie's two-sentence response is that:

> "…the cited rule [§100.3F of the Chief Administrator's Rules Governing Judicial Conduct] does not entitle plaintiff to any disclosure. It provides instead that, under certain circumstances, a judge who disqualifies him or herself '*may* disclose on the record' the basis for disqualification. 22 N.Y.C.R.R. §100.3(F) (emphasis added)."

This is an utter perversion of that safeguarding rule provision – and of §100.3E of the Chief Administrator's Rules Governing Judicial Conduct on which it rests. In mandatory language, §100.E, entitled "Disqualification", states "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…."

Under the title heading "Threshold Integrity Issues Pertaining to the Court: Disclosure by its Justices & the Disqualification of at least One: Associate Justice Lynch", ¶¶4-10 – and then ¶52 – of appellant Sassower's moving affidavit furnishes a litany of specifics as to why the impartiality of each justice – and the Court – might "reasonably be questioned". Under such circumstance, where, additionally Assistant Solicitor General Brodie's letter does not dispute that appellants have "reasonably…questioned" the impartiality of the justices – triggering <u>mandatory</u> judicial disqualification – §100.3F, entitled "Remittal of Disqualification", governs. It states:

> "A judge disqualified by the terms of subdivision (E)…, of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

In other words, absent each justice disputing, as relates to him/her, the reasonable questions raised by appellants' specifics, he/she is disqualified, pursuant to §100.3E – and cannot sit, except by making disclosure with respect thereto and asserting his/her belief that he/she can be impartial and is willing to participate, with the parties then agreeing, outside the presence of the judge, and then incorporating the agreement in the record.

Suffice to say that Assistant Solicitor General Brodie's flagrant deceit that §100.3F does not entitle appellants to the disclosure relief sought – when it <u>absolutely</u> does as a prerequisite as to any justice sitting on the case – comes after he has had more than a month within which to familiarize himself with the record of this citizen-taxpayer action, containing appellants' repetitive briefing of the issue – particularly by their memoranda of law [R.473, R.515-517], [R.924, R.973-979],

[R.1334] and by their June 16, 2017 conflict-of-interest/corruption complaint against Judge Hartman, filed with the Commission on Judicial Conduct [R.1320-1327] – whose accurate interpretation of §100.3F he could have further confirmed from the Commission on Judicial Conduct's most recent annual report, for 2018, posted on its website,

http://www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2018Annualreport.pdf,

containing the following, readily-found from its table of contents:

> "Conflicts of Interest. All judges are required by the Rules to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned. Three judges were cautioned for various isolated or promptly redressed conflicts of interest. One judge failed to disclose that a complaining witness was a judge who reviews his cases. Another judge failed to recuse himself from a matter after personally witnessing the alleged violation. A third judge failed to immediately recuse himself from a case despite the fact that he had a personal relationship with the complaining witness." (at p. 16, underlining added).

With regard to Assistant Solicitor General's assertions that "consideration of recusal is premature, because no panel has been selected" (at p. 6) and that, with respect to Justice Lynch's disqualification pursuant to §100.3E, "[b]ecause a panel has not been selected, this request again is premature" (at p. 7), the issue of recusal/disqualification precedes the selection of the panel. That issue – and the issue of disclosure – is what is before the Court, immediately, being the first of the threshold issues that the single justice hearing the TRO – Associate Justice Eugene Devine – must address as to himself.

Certainly, it would be inconsistent with the intent of this Court's Rules of Practice, §800.1:

> "…When a cause is argued or submitted to the court with four justices present, it shall, whenever necessary, be deemed submitted also to any other duly qualified justice of the court, unless objection is noted at the time of argument or submission."

for appellants not to make "objection…at the time of argument" – which, with respect to the TRO, is to a single justice – as to which, to prevent surprise, he and the Court of which he is part, are entitled to maximum notice.

Finally, and further false, is Assistant Solicitor General's assertion (at p. 6):

> "...the fact that appellant challenges judicial salaries does not require disqualification because every judicial officer would suffer the same purported conflict. *Matter of Maron v. Silver*, 14 N.Y.3d 230, 248-49 (2010) (discussing Rule of Necessity); *Pines v. State*, 115 A.D.3d 80, 90-91 (2d Dep't) (similar), *app. dismissed*, 23 N.Y.3d 982 (2014).".

Indeed, he has NOT denied or disputed appellant Sassower's rebuttal thereof, at ¶6 of her moving affidavit:

> "6. Any justice of this Court unable or unwilling to rise above his financial interest and relationships so as to impartially discharge his judicial duties MUST disqualify himself – and the "rule of necessity" is NOT to the contrary." (capitalization in the original).

The Letter's Fraudulent Section F (at pp. 7-8):
"If Emergency Relief is Granted, a Substantial Undertaking Should Be Required"

By this section, Assistant Solicitor General Brodie continues his knowingly false and misleading advocacy and makes manifest the attorney general's duty to have made a "formal determination" in this citizen-taxpayer action to represent plaintiffs – or here, appellants – or to have intervened on their behalf, or to be the plaintiff-appellant.

Tellingly, Assistant Solicitor General Brodie does not cite the citizen-taxpayer statute, State Finance Law Article 7-A, in support of his argument. Its §123-e(2) reads:

> "2. The court, at the commencement of an action pursuant to this article, or at any time subsequent thereto and prior to entry of judgment, upon application by the plaintiff or the attorney general on behalf of the people of the state, may grant a preliminary injunction and impose such terms and conditions as may be necessary to restrain the defendant if he or she threatens to commit or is committing an act or acts which, if committed or continued during the pendency of the action, would be detrimental to the public interest. A temporary restraining order may be granted pending a

> hearing for a preliminary injunction notwithstanding the requirements of section six thousand three hundred thirteen of the civil practice law and rules, where it appears that immediate and irreparable injury, loss, or damage will result unless the defendant is restrained before a hearing can be had."

In other words, and consistent with State Finance Law Article 7-A, which is geared to facilitating a citizen-taxpayer and the attorney general in bringing and pursuing actions thereunder, State Finance Law §123-e(2) does not expressly require or authorize an "undertaking", let alone one of the magnitude which Assistant Solicitor General Brodie proposes "from $27 million to northward of $300 million", without distinguishing, and deliberately so, between so-called "emergency" and "preliminary relief".

Instead, as his sole legal authority, Assistant Solicitor General Brodie cites, twice, in this three-paragraph section, CPLR §6312(b), which reads:

> "(b) Undertaking. Except as provided in section 2512, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, including…" (underlining added).

Yet the immediate issue before the Court is NOT a preliminary injunction, but a TRO – and, as to this Assistant Solicitor General Brodie conceals that it is governed by a separate provision, CPLR §6313, entitled "Temporary restraining order", whose paragraph c states:

> "(c) Undertaking. Prior to the granting of a temporary restraining order the court may, in its discretion, require the plaintiff to give an undertaking in an amount to be fixed by the court, containing terms similar to those set forth in subdivision (b) of rule 6312, and subject to the exception set forth therein."

Thus, even where a court grants a TRO to a plaintiff, without notice to a defendant – which is what CPLR §6313(a) allows – it has discretion NOT to require an undertaking "containing the terms

similar to those set forth in subdivision (b) of rule 6312" – but Assistant Solicitor General Brodie has not revealed this to the Court.

As for the "exception set forth" in CPLR §6312, which CPLR §6313 incorporates, "provided in section 2512", it reads, in pertinent part:

> "§2512. Undertaking by the state…or public officer.
> 1. Any provision of law authorizing or requiring an undertaking to be given by a party shall be construed as excluding the state,…or a public officer in behalf of the state or of such a corporation. Such parties shall, however, be liable for damages as provided in such provision of law in an amount not exceeding an amount which shall be fixed by the court whenever it would require an undertaking of a private party.
> 2. Where an appeal is taken by any such party, only the court to which the appeal is taken may fix the amount which shall limit the liability for damages pursuant to this section."

As the attorney general would be exempt from any "undertaking", let alone from the "substantial undertaking" that Assistant Solicitor General Brodie's section title urges "Should Be Required" from appellants, it underscores the importance of the attorney general's duty to discharge the affirmative functions contemplated by State Finance Law Article 7-A and Executive Law §63.1 – a threshold issue procedurally with respect to both the order to show cause and the appeal and substantively, with respect to the appeal.

The Letter's Fraudulent Section G (at p. 8):
"The Briefing Schedule Should Not Be Accelerated"

Here, too, in this final section of his letter, Assistant Solicitor General Brodie continues his fraud – this time by expurgating the below underscored portion of State Finance Law §123-c(4):

> "An action under the provisions of this article shall be heard upon such notice to such officer or employee as the court, justice or judge shall direct, and shall be promptly determined. The action shall have preference over all other causes in all courts.",

in order to purport (at p. 8) that the language of §123-c(4) he selectively quotes "does not, however, provide for accelerated briefing". This is false. The meaning of the underscored portion he omits is

that this Court – or a justice or judge thereof – is empowered to abbreviate time parameters for the appeal and motions pertinent thereto, consistent with the statute's purpose: to safeguard public monies and to do so with utmost expedition. Indeed, this expedition become all the more critical if, as it appears, State Finance Law 123-e(2) allows for a citizen-taxpayer plaintiff to obtain a TRO and preliminary injunction without the requirement of an undertaking.

There is nothing "inequitable" in "imposing an artificially shortened response time on respondents" for the filing of their brief, if, upon the argument of the TRO, scheduled for August 2, 2018, they do not have their brief. Respondents, all public officers, have had YEARS to come to terms with the open-and-shut, *prima facie* EVIDENCE of their "grand larceny of the public fisc" and other corruption, particularized by appellants' two citizen-taxpayer actions – and more than six months within which to verify the accuracy of appellants' "legal autopsy"/analysis of Judge Hartman's November 28, 2017 decision and judgment [R.9-30], appended to their pre-calendar statement [R.3-8] in support of their January 10, 2018 notice of appeal [R.1-2]. <u>The dispositive facts and law were always verifiable, readily – often within minutes – as they still are. Certainly, it takes no more than minutes to verify that the fifth sub-cause of appellants' sixth cause of action was disposed of on a LIE, concocted by the attorney general's office and adopted by Judge Hartman – or that Judge Hartman's *sua sponte*, two-sentence dismissal of appellants' seventh and eighth causes of action, unsupported by any law, is indefensible. These suffice for the Court's granting of the TRO and preliminary injunction, on the spot, *as a matter of law*.</u>

Assistant Solicitor General Brodie is not a solo practitioner. He is part of a well-staffed and resourced office, paid-for by the taxpayers, whose highest echelons, including Attorney General Underwood, were given notice, again, and again, and again of the necessity of supervisory and managerial oversight – with a draft copy of appellants' brief, with its "Questions Presented",

furnished them on June 14, 2018 to further assist them in recognizing that there is NO legitimate defense to the appeal – and that their duty was to take corrective steps, IMMEDIATELY.

Assistant Solicitor General Brodie does not identify when or why, among the many, many attorneys in the attorney general's Division of Appeals and Opinions, he was assigned to this case. Nor does he state that he could not, at any point, have notified his superiors that his other "multiple pending matters" would prevent him from meeting standard time-parameters, let alone preferential, expedited parameters appropriate to this citizen-taxpayer action. Indeed, it is a final flagrant contempt and deceit for Assistant Solicitor General Brodie to ask for "two months to prepare respondents' brief in this matter" – when, as he may be presumed to have recognized, six weeks ago, from his very first reading of appellants' brief, in draft – and from the reproduced record on appeal to which he stipulated, nearly a month ago – that there is NO DEFENSE to this appeal. As a "subordinate lawyer" [R.1290], his ethical duty, then and at every point thereafter, was to so-advise his superiors, including Attorney General Underwood – and to refuse to proceed further with representation of respondents, which belonged to appellants.

CONCLUSION

The litigation fraud committed by Assistant Solicitor General Brodie, by his July 23, 2018 letter to this Court, and then again by his July 26, 2018 letter – of which Attorney General Underwood and her team of supervisory/managerial attorneys are fully knowledgeable – disentitles him and them to anything other than sanctions, costs, and referral to disciplinary and criminal authorities – as expressly requested by appellant Sassower's accompanying reply affidavit, in further support of the order to show cause. As hereinabove demonstrated, not only must the order to show cause be signed, it must be signed with the TRO – appellants' showing of entitlement being completely unrebutted and established, *as a matter of law*.