SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY
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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,

Affidavit in Opposition to Respondents' June 27, 2022 Dismissal Motion & in Further Support of Petitioners' June 23, 2022 Notice of Petition

Petitioners/Plaintiffs,

-against-

NEW YORK STATE JOINT COMMISSION ON PUBLIC ETHICS,
LEGISLATIVE ETHICS COMMISSION,
NEW YORK STATE INSPECTOR GENERAL,

KATHY HOCHUL, in her official capacity as
GOVERNOR OF THE STATE OF NEW YORK,

ANDREA STEWART-COUSINS, in her official capacity as
TEMPORARY SENATE PRESIDENT, & the NEW YORK STATE SENATE,

CARL HEASTIE, in his official capacity as
ASSEMBLY SPEAKER, & the NEW YORK STATE ASSEMBLY,

LETITIA JAMES, in her official capacity as
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

THOMAS DiNAPOLI, in his official capacity as
COMPTROLLER OF THE STATE OF NEW YORK,

Respondents/Defendants.

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the above-named unrepresented individual petitioner/plaintiff,[1] fully familiar with all the facts, papers, and proceedings in this hybrid Article 78 proceeding/CPLR §3001 declaratory judgment action/State Finance Law Article 7-A citizen-taxpayer action, expressly brought "on behalf of the People of the State of New York & the public interest".

2. I submit this affidavit in opposition to the June 27, 2022 dismissal motion by Assistant Attorney General Gregory J. Rodriguez, acting "of Counsel" to Attorney General Letitia James, a respondent herein representing herself and her co-respondents, and in further support of petitioners' June 23, 2022 notice of petition.

3. Having no defense, on the merits, to this fully-documented lawsuit, exposing the corruption of New York state governance by the respondent public officers and public entities – where time is of the essence – Mr. Rodriguez has made a time-wasting and frivolous dismissal motion by papers which:

- transmogrify the caption to conceal that petitioners are acting "on behalf of the People of the State of New York & the Public Interest";
- conceal, *in toto*, the allegations of the verified petition;
- conceal, *in toto*, the EVIDENCE substantiating the petition, starting with its annexed exhibits;
- conceal the imperative for expedition, particularized by my June 6th affidavit and June 21st affidavit in support of orders to show cause and by my June 23rd affidavit in support of the notice of petition;
- conceal that this hybrid lawsuit includes a citizen-taxpayer action pursuant to State Finance Law Article 7-A which, by its terms, not only expressly contemplates the Attorney General's involvement as plaintiff or on behalf of plaintiffs (§123-a(3); §123-c(3), §123-d; §123-e(2)), but commands expedition: that it "shall be heard upon such notice…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." (§123-c(4)).

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[1] For simplicity, the petitioners/plaintiffs are hereinafter referred to as petitioners, the petition/complaint is referred-to as the petition, and respondents/defendants as referred-to as respondents.

4. As hereinbelow demonstrated, Mr. Rodriguez's motion is not merely insufficient, but a fraud upon the Court. Its sole value is to demonstrate that Attorney General James must be disqualified for interest from representing her co-respondents – and from even determining the "interest of the state" pursuant to Executive Law §63.1, which Mr. Rodriguez's motion does purport as having been done and which, were it done, would mandate the Attorney General's representation of petitioners, not respondents, *via* independent, outside counsel, retained for such purpose.

5. According to Mr. Rodriguez's June 27th notice of motion, filed at 11:14 pm – which, without referencing CPLR §2214 time provisions, he has made returnable on July 1st – he seeks:

> "an order pursuant to CPLR 7804(c) and (f); 3211(a)(7) and (8); 3014 and 304(a) granting dismissal of the petition, and alternatively, in the event the motion is denied, for leave pursuant to CPLR 7804(f) to serve an answer, within thirty days, and for such other relief as may be just and proper."

6. He supports his notice of motion with seven essentially identical affidavits or affirmations: six from attorneys for the Attorney General's co-defendants[2] and one from an employee of the Attorney General, which do not contest service made on June 23rd, but simply recite the papers that were served – a summons not being among them. He additionally furnishes a supporting memorandum of law, barely six pages in length. Its "Argument" for dismissal, consists of three "Points", cumulatively less than three pages, each citing a single case. Below is a rebuttal of the three frivolous Points Mr. Rodriguez presents for dismissal – and my requests to the Court in connection therewith.

Mr. Rodriguez's Frivolous Point I
"Petitioners Failed to Provide Sufficient Notice of this Article 78 Proceeding"

7. Mr. Rodriguez's one-paragraph Point I (at pp. 3-4) objects that petitioners served their June 23rd notice of petition, with a return date of Friday, July 1st – furnishing thereby eight days notice rather than the 20 days required by CPLR §7804(c).

8. This is not a basis for dismissing the petition – and Mr. Rodriguez offers no case for such proposition. Indeed, the SOLE case he cites, *Matter of Piacente v. DiNapoli*, 198 A.D. 3d 1026, 1028 (3d Dept 2021), has NOTHING to do with a notice of petition abridging time parameters.

9. The reason I made the June 23rd notice of petition returnable on July 1st is because I believed it to be the same as a notice of motion, which, pursuant to CPLR §2214(b), requires only eight days when personally served, which the notice of petition was. Indeed, the notice was originally titled "notice of motion" and I only changed it to "notice of petition", after consulting with Albany County Supreme Court Deputy Chief Clerk Mary Grace Sullivan regarding procedure for bringing on the petition/complaint by ordinary motion, pursuant to CPLR §2214(b), rather than order to show cause, pursuant to CPLR §2214(d).

10. The facts impelling petitioners to proceed by notice of petition, rather than order to show cause – and requiring expedition to secure, if not a TRO, then preliminary injunction – are set forth by my June 23rd affidavit in support of the notice of petition, my June 21st affidavit in support of an order to show cause, and my June 6th affidavit in support of an order to show cause. No aspect of what is there set forth is contested by Mr. Rodriguez or by the attorneys and employee who signed for him affidavits and affirmations.

11. Nor does Mr. Rodriguez or the affidavit/affirmation-signing attorneys and employee allege any prejudice to respondents by the July 1st return date. This is not surprising, as there is <u>no prejudice</u>, in fact, as they have had the verified petition since June 9th – and with it my June 6th affidavit supporting petitioners' original order to show cause, and the amended order to show cause that Justice Peter Lynch signed on June 8th, as I e-mailed them on June 9th with the NYSCEF link. Such followed communications mostly by phone, but also including e-mails here & here, that began

[2] There is no affidavit/affirmation for respondent Governor Hochul.

on June 7th, wherein I attempted to make arrangements for service, including their agreement to service *via* NYSCEF. On June 21st I e-mailed them the further order to show cause and my moving affidavit, seeking the same relief as I would seek by the June 23rd notice of petition.

12. As there is absolutely no prejudice to respondents by the July 1st return date – by contrast to the substantial injury and dislocation that will be caused to the People of the State of New York and the public interest by allowing Part QQ of Education, Labor, Housing, and Family Assistance Budget Bill #S.8006-C/A.9006-C – the "ethics commission reform act" – to take effect on July 8th – which is what petitioners' notice of petition and prior signed and unsigned orders to show cause were designed to avoid – **petitioners ask that, in the interest of justice and on an emergency basis, the Court hear the first two branches of their June 23rd notice of petition for a TRO and preliminary injunction – and that it schedule an evidentiary hearing for either Wednesday, July 6th or Thursday, July 7th**.

13. As for the other branches of the notice of petition, annexed hereto as Exhibit A is an amended notice of petition with a return date of Friday, July 22nd – 24 days from today, which, as reflected by the stamp and signature thereon, I have already served today on the Attorney General's Westchester Regional Office. Because July 22nd is AFTER the July 8th date on which, absent a stay, the "ethics commission reform act" will have taken effect, the amended notice of petition omits the first two branches of the notice of petition: for a TRO and preliminary injunction. Instead, it inserts a new first branch, prompted by Mr. Rodriguez's frivolous and fraudulent dismissal motion. What had been "other and further relief" in the notice of petition, is now phrased, in this new first branch, as:

> "disqualifying Attorney General James, a respondent/defendant, from representing her co-respondents/defendants based on the absence of any sworn statement by her, personally: (a) that representing them, rather than petitioners/plaintiffs, is based on a determination that they have a "merits" defense to the lawsuit, such that representing them is in the "interest of the state", as Executive Law §63.1 requires; and (ii) that her own direct financial and other interests in the lawsuit, as in petitioners/plaintiffs'

> March 5, 2021 complaint against her filed with respondent/defendant Joint Commission on Public Ethics (Exhibit D to the petition/complaint), does not require that she secure independent, outside counsel to determine the 'interest of the state' pursuant to Executive Law §63.1 – and petitioners/plaintiffs' entitlement to representation".

14. Should the Court deem it necessary for petitioners to proceed pursuant to this June 28, 2022 amended notice of petition, I ask that the Court specify whether the aforesaid, already-made personal service on the Attorney General's Westchester Regional Office is adequate – and whether it is deemed to cover the co-respondents.

15. I asked this question of Mr. Rodriguez, who I called shortly after 10 a.m. this morning and then again four hours later – and who thereafter returned my call. We had an amicable, constructive, and lengthy conversation, discussing most of the issues herein.[3] However, I was unable to get an answer from him concerning service of an amended notice of petition.

16. Among the important issues I discussed with Mr. Rodriguez was the realization I had made upon drafting the June 23rd notice of petition and, in so-doing, re-prioritizing the branches of the unsigned June 21st order to show cause and placing ALL the relief relating to JCOPE together, at

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[3] This includes his footnotes 1 and 2 to his Point I pertaining to service, which he does NOT make a basis for dismissal.

With respect his footnote 1, impugning my selection of the term "acknowledgment of service" as the description of the documents uploaded into NYSCEF, I told Mr. Rodriguez that prior to my uploading the service documents, I had telephoned both NYSCEF and the Albany County Clerk's Office to inquire as to the difference between "acknowledgment of service" and "admission of service" – the two seemingly applicable choices on the NYSCEF drop-down menu, as to which I had been unable to find anything on the NYSCEF website or by googling. Neither the NYSCEF staff nor the Albany County Clerk's Office knew the difference.

With respect to his footnote 2, that "the papers that were served upon respondents in this proceeding were served by Petitioner Elena Sassower. Therefore, under CPLR 2103, service is not proper", none of the affidavits/affirmations of the attorneys and employee for respondents supporting Mr. Rodriguez' motion identify, let alone object to, service having been made by me. Indeed, only my affidavits of service for the notice of petition and petition for JCOPE reflect personal service by me upon its Director of Ethics Keith St. John. As I stated to Mr. Rodriguez, following my service upon Mr. St. John – and to prevent any possibility of JCOPE raising a service objection on that ground – I returned to JCOPE with a non-party so that he could effect service upon Mr. St. John – including by a second set of the notice of petition and petition, if Mr. St John did not hand back the ones I had served him with. In the presence of JCOPE's two female staffers who sit at desks in the reception area, as well as the non-party who was ready to effect service, Mr. St. John stated that such re-service was not necessary and that JCOPE would not contest the service I had made. I further advised Mr. Rodriguez that I had served the pleadings in all three of the *CJA v. Cuomo* lawsuits against the state that I had commenced in 2012, 2014, and 2016 – as well as the motion papers – as, likewise, in my 2014 motion to intervene in the Legislature's declaratory judgment action against the Commission to Investigate Public Corruption – to which, as I recollect, there had been no objection.

the outset of the notice, that petitioners' two mandamus causes of action against JCOPE will NOT, in fact, be mooted by the "ethics commission reform act of 2022" taking effect on July 8th. The reason is the petition's sixth cause of action (¶¶78-85) – the first of the petition's five causes of action for declaratory relief – for an order:

> "declaring unconstitutional, unlawful, and void Part QQ of Education, Labor, Housing, and Family Assistance Budget Bill #S.8006-C/A.9006-C – the 'ethics commission reform act of 2022' – enacted in violation of mandatory provisions of the New York State Constitution, statutes, legislative rules, and caselaw".

As such declaration is a matter of open-and-shut, *prima facie*, documentary evidence – so-stated by the petition, obvious from its content, and reiterated by all three of my prior affidavits – the current Executive Law §94 and JCOPE, which the "ethics commission reform act of 2022" repeals, will, in the absence of an injunction before July 8th, be re-instated after, *as a matter of law*, by ANY fair and impartial tribunal – and, with it, petitioners' entitlement to mandamus against JCOPE based on that Executive Law §94 – the subject of their first and second causes of action (¶¶27-41; ¶¶42-47).

17. As the shut-down of JCOPE on July 8th and its re-instatement shortly thereafter will cause substantial chaos and inconvenience for the public, for JCOPE staff and for ethics enforcement operations, it is imperative that the constitutionality and lawfulness of the enactment of the "ethics commission reform act of 2022" be determined as immediately as possible so that JCOPE's operations are not needlessly interrupted. To facilitate this, I told Mr. Rodriguez I had already completed a CPLR §2214(c) notice to respondents of papers to be furnished to the Court at the hearing of the notice of petition, which I would be serving and filing *via* NYSCEF – and annexing to this affidavit (Exhibit C).

18. I also alerted Mr. Rodriguez to "the starting point" for the declaration of unconstitutionality, identified at ¶82 of the petition's sixth cause of action: my March 18, 2020 letter to then Governor Cuomo (Exhibit A-5 to the petition) pertaining to non-appropriation, so-called "Article VII legislation" that, by fraud, is morphed into bills – and to the relevant case of *New York*

State Bankers Association, Inc. et al. v. Wetzler, as Commissioner of the Department of Taxation and Finance of the State of New York, 81 NY2d 98, 102 (1993) wherein the Court of Appeals stated the matter succinctly: "The question concerns not what was enacted or its effect on the budgetary process, but whether there was authority to enact the provision at all."

Mr. Rodriguez's Frivolous Point II
"Petitioners Failed to Obtain Personal Jurisdiction Over Respondents in Connection with any Plenary Claims Alleged in the Petition-Complaint"

19. Mr. Rodriguez's one-paragraph Point II (at pp. 4-5) objects that petitioners served their hybrid June 6, 2022 verified petition/complaint with a notice of petition and not, additionally, a summons.

20. This also is not a basis for dismissing the petition – and Mr. Rodriguez offers no case as precedent. Indeed, the SOLE case he cites, *Collins v. Village of Head-of-the-Harbor*, 2018 U.S. Dist. LEXIS 1409, **14-15 (Sup. Ct. Suffolk Co. Feb. 15, 2018), is NOT to the contrary. Under the title heading "Summons", it reads:

> "It has been said that '[t]o avoid disputes over the acquisition of jurisdiction in hybrid actions-proceedings the pleading [should] be served with both a summons and notice of petition (or order to show cause). The summons invokes jurisdiction for the declaratory-judgment-action component while the notice of petition performs the same function for the Article 78 aspect of the case' (Alexander, Practice Commentary, McKinney's Cons Law of NY, 2016 Electronic Update, CPLR §7804; [internal citations omitted]). At least one trial court has found that 'the notice of petition and petition are the functional equivalent of a summons and complaint for the declaratory judgment claim pleaded' in a hybrid action (*see New York State Assemblyman Powell v. City of New York*, 16 Misc 3d 1113(A), 2007 Slip Op 51409(U) [Sup Ct NY Co 2007]). Neither the Court of Appeals nor any Appellate Division have ruled on this question.
>
> Here, the respondents argue that the cause of action for declaratory relief should be dismissed because service of a summons is required pursuant to CPLR §304 for the matter to proceed as a hybrid action, and petitioners did not serve a summons with the petition. The petitioner faxed the court a copy of a summons on December 6, 2017 but did not provide evidence of service. It is unnecessary, however, to reach the question of whether the order to show cause and petition here serve as the functional equivalent of a summons and complaint, thereby providing the Court with jurisdiction to consider the declaratory judgment component of this hybrid action without the necessity of also requiring service of a summons, as the Court is

> dismissing both the Article 78 proceeding and declaratory judgment action on other grounds."

21. In other words, *Collins v. Village of Head-of-the-Harbor* not only does not stand for the proposition that in a hybrid lawsuit a summons must be served, in addition to a notice of petition, but by its cited case of *Powell v. New York City* reveals that the legal precedent is in the other direction. As there stated:

> "In this case, defendants-respondents argue that the cause of action for declaratory relief should be dismissed because no summons and complaint were served with the petition and notice of petition. This argument is unconvincing. Defendants-respondents submit no authority that a 'hybrid' Article 78 proceeding-action must be commenced by filing separate pleadings of both a special proceeding and action, followed by service of both sets of papers. The initiatory papers filed and served here, denominated as a notice of petition and petition, are the functional equivalent of a summons and complaint for the declaratory judgment claim pleaded as the second cause of action. The Court therefore deems them the summons and complaint." (underlining added).

22. Deputy Chief Clerk Sullivan was plainly knowledgeable of this when, in response to my inquiries on June 22nd as to whether I needed to include a summons with the notice of petition I would be serving the next day, she told me I did not.

23. To further obviate this non-issue, I have today served a summons at the Attorney General's Westchester Regional Office, annexed hereto as Exhibit B, reflecting a receipt stamp and signature thereon. Here, too, I would request the Court's guidance with respect to additional service, if such should be necessary.

Mr. Rodriguez's Frivolous Point III
"The Petition-Complaint Fails to Comply with CPLR 3014"

24. Mr. Rodriguez' two-paragraph Point III (at p. 4-5) baldly purports that the June 6, 2022 petition contains "rambling allegations" and that because it "appears to attempt to link to documents on Petitioners' website", it is "an incomplete pleading that an adversary must search the internet in order to make complete". This is utterly false. There is nothing "rambling" about the allegations of the petition – and Mr. Rodriguez's failure to give a single example reflects as much.

Nor is there anything "incomplete" about the petition because it furnishes links to the mountain of EVIDENCE substantiating its allegations. This includes "at pp. 13, 14, 19, 21" to which Mr. Rodriguez cities, without the slightest elaboration at to anything "incomplete" on those pages.

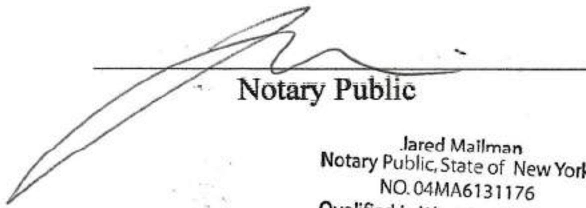
25. As for Mr. Rodriguez's cited case *Matter of Barnes v. Fischer*, 135 A.D.3d 1249, 1249-50 (3d Dept. 2016), which I am unable to locate, it has no relevance, there being no "overly broad and rambling allegations" on which to predicate dismissal of the petition pursuant to CPLR §3014.

CONCLUSION

26. As I stated to Mr. Rodriguez in our extensive phone conversation, his motion must be withdrawn – and his obligation is to refer this case "upstairs", to his superiors, for review and determination of the "interest of the state" pursuant to Executive Law §63.1 and the Attorney General James' duty to secure independent, outside counsel, as she is a respondent, directly interested, financially and otherwise. No one examining my March 5, 2021 complaint to JCOPE (Exhibit D-1), resting on – with respect to Attorney General James – the February 11, 2021 attorney misconduct complaint I filed against her with the Appellate Division attorney grievance committees (Exhibit D-2) and its included February 7, 2021 judicial misconduct complaint to the Commission on Judicial Conduct (Exhibit D-3) – could come to any other conclusion – and a sworn statement from Attorney General James, personally, is here mandated.

ELENA RUTH SASSOWER

Sworn to before me this
28th day of June 2022



Notary Public

Jared Mailman
Notary Public, State of New York
NO. 04MA6131176
Qualified in Westchester County
Commision Expires on August 1, 20 25