1st citizen taxpayer action (Albany Co # 1788-14) CV A v. Cuomo, et al. March 23, 2016 proposed verified 2nd supplemental complaint

422. The fact that this just-introduced/just-amended S.4610-A/A.6721-A, with its Part E, was then sped through to the Senate and Assembly floor, on a "message of necessity", to meet an April 1 fiscal year deadline, which had no relevance to it, only exacerbates the injury to the public which, pursuant to Legislative Law §32-a, had a right to be heard at a legislative hearing on the budget about a budget bill containing Part E (*Winner v. Cuomo*, *supra*, at p. 62, fn. 24.)

423. At bar, defendants' violations of multitudinous constitutional, legislative, and mandatory Senate and Assembly rule provisions, denying the People legislative due process and perpetrating fraud, render Chapter 60, Part E, of the Laws of 2015 unconstitutional. "*Albany's Dysfunction Denies Due Process*", 30 Pace L. Rev. 965, 982-983 (2010) Eric Lane, Laura Seago.

AS AND FOR A FOURTEENTH 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

424. Plaintiffs repeat, reiterate, and reallege ¶¶1-423, with the same force and effect as if more fully set forth herein.

425. Defendants' refusal to discharge ANY oversight duties with respect to the constitutionality and operations of a statute they enacted without legislative due process renders the statute unconstitutional, *as applied*. Especially is this so, where their refusal to discharge oversight is in face of DISPOSITIVE evidentiary proof of the statute's unconstitutionality, *as written and as applied* – such as plaintiffs furnished them (Exhibits 38, 37, 39, 40, 41, 42, 43, 44, 46, 47, 48).

426. The Commission on Legislative, Judicial and Executive Compensation operated unconstitutionally in at least four specific respects – and plaintiffs presented these to the Commission as threshold issues for its determination.

427. The Commissioners' willful disregard of these four threshold issues suffice to render the judicial salary increase recommendations of their December 24, 2015 Report void *ab initio* – and Chapter 60, Part E, of the Law of 2015 unconstitutional, *as applied.*

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**

428. Plaintiff SASSOWER raised the threshold issue of the disqualification of three of the Commission's seven members – Barry Cozier, Esq., James J. Lack, Esq., and Chair Sheila Birnbaum, Esq. – directly to them at the conclusion of the Commission's first organizational meeting on November 3, 2015. The context was her furnishing to each Commissioner a copy of plaintiffs' October 27, 2011 Opposition Report to the Commission on Judicial Compensation's August 29, 2011 Report, pivotally demonstrating that systemic judicial corruption, involving supervisory and appellate levels and embracing the Commission on Judicial Conduct is a constitutional bar to raising judicial salaries.

429. Later that day, plaintiff SASSOWER reiterated the disqualification issue by a November 3, 2015 e-mail,[27] stating:

> "…should any of the Commissioners feel themselves unable to discharge their duties with respect to the systemic, three-branch corruption issues presented by CJA's citizen opposition – and that other citizens will be presenting, as well – they should step down from the Commission forthwith. Two Commissioners, Cozier and Lack, are absolutely disqualified by reason of their active role in that corruption – and Chairwoman Birnbaum perhaps as well. I so-stated this to them, this morning – and will particularize the details, with substantiating evidence, in advance of the November 30, 2015 public hearing, should they fail to step down from the Commission – or publicly disclose and address their conflicts of interest."

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[27] Exhibit 6 to plaintiffs' November 30, 2015 written testimony, contained in accompanying free-standing folder, at pp. 3-4.

430. In testifying at the Commission's November 30, 2015 hearing, plaintiff SASSOWER repeated that:

> "This Commission's threshold duty is, of course, to address issues of the disqualification of its members for actual bias and interest" (testimony, p. 4)

and that, with respect to Commissioners Cozier and Lack and Chair Birnbaum,

> "all three [had] demonstrated their utter disregard for casefile evidence of judicial corruption, particularly as relates to the Commission on Judicial Conduct and the court-controlled attorney disciplinary system, whose corruption they have perpetuated." (testimony, p. 4).

431. Plaintiff SASSOWER's December 2, 2012 supplemental submission furnished the particulars as to why these three Commissioners could not examine the evidence of systemic judicial corruption, raised by plaintiffs and other citizens in opposition to judicial salary increases, without exposing their pivotal roles in covering up that evidence and perpetuating the corruption (free-standing folder).

432. The failure and refusal of Commissioners Cozier, Lack, and Chair Birnbaum to rule upon the disqualification issue raised, the failure and refusal of their fellow Commissioners to rule upon it, and the concealment of the disqualification issue from the Commission's December 24, 2015 Report – simultaneously with concealing that systemic judicial corruption was ever raised in opposition to the judicial salary increases and that it is an "appropriate factor" – concede the disqualifications, *as a matter of law* – and renders the Report a nullity.

B. ***As Applied*, a Commission that Conceals and Does Not Determine Whether Systemic Judicial Corruption is an "Appropriate Factor" Barring Judicial Salary Increases is Unconstitutional**

433. In testifying before the Commission on November 30, 2015 at its one and only hearing on judicial compensation, plaintiff SASSOWER identified, both by her oral and written presentation, that:

> "The appellate, administrative, disciplinary, and removal provisions of Article VI [of the New York State Constitution] are safeguards whose integrity – or lack thereof – are not just 'appropriate factors' [for the Commission's consideration], but constitutional ones. Absent findings that these integrity safeguards are functioning and not corrupted, the Commission cannot constitutionally recommend raising judicial pay."

434. In so-stating, she was quoting from plaintiffs' October 27, 2011 Opposition Report which presented a constitutional analysis of the Court of Appeals February 23, 2010 decision in *Maron v. Silver,* 14 N.Y.3d 230, and Article VI of the New York State Constitution – and her written testimony appended the analysis, in full (Exhibit 3 thereto).

435. The Commissioners' failure to deny or dispute the accuracy of that analysis in any respect – and their concealment, by their December 24, 2015 Report, of the very issue that systemic judicial corruption, involving supervisory and appellate levels and the Commission on Judicial Conduct is an "appropriate factor" of constitutional magnitude – concedes it, *as a matter of law*.

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**

436. From the very first of plaintiff SASSOWER's e-mails to the Commission – on November 2, 201528 – she advised that the Commission on Judicial Compensation's August 29, 2011 Report was the product of fraud "covered up by all the executive and legislative public officers who believe themselves entitled to pay raises". Her e-mail stated that this was:

> "chronicled in CJA's October 27, 2011 Opposition Report, in a mountain of correspondence, criminal and ethics complaints relating thereto, and by the public interest litigations we have undertaken over the past four years, all accessible from the prominent links on CJA's homepage, www.judgewatch.org. …
>
> Please forward this e-mail to all seven members of the Commission on Legislative, Judicial and Executive Compensation so that they can be

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28 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at pp. 5-6.

apprised of the systemic fraud, corruption, and dysfunction that is before them, threshold, not only with respect to judicial compensation, but with respect to legislative and executive compensation." (underlining in the original).

437. The following morning, November 3, 2015, before the Commission's first organizational meeting, plaintiff SASSOWER sent a second e-mail stating:

> "...inasmuch as CJA's October 27, 2011 Opposition Report to the Commission on Judicial Compensation's August 29, 2011 Report is the STARTING POINT for your determination of the compensation issues as relate to ALL THREE BRANCHES, I take this opportunity to furnish you that link, directly. Here it is: http://www.judgewatch.org/web-pages/judicial-compensation/opposition-report.htm. The four-page executive summary is attached.
>
> I am available to answer questions, including publicly and under oath." (red and capitalization in the original).

438. Following the November 3, 2015 first organizational meeting, plaintiff SASSOWER sent a second November 3, 2015 e-mail,[29] stating:

> "I hereby request to testify at the Commission's November 30, 2015 public hearing in New York City.
>
> Such hearing date, nearly 4 full weeks from now, gives each Commissioner ample time to individually determine whether, as particularized by CJA's October 27, 2011 Opposition Report, the 3-phase judicial pay raises recommended by the August 29, 2011 Report of the Commission on Judicial Compensation and received by this state's judges beginning April 1, 2012, are statutory-violative, fraudulent, and unconstitutional – thereby requiring that this Commission's recommendations – having 'the force of law' – be for the nullification/voiding of the August 29, 2011 Report AND a 'claw-back' of the $150-million-plus dollars that the judges unlawfully received pursuant thereto.
>
> Because of the importance of CJA's October 27, 2011 Opposition Report, not only to your statutorily-required December 31, 2015 report of 'adequate levels of compensation and non-salary benefits' for this state's judges, but to your statutorily-required November 15, 2016 report of 'adequate levels of compensation and non-salary benefits' for our legislative and executive constitutional officers, I furnished a hard copy of the full October 27, 2011 Opposition Report to Chairwoman Birnbaum at the conclusion of this morning's organizational meeting. It consisted of: (1)

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29 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at pp. 3-4.

CJA's 38-page Opposition Report; (2) CJA's substantiating two-volume Compendium of Exhibits; and (3) the final two motions in CJA's lawsuit against the Commission on Judicial Conduct that went up to the Court of Appeals in 2002 – identified by the Opposition Report as having been handed up by me to the Commission on Judicial Compensation at its one and only July 20, 2011 public hearing, in support of my testimony.

To the other three Commissioners physically present at this morning's meeting – Commissioners Johnson, Cozier, and Lack – I furnished to each, *in hand*, a copy of the 38-page Opposition Report and its 4-page Executive Summary.

As for the three Commissioners not physically present – Commissioners Hedges, Reiter, and Hormozi – I had brought to the meeting copies of the 38-page Opposition Report and 4-page Executive Summary for them, as well. Unless they request same, I will assume they will be reading and/or downloading the Opposition Report from CJA's webpage: http://www.judgewatch.org/web-pages/judicial-compensation/opposition-report.htm. The Executive Summary is attached. ..." (underlining, capitalization, and italics in the original).

439. Two weeks later, by a November 18, 2015 e-mail,[30] plaintiff SASSOWER stated that by now the Commissioners

> "should have each read and considered [the October 27, 2011 Opposition Report] so dispositive as to mandate a Commission request, if not demand, to the Judiciary and other judicial pay raise advocates for their comment, including their findings of fact and conclusions of law with respect thereto." (underlining in the original).

Based thereon, she stated:

> "please deem this e-mail as CJA's request that the Commission...give notice to the Judiciary and judicial pay raise advocates for their findings of fact and conclusions of law with respect to CJA's October 27, 2011 Opposition Report. As seen from the annexed October 28, 2011 e-mail from CJA to the Judiciary and judicial pay raise advocates, they have had a FULL FOUR YEARS to have made findings of fact and conclusions of law.
>
> Needless to say, the Commission's notice to the Judiciary and judicial pay raise advocates – particularly those who have already contacted the Commission about testifying at the November 30th Manhattan hearing – should request their response to CJA's assertion that the October 27, 2011 Opposition Report requires "that this Commission's recommendations – having 'the force of law' – be for the nullification/voiding of the August 29, 2011 Report AND a 'claw-back' of the $150 million-plus dollars that the

30 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at pp. 2-3.

judges unlawfully received pursuant thereto." (underlining added, capitalization in the original).

440. Yet, eleven days later, at the Commission's November 30, 2015 public hearing, the Commissioners allowed the Judiciary and judicial pay raise advocates to urge them to rely on the Commission on Judicial Compensation's August 29, 2011 Report – without the slightest inquiry as to their findings of fact and conclusions of law with respect to plaintiffs' October 27, 2011 Opposition Report.

441. Plaintiff SASSOWER's own testimony at the hearing reiterated that plaintiffs' October 27, 2011 Opposition Report "proved" the "fraudulence, statutory violations, and unconstitutionality of the Commission on Judicial Compensation's August 29, 2011 Report and its recommended judicial salary increases – and that the record of plaintiffs' three litigations based thereon established that:

> "But for the evisceration of any cognizable judicial process in ALL three of these litigations...current judicial salaries would rightfully be what they were in 2011 and the 2010 statute that created the Commission on Judicial Compensation which, in 2015, became the template for the statute creating this Commission, would have been declared unconstitutional, long, long ago." (testimony, p. 2).

She stated:

> "The Judiciary and judicial pay raise advocates testifying here today, and by their written submissions, tout the excellence and high-quality of the Judiciary – implicitly recognizing that judicial salary increases are predicated on judges fulfilling their constitutional function of rendering justice. Plainly, they need a reality check if they are actually unaware of the lawlessness and non-accountability that reigns in New York's judicial branch, notwithstanding our notice to them, again, and again, and again. Let them confront, with findings of fact and conclusions of law, our October 27, 2011 Opposition Report and our three litigations arising therefrom. This includes our constitutional analysis, drawn from the Court of Appeals' February 23, 2010 decision in the judges' judicial compensation lawsuits and from Article VI of the New York State Constitution..." (testimony, p. 2, underlining added).

She further stated that each of the Commissioners, by then, had had ample time to verify the accuracy of the October 27, 2011 Opposition Report and that "current judicial salary levels are…'ill-gotten gains', stolen from the taxpayers" (at p. 4).

442. On December 2, 2015, plaintiffs furnished the Commission with a supplemental submission stating:

> "The Commission's charge is to 'examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits' (§2.1) and 'the prevailing adequacy of pay levels and other non-salary benefits' (§2.2a(2)). None of the judges and other pay raise advocates testifying before you identified this. Instead, they misled you with rhetoric that the levels you should be setting are the ones they view as 'fair', 'equitable', and commensurate with their self-serving notions of the dignity and respect to be accorded the judiciary, furnishing NO EVIDENCE as to the inadequacy of current judicial salary levels – bumped up $40,000 by the Commission on Judicial Compensation's August 29, 2011 Report. They did not even assert that current salary levels are inadequate, let alone after the addition of non-salary benefits. In fact, and repeating their fraud at the Commission on Judicial Compensation's July 20, 2011 hearing, they made no mention of non-salary benefits – or their monetary value – a concealment also characterized by their written submissions before you.
>
> …CJA's October 27, 2011 Opposition Report…highlighted (at pp. 1, 17-18, 22, 31) that among the key respects in which the Commission on Judicial Compensation's August 29, 2011 Report was statutorily-violative and fraudulent is that its salary increase recommendations were 'unsupported by any finding that current 'pay levels and non-salary benefits' [were] inadequate' – reflective of the fact that the judges and judicial pay raise advocates had not furnished probative evidence from which such finding could be made. Such finding, moreover, would require an articulated standard for determining adequacy…" (pp. 1-2, capitalization in the original).

The December 2, 2015 supplemental submission then went on to show (pp. 2-3) that the ONLY evidence that the Commission had before it was as to the adequacy of existing salary and non-compensation benefits.

443. On December 21, 2015, plaintiff SASSOWER furnished the Commission with a further submission. Entitled "Assisting the Commission in discharging its statutory duty of 'tak[ing]

into account all appropriate factors' as to 'adequate levels of compensation and non-salary benefits", it presented:

> "further evidence of 'the lawlessness and non-accountability that reigns in New York's judicial branch, to which [she] testified at the November 30, 2015 hearing as not only an 'appropriate factor' for the Commission's consideration, disentitling the judiciary to any salary increases, but a 'factor' of constitutional magnitude." (underlining in the original).

The letter reiterated that the judges and judicial pay raise advocates could easily corroborate this – prefatory to furnishing the Commission "with findings of fact and conclusions of law with respect to...CJA's October 27, 2011 Opposition Report and the record of the three litigations based thereon.

444. The Commission's December 24, 2015 Report ignored ALL the foregoing. It made no mention of any opposition to the judicial salary increases, made no mention of plaintiffs' October 27, 2011 Opposition Report, made no findings of fact and conclusions of law with respect to it – or with respect to the record of the three lawsuits based thereon – or as to the adequacy of existing levels of judicial compensation and non-salary benefits. Its judicial salary increase recommendations rested on the Commission on Judicial Compensation's August 29, 2011 Report – and on no finding that existing levels of judicial compensation and non-salary benefits were inadequate. In other words, the December 24, 2015 Report is based on the very fraud and absence of evidence that plaintiffs had presented in opposition.

D. ***As Applied*, a Commission that Suppresses and Disregards the Input of Taxpaying Citizens, Particularly in Opposition to Salary Increases, is Unconstitutional**

445. By an November 18, 2015 e-mail,[31] plaintiff SASSOWER objected to the Commission's decision, at its November 3, 2015 first organizational meeting, to hold only a single hearing on judicial compensation, in Manhattan – "without the slightest discussion of whether that

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31 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at p. 2.

would be fair to New Yorkers in the state's vast western, northern, and central regions, where, additionally, salaries and costs of living are so markedly lower." She requested that the Commission "schedule at least one upstate public hearing on judicial compensation".

446. Later that day, plaintiff SASSOWER sent another e-mail,[32] this one entitled: "Informing the Public about the Commission's Nov. 30 Public Hearing on Judicial Compensation & its Opportunity to be Heard". Noting that in the two weeks since the Commission had scheduled its November 30 2015 public hearing in Manhattan, it had "yet to send out a press release about it and the opportunity the public has to testify and/or make written submissions about salaries and benefits for judges, whose costs it pays for", she requested that the Commission immediately put out a press release about the November 30th hearing – "and the opportunity the public has to testify and/or to furnish written comment". She further stated:

> "the only reason for the Commission's proceeding 'quietly' – as it has – is its knowledge that the taxpaying public would never tolerate pay raises for corrupt and incompetent judges – such as we have and cannot rid ourselves of. Likewise pay raises for our collusive and corrupt Legislators and Governor, Attorney General, and Comptroller..."

447. Plaintiff SASSOWER received no response to either of these two requests because the Commissioners did not send her any response.

448. At the November 30, 2015 public hearing, plaintiff SASSOWER preceded her testimony by the observation that:

> "There was no press announcement from this Committee, press release sent out notifying the public of this hearing today and, consequently, there are not many people present, nor who requested to testify because they didn't know about this hearing. Nor did they ever know or do they know that they have an opportunity to make written submissions." [transcript, p. 70].

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32 Exhibit 6 to plaintiff SASSOWER's November 30, 2015 testimony, at p. 1.

449. None of the Commissioners disputed that there had been no press announcement or release sent out to inform the public. Nevertheless, a week later, Chair Birnbaum opened the Commission's December 7, 2015 meeting – its first after the hearing – by stating:

> "there was a statement made about that we did not get notice of the hearings out to the public. I just would like to tell you that there was an in-media advisory that is on our website and that was sent out to over 100 media outlets throughout the state and that was also distributed to wire services who have nationwide distribution. So we feel strongly that there was more than sufficient publicity about the hearings. And the hearings were very well attended..." [transcript, p. 2].

450. Upon information and belief, Chair Birnbaum's assertion that a media advisory posted on the Commission's website had been sent out to over 100 media outlets throughout the state and ...distributed to wire services who have nationwide distribution" is false.[33] No substantiation was furnished in response to plaintiff SASSOWER's FOIL request.[34]

451. The Commission's December 24, 2015 Report concealed the paucity of its outreach. Stating that it had "invited written commentary and established post office and e-mail addresses" (at p. 4), the Report did not reveal how this had been publicized or the opportunity to testify at the hearing, which, in three separate places (Chair Birnbaum's coverltr, pp. 1, 4), it misrepresented as being "day-long", when, in fact, it was only 2-1/2 hours. It concealed entirely that there was any opposition to judicial salary increases, whether from "interested individuals" or "organizations", let alone its basis, and made no finding as to its legitimacy or sufficiency in rebutting support for the judicial salary increases.

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[33] The Commission made no claim to having sent out any press release for its March 10, 2016 hearing on legislative and executive compensation, held in the same location as its November 30, 2015 hearing. The result was that it had only two witnesses testifying – the executive directors of Common Cause-NY and Citizens Union.

[34] Plaintiffs' FOIL requests to the Commission are in the accompanying free-standing folder containing their submissions to the Commission.

452. The Commission's failure to meaningfully elicit citizen input – and to address the citizen opposition to judicial salary increases and its basis that it had before it – renders its December 24, 2015 Report unconstitutional, *as a matter of law*.[35]

AS AND FOR A FIFTEENTH CAUSE OF ACTION

The Commission's Violation of Express Statutory Requirements of Chapter 60, Part E, of the Laws of 2015 Renders their Judicial Salary Increase Recommendations Null & Void

453. Plaintiffs repeat, reiterate, and reallege ¶¶1-452, with the same force and effect as if more fully set forth herein.

454. The Commission on Legislative, Judicial and Executive Compensation violated Chapter 60, Part E, of the Laws of 2015 in multiple respects:

(i) in violation of §2, ¶¶1, 2(a), the Commission examined only judicial salary, not "compensation" apart from salary, and not "non-salary benefits";

(ii) in violation of §2, ¶¶1, 2(a), the Commission made no finding and furnished no evidence that current "compensation and non-salary benefits' or "pay levels and non-salary benefits" of New York State judges are inadequate;

(iii) in violation of §2, ¶3, the Commission did not "take into account all appropriate factors", such as systemic judicial corruption and citizen opposition – and made no claim that it had;

(iv) in violation of §2, ¶3, the Commission did not "take into account three of the six enumerated "appropriate factors".

455. Each of these statutory violations is particularized by plaintiffs' 12-page "Statement of Particulars in Further Support of Legislative Override of the 'Force of Law' Judicial Salary Increase Recommendations, Repeal of the Commission Statute, Etc." (Exhibit 40), which plaintiffs January 15, 2015 letter to defendants FLANAGAN and HEASTIE furnished those defendants and

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[35] "It is basic that an 'act of the legislature is the voice of the People speaking through their representatives. The authority of the representatives in the legislature is a delegated authority and it is wholly derived from and dependent upon the Constitution' (*Matter of Sherrill v O'Brien*, 188 NY 185, 199).", *New York State Bankers Association, Inc. v. Wetzler*, 91 N.Y.2d 98, 102 (1993) (underlining added).