SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

-against-

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

Defendants.

Index No 1788-14

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SUPPLEMENTAL COMPLAINT AND FOR SUMMARY JUDGMENT

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendants Andrew M. Cuomo, Dean Skelos, NYS Senate, Sheldon Silver, NYS Assembly, Eric T. Schneiderman and Thomas DiNapoli
The Capitol
Albany, New York 12224-0341
Telephone: (518) 776-2608
Fax: (518) 915-7738 (Not for service of papers)

Adrienne J. Kerwin
Assistant Attorney General,
of Counsel

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PRELIMINARY STATEMENT

This action was commenced by the filing of a summons and complaint, by plaintiffs Center for Judicial Accountability, Inc. ("CJA") and Elena Ruth Sassower, on or about March 28, 2014. See Kerwin aff. at Exh. A. Defendants' motion to dismiss the complaint was granted as to plaintiffs' first three causes of action, and denied only as to plaintiffs' fourth cause of action. See Kerwin aff. at Exh. B. With the permission of the court, plaintiffs filed a supplemental complaint. See Kerwin aff. at Exh. D. The supplemental complaint in this action challenges only the initial steps taken toward the enactment of the 2015-16 Legislative and Judiciary budgets. See id. Specifically, plaintiffs allege that (1) the Legislature did not provide a certified estimate of its financial needs for the 2015-16 fiscal year as required by Article VII, section 1 of the New York State Constitution; (2) the certified estimates of financial needs submitted by the Legislature and Judiciary were not properly itemized pursuant to Article VII, section 1 of the New York State Constitution; (3) the Governor failed to present the certified estimates of the Legislature and Judiciary in his Executive Budget "without revision" as required by Article VII, section 1 of the New York State Constitution; and (4) the Legislature violated its own rules and Legislative Law 32-a. See id.

This memorandum of law is submitted on behalf of defendants Governor Andrew M. Cuomo, the New York State Senate, the New York State Assembly, Senate Temporary President Dean Skelos, Speaker Sheldon Silver, Attorney General Eric T. Schneiderman and Comptroller Thomas DiNapoli in support of this (1) pre-answer motion to dismiss the supplemental complaint pursuant to CPLR 3211(a)(1), (a)(2) and (a)(7) seeking dismissal of the supplemental complaint based on documentary evidence (see, e.g., Ferrari v. Iona Coll., 95 A.D.3d 576 [1st

Dep't 2012]), lack of subject matter jurisdiction and for failure to state a cause of action; and (2) issue having been joined on the original complaint, a motion for summary judgment on plaintiffs' fourth cause of action contained in the original complaint pursuant to CPLR 3212.

FACTS AS ALLEGED IN THE ORIGINAL COMPLAINT

The initial complaint includes 126 paragraphs of allegations and over 70 exhibits that relate mostly to plaintiffs' endeavors, both last year and years ago, to convince the State government that it has enacted, and continues to enact, State budgets allegedly inconsistent with the requirements of the New York State Constitution. See Kerwin aff. at Exh. A. In fact, almost all of the exhibits attached to the original complaint are letters written, and FOIL requests made, by the plaintiffs, themselves. See id. While the complaint is voluminous, it contains mostly allegations about prior events not relevant to the causes of action at issue in this proceeding. See id.

When distilled to those allegations that appear to relate to plaintiffs' claims, the original complaint alleges that, pursuant to Article VII, section 1 of the New York State Constitution, the Judiciary and the Legislature transmitted the estimates of their financial needs for the 2014-15 fiscal year to the Governor on November 23, 2013, and November 27, 2013, respectively. The certification language that accompanied the Judiciary's estimate stated, "Pursuant to Article VII, Section 1 of the Constitution of the State of New York I certify that the attached schedules are the itemized estimates of the financial needs of the Judiciary for General State Charges for the fiscal year beginning April 1, 2014. . ." See Kerwin aff. at Exh. F. The certification language that accompanied the Legislature's estimate stated, "Attached hereto is a copy of the Legislature's Budget for the 2014-15 fiscal year pursuant to Article VII, Section 1 of the New

York State Constitution." See Kerwin aff. at Exh. E.

Thereafter, the Governor included those estimates in his Executive Budget on January 21, 2014. See Kerwin aff. at Exh. G. Also included in the Executive Budget were lists documenting previously-appropriated monies of the Judiciary and Legislature that had not yet been spent and, therefore, were available for re-appropriation. See id. Plaintiffs allege that the Senate and Assembly violated their own rules and Legislative Law §32-a when considering and voting on the State Budget by doing, or failing to do, numerous things such as (1) failing to hold public hearings, (2) ensuring that fiscal notes and introducer's memoranda accompanied budget bills and (3) failing to make daily stenographic records of legislative proceedings available for public inspection. See Kerwin aff. at Exh. A

FACTS AS ALLEGED IN THE SUPPLEMENTAL COMPLAINT

The supplemental complaint adds 109 additional paragraphs of factual allegations, and four additional causes of action (causes of action five, six, seven and eight). See Kerwin aff. at Exh. D. However, the additional 109 paragraphs operate to allege that everything that occurred as described in the original complaint with respect to the 2014-15 Legislative and Judiciary budgets also occurred in connection with the 2015-16 Legislative and Judiciary budgets. See id. Accordingly, plaintiffs' fifth, sixth, seventh and eighth causes of action are identical to their first, second, third and fourth causes of action – as described -- except for the fiscal year of the budget involved.

ARGUMENT

Pursuant to the October 9, 2014, Decision and Order of this court, plaintiffs' first, second and third causes of action have been dismissed. See Kerwin aff. at Exh. B. For the reasons

articulated by the Court in that Decision and Order, plaintiffs' fifth, sixth and seventh causes of action asserted in the supplemental complaint should also be dismissed. Additionally, for the reasons discussed below, defendants are entitled to judgment in their favor as to plaintiffs' fourth and eighth causes of action.[1]

POINT I

PLAINTIFFS' FIFTH, SIXTH AND SEVENTH CAUSES OF ACTION SHOULD BE DISMISSED

Since the Court dismissed plaintiffs' first, second and third causes of action for the reasons discussed in its October 9, 2014 Decision and Order, plaintiffs' fifth, sixth and seventh causes of action contained in the supplemental complaint should also be dismissed because they allege identical claims on indistinguishable facts. The "law of the case" doctrine "'is a rule of practice, articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned.'" Clark v. Clark, 117 AD3d 668, 69 (2d Dept 2014) (quoting Martin v. City of Cohoes, 37 NY2d 162, 165 [1975]). This Court has already held that (1) plaintiffs' first cause of action, alleging that the Legislative budget was not properly certified or itemized, is not justiciable and fails to state a claim; (2) plaintiffs' second cause of action, alleging that the Judiciary budget was not properly itemized, is not justiciable fails to state a claim; and (3) plaintiffs' third cause of action, alleging

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1 Additionally, as a non-attorney, plaintiff Sassower cannot represent the interests of the corporate plaintiff in this action. CPLR 321(a) prohibits the appearance of a "corporation or voluntary association" in this judicial proceeding other than by an attorney. See CPLR 321(a). Although not mentioned in the supplemental complaint, the complaint describes plaintiff CJA as "a national non-partisan, non-profit citizens' organization" whose "patriotic purpose is to safeguard the judicial process by insuring the integrity of its judges." See Kerwin aff. at Exh. A, ¶¶4-5. The complaint alleges that plaintiff CJA appears through its Director, plaintiff Sassower. See Kerwin aff. at Exh. A. Upon information and belief, plaintiff Sassower is not an attorney admitted to practice law in the State of New York. See Kerwin aff. at ¶5. Therefore, pursuant to CPLR 321(a), any claims alleged in the complaint on behalf of plaintiff CJA must be dismissed. Naroor v. Gondal, 5 N.Y.3d 757, 757 (2005); Cinderella Holding Corp. v. Calvert Ins. Co., 265 AD2d 444, 444 (2d Dept 1999).

that the executive budget did not properly include the Legislative and Judiciary budgets "without revision," is also not justiciable and fails to state a claim. See Kerwin aff. at Exh. B. Accordingly, plaintiffs' fifth, sixth and seventh causes of action, alleging the same claims, are also not justiciable, fail to state claims, and should be dismissed.

Specifically, the supplemental complaint fails to allege a cause of action subject to judicial review. Plaintiffs' allegations in support of their fifth, sixth and seventh causes of action relating the 2015-16 budget challenge once again only the initial steps taken toward the enactment of the 2015-16 Legislative and Judiciary budgets. Specifically, plaintiffs allege that (1) the Legislature did not provide a certified estimate of its financial needs for the 2015-16 fiscal year as required by Article VII, section 1 of the New York State Constitution, see Kerwin aff. at Exh. D, ¶¶131-138; (2) the certified estimates of financial needs submitted by the Legislature and Judiciary were not properly itemized pursuant to Article VII, section 1 of the New York State Constitution, see id. at ¶¶131-144; and (3) the Governor failed to present the certified estimates of the Legislature and Judiciary in his executive budget "without revision" as required by Article VII, section 1 of the New York State Constitution. See id. at ¶¶145-150.

While these allegations were added challenging the proposed 2015-16 State Budget, the budget has been enacted. Accordingly, plaintiffs' supplemental claims are now challenges to the constitutional validity of an enacted statute. Where, as here, a plaintiff asserts that a statute is unconstitutional, courts are mindful that enactments of the Legislature – a coequal branch of government – may not casually be set aside by the Judiciary. The statutes in issue enjoy a strong presumption of constitutionality, grounded in part on "an awareness of the respect due the legislative branch." Dunlea v Anderson, 66 N.Y.2d 265, 267 (1985). On the merits, a plaintiff

bears the heavy burden of establishing the statute's unconstitutionality "beyond a reasonable doubt." Matter of E.S. v. P.D., 8 NY3d 150, 158 (2007).

Article VII, section 1 of the New York State Constitution states

> . . . **Itemized** estimates of the financial needs of the legislature, **certified** by the presiding officer of each house, and of the judiciary, approved by the court of appeals and **certified** by the chief judge of the court of appeals, shall be transmitted to the governor not later than the first day of December in each year for inclusion in the budget **without revision** but with such recommendations as the governor may deem proper. Copies of the itemized estimates of the financial needs of the judiciary also shall forthwith be transmitted to the appropriate committees of the legislature.

See N.Y. Const. art. VII, §1 (emphasis added). Plaintiffs allege that the defendants violated this constitutional provision by (1) failing to provide sufficient itemization, (2) failing to provide a sufficient certification and (3) failing to include the estimates in the budget without revision.

A. Degree of Itemization

The plaintiffs allege that the estimates of financial needs of the Legislature and Judiciary transmitted to the Governor in advance of the preparation and presentation of the proposed 2015-16 executive budget were not "itemized" as required by Article VII, section 1 of the State Constitution. However, an argument that a budget is not adequately itemized is not justiciable. Urban Justice Ctr. v. Pataki, 38 A.D.3d 20, 30 (1st Dept 2006). The degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the reviewer to effectively review it. Saxton v. Carey, 44 N.Y.2d 545, 550-51 (1978). That decision is for the reviewing governmental body to make, and not an issue to be delineated by the courts. Id. Therefore, if the Governor determined that the alleged lack of itemization precluded him from

giving the proposed Legislature and Judiciary budgets meaningful review, he could have refused to approve it. Id. If the Governor was satisfied, the courts cannot find differently. Id. In fact, in dismissing plaintiffs' first and second causes of action, this Court determined that the "itemization challenge clearly must be dismissed as it is nonjusticiable. . ." See Kerwin aff. at Exh. B, p. 5.

Therefore, since the Governor accepted and acted upon the estimates of the financial needs of the Legislature and Judiciary, the level of itemization therein is not subject to judicial review. Accordingly, plaintiffs' claims relating to the itemization of the estimated financial needs of the Legislature and Judiciary should be dismissed.

B. Sufficiency of Certification

The plaintiffs also allege that the estimate of financial needs of the Legislature transmitted to the Governor was not "certified" as required by Article VII, section 1 of the State Constitution. However, the Legislature's estimate of its financial needs for the 2015-16 fiscal year was transmitted to the Governor with the following certification, signed by defendants Dean Skelos and Sheldon Silver: "Attached hereto is a copy of the Legislature's Budget for the 2015-16 fiscal year pursuant to Article VII, Section 1 of the New York State Constitution." See Kerwin aff. at Exh. I. Plaintiffs appear dissatisfied with this certification because it is not the same as the one provided from the Judiciary. In its certification, the Judiciary stated, "Pursuant to Article VII, Section 1 of the Constitution of the State of New York I certify that the attached schedules are the itemized estimates of the financial needs of the Judiciary for General State Charges for the fiscal year beginning April 1, 2015. . ."[2] See Kerwin aff. at Exh. J. Both

2 Unlike the estimate of financial needs of the Legislature, which only needs to be certified by the leaders of the

certifications purport to do the same thing – namely, comply with the requirements of Article VII, section 1. The lack of the word "certify" in the language chosen by the Legislature to convey this compliance does not somehow make the certification unconstitutional.

An examination of the sufficiency of certifications in other contexts demonstrates that, if a law requiring a certification does not specify the form or language that must be used, no particular form or language is required. See e.g. Rattley v. New York City Police Dep't, 96 N.Y.2d 873, 875 (2001) (FOIL statute "does not specify the manner in which an agency must certify that documents cannot be located"); Lazzari v. Town of Eastchester, 20 N.Y.3d 214, 222 (2012) (nothing in Civil Service statute "suggests, much less required, that a medical certification be in writing or take any particular form"); Schum v. Burchard, 211 A.D. 126, 128 (2d Dept 1924) ("It is not necessary that the words of the [real property] statute be contained in the certificate. A substantial compliance with the statute is sufficient"), and it is up to the party receiving the certification to determine if the certification is acceptable. Maybee v. State of New York, 4 N.Y.3d 415, 420 (2005) (if Legislature is dissatisfied with a certification of necessity from the Governor, it can reject it).

Since Article VII, section 1 merely states that the estimates of the financial needs of the Judiciary and Legislature must be "certified," and does not require what form such a certification must take, or what language must be used, no particular form or language is necessary. Therefore, as this Court determined in dismissing plaintiffs' first cause of action, the certification provided by the legislative leaders, declaring that the document is produced pursuant to the constitutional mandate, was constitutionally sufficient. See Kerwin aff. at Exh. B., p. 5.

Senate and Assembly, the estimate of the financial needs of the Judiciary must be approved by the New York State Court of Appeals before it can be certified by the Chief Judge. See N.Y. Const. art. VII, §1.

However, as with the degree of itemization discussed above, if the Governor was dissatisfied with the certification provided by the Legislature, he could have rejected it. Since the Governor was satisfied with the certification, and there is no pretext as to what was clearly intended, it is not subject to further judicial review, nor should it be. Therefore, plaintiffs' claims relating to the Legislature's certification should be dismissed.

C. Inclusion of Re-Appropriations with Certified Submissions of the Legislature and Judiciary

The plaintiffs further allege that, by including re-appropriation amounts from prior Legislative and Judiciary budgets in his proposed State Budget, the Governor failed to include the certified estimates of financial needs of the Legislature and Judiciary in the State Budget "without revision." This claim completely misinterprets the role of the inclusion of re-appropriation amounts in the Executive Budget. Plaintiffs appear to believe that the items and amounts listed in the re-appropriations were "added" to the estimates of financial need submitted by the Judiciary and Legislature. However, all that the re-appropriations reflect are unused funds from appropriations made in prior fiscal years. A comparison of the amounts sought by the Judiciary and Legislature, and the purposes therefore, with the amounts and purposes listed in the Executive Budget shows that they are identical. As this Court found in dismissing plaintiffs' substantively indistinguishable third cause of action, the inclusion of re-appropriations did not violate the requirement that the estimated financial needs of the Judiciary and Legislature be included in the Executive Budget "without revision." See Kerwin aff. at Exh. B, p. 6. Identifying the amounts of funds available for re-appropriation in the budget bill did nothing to change, alter or revise the funds sought by the Judiciary and Legislature. Therefore, plaintiffs'

claims relating to the inclusion of the re-appropriation amounts in the Governor's Executive Budget should again be dismissed.

D. Violation of Senate/Assembly Rules

In their eighth cause of action, the plaintiffs allege that the Senate and Assembly acted in violation of their own rules in considering the 2015-16 budget. The supplemental complaint alleges violations of various internal rules of the Legislature.[3] However, it is well-settled that such procedural matters are "wholly internal" to the Legislature and thus beyond judicial review under the separation of powers. Heimbach v. State, 59 N.Y.2d 891, 893 (1983), app. dismissed 464 U.S. 956 (1983)(determining whether a legislative roll call was incorrectly registered is a legislative matter beyond judicial review); Urban Justice Ctr. v. Pataki, 38 A.D.3d 20, 27 (1st Dept 2006), lv. denied 8 N.Y.3d 958 (2007) (not the province of the courts to direct the Legislature on how to do its work, particularly where the internal practices of the Legislature are involved). The independence of the Legislature and Judiciary requires that each must be "confined to its own functions and can neither encroach upon nor be made subordinate to" each other. Matter of Davies, 168 N.Y. 89, 101 (1901); Urban Justice Ctr., 38 A.D.3d at 27. To this end, each branch must "be free from interference, in the discharge of its own functions and particular duties, by either of the others." Matter of Gottlieb v. Duryea, 38 A.D.2d 634, 635 (1971), aff'd 30 N.Y.2d 807 (1972), cert. denied 409 U.S. 1008 (1972); see People ex rel. Burby v. Howland, 155 N.Y. 270, 282 (1898). Simply put, "it is not the province of the courts to direct the [L]egislature how to do its work." Heimbach, 59 N.Y.2d at 893, quoting N.Y. Public Interest

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3 Plaintiffs allege violations of Senate Rule VIII, §7; Senate Rule VII, §§1, 4(b) & 6; Assembly Rule III, §§1(f), 2(a), 2(g) & 6; Senate and Assembly Joint Rule III, §2; Senate Resolutions #4036, #950; and Assembly Resolution 203. See Kerwin aff. at Exh D, ¶¶147, 21, 211, 212, 214, 215, 216, 224228, 229, 234

Research Group v. Steingut, 40 N.Y.2d 250, 257 (1976); People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906). Any other result would foist this Court into an "improvident intrusion into the internal workings of a coequal branch of government." Smith v. Espada, Index No. 4912-09 (Sup. Ct., Albany Co., June 16, 2009).[4] For these reasons, plaintiffs' claims relating to alleged violations of Senate and Assembly rules should be dismissed.

POINT II

PUBLICLY AVAILABLE DOCUMENTARY EVIDENCE PROVES THAT THE DEFENDANTS DID NOT VIOLATE LEGISLATIVE LAW §32-A

Plaintiffs' claims that defendants violated Legislative Law §32-a in connection with the 2014-15 and 2015-16 Legislative and Judiciary Budgets should also be dismissed.[5] Legislative Law §32-a states as follows:

> After submission and prior to enactment of the executive budget, the senate finance committee and the assembly ways and means committee jointly or separately shall conduct public hearings on the budget. Such hearings may be conducted regionally to provide individuals and organizations throughout the state with an opportunity to comment on the budget. The committees shall make every effort to hear all those who wish to present statements at such public hearings. The chairs of the committees jointly or separately shall publish a schedule of hearings.

See N.Y. Leg. Law §32-a. The plaintiffs allege that the defendants violated this statute in connection with the consideration of the Judiciary and Legislative budgets contained in the 2014-15 and 2015-16 Executive Budgets. However, existing public documents prove otherwise.

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4 Further, the plaintiffs lack standing to bring any claims relating to the Legislature's alleged violations of its own rules and procedures because they cannot allege an injury "distinct from that suffered by the public at large." Urban Justice Center v. Silver, 66 A.D.3d 567, 567 (1st Dept 2009) (the organizational plaintiff challenged certain rules and practices adopted by the Senate and the Assembly. The court held that the plaintiff lacked standing because it "failed to allege a personally concrete and demonstrable injury distinct from that suffered by the public at large").

5 While plaintiffs' eighth cause of action must be considered using a motion to dismiss standard, see CPLR 3211, the court should apply a summary judgment standard as to defendants' motion relating to plaintiffs' fourth cause of action. See CPLR 3212.

6 The Court of Appeals has specifically stated that the provision is to provide at least as much protection as the

A. Hearings Were Scheduled, and Held, in Connection With the 2014-15 and 2015-16 Legislative and Judiciary Budgets

The schedule for the hearings on budget bill S.6351-A/A.8551-A was published on January 10, 2014, and the accompanying press release outlined the steps that needed to be taken to request to testify at that hearing. See Kerwin aff. at Exh. M. Specifically, the press release stated as follows:

> In accordance with the schedule, the hearings will commence on Monday, January 27, and continue through Tuesday, February 11, 2104. The respective state agency or department heads will begin testimony each day, followed by witnesses who have signed up to testify on that area of the budget. Those testifying must limit comments to no more than 10 minutes.
>
> Persons interested in testifying must contact the person listed on the schedule no later than the close of business, two days prior to the respective hearing. . . .
>
> The agency and the departmental portion of the hearings are provided for in Article 7, Section 3 of the Constitution and Article 2, Section 31 of the Legislative Law. The state Legislature is also soliciting public comment on the proposed budget pursuant to Article 2, Section 32-a of the Legislative Law.

See id.

The public hearings on budget bill S.6351-A/A.8551 were, in fact, held on February 5, 2014, as demonstrated by the transcript of that hearing. See Kerwin aff. at Exh. O. Twenty-three individuals were listed as speakers on the agenda for the hearing. See id. at Exh. N. The hearing lasted over nine hours, and testimony was, in fact, provided by numerous speakers on a number of different topics, including the Judiciary Budget. See id. at Exh. O.

Similarly, the schedule for the hearings on budget bill S.2001-A/A.3001-A was published on January 16, 2015, and the accompanying press release identically outlined the steps that needed to be taken to request to testify at that hearing. See id. at Exh. P. The public hearings on budget bill S.2001-A/A.3001-A were, in fact, held on February 26, 2015, as demonstrated by the

transcript of that hearing. See id. at Exh. R. Thirty-four individuals were listed as possible speakers on the agenda for the hearing. See id.at Exh. Q. The hearing lasted approximately ten hours, and testimony was again provided by numerous speakers on a number of different topics, including the Judiciary Budget. See id. at Exh. R.

Based on this irrefutable, publicly-available evidence, schedules for the public hearings were published, and public hearings on budget bills S.6351-A/A.8551-A and S.2001-A/A.3001-A were, in fact, held in accordance with Legislative Law §31 and §32-a, as well as Article 7, Section 3 of the Constitution.

B. Determinations as to the Location of Public Hearings, and Who is Permitted to Testify at Public Hearings, are Not Justiciable

Having established that schedules for the public hearings were published, and the public hearings did, in fact, take place, the only other possible allegations pursuant to Legislative Law §32-a contained in plaintiffs' fourth and eighth causes of action relate to the locations of the hearings, and who was permitted to testify at the hearings. See N.Y. Leg. Law §32-a. Such determinations are protected from judicial review by the Speech or Debate Clause of the New York State Constitution. The Speech or Debate Clause of the New York State Constitution provides that as to any "speech or debate in either house of the legislature, the members shall not be questioned in any other place." See N.Y. Const. Art. III § 11. It is designed to protect members of the Legislature from Executive or Judicial interference or oversight that realistically threatens to control or restrict members of the Branch in carrying out their legislative responsibilities.[6] The legislative privilege protects against prosecution by an unfriendly

6 The Court of Appeals has specifically stated that the provision is to provide at least as much protection as the comparable provision and immunity granted by the federal constitution. See Art. I, § 6, Cl. 1. People v. Ohrenstein, 77 N.Y.2d 38, 53 (1991).

executive and conviction by a hostile judiciary. It is one manifestation of practical security for ensuring legislative independence. United States v. Johnson, 383 U.S. 169, 177-9 (1966).

The Clause ensures that under no circumstances is a member required to answer in any other place than the legislature for their actions or non-actions. The Clause is designed not for the private or personal benefit of the members, but to insure the integrity of the process by insuring the independence of the legislators themselves. United States v. Brewster, 408 U.S. 501, 507 (1972); People v. Ohrenstein, 77 N.Y.2d 38, 54 (1991). The fundamental purpose of the Speech or Debate Clause is to ensure that legislators perform their duties independently, without fear of lawsuits or interference from the coordinate branches of government. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975); Straniere v. Silver, 218 A.D.2d 80, 83 (3d Dept. 1996) aff'd. 89 N.Y.2d 825 (1996). It protects members of the legislature from the potential harassment, disruption, and distraction that would come with the burden of having to defend themselves, provide evidence, or rebut evidence. Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 732-33 (1980).

The internal workings of the Senate and Assembly, including their internal thought processes and underlying motivations, are protected activities that fall within the province of the speech and debate privilege. Ohrenstein, 77 NY2d at 54; Eastland, 421 U.S. at 503. In order to be protected by the Speech or Debate Clause, the legislative act must be an "integral part of the deliberative and communicative processes by which members participate in proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the constitution places within the jurisdiction of either House." Ohrenstein, 77 NY2d at 54, citing Gravel v. United States, 408 U.S. 606 (1972). The privilege shields the

acts that mold ideas into legislation. See, e.g., Humane Society v. City of New York, 188 Misc.2d 735 (Sup. Ct. New York Cty. 2001). The privilege reaches to protect the thought processes of legislators as well as the actual communications. Campaign for Fiscal Equity v. State, 179 Misc.2d 907 (Sup. Ct. New York Cty. 1999) aff'd. 265 A.D.2d 277 (1st Dept. 1999). The Clause also extends to staff members and their work when engaged in legislative business. Gravel v. United States, 408 U.S. at 616; Campaign for Fiscal Equity v. State, 179 Misc.2d 907 (Sup Ct. NY Cty. 1999) aff'd. 265 AD2d 277 (1st Dept. 1999); Oates v. Marino, 106 A.D.2d 289 (1st Dept. 1984).

Plaintiffs' claims in her fourth and eighth causes of action appear to stem from the fact that plaintiff Sassower's requests by email and telephone to testify orally were not granted.[7] However, who is selected to testify orally at legislative hearings, and why such people are, or are not, chosen, are not issues that may be judicially reviewed.[8] Larabee v. Governor of the State of New York, 65 AD3d 74, 87-92 (1se Drpt 2009) (Speech or Debate Clause applies to all legitimate legislative activity, which includes all acts of the Legislature other than political matters). Accordingly, plaintiffs' fourth and eighth causes of action should be dismissed in their entirety, with prejudice.

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7 Although the complaints also allege that the public hearings were not held "regionally" as permitted by Legislative Law §32-a, it is not clear how the lack of a particular regionally-held hearing affected or aggrieved the plaintiffs. In any event, the statute is permissive, not mandatory, as "hearings may be conducted regionally".

8 Similarly, any discovery demands relating to where hearings were held, and why certain individuals were, or were not, permitted to testify at the hearings would be objectionable under the Speech or Debate clause. Accordingly, it would be impossible for discovery to take place in this action on plaintiffs' fourth and eighth causes of action. Humane Society of New York v. City of New York, 188 Misc2d 735, 740 (Sup. Ct. New York Co. 2001) (depositions and document demands impermissible under legislative immunity privilege).

POINT III

ATTORNEY GENERAL SCHNEIDERMAN AND COMPTROLLER DINAPOLI ARE NOT PROPER DEFENDANTS

To the extent that the supplemental complaint is read to contain allegations against Attorney General Schneiderman or Comptroller DiNapoli, such claims should be dismissed for the reasons stated in the Court's October 9, 2014 Decision and Order. See Kerwin aff. at Exh.B.

CONCLUSION

For the reasons discussed above, the supplemental complaint should be dismissed in its entirety with prejudice, and defendants should be granted summary judgment on plaintiffs' fourth cause of action.

Dated: Albany, New York
July 28, 2015

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendants Andrew M. Cuomo, Dean Skelos, NYS Senate, Sheldon Silver, NYS Assembly, Eric T. Schneiderman and Thomas DiNapoli
The Capitol
Albany, New York 12224-0341

By:_____
Adrienne J. Kerwin
Assistant Attorney General, of Counsel
Telephone: (518) 776-2608
Fax: (518) 915-7738 (Not for service of papers)