SUPREME COURT OF STATE OF NEW YORK
ALBANY COUNTY

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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,

Plaintiffs,

Index #1788-14

-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 SILVER, 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.

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PLAINTIFFS' MEMORANDUM OF LAW

in Opposition to Defendants' Dismissal/Summary Judgment Motion,
& in Support of Plaintiffs' Cross-Motion for Summary Judgment & Other Relief

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ELENA RUTH SASSOWER, Plaintiff *Pro Se*, individually
& as Director of the Center for Judicial Accountability, Inc.,
and on behalf of the People of the State of New York &
the Public Interest

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MEMORANDUM OF LAW

Introduction

This memorandum of law is submitted in opposition to Attorney General Eric T. Schneiderman's July 28, 2015 motion, by Assistant Attorney General Adrienne Kerwin:

> (1) to dismiss plaintiffs' March 30, 2015 supplemental verified complaint "in its entirety, with prejudice", pursuant to CPLR §§3211(a)(1), (a)(2), and (a)(7); and
>
> (2) for summary judgment, pursuant to CPLR §3212, on the fourth cause of action of plaintiffs' March 28, 2014 verified complaint.

Additionally, this memorandum is submitted in support of plaintiffs' accompanying cross-motion.

Apparently, AAG Kerwin believes this Court will continue to allow her to get away with trashing all litigation standards and rules of professional conduct. As with essentially all her prior submissions, her July 28, 2015 dismissal/summary judgment motion is, from beginning to end, and in virtually every line, a fraud on the court. Indeed, her instant motion largely replicates, *verbatim*, her April 18, 2014 motion to dismiss plaintiffs' March 28, 2014 verified complaint – a fact she could have disclosed, but does not. To this she has added further material frauds, including:

- that the fifth, sixth, and seventh causes of action of plaintiffs' verified supplemental complaint are identical to the first, second, and third causes of action of plaintiffs' verified complaint – when they are not;

- that the reasoning of the October 9, 2014 decision, dismissing plaintiffs' first, second, and third causes of action, compels dismissal of plaintiffs' fifth, sixth, and seventh causes of action – when the fifth, sixth, and seventh causes of action consist, in the main, of analyses showing that the dismissals of the first, second, and third causes of action by the October 9, 2014 decision are legally insupportable and factually baseless;

- that defendants have 'publicly available documentary evidence' of the Legislature's compliance with Legislative Law §32-a, entitling them to dismissal of plaintiffs' eighth cause of action and summary judgment as to the fourth – when defendants have no such evidence and when those two causes of action include a succession of other statutory, rule, and constitutional violations, as to which she furnishes no evidence, nor even claims compliance.

Virtually everything plaintiffs stated in opposition to AAG Kerwin's April 18, 2014 dismissal motion applies here. Therefore, plaintiffs largely repeat their May 16, 2014 opposing memorandum of law, making minor adaptations consistent with the slight differences in AAG Kerwin's July 28, 2015 motion. Suffice to say that had the Court appropriately determined the misconduct issues that plaintiffs have repeatedly placed before it – most recently by plaintiff Sassower's April 15, 2015 affidavit in reply to AAG Kerwin's opposition to their March 30, 2015 motion to file their verified supplemental complaint[1] – plaintiffs and the Court would not now be burdened with the repetition.

As hereinafter shown, AAG Kerwin's motion is not just frivolous, but a 'fraud on the court'[2] which would be unacceptable if perpetrated by an ordinary lawyer. That it is perpetrated on behalf of

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[1] Plaintiff Sassower's April 15, 2015 reply affidavit particularized the fraudulence of AAG Kerwin's opposition by 13 fact-specific pages, ending with the following:

> "Finally, this Court's duty is to protect the integrity of the judicial process and impose sanctions and penalties upon AAG Kerwin for her frivolous and fraudulent April 9, 201[5] opposition, as hereinabove demonstrated, consistent with 22 NYCRR §130-1.1 et seq., Judiciary Law §487, et seq., and §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct. Plaintiffs do not need to avail themselves of a formal motion to request such relief, as it is a power that any fair and impartial tribunal recognizes.[fn6]" (at ¶26).

The Court's response, by its June 24, 2015 decision/order, was to make no mention of the fraud particularized by the reply affidavit and to baldly state:

> "Plaintiffs' remaining requests for relief have been considered and found to be lacking in merit."

[2] '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.'

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:

> "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-*

this state's highest law enforcement officer to subvert the statutory safeguard for protecting taxpayer monies provided by State Finance Law Article 7-A (§123, *et seq.*) requires severest action by this Court. As requested by plaintiffs' cross-motion, this includes sanctions and costs, pursuant to 22 NYCRR §130-1.1 *et seq.*; penal law punishment and treble damages, pursuant to Judiciary Law §487; referral to disciplinary authorities, pursuant to §100.3 D(2) of the Chief Administrator's Rules Governing Judicial Conduct; an order directing AAG Kerwin to disclose who in the Attorney General's office has independently evaluated the 'interest of the state' herein and plaintiffs' entitlement to the Attorney General's representation/intervention, pursuant to Executive Law §63.1 and State Finance Law Article 7-A; and disqualification of the Attorney General for conflict of interest, pursuant to Rule 1.7 of the Rules of Professional Conduct for Attorneys.

It also includes notice to AAG Kerwin that her motion to dismiss plaintiffs' verified supplemental complaint is being converted to a motion for summary judgment for plaintiffs, pursuant to CPLR §3211(c); summary judgment to plaintiffs on the fourth cause of action of their verified complaint, pursuant to CPLR §3212; imposition of sanctions and other relief against AAG Kerwin and those complicitous with her, pursuant to the Court's October 9, 2014 decision/order, following determination of the issues not determined therein.

Suffice to note the fundamental legal principle 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

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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']).''

> 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).

AAG Kerwin's Deficient & Fraudulent Dismissal/Summary Judgment Motion – Starting with her Non-Probative, Deceitful Affirmation

The Attorney General's motion consists of a notice of motion signed by AAG Kerwin, who identifies herself as "of Counsel". It seeks to dismiss plaintiffs' supplemental complaint "in its entirety, with prejudice", pursuant to CPLR §§3211(a)(1) (documentary evidence), (a)(2) (lack of jurisdiction), and (a)(7) (failure to state a cause of action), and, additionally, summary judgment pursuant to CPLR §3212 on the fourth cause of action of plaintiffs' original complaint. It also states "Oral argument is not requested".

The notice of motion does not refer to any accompanying memorandum of law, but only to AAG Kerwin's "annexed affirmation". It is not annexed, but accompanying.

Although AAG Kerwin's affirmation expressly states that it is "under penalty of perjury pursuant to CPLR 2106", it is not affirmed "to be true", as CPLR §2106 requires:

> "The statement of an attorney…when subscribed and affirmed by him to be true under penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit."

According to treatise authority:

> "While attorneys always have a professional duty to state the truth in papers, the affirmation under this rule gives attorneys adequate warning of prosecution for perjury for a false statement.", McKinneys Consolidated Laws of New York Annotated, 7B, p. 817 (1997), Commentary by Vincent C. Alexander.

Tellingly, AAG Kerwin's affirmation does not set forth the basis upon which it is made – whether personal knowledge, familiarity with the facts, papers, and proceedings, or upon information and belief. It is, therefore, completely non-probative, *as a matter of law*.

More than 110 years ago, it was already stated:

> "It has too long been the rule to need the citation to authority, that such averments in an affidavit have not [sic] probative force. The court has a right to know whether the affiant had any reason to believe that which he alleges in his affidavit." *Fox v. Peacock*, 97 A.D. 500, 501 (1904).[3]

Such affirmation is also insufficient for purposes of AAG Kerwin's summary judgment motion. CPLR §3212(b) expressly requires that such a motion be:

> "supported by affidavit… The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that… the cause of action… has no merit."

AAG Kerwin has no personal knowledge of the facts set forth by the complaint's fourth cause of action, for which she is seeking summary judgment, does not recite any of the "material facts" pertinent thereto, and does not show that the fourth "cause of action…has no merit".

Rather, with the exception of her ¶¶7-8 that materially falsify, distort, and simplify the supplemental complaint, her affirmation is essentially a vehicle for annexing exhibits, none of which she attests to as being true copies and several of which are materially incomplete. Of the 18 exhibits annexed to her affirmation, she described them as follows:

Exhibit A: "A copy of the summons and complaint, without exhibits"[4]

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[3] *Pachucki v. Walters*, 56 A.D.2d 677 (3rd Dept. 1977); *Soybel v. Gruber*, 132 Misc. 2d 343, 346 (NY Co. 1986): "An affirmation by an attorney without personal knowledge of the facts is without probative value and must be disregarded."

[4] *As a matter of law*, the exhibits are part of the pleading. As stated and reflected therein, they furnish the documentary proof and substantiating particulars.

Exhibit B: "A copy of the court's October 8 (sic), 2014 Decision and Order"

Exhibit C: "A copy of [defendants' November 6, 2014] Answer" [to the complaint]

Exhibit D: "A copy of the supplemental complaint, without exhibits"[5]

Exhibit E: "A copy of the Legislature's certified estimate of its financial needs for the 2014-15 fiscal year"

Exhibit F: "A copy of the Judiciary's certified estimate of its financial needs for the 2014-15 fiscal year"

Exhibit G: "A copy of the Legislative and Judiciary Budget included in the Governor's 2014-15 Executive Budget (budget bill S.6451-A/A.8551-A)"

Exhibit H: "A copy of the enacted 2014-15 Legislative and Judiciary Budget (budget bill S.6451-A/A.8551-A)"

Exhibit I: "A copy of the Legislature's certified estimate of its financial needs for the 2015-16 fiscal year"

Exhibit J: "A copy of the Judiciary's certified estimate of its financial needs for the 2015-16 fiscal year"

Exhibit K: "A copy of the Legislative and Judiciary Budget included in the Governor's 2015-16 Executive Budget (budget bill S.2001-A/A.3001-A"

Exhibit L: "A copy of the enacted 2015-16 Legislative Budget Bill (budget bill S.2001-A/A.3001-A)"

Exhibit M: "A copy of the 2014-15 press release and public hearing schedule"

Exhibit N: "A copy of the agenda for the February 5, 2014 public hearing"

Exhibit O: "A transcript of the [February 5, 2014] public hearing"

Exhibit P: "A copy of the 2015-16 press release and hearing schedule"

Exhibit Q: "A copy of the agenda for the February 26, 2015 public hearing"

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[5] See fn. 4, *supra*.

Exhibit R: "A transcript of the [February 26, 2015] public hearing"

This is implicitly the "documentary evidence" upon which AAG Kerwin's motion seeks dismissal pursuant to CPLR §3211(a)(1) and summary judgment pursuant to CPLR §3212. In fact, her exhibits are ALL "documentary evidence" for summary judgment for plaintiffs pursuant to CPLR §3211(c) and §3212. This includes AAG Kerwin's Exhibit C: defendants' answer.

AAG Kerwin's answer is, of course, the predicate without which she could not make her CPLR §3212 motion against the fourth cause of action of plaintiffs' complaint. Nowhere in her motion does she reveal that plaintiffs' complaint was verified or that, because it was verified, defendants' answer, likewise, had to be verified (CPLR§3020(a). She then avails herself of CPLR §3020(d)(2) to avoid having any of the defendants with knowledge of the facts verify the answer, as she readily could have done. Even still, she has not obtained a non-party with knowledge of the facts to verify the answer, as she also could readily have done.[6] Instead, she herself has signed the verification for the answer she wrote – an answer so sham and perjurious in its denials and denials of "knowledge or information sufficient to form a basis of belief to admit or deny"[7] that, in seeking summary judgment as to the fourth cause of action, she furnishes NO documentary evidence to substantiate its denials, nor affidavit from anyone with "knowledge or information…to admit or deny" what she professed to have no "knowledge or information sufficient to…admit or deny".[8]

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6 "The general rule is that the party and not the lawyer makes the verification. [fn, citing CPLR 3020(d)] The practitioner does well to leave verification to the client. Seldom does the lawyer know the facts at first hand and it takes little effort to have the client make the affidavit of verification." New York Practice, David Seigel: §233 "Who May Verify".

7 To facilitate the Court's review of AAG Kerwin's answer, a "marked pleading" is annexed to plaintiff Sassower's accompanying affidavit as Exhibit 22. See, also, CPLR §3023: "Construction of verified pleading".

8 AAG Kerwin's verification states, in pertinent part:

> "…I have been assigned to defend this action and I am acquainted with the pleadings, papers, and proceedings to date. I have read the foregoing answer. The same is true to my

Indeed, other than annexing the answer as an exhibit to her affirmation, she never refers to the answer once.

AAG Kerwin's Deficient & Fraudulent Memorandum of Law

AAG Kerwin's supporting memorandum of law is 16 pages, divided into five sections: a two-paragraph "Preliminary Statement" (pp. 1-2); a three-paragraph section entitled "Facts As Alleged In The Original Complaint" (pp. 2-3); a one-paragraph section entitled "Facts As Alleged in the Supplemental Complaint" (p. 3); a three-point "Argument" (pp. 4-16), and a one-sentence "Conclusion" (p. 16). As AAG Kerwin has not incorporated her memorandum of law into her affirmation, swearing to its truth, the factual assertions in the memorandum are unsworn.

Completely absent from AAG Kerwin's memorandum of law is any identification of the rudimentary standards governing dismissal and summary judgment motions – reflective of her knowledge that she has not remotely met the standard for either. Indeed, only with respect to CPLR §3211(a)(1), dismissal based on documentary evidence, does she even supply a legal citation,

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knowledge, except as to those matters alleged upon information and belief, and as to those matters, I believe them to be true.

I make this verification pursuant to CPLR Section 3020(d)(2), because the answering Defendants are officials and entities of the State of New York, and I am acquainted with the facts of this proceeding."

Such is a material fraud. AAG Kerwin purports "knowledge" she does not have – and fails to state that such matters as are "alleged upon information and belief" – of which she has none – are based on "correspondence and other writings furnished to [her] by [defendants] and interviews with officers and employees of [defendants]" – as is consistent with form verifications for verifications pursuant to CPLR 3020(d). New York Practice, Siegel, *supra*, prints such illustrative form.

Reflective of the bad-faith nature of AAG Kerwin's verified answer are her responses that "Deny knowledge or information sufficient to form a basis of belief to admit or deny" to ¶¶25, 39, 45, 49, 64, 65, 74 of the complaint asserting that defendants did not respond to plaintiffs' correspondence, including requesting to testify in opposition at the Legislature's budget hearing, pursuant to Legislative Law §32-a. These are straightforward allegations to which, based on conversations with her clients, AAG Kerwin should have been able to respond.

Ferrari v. Iona College, 95 A.D.3d 576 (2012) – a First Department case that does not enunciate the applicable standard, other than to cite to *Leon v Martinez*, 84 NY2d 83, 88 (1994), which does:

> "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481, 484; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634). Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., *Heaney v Purdy*, 29 NY2d 157). In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, *supra*, at 635) and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one''(*Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, *supra*, at 636).

The controlling standard of *Leon v Martinez* – recited in an abundance of Third Department cases[9] – made it frivolous, *as a matter of law*, for AAG Kerwin to have made a dismissal motion under CPLR §§3211(a)(7) and (a)(1) unless she could identify ALL the accepted-as-true allegations of the verified supplemental complaint which, taken together, fail to state a cause of action; and ALL the allegations which, stating a cause of action, are conclusively disposed of, *as a matter of law*, by documentary evidence. AAG Kerwin's dismissal motion does neither. Her affirmation does not cite any of the paragraphs of either the complaint or supplemental complaint. As for her memorandum of law, its citations to the complaint and verified complaint either materially simplify, distort, or falsify the content of the cited paragraphs or do not reveal their content at all.[10]

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[9] Among these, *Moulton v. New York*, 114 A.D.3d 115 (3rd Dept. 2013); *Kosmider v. Garcia*, 111 A.D.3d 1134 (3rd Dept. 2013); *Delaware County v. Leatherstocking Healthcare*, 110 A.D.3d 1211 (3rd Dept. 2013); *Nelson v. Lattner Enterprises*, 108 A.D.3d 970 (3rd Dept. 2013); *McBride v. Springsteen-El*, 106 A.D.3d 1402 (3rd Dept. 2013).

Mason v. First Central National Life Insurance Inc., 86 A.D.3d 854, 855 (3rd Dept. 2010); *Erie Insurance Group v. National Grange Mutal Insurance Co.*, 63 A.D.3d 1412 (3rd Dept. 2009); *Weston v. Cornell University*, 56 A.D.3d 1074 (3rd Dept. 2008); *Ozdemir v. Caithness Corporation*, 285 A.D.2d 961, 963 (3rd Dept. 2001).

[10] The sum total of AAG Kerwin's citation to paragraphs of the complaint and supplemental complaint,

Further, because AAG Kerwin's motion to dismiss the supplemental complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7) is not directed to any specific cause of action, but to the supplemental complaint "in its entirety", it was incumbent upon her to disclose the governing standard for that relief:

> "...such a motion will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleadings as a whole without particularizing the specific causes of action sought to be dismissed (Halpern v Halpern, 109 AD2d 818, 819)." *Huntsman Chemical Corporation et al. v. Tri/Insul Company, Inc.*, 183 A.D.2d 1002 (3rd Dept. 1992).

Also absent is the controlling standard for summary judgment pursuant to CPLR §3212:

> "The proponent of a summary judgment motion is required to make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers.' (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853, 476 N.E.2d 642, 487, N.Y.S.2d 316 (NY 1985)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, 'by evidentiary proof in admissible form' (*Zuckerman v. New York*, 49 NY2d 557, 562, 404 N.E.2d 718, 427)".

Additionally, because this is a citizen-taxpayer action under State Finance Law Article 7-A [§123 *et seq.*], AAG Kerwin needed to set forth the law pertaining to that statutory safeguard against "wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property" (§123-b) – including that the dismissal/summary judgment relief she seeks is consistent therewith.

Yet, not only does AAG Kerwin NOT furnish the law pertaining to citizen-taxpayer actions pursuant to State Finance Law Article 7-A, she conceals that that plaintiffs have sued pursuant thereto. This alone requires denial of her dismissal/summary motion, *as a matter of law*, as she has

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by her memorandum of law, are at page 4 (fn 1): ¶¶4, 5; at page 5: ¶¶131-138, ¶¶131-144, ¶¶145-150; and at

neither asserted nor shown that plaintiffs have not established their entitlement to declaratory relief under the very legal authority pursuant to which they have brought their action.[11]

Indeed, AAG Kerwin conceals that because this citizen-taxpayer action seeks a declaratory judgment, it cannot be "dismissed" – as her motion requests. Rather, a declaration must issue, *Seymour v. Cuomo*, 180 A.D.2d 215, 217-218 (1992); *Donovan v. Cuomo*, 126 A.D.2d 305, 310 (3rd Dept. 1987). As stated in New York Practice, David D. Siegel, (5th ed. 2011):

> "If a plaintiff in an ordinary action loses on the merits, the result is a dismissal of the complaint. In a declaratory action, 'the court should make a declaration, even though the plaintiff is not entitled to the declaration he seeks'.[fn1] A mere dismissal is not appropriate.[fn2] The court must determine the rights of the parties to the dispute involved and, if the defendant prevails, the declaration should simply go the defendant's way.[fn3] If the defendant should move to 'dismiss' the complaint for failure to state a cause of action, under CPLR 3211(a)(7), the motion in the declaratory context should be taken as a motion for a declaration in the defendant's favor and treated accordingly."

Below are some further highlights of the AAG Kerwin's legally-insufficient and fraudulent memorandum of law.

AAG Kerwin's "Preliminary Statement" (pp. 1-2)

Materially omitting that this is a citizen taxpayer action and that it was commenced by a verified complaint, with plaintiffs expressly acting not only for themselves but "on behalf of the People of the State of New York & the Public Interest" – in other words, acting in the stead of the Attorney General – AAG Kerwin also omits that the supplemental complaint is verified. She summarizes its content as follows:

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page 10 (fn. 3): ¶¶147, 21, 211, 212, 214, 215, 216, 224, 228, 229, 234.

[11] *Cf., New York State Association of Small City School Districts v. State of New York*, 42 A.D.3d 648, 651 (2007):

> "...A viable cause of action against the State under the Education Article...
> ...To state a cause of action under the Education Article..."

> "The supplemental complaint in this action challenges only the initial steps taken toward the enactment of the 2015-16 Legislative and Judiciary budgets. See [Kerwin aff. at Exh. D]. Specifically, plaintiffs alleged that (1) the Legislature did not provide a certified estimate of its financial needs for the 2015-16 fiscal years 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 failed to follow its own rules and procedures and Legislative Law §32-a. See id." (at p. 1).

This is essentially a *verbatim* repetition of ¶¶7-8 of AAG Kerwin's affirmation – and its incomplete and materially false description is not buttressed by citation to any specific paragraphs of the supplemental complaint.

Suffice to note that an accurate, ready-made summary of the complaint was available to AAG Kerwin in the supplemental complaint's Prayer for Relief/WHEREFORE clause (pp. 39-41). However, such accurate portrayal of the supplemental complaint would have prevented her from moving against it – which is why she did not use it.

AAG Kerwin's "Facts As Alleged in the Original Complaint" (pp. 2-3)

AAG Kerwin begins by identifying the original complaint as consisting of "126 paragraphs of allegations". These she disparages as "mostly allegations about prior events not relevant to the causes of action at issue in this proceeding" (at p. 2). This is false – and, tellingly, AAG Kerwin does not identify a single "not relevant" allegation. Indeed, notwithstanding the complaint contains a section entitled "...Background Factual Allegations" (¶¶4-13), she cites to none of its allegations as "not relevant".

Similarly, she disparages (at p. 2) the complaint's "over 70 exhibits as "almost all...letters written and FOIL requests made, by the plaintiffs themselves" – never revealing what the complaint has to say about them, namely, that they are dispositive and present "an open-and-shut, *prima facie*

case of public corruption, verifiable in minutes, involving huge sums of taxpayer monies" (¶33, also, ¶¶5(i), 76, 100). Tellingly, none of the "over 70 exhibits" are identified by AAG Kerwin. This includes plaintiffs' December 11, 2013 and December 30, 2013 letters, highlighted as dispositive of the unlawfulness, unconstitutionality, and fraud of the Judiciary and Legislative budgets (¶¶33, 51, 77, 100).

AAG Kerwin then purports to "distill[]...those allegations that appear to relate to plaintiffs' claims", stating:

> "the original complaint alleges that, pursuant to Article VII, section I 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." (at p. 2).

Aside from the fact that the complaint alleges (at ¶27) that the Judiciary transmitted its estimates to the Governor on November 29 NOT "November 23", the complaint does not allege that the Legislature transmitted "estimates of [its] financial needs", but, rather that it transmitted "the Legislature's Budget", which is what the November 29, 2013 letter expressly stated (¶¶15-19). AAG Kerwin then falsely purports that there was accompanying "certification language". There was none. The complaint unequivocally states that there was no certification of any kind because, in addition to missing "General State Charges", the Legislative budget was a contrivance of defendants Silver and Skelos, fashioned to fortify their power and deprive members and legislative committees of their "financial needs" for discharging their constitutional function (¶¶18, 79-80, 82-88).

Also false is AAG Kerwin's reference (at p. 2) of the Judiciary's certification – making it appear that there was only one certification and that it was for "General State Charges". Simultaneously, her annotation to her Exhibit F is false, as it is not the Judiciary's itemization and certification of its "General State Charges", but its itemization and certification of operating expenses.

AAG Kerwin also falsely asserts (at p. 3) that the Governor's Legislative/Judiciary budget bill "included…lists documenting previously-appropriated monies of the Judiciary and Legislature that had not yet been spent and, therefore, were available for re-appropriation." (underlining added). Not so. The complaint recites that such monies were not proper for "re-appropriation" and were constitutionally and statutorily violative, including by their lack of certification (¶¶43-44, 70, 103-106, 110-112).

As for AAG Kerwin's final sentence (at p. 3):

> "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",

this describes plaintiffs' fourth cause of action (¶¶113-126). However, it is materially incomplete in failing to identify violations of the Constitution and, specifically with respect to the behind-closed-door, three-men-in-a-room negotiations of defendants Cuomo, Skelos, and Silver – and that this secrecy embraces additional statutory and rule violations.

AAG Kerwin's "Facts as Alleged in the Supplemental Complaint" (p. 3)

The single paragraph under this title heading is materially false. It states, in full:

> "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 budgets also occurred in connection with the 2015-16 Legislative and Judiciary budgets. See id. Accordingly, plaintiffs' five, sixth, seventh and eighth causes of action are identical to the first, second, third and fourth causes of action – as described – except for the fiscal year of the budget involved." (p. 3, underlining in final sentence added).

The assertion that plaintiffs' fifth, sixth, and seventh causes of action of their supplemental complaint are "identical" to the first, second, and third causes of action of the original complaint is

an outright fraud. The fifth, sixth, and seventh causes of action, with the exception of the first two paragraphs of each, are, in their entirety, analyses of why they are not barred by the Court's October 9, 2014 decision dismissing the first, second, and third causes of action. Thus:

- ¶¶171-178 of plaintiffs' fifth cause of action analyze the October 9, 2014 decision with respect to their first cause of action;
- ¶¶181-193 of plaintiffs' sixth cause of action analyze the October 9, 2014 decision with respect to their second cause of action;
- ¶¶196-202 of plaintiffs' seventh cause of action analyze the October 9, 2014 decision with respect to their third cause of action.

It is to conceal this – and to prevent comparison between the four causes of action of the supplemental complaint (¶¶169-178, ¶¶179-193, ¶¶194-202, ¶¶203-236) and the four causes of action of the original complaint (¶¶76-98, ¶¶99-108, ¶¶109-112, ¶¶113-126) that AAG Kerwin furnishes no paragraph references to either.

AAG Kerwin's Three-Point "Argument" (pp. 3-11)

AAG Kerwin prefaces her three-point "Argument" with a prefatory paragraph asserting that plaintiffs' fifth, sixth, and seventh causes of action should be dismissed based on the "reasons articulated by the Court" in its October 9, 2014 decision dismissing the first, second, and third causes of action – and that "defendants are entitled to judgment in their favor as to plaintiffs' fourth and eighth causes of action."[fn.1,,,12]

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12 AAG Kerwin's annotating fn. 1, stating that "as a non-attorney, plaintiff Sassower cannot represent the interests of the corporate plaintiff in this action…", repeats, *virtually verbatim*, Point I of her April 18, 2014 memorandum of law. Plaintiffs' rebutting May 16, 2014 opposing memorandum of law (at pp. 13-14) – to which AAG Kerwin had no response – was as follows:

> "AAG Kerwin's Point I (p. 4), entitled 'All Claims Brought by Plaintiff Center for Judicial Accountability, Inc. Must be Dismissed', is founded on falsehood and material omission. AAG Kerwin's assertion that 'The complaint alleges that plaintiff CJA appears through its Director, plaintiff Sassower' is false, as she knows in supplying no annotating reference to the complaint. It is also a shameful, altogether improper objection, in view of plaintiff Sassower's repeated assertion and request for the Attorney General's representation

AAG Kerwin's Point I (pp. 4-11): "Plaintiffs' Fifth, Sixth and Seventh Causes of Action Should be Dismissed"

AAG Kerwin's Point I is based, entirely, on the Court's October 9, 2014 decision, dismissing plaintiffs' first, second, and third causes of action. AAG Kerwin purports that the fifth, sixth, and seventh causes of action "allege identical claims on indistinguishable facts". This is false. The fifth, sixth, and seventh causes of action primarily allege – and demonstrate – that the October 9, 2014 decision is insupportable, in fact and law, in dismissing the first, second, and third causes of action. AAG Kerwin does not identify, let alone contest, the content of any of the paragraphs of plaintiffs' fifth, sixth, and seventh causes of action. As such, her CPLR §3211 motion to dismiss those causes of action is frivolous, *as a matter of law*.

AAG Kerwin then adds to her concealment of the dispositive content of the fifth, sixth, and seventh causes of action by asserting:

> "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])."

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and intervention for plaintiffs pursuant to Executive Law §63.1, to which there has been no response – as AAG Kerwin also knows in concealing such material fact. Certainly, it is reasonable to infer that among the reasons AAG Kerwin conceals that this action is a citizen-taxpayer action pursuant to State Finance Law Article 7-A is because its provisions plainly contemplate that the Attorney General will involve himself as plaintiff or on behalf of plaintiffs to ensure a merits determination of wrongful, illegal, and unconstitutional expenditures of taxpayer monies.

Certainly, too, AAG Kerwin well knows that no purpose would be served by dismissal of 'any claims alleged in the complaint on behalf of plaintiff CJA'. Perfectly evident from the complaint is that there are no claims alleged that would not continue by plaintiff Sassower, who, like CJA, is additionally acting 'on behalf of the People of the State of New York & the Public Interest', in the absence of the participation of the Attorney General and Comptroller, whose duty it is to safeguard public monies. *Cf.*, *Cass v. New York*, 88 A.D.2d 305, 308 (3rd Dept. 1982) [dismissal of action against the state as being 'a result of little practical consequence since the two State officers [Comptroller and Chief Administrator of the Courts] remain as parties defendant']."

This is utterly specious. The October 9, 2014 decision is not before "judges and courts of co-ordinate jurisdiction", but before the very judge who rendered it. AAG Kerwin cites no law that a judge may not revisit his own decision – especially where, as at bar, circumstances so-warrant, because it cannot be justified, *in fact or law*.

AAG Kerwin then compounds these two deceits by a third deceit, purporting (at pp. 4-5) that the October 9, 2014 decision dismissed plaintiffs' first, second, and third causes of action on grounds that they were non-justiciable and failed to state a claim. This is materially incomplete. The decision's dismissal of the first, second, and third causes of action was additionally based on "documentary evidence submitted by defendants". This is not only evident from the face of the decision, but is prominently featured in plaintiffs' fifth, sixth, and seventh causes of action (¶¶173-175; ¶¶183-187; ¶¶197-200), each pointing out that the decision does not identify the allegedly rebutting "documentary evidence submitted by defendants" – and that such does not exist.

AAG Kerwin then continues with more deceits. She purports (at p. 5) that the supplemental complaint's fifth, sixth, and seventh causes of action "challenges only the initial steps taken toward the enactment of the 2015-16 Legislative and Judiciary budgets" – without revealing that the complaint's eighth cause of action challenges "enactment". As for the only "specifics" of plaintiffs' allegations that she reveals (at p. 5):

> "(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",

these grossly simplify, distort, and falsify – and comparison with the cited paragraphs shows this plainly – none from the fifth, sixth, and seventh causes of action, other than, generically, as paragraphs "repeat[ed], reiterate[d], and reallege[d]" (¶¶169, 179, 194).

The balance of AAG Kerwin's Point I, spanning from the last paragraph on page 5 through to page 11, replicates, essentially *verbatim* and with only minimal modifications, her April 18, 2014 memorandum of law, where it was pages 5-11 of her Point II.[13] Her Point I does not identify this – let alone that these arguments were all rebutted by plaintiffs' May 16, 2014 memorandum of law, demonstrating their fraudulent, bad-faith nature – uncontested by her[14].

Plaintiffs' rebuttal, by their May 16, 2014 memorandum of law, is below, modified only as necessary to conform to the slight modifications made by AAG Kerwin:

AAG Kerwin purports that because the budget for fiscal year 2015-16 has been enacted, there is a higher constitutional hurdle because "plaintiffs' claims are now challenges to the constitutional validity of an enacted statute." Conspicuously, neither of her two cited cases involve the state budget – nor challenges brought under State Finance Law Article 7-A.

She then purports that plaintiffs' constitutional claims rest on defendants' violation of Article VII, §1 of the New York State Constitution, as if only a single constitutional provision is at issue. This is false. The supplemental complaint alleges violations of Article VII, §7, Article III, §16, and Article III, §10 – each quoted in the supplemental complaint (¶¶181, 191, 236, PRAYER FOR RELIEF/"WHEREFORE" clause: pp. 39, 40) and concealed by AAG Kerwin. Her concealment of these further constitutional violations, which she does not deny, mandates denial of her dismissal

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[13] This Point II was presented under the following section headings: "A. Constitutional Claims" (pp. 5-6); "1. Degree of Itemization" (pp. 6-7); "2. Sufficiency of Certification" (pp. 7-8); "3. Inclusion of Re-Appropriations with Certified Submissions of the Legislature and Judiciary" (p. 9); "B. Violation of Senate/Assembly Rules" (pp. 9-11).

[14] This was highlighted by plaintiffs' June 16, 2014 reply memorandum of law.

motion, *as a matter of law* – as she does not contest the violations, as to which she makes no argument whatever.

As for defendants' violations to Article VII, §1 of the New York State Constitution, AAG Kerwin purports that plaintiffs alleged them to consist of: "(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." She then furnishes a subsection for each. However, she also appends a fourth subsection (at pp. 10-11), having nothing to do with Article VII, §1, or, for that matter, with the title of her Point I, *to wit*, the supplemental complaint's fifth, sixth, and seventh causes of action. Rather, this fourth subsection entitled "Violation of Senate/Assembly Rules" pertains to the supplemental complaint's eighth cause of action.

AAG Kerwin's Point I, Section A (pp. 6-7): "Degree of Itemization" is the only subsection for which AAG Kerwin has passingly relevant caselaw, *Urban Justice Center v. Pataki*, 38 AD3d 20, 30 (1st Dept. 2006); *Saxton v. Carey*, 44 NY2d 545, 550-51 (1978), each distinguishable by the facts presented by plaintiffs' supplemental complaint, concealed by AAG Kerwin. Neither case involves, as here, the fashioning of "slush fund" budgets for purposes asserted and shown to be illegitimate, illegal, unconstitutional, and fraudulent. Such "slush funds", born of lump sum appropriations defying meaningful review and exacerbated by budget bill transfer provisions – combined with a modern-day reality where checks and balances between the government branches have given way to collusive, behind-closed-doors deal-making – establish that the time has come to adopt the powerful dissent of Court of Appeals Presiding Judge Fuld in *Hidley v. Rockefeller*, 28 NY2d 439, 447-449 (1971):

> "To suggest that the courts are powerless to declare appropriation bills unconstitutional – on the ground that they contain lump sums or insufficiently detailed items – merely because the Legislature did not request more or greater detail…is startling and dangerous doctrine. The circumstance that the legislators may

> choose to accept or act upon budget bills presented, no matter how inadequate, cannot and should not condone or validate what is unconstitutional and impermissible. The constitutional mandate that there be budgetary itemization and detail may not be evaded by the executive or legislative branch of government, whether acting separately or jointly, In the words of this court in the *Tremaine* case (281 NY [1], 11 [1939]), 'the fundamental law [is] binding on us all, Judiciary, Governor, Legislature.'"

The supplemental complaint (at ¶128) repeats, realleges, and reiterates "the entirety" of plaintiffs' complaint. Had AAG Kerwin cited to any of its pertinent paragraphs, it would have been evident that to the passing extent they refer to insufficient, inadequate itemization, it is as a manifestation of the unconstitutional control that the Temporary Senate President and Assembly Speaker have arrogated to themselves to fashion the Legislative budget as a "slush fund" from which to fortify their power, at the expense of member offices and legislative committees, whose inadequate funding renders them unable to discharge their constitutional function and so-stated by the complaint (¶¶89-98) and supplemental complaint (¶¶220-221). Likewise, as pertains to the Judiciary's budget, inadequate, insufficient itemization has created a "slush fund" from which the Judiciary was able to draw to fund the third-phase of the fraudulent, statutorily-violative, and unconstitutional judicial salary increase, completely unidentified and unitemized by the budget (¶¶100-103, 108). Moreover, with respect to the entirely concealed judicial salary increases, now fully-funded and constituting a recurring annual imposition on taxpayers, in perpetuity, the issue is not the "degree of itemization", but the total disregard of "the constitutional mandate to itemize" – a distinction *Saxton v. Carey* palpably recognizes, and *Urban Justice Center v. Pataki* resting thereon.

Suffice to note AAG Kerwin's concluding assertion (at p. 7): "Accordingly, plaintiffs' claims relating to the itemization of the estimated financial needs of the Legislature and Judiciary should be dismissed" (underlining added) does not identify which paragraphs of the supplemental complaint's four causes of action would be dismissible based on her superficial and misleading "degree of

itemization" argument, even were the Court able to dismiss claims, as opposed to causes of action, and do so in face of a notice of motion directed to "dismissal of the supplemental complaint in its entirety".

AAG Kerwin's Point I, Section B (pp. 7-8): "Sufficiency of Certification" is based on the falsehood that plaintiffs are not satisfied with the supposed certification of the Legislature's "estimate of financial needs", represented by the December 1, 2014 transmittal letter signed by defendants Skelos and Silver because it does not use the word "certify". According to AAG Kerwin (at p. 8): "The lack of the word 'certify' in the language chosen by the Legislature to convey this compliance [with Article VII, §1] does not somehow make the certification unconstitutional".

This is false – and is fashioned from AAG Kerwin's not citing to the paragraphs of the supplemental complaint highlighting that not only is the word "certify" absent from the December 1, 2014 letter, but the words "itemized estimates of the financial needs of the legislature" (¶¶132, 133) – as Article VII, §1 mandates. Thus, even were the signed letter to be deemed a certification, notwithstanding it does not use the word "certify", it is not certifying the constitutionally-required "itemized estimates of the financial needs of the legislature", to which it does not even refer – and to which the transmitted budget does not even refer.

To craft her bogus argument that the signed December 1, 2014 letter is a certification of "itemized estimates of the financial needs of the legislature", AAG Kerwin also conceals the paragraphs of the supplemental complaint reflecting why defendants Skelos and Silver furnished no certification (¶¶134, 136, 175), *to wit*, (1) it is missing "General State Charges"; (2) its figures are identical to the budgets for the past four years, thereby revealing they are not actual "financial needs", but manipulated and contrived. Consequently, were the Court to actually deem the December 1, 2014 letter a certification by defendants Skelos and Silver – as AAG Kerwin would

have the Court do – such would make these defendants liable for falsely certifying that "the Legislature's Budget" is "itemized estimates of the financial needs of the legislature", when it is demonstrably not – and as they knew it was not.

Tellingly, AAG Kerwin fails to provide a definition of "certify". As defined by Black's Law Dictionary (8th edition, 2004, Thomson-West), it is: "1. To authenticate or verify in writing. 2. To attest as being true or as meeting certain criteria." According to Ballentine's Law Dictionary (3rd edition, 1969, Lawyers Publishing Cooperative), it is: "To authenticate by a certificate; to vouch for a thing in writing; a certificate is an authoritative attestation, and any form which affirms the fact in writing is sufficient."

As for AAG Kerwin's cited cases (at p. 8), none interpreting the certification required by Article VII, §1, all involve certifications which, irrespective of their form and language, identify the thing being certified. By contrast, the so-called certification of the December 1, 2014 letter does not identify "itemized estimates of the financial needs of the legislature", which is the certification Article VII, §1 requires. Nor do those cases appear to involve – as here – a *prima facie* showing – entirely concealed by AAG Kerwin – that would make any purported certification a fraud, i.e. no "General State Charges", and rigged, unchanging figures, etc.

AAG Kerwin also conceals that plaintiffs' supplemental complaint presents issues of certification apart from the December 1, 2014 letter, these being the "re-appropriations" that are contained in the Governor's Legislative/Judiciary Budget Bill #S.2001/A.3001. For the Legislature, they are the 22 pages in an out-of-sequence section at the back of the budget bill, which were never part of "the Legislature's Budget" transmitted by the December 1, 2014 coverletter (¶¶149-150). For the Judiciary, they are the "re-appropriations" that were part of the Judiciary's single-budget bill, as to which there is a question as to whether it was encompassed by the Judiciary's certification of its

two-part proposed budget of "itemized estimates" of "financial needs" (¶¶140-143). Apparently, AAG Kerwin is unable to concoct an argument as to their certification.

Here, too, AAG Kerwin's concluding assertion (at p. 9): "Therefore, plaintiffs' claims relating to the Legislature's certification should be dismissed" (underlining added) does not identify the paragraphs of the supplemental complaint's causes of action that would be dismissible based on her bogus, fraudulent argument limited to the December 1, 2014 letter, even were the Court able to dismiss claims, as opposed to causes of action, and do so in face of a notice of motion directed to "dismissal of the supplemental complaint in its entirety".

AAG Kerwin's Point I, Section C (pp. 9-10): "Inclusion of Re-Appropriations with Certified Submissions of the Legislature and Judiciary" is an outright fraud, revealed by the paragraphs of plaintiffs' supplemental complaint pertaining to the Legislative and Judiciary re-appropriations (¶¶137, 140-143, 148-150) – and the seventh cause of action (¶¶194-202), none of which AAG Kerwin cites in support of her argument, just as she cites no legal or other authority to support what she says – which, with respect to her factual assertions, required a sworn statement by someone with testimonial capacity.

Plaintiffs' supplemental complaint does not allege that by including "re-appropriations" for the Legislature and Judiciary in his Budget Bill #S.2001/A.3001, defendant Cuomo had failed to present "the certified estimates of financial needs of the Legislature and Judiciary in the State budget 'without revision'". Indeed, judiciary reappropriations are not embraced by the seventh cause of action. Rather, the seventh cause of action challenges the constitutionality and lawfulness of legislative reappropriations, absent answers to "basic questions", enunciated at ¶199:

> "where these reappropriations came from, who in the Legislature, if anyone, certified that the monies proposed for reappropriations were suitable for that purpose; their cumulative total; and the cumulative total [of] the monetary allocations for the Legislature in Budget Bill #S.6351/A.8551".

AAG Kerwin does not answer a single one of these questions – all of which she conceals. Instead, she purports:

> "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."

This is utterly deceitful. Although she makes it appear that legislative and judiciary reappropriations are not "added", she does not make that statement directly, let alone furnish an affidavit from anyone who could speak knowledgeably on the subject. Nor does she demonstrate the "comparison" to which she refers. This is because her proposed "comparison" would not show that reappropriations are not "added". Consequently, she has furnished not the slightest evidence in support of her concluding assertion (at pp. 9-10): "Therefore, plaintiffs' claims relating to the inclusion of the re-appropriation amounts in the Governor's Executive Budget should again be dismissed" (underlining added). Here, too, she does not specify the paragraphs of the supplemental complaint which would be dismissible based on her factually and legally unsupported argument, even were the Court able to dismiss claims, as opposed to causes of action, and do so in face of a notice of motion directed to "dismissal of the supplemental complaint in its entirety".

AAG Kerwin's Point I, Section D (pp. 9-11): "Violation of Senate/Assembly Rules" asserts that plaintiffs' eighth cause of action "alleges that the Senate and Assembly acted in violation of their own rules in considering the 2015-16 budget" and "alleges violations of various internal rules of the Legislature[fn3]", specifying, in her footnote 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, #930; and Assembly Resolution 203. See Kerwin aff. at Exh D, ¶¶147, 21, 211, 212, 214, 215, 216, 224228, 229, 234".

She then asserts:

> "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" (p. 10).

In other words, AAG Kerwin does not deny the violations of Senate and Assembly – purporting, instead, that such is "beyond judicial review under the separation of powers". However, none of her cited caselaw, beginning with *Heimbach v. State*, 59 N.Y.2d 891, 893 (1983), *app. dismissed* 464 U.S. 956 (1983), articulates the proposition – which AAG Kerwin would have this Court adopt – that the Legislature, being constitutionally enabled to make its own rules, is thereupon free to violate the rules it has made. Indeed, as stated by the Appellate Division, Third Department in *Seymour v. Cuomo*, 180 A.D.2d 215, 217 (1992):

> "The rules established by the Senate and Assembly to govern the proceedings in each house (NY Const, art 3, §9) are the functional equivalent of a statute."

Just as the Legislature is not free to violate statutes – and AAG Kerwin makes no argument that it is – so, too, is the Legislature not free to violate its own functionally-equivalent rules.

Here, too, AAG Kerwin's concluding assertion (at p. 11): "For these reasons, plaintiffs' claims relating to alleged violations of Senate and Assembly rules should be dismissed" (underlining added) does not specify the paragraphs of the supplemental complaint which would be dismissible based on her shameful deceit that the Legislature may freely violate its own "internal rules" , even were the Court able to dismiss claims, as opposed to causes of action, and do so in face of a notice of motion directed to "dismissal of the supplemental complaint in its entirety".

AAG Kerwin's Point II (pp. 11-15)
"Publicly Available Documentary Evidence Proves that the Defendants Did Not Violate Legislative Law §32-A"

AAG Kerwin's Point II begins by purporting that "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[fn.5]." Her annotating footnote 5 reads:

> "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." (fn. 5, p. 11)

This is the only place in her memorandum of law where AAG Kerwin alludes to governing standards – and it is unaccompanied by any explication of those standards and caselaw, reflective of her knowledge that she has no entitlement to dismissal under CPLR §3211 or summary judgment under §3212.

She then presents two sections in support of her assertion that although "plaintiffs allege that the defendants violated [Legislative Law §32-a]…existing public documents prove otherwise."

AAG Kerwin's Point II, Section A (pp. 12-13):
"Hearings Were Scheduled, and Held, in Connection with the 2014-2015 and 2015-16 Legislative and Judiciary Budgets"

Notwithstanding AAG Kerwin presents what she terms "irrefutable, publicly-available evidence", her own documentary evidence for fiscal years 2014-15 and 2015-16 establishes that no hearings were scheduled for the Legislative budget, no hearings were held for the Legislative budget, and not a single witness testified concerning the Legislative budget.

This documentary evidence is, in the first instance, AAG Kerwin's Exhibits M and P. These are the Legislature's press releases and accompanying schedules of public budget hearings for fiscal years 2014-2015 and 2015-2016, respectively. Immediately obvious is that they do not identify hearing dates for either the Legislative or Judiciary budgets – or for the Governor's budget bills with

respect thereto. Rather, and as stated in the press releases, the budget hearings are organized by "programmatic area[s]". Thus, AAG Kerwin's assertion "The schedule for the hearings on budget bill S.6351-A/A.8551-A was published on January 10, 2014" is false, as is her assertion "the schedule for the hearings on budget bill S.2001-A/A.3001-A was published on January 16, 2015", also false.

Additionally false is AAG Kerwin's assertion that the public budget hearings on S.6351-A/A.8551 and S.2001-A/A.3001-A "were, in fact, held on February 5, 2014" and "February 26, 2015", "as demonstrated by the transcript[s]". This is proven by her Exhibits O and R, which are the transcripts. They show that the budget hearings on those two dates were on the "programmatic area" of "public protection" – and that the Legislature's own budget was not announced as within its ambit. Thus, Senate Finance Committee Chairman DeFrancisco opened the February 5, 2014 budget hearing on "public protection", stating:

> "Today's hearing will be limited to a discussion of the Governor's proposed budget for the Office of Court Administration, Division of Homeland Security and Emergency Services, Division of Criminal Justice Services, Department of Corrections and Community Supervision, Division of State Police, Commission on Judicial Conduct and the Office of Indigent Legal Services." (Kerwin Exhibit O, p. 6)

He opened the February 26, 2015 hearing stating:

> "Today's hearing will be limited to a discussion of the Governor's proposed budget for the Office of Court Administration, Division of Homeland Security and Emergency Services, Division of Criminal Justice Services, Department of Corrections and Community Supervision, Division of State Police, Commission on Judicial conduct, and the Office of Indigent Legal Services. As I said, it's limited to those topics." (Kerwin Exhibit R, pp. 6-7).

Consistent therewith, the transcripts of the February 5, 2014 and February 26, 2015 budget hearings establish that not a single witness testified about the Legislature's budget – and AAG Kerwin does not contend otherwise. Indeed, AAG Kerwin also does not contend that any of 23 individuals listed as "speakers on the agenda" for the February 5, 2014 hearing – her Exhibit N – or the 34 individuals

listed as "possible speakers on the agenda" for the February 26, 2015 hearing – her Exhibit Q – were slated to testify on the Legislature's budget.

Consequently, AAG Kerwin's own "irrefutable, publicly-available evidence" proves that the Legislature held no budget hearings on the Legislature's budget – or on the legislative portion of Budget Bills S.6351/A.8551 or S.2001/A.3001.

As for the Legislature's hearings on the Judiciary's budget, the transcripts (Kerwin's Exhibits O, R) establish that the Judiciary's budget was placed within the "public protection" rubric – where it consumed a relatively small fraction of each hearing. AAG Kerwin attempts to conceal how minimal the Legislature's hearings on the Judiciary's budget and its embodiment in S.6351/A.8551 and S.2001/A.3001 actually were by purporting that the February 5, 2014 hearing "lasted over nine hours", with "Twenty-three individuals" listed as speakers, and that the February 26, 2015 hearing "lasted approximately ten hours" with "Thirty-four individuals" listed as "possible speakers". However, almost all of this was for "public protection" executive branch agencies and programs, not for the Judiciary, whose budget was not the subject of any opposition testimony at either hearing.

AAG Kerwin's Point II, Section B (pp. 13-15):
"Determinations as to the Location of Public Hearings,
and Who is Permitted to Testify at Public Hearings, are Not Justiciable"

Concealing that no Legislative budget hearings were held for the Legislative budget – and that the budget hearings for the Judiciary budget included not a single witness testifying in opposition – AAG Kerwin does not reveal the further allegations of plaintiffs' fourth and eighth causes of action pertaining to Legislative Law §32-a. Rather, she states: (at p. 13):

> "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."

That is false. The violation of Legislative Law §32-a on which the fourth cause of action focuses is its mandatory language: "The committees shall make every effort to hear all those who wish to present statements at such public hearings" (underlining added), as to which the fourth cause of action states:

> "116. As hereinabove demonstrated, the ONLY 'effort' made by defendants SENATE and ASSEMBLY was in ignoring, without response, plaintiff SASSOWER's repeated phone calls and written requests to testify at public hearings in opposition – which they did with full knowledge that her testimony was not only serious and substantial, but dispositive.
>
> 117. There is not the slightest excuse for what these defendants did in violating not only plaintiffs' right to be heard, but the public's right to hear the particularized facts and law that plaintiffs had, in abundance, with respect to the Judiciary and Legislative budgets – and with respect to the Commission to Investigate Public Corruption." (underlining in the complaint).[15]

So, too, plaintiffs' eighth cause of action highlighted that the Senate and Assembly fiscal committees made no "effort" to allow plaintiffs to testify – and that they did so with knowledge that plaintiffs' testimony was dispositive:

> "217. Upon information and belief, the reason the Chairs and Ranking Members of the Senate Finance Committee and Assembly Ways and Means Committee made no 'effort' to allow plaintiff SASSOWER to testify in opposition to the Legislature's proposed budget, the Judiciary's proposed budget, and Budget Bill #S.2001/A.3001 – in violation of Legislative Law 32-a – was to prevent the public from hearing the dispositive grounds upon which each is unconstitutional, unlawful, and fraudulent – not the least reason being their concealment of relevant dollar costs, both cumulative and by itemizations defying meaningful review. (underlining in complaint).

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[15] The "hereinabove" demonstration are the multitude of paragraphs of the verified complaint reciting – and annexing documentary evidence – of plaintiffs' repeated requests to testify, the dispositive basis thereof, and the wilful and deliberate disregard of same by the legislative defendants. These span from ¶¶37-51 – and AAG Kerwin's response, by the answer she wrote and verified – her Exhibit C – was to "Deny knowledge or information sufficient to form a basis of belief to admit or deny" whether defendants had responded (¶¶39, 45, 49). As for the documentary evidence she has furnished – the hearing transcripts and witness lists – these establish that the legislative defendants did not call plaintiffs to testify.

However, the eighth cause of action then continues with a broader attack, identifying that the Senate and Assembly fiscal committees "have effectively subverted Legislative Law 32-a" – giving the particulars as follows:

> 218. Plaintiff SASSOWER's February 23, 2015 letter to the Chairs and Ranking Members of the Senate Finance Committee and Assembly Ways and Means Committee is true and correct in its analysis that these two committees have effectively subverted Legislative Law §32-a by combining the public hearings on the budget required by Legislative Law 32-a with the very different budget hearings of Article VII, §3 of the New York State Constitution and Legislative Law §31 for the testimony of the Governor, Executive branch agency heads, and the like. As stated,
>
> > 'Your combined budget hearings – which you organize by 'programmatic areas' – are filled with testimony from officials and recipients of budgetary appropriations. The public's testimony is shoved to the end – or, if dispositive of the unlawfulness and unconstitutionality of the budget, shut out entirely on the pretext that the hearing is full.
> >
> > Exacerbating this subversion of Legislative Law §32-a is your failure to hold the public budget hearings 'regionally', as the statute contemplates, and your assigning the Judiciary's budget to the 'programmatic area' of 'public protection', as if the Judiciary were an Executive branch agency. Apparently you are now also assigning the Legislature's budget to that same Executive branch 'programmatic area' – at least for purposes of denying my request to testify in opposition to it.' (Exhibit 8, underlining in the original).
>
> 219. In fact, the Chairs and Ranking Members of the Senate Finance Committee and Assembly Ways and Means Committee never intended to examine the Legislature's budget for fiscal year 2015-2016 at the February 26, 2015 budget hearing on 'public protection', did not examine it at that budget hearing, and, in violation of Legislative Law §32-a, held no hearing at which plaintiff SASSOWER or any other member of the public could be heard with respect to the Legislature's budget for fiscal year 2015-2016.
>
> 220. Underlying this violation of Legislative Law §32-a with respect to holding a hearing on the Legislature's budget – and the budget bill encompassing it – is the Legislature's direct conflict of interest in exposing the constitutional, statutory, and rule violations with respect to its own budget, creating a 'slush fund' from which leadership, including its appointed committee chairs and ranking members, monopolize power at the expense of rank-and-file members and functioning committees."

These paragraphs also expose the deceit of AAG Kerwin's only further description of the content of plaintiffs' fourth and eight causes of action – a single sentence appearing in the concluding paragraph of her Point II, Section B, 1-1/2 pages later (at p. 15):

> "Plaintiffs' claims in her fourth and eight causes of action appear to stem from the fact that plaintiff Sassower's requests by email and telephone to testify orally were not granted."

Here, too, AAG Kerwin conceals plaintiffs' evidence-based assertions that defendant Senate and Assembly are rigging the hearings to prevent testimony that is not only in opposition, but dispositive of unconstitutionality, illegality, and fraud being collusively committed by the Legislature, Judiciary, and Executive branches with respect to the budget.

The only explanation for this concealment is that doing otherwise would foreclose a Speech or Debate Clause defense. Indeed, in the Court of Appeals' decision in *People v. Ohrenstein*, 77 N.Y.2d 38 (1990), whose page 54 AAG Kerwin twice-cites, the Court stated:

> "Historically the Speech or Debate Clause serves to preserve the integrity of the Legislature by preventing other branches of government from interfering with legislators in the performance of their duties. But no matter how far the immunity may extend under the State Constitution, it cannot be said that it was intended to provide a sanctuary for legislators who would defraud the State…".

And the dissent of Judge Simons, though not on this ground, is also relevant, stating:

> "Legislators are trustees of the public treasury. They may appropriate and spend State funds to the extent authorized, but if they do so to benefit themselves or others personally, they commit a crime. (at 64).

Having materially simplified and falsified plaintiffs' fourth and eighth causes of action with respect to Legislative Law §32-a, AAG Kerwin asserts (at p. 15):

> "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".

For this proposition she cites the Appellate Division, First Department's 2009 decision in one of the judicial compensation case brought by state judges, *Larabee v. Governor of the State of New York*, 65 A.D.3d 74, 87-92, purporting that it holds that

> "Speech or Debate Clause applies to all legitimate legislative activity, which includes all acts of the Legislature other than political matters".

This is false. In *Larabee*, the First Department stated:

> "...defendants assert absolute immunity by operation of the Speech or Debate Clause of NY Constitution, article III, §11. They argue that by virtue of the Speech or Debate Clause, a court is not empowered to inquire into the Legislature's reasons for adopting or not adopting particular measures which thus remain beyond judicial review....
>
> ...Individual statements of legislators or legislative acts may be protected from litigation, but it does not automatically follow that the manner in which legislative decisions are made is similarly protected; otherwise, the fundamental purpose of judicial review, to determine the constitutionality of governmental acts, would be eviscerated...
>
> ...As noted by Professor Tribe, 'to the extent that legislative and nonlegislative actions are entangled in practice, the privileged status of legislative action does not preclude its judicial review,' which may still be accomplished without formally requiring individual legislators 'to answer personally for legislative acts' (Tribe, American Constitutional Law §5-20, at 1019). Courts are empowered to determine the constitutional boundaries of each branch of government (*Pataki v New York State Assembly*, 4 NY3d 75, 96, 824 NE2d 898, 791 NYS2d 458 [2004]) and whether an action is within the purview of legitimate legislative activity (*Straniere*, 218 AD2d at 85).
>
> We find that legislative immunity is unavailable to shield defendants from plaintiffs' separation of powers claim. Since no member of the Legislature has been named a defendant in his or her individual capacity, we need not be concerned with the historical and entirely appropriate concern that a legislator might be harmed by the prospect of civil or even criminal liability as a consequence of his or her unfettered discharge of legislative duties.
>
> To the extent that the Speech or Debate Clause bars inquiry into the motivations underlying legislative decisions and communications, those concerns are academic, considering that the record is replete with information, including public statements by legislative leaders, explaining why judicial salary increases were abandoned at the eleventh hour (*Straniere*, 218 AD2d at 83; *Hutchinson*, 443 US at 131-132)... We need only look to the outward manifestation...".

Needless to say, in so-holding, the First Department not only had before it the argument of the plaintiff judges, who argued against a Speech or Debate Clause defense, but of *amici* such as then

Court of Appeals Chief Judge Judith Kaye and the Unified Court System Court, whose brief included the following:

> "The Chief Judge's and Judiciary's salary-inadequacy claim under the separation-of-powers doctrine, as well as the Compensation Clause claims in this case and in *Kaye v. Silver*, do not depend on legislative motives. Those claims do not even arguably challenge why legislators have failed to do what they should have done; they straightforwardly allege that legislative and executive actions and inactions themselves violate the State Constitution. That, of course, is exactly the sort of straightforward 'judicial review of legislative acts' that unquestionably '[l]egislative immunity does not…bar.' Powell, 395 U.S. at 503. As the Supreme Court said in *Kilbourn v. Thompson*:
>
> > 'Especially it is competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.'
>
> 103 U.S. at 199, quoted in *Powell*, 395 U.S. at 506." (October 23, 2008 brief, at p. 39).

At bar, no legislators are named in their individual capacities in this declaratory judgment action, challenging the constitutionality and lawfulness of the Legislature's acts with respect to the budget. Nor is any inquiry of underlying motivations needed. "[T]he outward manifestation", as detailed by plaintiffs' complaint and supplemental complaint, is sufficient for determining the violation and subversion of Legislative Law §32-a. Plaintiffs' challenge does not require an inquiry into "legislative motives", but "straightforwardly" alleges that what defendant Senate and Assembly did violated and subverted Legislative Law §32-a – and amply buttresses this with evidentiary proof.

Having misrepresented the First Department decision in *Larabee* , AAG then conceals the Court of Appeals' decision in *Maron v. Silver*, 14 NY3d 230 (2010), which, with briefing from

Chief Judge Kaye, the Office of Court Administration, and other judicial plaintiffs, not only upheld the First Department's determination in *Larabee*, but additionally stated:

> "The Speech or Debate Clause applies to only 'members' and to 'any speech or debate in either house.' Nowhere does the Clause state that such immunity applies to either house of the Legislature as a whole, and therefore, it does not apply to the Assembly or the Senate. ..." (at 257).

At bar, the violations of Legislative Law §32-a are those of the Legislature as a whole.

AAG Kerwin then concludes her Point II, Section B with a further deceit. Having misrepresented both fact and law with respect to Legislative Law §32-a, her concluding sentence states (at p. 15): "Accordingly, plaintiffs' fourth and eighth causes of action should be dismissed, in their entirety, with prejudice." She thereby conceals that violation of Legislative Law §32-a is only one of the statutory violations presented by these two causes of action, not the whole. Thus, ¶¶231-234 of plaintiffs' eighth cause of action present a further statutory violation: of Legislative Law §54-a relating to the joint budget conference committee.

Additionally, both the fourth and eight causes of action present constitutional, statutory, and rule violations pertaining to openness – concluding with the same identical paragraph, modified only by a change in the name of the Assembly Speaker:

> "...one need only examine the Constitutional, statutory, and Senate and Assembly rule provisions relating to openness – such as Article III, §10 of New York's Constitution '...The doors of each house shall be kept open...' ; Public Officers Law, Article VI 'The legislature therefore declares that government is the public's business...'; Senate Rule XI, §1 'The doors of the Senate shall be kept open'; Assembly Rule II, §1 'A daily stenographic record of the proceedings of the House shall be made and copies thereof shall be available to the public' – to see that government by behind-closed-doors deal-making, such as employed by defendants CUOMO, SKELOS, SILVER [HEASTIE], SENATE, and ASSEMBLY, is an utter anathema and unconstitutional – and that a citizen-taxpayer action could successfully be brought against the whole of the Executive budget." (¶¶126, 236).

Then, too, because this is a declaratory judgment action, dismissal is "not appropriate", *Seymour v. Cuomo*, 180 A.D.2d 215, 217-218 (3rd Dept. 1992), *Donovan v. Cuomo*, 126 A.D.2d 305, 310 (3rd Dept. 1987), New York Practice, §440, David D. Siegel (5th ed. 2011).

AAG Kerwin's Point III (p. 16)
"Attorney General Schneiderman and Comptroller DiNapoli are Not Proper Defendants"

AAG Kerwin's one-sentence Point III asserts (at p. 16):

> "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."

The sum total of "reasons stated in the Court's October 9, 2014 Decision and Order" is its bald assertion:

> "...the Court finds that the Attorney General and Comptroller are entitled to dismissal of the action in its entirety as plaintiffs' complaint does not adequately state a single cause of action as to either defendant." (at p. 6).

As with the dismissal of plaintiffs' first, second, and third causes of action, such is utterly insupportable – and plaintiffs' May 16, 2014 memorandum of law, in opposition to AAG Kerwin's April 18, 2014 dismissal motion purporting that the Attorney General and Comptroller were not proper defendants, set forth the pertinent facts and law – without contest from defendants. The Court's October 9, 2014 decision addresses none of it.

As therein set forth, plaintiffs' complaint sought to prevent disbursements of state funds and taxpayer monies under Legislative/Judiciary Budget Bill #S.6351/A.8551—and such disbursement are made by the Comptroller. AAG Kerwin's cited case, *Cheevers v. State*, 2002 Misc. LEXIS 834 (Sup. Ct. Albany Co., July 10, 2002), which she identified as "finding the Comptroller to be an improper party because the case was not challenging a disbursement by the Comptroller" reinforces that Comptroller DiNapoli was a necessary party. Indeed, inasmuch as defendants Senate and Assembly had already voted on Budget Bill #S.6351/A.8551 and defendant Cuomo had already

signed it into law, the Comptroller was the most important defendant, as he was the only one who could be enjoined. *Cass v. New York*, 88 A.D.2d 305, 308 (3rd Dept. 1982).

Nor was AAG Kerwin correct in stating that there was only a single allegation in the complaint about Comptroller DiNapoli – ¶13. There were two important additional paragraphs, ¶¶5(b) and (c) – and these identified that Comptroller DiNapoli and Attorney General Schneiderman were complicit in the statutorily-violative, fraudulent, and unconstitutional judicial salary increase recommended by the Commission on Judicial Compensation – whose third phase was challenged by the complaint – as each did nothing to protect the public fisc when plaintiffs filed corruption complaints with them.

Defendant DiNapoli has an ongoing duty, as Comptroller, to safeguard the public fisc. Likewise, defendant Schneiderman, as Attorney General, has an ongoing duty – recognized, in fact, by the citizen-taxpayer statute which contemplates his role as plaintiff, reinforcing powers he possesses under Executive Law §63 pertaining to his "duties".

As to defendant Schneiderman, AAG Kerwin purports (p. 11):

> "Although entirely unclear, the complaint appears to name Attorney General Schneiderman as a party because he was directed by the Governor to investigate instances of public corruption."

For this she cites to the complaint's ¶12. However, there is nothing "unclear" about ¶12 – identifying defendant Schneiderman's participatory role in the Commission to Investigate Public Corruption which, by virtue of Executive Law §63.8, essentially operated as an extension of his office. Tellingly, none of the references to the Commission from plaintiffs' complaint (¶¶5(i), 7, 24, 31, 33, 48, 72, p. 46: "other and further relief") were cited by AAG Kerwin's dismissal motion. This includes the Commission's pretense that plaintiffs' "matter falls outside our mandate" – such being plaintiffs' corruption complaints against, *inter alia*, all the defendants herein, including

Attorney General Schneiderman and Comptroller DiNapoli, for "grand larceny of the public fisc and other corrupt acts" with respect to the Governor's Legislative/Judiciary Budget Bill S.2601-A/A.3001-A for fiscal year 2013-2014 and plaintiffs' January 7, 2014 supplemental complaint pertaining to the fraudulence and unconstitutionality of the Judiciary's and Legislature's proposed budgets for fiscal year 2014-2015, established by their dispositive December 11, 2013 and December 30, 2013 letters.

With the Commission to Investigate Public Corruption now disbanded, its mandate to investigate public corruption and to "Follow the money" is properly carried on by Attorney General Schneiderman, who prides himself with not only having a "public integrity bureau", but a partnership with Comptroller DiNapoli to safeguard public monies and taxpayer dollars (Exhibit BB)[16].

PLAINTIFFS' CROSS-MOTION

Plaintiffs' Entitlement to a Court Order Giving Notice, Pursuant to CPLR §3211(c), that AAG Kerwin's Dismissal Motion is being Converted to a Motion for Summary Judgment in Plaintiffs' Favor

CPLR §3211(c), entitled "Evidence permitted; immediate trial, motion treated as one for summary judgment", reads as follows:

> "Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion."

Pursuant to CPLR §105(u), "A 'verified pleading' may be utilized as an affidavit whenever the latter is required.[17]

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[16] This exhibit is annexed to plaintiff Sassower's June 16, 2014 reply affidavit in further opposition to AAG Kerwin's April 18, 2014 dismissal motion.

[17] 2 Carmody-Wait 2d §4:12 "a sworn complaint may be regarded as an affidavit."

Plaintiffs rest on the fact-specific allegations of their verified supplemental complaint and the legal authority cited therein and hereinabove, and plaintiff Sassower's accompanying affidavit to support their cross-motion for an order pursuant to CPLR §3211(c) giving notice that the Court is treating AAG Kerwin's motion to dismiss the supplemental complaint, pursuant to CPLR §3211, as entitling plaintiffs to summary judgment on each of their four causes of action therein. Indeed, the brazen fraud that pervades AAG Kerwin's dismissal motion reinforces plaintiffs' entitlement under controlling legal principles, hereinabove quoted (p. 3).

State Finance Law Article 7-A, entitled "citizen-taxpayer action", is expressly and unequivocally the statutory remedy given to each citizen and taxpayer against "an illegal or unconstitutional act of a state officer or employee" who "in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property..." For this reason, it was invoked by plaintiffs in pleading "unconstitutionality and unlawfulness" in connection with the Governor's Legislative/Judiciary budget bill for fiscal year 2015-2016 (¶127) – and seeking a declaratory judgment on four separate causes of action (¶¶169-178; ¶¶179-193; ¶¶194-202; ¶¶203-236).

As hereinabove demonstrated, AAG Kerwin's dismissal motion wholly conceals the allegations of plaintiffs' supplemental complaint pertaining to defendants' constitutional violations of Article VII, §7, Article III, §16, and Article III, §10 (¶¶181, 192, 236), thereby conceding them, as a matter of law. She reveals only the pleaded violation of Article VII, §1, distorting them and furnishing no applicable caselaw.

The supplemental complaint further pleads statutory violations: of Legislative Law §54-a (¶¶231-234) and Public Officers Law, Article VI. These too are concealed by AAG Kerwin.

Additionally, the supplemental complaint pleads fraud in connection with these constitutional and statutory violations – a further basis for relief under State Finance Law Article 7-A :

> "a citizen-taxpayer action lies 'only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes'' (*Mesivta of Forest Hills Inst. v City of New York*, 58 NY2d 1014, 1016; *Kaskel v Impellitteri*, 306 NY 73, 79; *Fisher v Biderman*, 141 Misc 2d 804, 809)." *Schwarz v. NYS Dept of Transportation*, 158 A.D.2d 967 (4th Dept. 1990) (underlining added).

Plaintiffs' verified supplemental complaint and the verified complaint it incorporates – both fact-specific, evidence-supported verified pleadings – make a *prima facie* showing as to all these constitutional and statutory violations and fraud. Likewise, of the Legislature's violations of a succession of Senate and Assembly rules.

Plaintiffs' Entitlement to Summary Judgment on the Fourth Cause of Action of their Verified Complaint, Pursuant to CPLR §3212(b)

CPLR §3212(b), entitled "Supporting proof; grounds; relief to either party", states, in pertinent part:

> "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

Plaintiffs hereby cross-move for the relief to which they are entitled, "without the necessity of a cross-motion": summary judgment on the fourth cause of action of their verified complaint.

Plaintiffs' fourth cause of action – under the title heading "Nothing Lawful or Constitutional Can Emerge From a Legislative Process that Violates its Own Statutory and Rule Safeguards" – is set forth at ¶¶113-126 of their verified complaint.

AAG Kerwin's response to these paragraphs, by the answer she wrote and verified, was – in the main – to baldly "deny" them. Plaintiffs' "marked pleading" (Exhibit 12) shows this clearly: 9 of the 13 paragraphs of the fourth cause of action, she denied. Her instant summary judgment

motion does not substantiate these bald denials in any respect. She furnishes no documentary evidence of defendants' compliance with the rules that the fourth cause of action specifies to have been violated. For that matter, she does not even claim that the rules were complied with. Rather, by her memorandum of law she asserts that the issue of defendants' compliance with the legislature's rules is beyond judicial review – a proposition she identically put forward in her April 18, 2014 dismissal motion.

As for violation of statutory law, her memorandum of law confines itself to Legislative Law §32-a, as to which she fraudulently purports in her Point II that "Publicly Available Documentary Evidence Proves that Defendants Did Not Violate Legislative Law §32-A". This is false. As hereinabove demonstrated, her own documentary evidence proves that defendants Senate and Assembly held no hearing on its own Legislative budget and on the Governor's budget bill with respect thereto – and that their hearing on the Judiciary budget and the Governor's budget bill included no witness in opposition.

The paragraphs of plaintiffs' first, second, and third causes of action – incorporated by reference in their fourth cause of action (¶113) – embody the particulars of what would have been plaintiff Sassower's testimony at defendant Legislature's budget hearings. AAG Kerwin response to these causes of action, by her answer, is that:

> "As to the allegations contained in paragraphs 76 through 112 of the complaint, no response is required in light of the court's October 9, 2014 Decision and Order. To the extent that a response is deemed required, the allegations are denied." (Kerwin Exhibit C, ¶12).

Yet, the Court's October 9, 2014 dismissal of these three causes of action, largely on grounds of justiciability, is not germane to legislative budget hearings where justiciability is not at issue, the merits are. AAG Kerwin furnished no merits defense to virtually all the particularized paragraphs of those three causes of action, omitting them entirely from her motion. As for AAG Kerwin's

alternative bald denials of ¶¶76 through 112, by her answer, they are rebutted by the specificity and evidence presented by those paragraphs – all reinforcing plaintiffs' summary judgment entitlement on their fourth cause of action pertaining to defendant Senate and Assembly's violation of Legislative Law §32-a.

With respect to the judicial salary increase – whose third phase was concealed in the judiciary's budget for fiscal year 2014-2015 and Budget Bill #S.6351/A.8551 – the *prima facie* proof that such increase is statutorily-violative, fraudulent and unconstitutional are the documents specified by ¶108 of the second cause of action, *to wit*, plaintiffs' October 27, 2011 Opposition Report to the August 29, 2011 Report of the Commission on Judicial Compensation and the verified complaint in *CJA v. Cuomo I* based thereon. Through litigation fraud and deceit, AAG Kerwin was able to withhold them from the Court and impede plaintiffs' summary judgment entitlement to a declaration based thereon. They are now furnished to the Court, by plaintiffs, in a free-standing file folder, due to their volume.

Suffice to say, that the purpose of all the rules, statutes, and constitutional provisions identified by plaintiffs' fourth cause of action – and additionally embracing those identified by the first and second causes of action – is, at very least, to prevent the constitutional abomination of budgets whose cumulative dollar amount is not known to the taxpaying public who will be required to pay for them. In the words of ¶118:

> "Nor is there the slightest excuse for [defendant legislators'] wilful and deliberate violation of their own rules – as, for instance, Senate Rule VIII, §7, Senate Rule VII, §1, and Assembly Rule III, §1(f) pertaining to fiscal notes and introducer's memoranda, whose purpose is to ensure that legislators – and the public – are alerted to relevant costs. Even beyond the concealed, unitemized third phase of the judicial salary increase, defendants SENATE and ASSEMBLY have demonstrated their utter unconcern in imposing upon taxpayers the expense of two budgets – the Judiciary and Legislative budgets – whose dollar amount they do not know or will not reveal. Such is utterly unconstitutional." (underlining added).

AAG Kerwin has failed to substantiate her dismissal/summary judgment motion with this most basic information as to the cumulative dollar amount of the Judiciary and Legislative budgets – inclusive of their "general state charges" and untallied "reappropriations". Indeed, she has not even identified where the Legislature's "general state charges" are and their dollar total. Nor has she purported that the reappropriations of the Legislature and Judiciary were certified, either as to their suitability as reappropriations or as to their amounts. This suffices to preclude any award of summary judgment to defendants on the fourth cause of action and to compel the granting of same to plaintiffs by a declaration of unconstitutionality and unlawfulness.

Plaintiffs' Entitlement to Sanctions and Other Relief against AAG Kerwin & Those Complicitous in her Fraud and Contempt of the Order to Show Cause, with TRO, Signed by the Court on June 16, 2014

Plaintiffs' October 27, 2011 Opposition Report and the verified complaint in *CJA v. Cuomo I* based thereon were the key documents that plaintiff Sassower handed up to the senate and assembly fiscal committees when she testified before them in opposition to the second phase of the judicial pay raises at their February 6, 2013 "public protection" budget hearing – and her doing so is visible from the Senate and Assembly videos of the hearing and reflected by the transcript[18].

Pursuant to Legislative Law §67, the fiscal committees were statutorily-required to preserve these documents "in the senate finance committee room" until the adjournment of the follow year's legislative session. To ensure that they would not be destroyed thereafter, plaintiffs brought an order to show cause with a TRO, which the signed by the Court on June 16, 2014.

The Court's October 9, 2014 decision does not identify the documents sought by plaintiffs' June 16, 2014 order to show cause with TRO. Its two paragraphs on the subject, including its footnote 1 quoting the language of Legislative Law §67 *verbatim*, are as follows:

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[18] The transcript is Exhibit 1 to plaintiff Sassower's July 7, 2014 reply affidavit in further support of

"...Ms. Sassower brought an OTSC with TRO seeking to prevent the destruction of certain records and directing that said records be furnished to the Court. Defendants provided the Court with, what they represented to be, a copy of the only documents in their possession that may arguably be those described in the OTSC. Defendants also consented to maintaining the original version of said documents until the completion of the underlying motion. Plaintiff's reply papers on the OTSC set forth her conclusions that, *inter alia*, (1) the AAG's submission on the document destruction issue was a flagrant fraud on the Court; and (2) the AAG's submission revealed that defendants had violated Legislative Law §67[fn1]; and (3) the AAG and her collaborating superiors and defendants are in contempt of the TRO set forth in the OTSC.

Discussion

Destruction of Documents

The record reflects that defendants have represented to the Court that they have produced all responsive documents in their possession to the Court and have agreed to maintain the original version of said documents until the completion of the underlying action. Accordingly, the Court will Order that said original documents not be destroyed until the completion of the underlying action. To the extent plaintiffs seek additional relief from the June 16, 2014 OTSC, said requested relief is not properly before this Court and/or is wholly without merit. In particular, the court notes: (1) plaintiffs' complaint does not set forth any cause of action asserting that any of the defendants violated Legislative Law §67; and (2) the plaintiffs have not brought a formal motion for contempt and/or sanctions." (Kerwin's Exhibit C, pp. 2-3).

In other words, without identifying that what AAG Kerwin had turned over in response to the Order to Show Cause with TRO was a 4-page Executive Summary of plaintiffs' October 27, 2011 Opposition Report, the Court, without explanation, accepted her representation that this was everything. It did not determine whether her 4-page turnover was a "flagrant fraud on the Court", constituted evidence of defendants' violation of Legislative Law §67, and was a possible contempt of the TRO. This, notwithstanding plaintiffs' July 7, 2014 "reply papers" furnished not "conclusions", but particularized facts and evidence to enable the Court to determine each issue and to secure from

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plaintiffs' order to show cause with TRO.

defendants the evidentiary proof for the declaration sought as part of plaintiffs' second cause of action:

> "that the Judiciary's proposed budget for fiscal year 2014-2015, embodied in Budget Bill #S.6351/A.8551, is a wrongful expenditure, misappropriation, illegal and unconstitutional because it conceals the third phase of the judicial salary increase, its cost, and the prerogative of the Legislature and Governor to strike it; [and] that this prerogative is a duty based on plaintiffs' October 27, 2011 Opposition Report because the recommendation on which the salary increase is based is statutorily-violative, fraudulent, and unconstitutional" (verified complaint, PRAYER FOR RELIEF/WHEREFORE clause: p. 44, underlining in the original).

The October 9, 2014 decision does not identify what is the "additional relief...not properly before the Court", for which a "formal motion for...sanctions" is necessary. It can only be the three issues identified as presented by plaintiffs' "reply papers". Consequently, plaintiffs hereby bring the indicated "formal motion for...sanctions" – and seek $10,000 sanctions and maximum costs, pursuant to 22 NYCRR §130-1.1 *et seq*. Additionally, based on this specific litigation fraud by AAG Kerwin, not determined by the October 9, 2014 decision, whose consequence has been to deprive plaintiffs of the declaration to which their second cause of action entitled them – at a cost to taxpayers of tens of millions of taxpayer dollars since October 9, 2014 – plaintiffs seek penal law enforcement and treble damages pursuant to Judiciary Law §487, as well as referral to disciplinary authorities pursuant to this Court's mandatory disciplinary responsibilities pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.

As plaintiffs have now produced the voluminous October 27, 2011 Opposition Report and the verified complaint in *CJA v. Cuomo I* based thereron – identical to what plaintiff Sassower handed up at the February 6, 2013 budget hearing – they have now additionally reinforced the merit of the relief sought and demonstrated by their July 7, 2014 "reply papers".

Plaintiffs' Entitlement to a Court Order Compelling the Attorney General to Identify Who is Evaluating "the Interest of the State" and their Entitlement to his Intervention/Representation Pursuant to Executive Law §63.1 and State Finance Law Article 7-A

Executive Law §63.1 identifies that the Attorney General's litigation position is contingent on "the interest of the state". It reads as follows:

"The attorney-general shall:

> 1. Prosecute 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. No 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." (underlining added).

State Finance Law Article 7-A also contemplates the Attorney General's affirmative role in safeguarding against "wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property" (§123-b) – including as plaintiff:

> §123-a defines "person" to include "the attorney general" and he is the only "person" so-specified;
>
> §123-c(3) states "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."
>
> §123-d states that costs and security "shall not apply to any action commenced by the attorney general in the name of and on behalf of the people of the state."

The Attorney General's duty is thus not to provide a knee-jerk defense, but to determine "the interest of the state". Where there is no legitimate defense to a lawsuit, the Attorney General's

obligation is not to defend, but to intervene and/or represent the plaintiff so as to uphold "the interest of the state". And this is underscored where the lawsuit is a citizen-taxpayer action.

AAG Kerwin's litigation fraud by her July 28, 2015 dismissal/summary judgment motion, including her concealment that this is a citizen-taxpayer action, is *prima facie* evidence that the Attorney General has no legitimate defense, not to the supplemental complaint and not to the complaint – and that his duty was to have intervened on plaintiffs' behalf and/or to have represented them.

As chronicled by the record of this citizen-taxpayer action, including by plaintiff Sassower's March 30, 2015 affidavit in support of plaintiffs' motion to file their verified supplemental complaint (at ¶9), AAG Kerwin and her superiors in the Attorney General's office have refused to identify who in the Attorney General's office has independently evaluated "the interest of the state" and the Attorney General's duty, consistent therewith, to be assisting plaintiffs – here acting as private attorneys general. Such information must now be compelled by court order so that the Court may be properly assisted in discharging its own constitutional and statutory duties.

Plaintiffs' Entitlement to Attorney General Schneiderman's Disqualification for Conflict of Interest

In *Greene v. Greene*, 47 NY2d 447, 451 (1979), the Court of Appeals articulated key principles governing attorney disqualification for conflict of interest:

> "It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law (Code of Professional Responsibility, canon 7). For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests (see, e.g., *Cardinale v Golinello*, 43 NY2d 288, 296; *Eisemann v Hazard*, 218 NY 155, 159; Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation

> of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large.
>
> ...where it is the lawyer who possesses personal, business or financial interest at odds with that of his client, these prohibitions apply with equal force (Code of Professional Responsibility, DR 5-101, subd [A]). Viewed from the standpoint of a client, as well as that of society, it would be egregious to permit an attorney to act on behalf of the client in an action where the attorney has a direct interest in the subject matter of the suit. ...the conflict is too substantial, and the possibility of adverse impact upon the client and the adversary system too great, to allow the representation."

The former DR 5-101 is now reflected in Rule 1.7 of New York's Rules of Professional Conduct. Rule 1.7(a)(2) bars a lawyer from representing a client if a "reasonable lawyer" would conclude:

> "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests."[19]

The Attorney General's first and foremost client is the People of the State of New York. At bar, however, Attorney General Schneiderman is compromised by his own self-interest in preventing adjudication of the statutorily-violative, fraudulent, and unconstitutional judicial salary raises that he was duty-bound to stop years ago, but which he instead corruptly enabled, including by his litigation fraud in *CJA v. Cuomo I*, recited at ¶¶5(a)-(j) of the verified complaint. This is why AAG Kerwin conceals the judicial salary issue entirely in her July 28, 2015 dismissal/summary judgment motion, as likewise in her April 18, 2014 dismissal motion – and why, additionally, she responded with fraud and deceit to plaintiffs' June 16, 2014 order to show cause with TRO, requiring defendants' production of CJA's October 27, 2011 Opposition Report and the verified complaint in *CJA v. Cuomo I*.

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[19] Such is permitted under Rule 1.7(b) only if, *inter alia*, "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"; and "(4) each affected client gives informed consent, confirmed in writing".

Suffice to add that among Attorney General Schneiderman's multitudinous motives for covering up the unlawfulness, fraud, and unconstitutionality of the judicial salary raises – and the commission scheme that produced them, Chapter 567 of the Laws of 2010 – is his own financial interest in having his own salary raised. In a system of co-equal government branches, there is a necessary equivalence in the salaries of the constitutional officers of each branch. He, like the Governor, and Comptroller are constitutional officers of the executive branch, just as judges are constitutional officers of the judicial branch and legislators of the legislative branch.

In the behind-closed doors, "three-men-in-a-room" budget negotiations for fiscal year 2015-2016, defendants Cuomo, Skelos and Heastie amended budget bills which, at the 11th hour, were introduced and passed by the Legislature in rubber-stamp fashion. Among these was Budget Bill #S.4610-A/A.6721-A and its amendments included repeal of Chapter 567 of the Laws of 2010, so as to replace the Commission on Judicial Compensation, with a Commission on Legislative, Judicial, and Executive Compensation.

The amendment – Part E of Budget Bill #S.4610-A/A.6721-A – largely replicates the provisions of Chapter 567 of the Laws of 2010. *As written*, it suffers from the same constitutional infirmities as were directly challenged by the verified complaint in *CJA v. Cuomo, I* [Second Cause of Action: ¶¶140-154] – and which are indirectly challenged by the verified complaint herein. The financial interest of Attorney General Schneiderman is to thwart adjudication of it and the violative, unconstitutional manner in which budget bills are amended – and such could not more sharply contrast to the interest of the People of the State of New York.

Plaintiffs' Entitlement to Costs & Sanctions against AAG Kerwin and Collusive Supervisory Attorneys Pursuant to 22 NYCRR §130-1.1

Under 22 NYCRR §130-1.1-a(a), "Every pleading, written motion, and other paper, served on another party or filed or submitted to the court" is required to be signed. §130-1.1(b) identifies this signature requirement as constituting certification that "to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, (1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c)" §130-1.1(c) defines conduct as "frivolous" if:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false."[20]

As hereinabove demonstrated, the subject dismissal/summary judgment motion, signed by AAG Kerwin, meets the test for frivolousness on all three counts. It brazenly disregards the most fundamental legal standards, beginning with honesty. Such motion, being based in fraud, has no legitimate purpose and can only be seen as "undertaken primarily to delay or prolong the resolution of the litigation or maliciously injure [the plaintiffs herein]".

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[20] Under §130-1.1, the court is empowered to impose "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct". "[F]inancial sanctions" of up to $10,000 may additionally be imposed, payable to the Lawyers' Fund for Client Protection (§130-1.2, §130-1.3).

Plaintiffs' Entitlement to Penal Law Penalties against AAG Kerwin and Complicitous Supervisory Lawyers – & to Treble Damages Pursuant to Judiciary Law §487

Judiciary Law §487, "Misconduct by attorneys", states, in pertinent part:

"An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party;

...

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

Consistent with the New York Court of Appeals' decision in *Amalfitano v. Rosenberg*, 12 NY3d 8, 14 (2009), recognizing "the evident intent" of Judiciary Law §487 "to enforce an attorney's special obligation to protect the integrity of the court and its truth-seeking function", plaintiffs are entitled to penal law punishment against AAG Kerwin and complicitous supervisory lawyers in the Attorney General's office, as well as such determination as would afford them "treble damages" in a civil action.

Plaintiffs' Entitlement to Disciplinary Referral of AAG Kerwin and Complicitous Supervisory Lawyers

This Court's duty to ensure the integrity of the judicial process is set forth in Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct. Part 100.3D relates to a judge's "Disciplinary Responsibilities". In mandatory language it states:

> "(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."

New York's Rules of Professional Conduct, promulgated as joint rules of the Appellate Divisions of the Supreme Court, are Part 1200 of Title 22 of New York Codes, Rules and

Regulations. Particularly relevant is the Code's definition section, which specifies "fraud" as involving:

> "scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another" (1200.1(I)).

It also defines "law firm" as including "a government law office".

Rule 3.1, entitled "Non-Meritorious Claims and Contentions", states:

> "a lawyer shall not…defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous…". (subsection a).

The definition of "frivolous" is the same as that under 22 NYCRR §130.1.1(c) and includes knowingly assert[ing] material factual statements that are false" (subsection b).

Rule 3.3, entitled "Conduct Before a Tribunal", states:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

Rule 8.4, entitled "Misconduct", states:

"A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct…

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice."

Rule 5.1 is entitled "Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers" and states:

> "(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.
>
> (b)(1) A lawyer with management responsibilities in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.
>
> (2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.
>
> (c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate…
>
> (d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:
>
> (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or
>
> (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and
>
> (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
>
> (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated."

As demonstrated by this memorandum of law, the Attorney General's July 28, 2015 dismissal/summary judgment motion, by its "of counsel" AAG Kerwin, flagrantly violates the Rules of Professional Conduct and, specifically, Rule 3.1, Rule 3.3, and Rule 8.4. Such substantial violations require that the Court "take appropriate action" by referring AAG Kerwin and her culpable

superiors in the Attorney General's office to disciplinary authorities, consistent with the unequivocal directive of the New York Court of Appeals:

> "the courts are charged with the responsibility of insisting that lawyers exercise the highest standards of ethical conduct...Conduct that tends to reflect adversely on the legal profession as a whole and to undermine public confidence in it warrants disciplinary action (*see Matter of Holtzman*, 78 NY2d 184, 191 cert denied, ___ US __, 112 S.Ct 648; *Matter of Nixon*, 53 AD2d 178, 181-182; *cf., Matter of Mitchell*, 40 NY2d 153, 156).", *Matter of Rowe*, 80 NY2d 336, 340 (1992).[21]

Plaintiffs' Entitlement to Vacatur of the Court's October 9, 2014 Decision/Order Pursuant to CPLR §5015(a)(3)

CPLR §5015 is entitled "Relief from judgment or order" – and it states, in pertinent part:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> ...3. fraud, misrepresentation, or other misconduct of an adverse party".

As hereinabove demonstrated, AAG Kerwin's July 28, 2015 dismissal/summary judgment motion is fashioned on fraud, misrepresentation, and misconduct, from beginning to end and in virtually every sentence. In so doing, it replicates, *identically*, the fraud, misrepresentation, and misconduct permeating her April 18, 2014 dismissal motion and her July 2, 2014 opposition to plaintiffs' June 16, 2014 order to show cause with TRO – resulting in the Court's October 9, 2014 decision/order.

The Court's failure, by its October 9, 2014 decision, to adjudicate AAG Kerwin's fraud, misrepresentation, and misconduct with respect to plaintiffs' June 16, 2014 order to show cause with

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[21] "A Court cannot countenance actions, on the part of an attorney, which are unethical and in violation of the attorney's Canon on Ethics... ...A Court cannot stand idly by and allow a violation of law or ethics to take place before it.", *People v. Gelbman*, 568 N.Y.S2d 867, 868 (Just. Ct. 1991).

TRO are the subject of a separate branch of this cross-motion, hereinabove detailed (at p. 42). A for AAG Kerwin's fraud, misrepresentation, and misconduct relating to her April 18, 2014 dismissal motion, particularized by plaintiffs' May 16, 2014 opposition/cross-motion, the Court's October 9, 2014 decision identifies (at p. 2) the cross-motion relief, but then denies it in the same fashion as it dismisses the first, second, and third causes of action of plaintiffs' complaint. In other words, it does not identify ANY of the facts, law, or legal argument plaintiffs presented in support. The entirety of what the decision says are two completely conclusory paragraphs under the heading "Plaintiffs' Cross-Motion", *to wit*,

> "Based upon the Court's review of plaintiffs' complaint and the submissions in this matter, the Court finds that conversion of the motion to dismiss is inappropriate (*see generally*, Bailey v. Fish & Neave, 30 AD3d 48, 55-56 [1st Dept. 2006]). The Court also finds that CPLR §2214(c) does not warrant the apparent type of discovery relief requested by plaintiffs herein. CPLR §2214(c) requires the moving party, in this case the plaintiffs, to furnish all papers not already in possession of the Court necessary to the consideration of the questions involved. The Court notes that plaintiffs' Notice specifically refers to documents to be produced regarding plaintiffs' OTSC for a TRO and preliminary injunction. As such, the Court will not 'so order' plaintiffs' Notice to Furnish Papers.
>
> Also, the Court has searched the records and found absolutely no basis to award sanctions[fn2] in this matter or to take any disciplinary action against the AAG or any other lawyers affiliated with defendants. Additionally, the Court has not been persuaded that any legal basis exists to compel the AAG to provide the requested information concerning representation of the defendants. Further, the Court finds insufficient basis to disqualify the Attorney General's office or the Attorney General from representing all defendant (sic) in this matter. Finally, in light of the Court's findings, the Court declines to award plaintiffs any motion costs on the cross-motion." (at pp. 4-5)

As the Court cannot adjudicate AAG Kerwin's instant dismissal/summary judgment motion and plaintiffs' opposition/cross-motion, without revisiting its disposition of plaintiffs' opposition/cross-motion to AAG Kerwin's prior dismissal motion, such furnishes the Court with the opportunity to repudiate her fraud, misrepresentation, and other misconduct by vacating its October

9, 2014 decision/order, consistent with the statutory remedy that CPLR §5015(a)(3) affords.

CONCLUSION

AAG Kerwin's dismissal/summary judgment motion must be denied, *as a matter of law*, with plaintiffs' cross-motion granted consistent with the facts and law, herein particularized.

ELENA RUTH SASSOWER, Plaintiff *Pro Se*, individually
& as Director of the Center for Judicial Accountability, Inc.,
and on behalf of the People of the State of New York &
the Public Interest

September 22, 2015