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 #5122-16
RJI #01-16-122174

-against-

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York, JOHN J. FLANAGAN in his official capacity as Temporary Senate President, THE NEW YORK STATE SENATE, CARL E. HEASTIE, 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, THOMAS P. DiNAPOLI, in his official capacity as Comptroller of the State of New York, and JANET M. DiFIORE, in her official capacity as Chief Judge of the State of New York and chief judicial officer of the Unified Court System,

Defendants.

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PLAINTIFFS' ANALYSIS
of Assistant Attorney General Adrienne Kerwin's March 22, 2017 Opposition, on behalf of Defendants, to Plaintiffs' February 15, 2017 Order to Show Cause for Judge Hartman's Disqualification, Vacatur of her December 21, 2016 Decision/Order, Disclosure, Reargument/Renewal, and Other Relief

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"In my view, this matter has been handled appropriately in all respects by this office"
(March 27, 2017 e-mail of Attorney General Litigation Bureau Chief Jeffrey Dvorin)

"We believe we have handled your concerns appropriately
and are prepared to discuss your concerns in the context of any papers
you present to the court. We have nothing further to add outside the litigation context."
(March 28, 2017 e-mail of Deputy Attorney General Meg Levine)

June 10, 2017

Ex E

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INTRODUCTION

This analysis of defendants' March 22, 2017 opposition to plaintiffs' February 15, 2017 order to show cause for Judge Hartman's disqualification, vacatur of her December 21, 2016 decision/order, and other relief, filed by Assistant Attorney General Adrienne Kerwin, is furnished for a two-fold purpose:

(1) to substantiate plaintiffs' March 24, 2017 notice to Judge Hartman and to AAG Kerwin's superiors in the Attorney General's office that such opposition, consisting of AAG Kerwin's affirmation and a memorandum of law signed by her, were fraudulent – and that it was the duty of the Attorney General's office to withdraw them[1]; and

(2) to establish what Judge Hartman "overlooked" by her comparably fraudulent May 5, 2017 decision, denying plaintiffs' February 15, 2017 order to show cause "in its entirety" and whose sole reference to AAG Kerwin's opposing papers was its CPLR §2219(a) listing of them as "Papers Considered".

As hereinafter demonstrated, AAG Kerwin's opposition replicates her *modus operandi* of litigation fraud chronicled, in this citizen-taxpayer action, by plaintiffs' September 30, 2016 memorandum of law – and by all five of plaintiffs' memoranda of law in their predecessor citizen-taxpayer action.[2]

AAG Kerwin's LEGALLY INSUFFICIENT AFFIRMATION

AAG Kerwin's three-page March 22, 2017 affirmation is as legally insufficient and non-probative as her only other affirmation in this citizen-taxpayer action, dated September 15, 2016, and

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[1] The March 24, 2017 notice is Exhibit 6-a to plaintiff Sassower's May 15, 2017 reply affidavit in further support of plaintiffs' March 29, 2017 order to show cause. The responses of Attorney General's Litigation Bureau Chief Jeffrey Dvorin and Deputy Attorney General Meg Levine, quoted on the coverpage herein, are Exhibits 6-j and 6-p thereto, with plaintiffs' e-mails to higher supervisory levels: Executive Deputy Attorney General for State Counsel Ken Stauffer, Chief Deputy Attorney General Janet Sabel, Chief Deputy Attorney General Jason Brown, and Attorney General Schneiderman – to which there was no response – annexed as Exhibits 7-e, 7-g, and 7-h.

[2] These five memoranda of law are cited at footnote 1 of plaintiffs' September 30, 2016 memorandum of law as dated May 16, 2014, June 16, 2014, September 22, 2015, November 5, 2015, and April 22, 2016.

her many affirmations in the predecessor citizen-taxpayer action. Notwithstanding these deficiencies have been pointed out again and again and again in all plaintiffs' responding memoranda of law, AAG Kerwin blithely repeats them.

Thus, once again, AAG Kerwin furnishes an affirmation that not only fails to assert that it is "true under the penalty of perjury", but fails to identify the basis upon which it is made, whether personal knowledge, or information and belief – and, if the latter, the basis thereof.

As with virtually all her other affirmations, the purpose of her March 22, 2017 affirmation is essentially as a vehicle for annexing exhibits. However, the three exhibits she annexes have no purpose, other than to add bulk to her utterly skimpy presentation:

> AAG Kerwin's Exhibit A is plaintiffs' September 2, 2016 verified complaint, without exhibits, which is already before Judge Hartman, with exhibits – and which requires the exhibits to be intelligible;
>
> AAG Kerwin's Exhibit B is Judge Hartman's December 21, 2016 decision & order – and it is plaintiffs' first exhibit, Exhibit T-1, to their February 15, 2017 order to show cause for her disqualification for demonstrated actual bias, to vacate the decision, and other relief;
>
> AAG Kerwin's Exhibit C is defendants' January 20, 2017 verified answer to plaintiffs' verified complaint – and it is T-4 to plaintiffs' February 15, 2017 order to show cause.

Apart from her misleading paraphrase of the relief sought by plaintiffs' February 15, 2017 order to show cause, concealing, for example, at her ¶2, that the disqualification of Judge Hartman is for "demonstrated actual bias and interest", vacating her December 21, 2016 decision and order by reason thereof and, if denied, for disclosure; and, likewise, at ¶4, her varyingly misleading paraphrase of the ten causes of action of plaintiffs' September 2, 2016 verified complaint, her affirmation boils down to a single paragraph, ¶7, which states:

> "For the reasons discussed in Defendants' Memorandum of Law submitted herewith, and incorporated herein, the plaintiff's current motion should be denied in its entirety."

As with her prior affirmations, AAG Kerwin does not swear to the truth of her memorandum of law, neither to its assertions of fact, nor its presentation of law.

AAG Kerwin's FRAUDULENT MEMORANDUM OF LAW

AAG Kerwin's barely 15-page memorandum of law consists of four parts: a "Preliminary Statement" (at p. 1); a "Summary of Relevant Facts and Procedural History" (at pp. 1-4); an "Argument" (at pp. 4-14); and a "Conclusion" (at p. 15).

AAG Kerwin's "Preliminary Statement" (at p. 1)

The three paragraphs under this title heading begin with a repetition of ¶2 of AAG Kerwin's affirmation, materially concealing that plaintiffs' February 15, 2017 order to show cause seeks Judge Hartman's disqualification for "demonstrated actual bias and interest", vacating her December 21, 2016 decision and order by reason thereof and, if denied, for disclosure.

The second and third paragraphs thereupon state:

> "In her motion, Plaintiff fails to submit any reason why Judge Hartman should be disqualified from adjudicating this case. Plaintiff also fails to submit any substantive argument for reargument of her opposition to Defendants' motion to dismiss, and she fails to identify any new fact that was unavailable to her that could justify renewal. And, because her argument for vacatur rests solely on the faulty premise that the Court lacked jurisdiction over this case because of fraud and bias, there is no basis to vacate the judgment. Finally, Plaintiffs fail to provide the Court with any reason why she should be awarded motion costs.
>
> Plaintiff's motion should be denied in its entirety."

These are the flagrant frauds presented by AAG Kerwin's four-point "Argument" (pp. 4-14) and "Conclusion" (p. 15), hereinbelow detailed.

AAG Kerwin's "Summary of Relevant Facts and Procedural History" (at pp. 1-4)

This section consists of three subsections, each materially false and misleading. Concealed, entirely, is the MOST RELEVANT of "Relevant Facts and Procedural History", *to wit*:

(1) that on September 2, 2016, plaintiffs commenced this citizen-taxpayer action by a verified complaint accompanied by an order to show cause for a preliminary injunction with TRO, which had gone before Acting Supreme Court Justice Roger McDonough, the duty-judge on that date, who had stricken the TRO, giving defendants, represented by AAG Kerwin, two weeks to respond;

(2) that defendants' response, signed by AAG Kerwin, was a September 15, 2016 cross-motion to dismiss plaintiffs' September 2, 2016 verified complaint and in opposition to their order to show cause for a preliminary injunction;

(3) that plaintiffs replied by a September 30, 2016 memorandum of law and affidavit of plaintiff Sassower seeking, *inter alia*, sanctions against AAG Kerwin and her superiors in the Attorney General's office, disqualification of defendant Attorney General Schneiderman from representing his co-defendants – and conversion of AAG Kerwin's cross-motion to summary judgment for plaintiffs on all ten of their causes of action.

Subsection A "Causes of Action Asserted in Complaint" (at pp. 1-2)

Excepting the final sentence of this section that reads "Plaintiffs seek declaratory and injunctive relief" (at p. 2), the whole of this one-paragraph section is a *verbatim* repetition of AAG Kerwin's varyingly misleading paraphrase of the ten causes of action of plaintiffs' September 2, 2016 verified complaint, appearing at ¶4 of her affirmation. AAG Kerwin paraphrase makes the following material changes to plaintiffs' causes of action:

- from the first three causes of action, she removes the word "unlawful", so as to make it appear that they are, exclusively, challenges to constitutionality, which they were not;

- from the fourth cause of action, she removes reference to the "statutory" nature of the violations—making it appear that the issues of unlawfulness and unconstitutionality are confined to legislative rule violations, which they are not;

- from the ninth cause of action, she adds the word "process" to "three-men-in-a-room budget deal-making" – as if it involves "process", which it does not;

- from the tenth cause of action, she removes its challenge to the lawfulness of the district attorney salary reimbursement item and to the propriety and lawfulness of the reappropriations.

AAG Kerwin furnishes no elaboration of the content of any of the ten causes of action. Most importantly, she does not reveal that the first four causes of action of plaintiffs' September 2, 2016 verified complaint each contain four paragraphs that they are not barred by Judge McDonough's dismissals of four comparable causes of action in plaintiffs' March 28, 2014 verified complaint and of four comparable causes of action in plaintiffs' March 31, 2015 verified supplemental complaint in their predecessor citizen-taxpayer action because Judge McDonough had accomplished these dismissals:

> "in the same fraudulent way: by completely disregarding the fundamental standards for dismissal motions, distorting the few allegations he cherry-picked, baldly citing inapplicable law, and resting on 'documentary evidence' that he did not identify – and which does not exist." (¶¶26, 37, 43, 51, September 2, 2016 complaint, underlining in the original)

Nor does she identify the substantiating proof to which those first four causes of action each referred: plaintiffs' 36-page, single-spaced analysis of Judge McDonough's August 1, 2016 decision, annexed as Exhibit G to their September 2, 2016 verified complaint, and demonstrating it to be:

> "a judicial fraud, falsifying the record in all material respects to grant defendants relief to which they are not entitled, *as a matter of law*, and to deny plaintiffs relief to which they are entitled, *as a matter of law*". (Exhibit G: at p. 2, underlining and italics in the original).

Subsection B "Similar Citizen-Taxpayer Action Commenced in 2014" (at pp. 2-3)

This two-paragraph subsection is materially false. Tellingly AAG Kerwin ends each paragraph by citing, in substantiation, Judge Hartman's December 21, 2016 decision – notwithstanding its fraudulence is established by plaintiffs' 23-1/2-page analysis thereof, annexed as Exhibit U to their February 15, 2017 order to show cause to disqualify Judge Hartman for demonstrated actual bias.

AAG Kerwin's first paragraph reads:

> "In the Complaint, Plaintiffs expressly state that the first, second, third, fourth, sixth, seventh, eighth, and ninth of their asserted causes of action are duplicative of causes of action asserted in a previous citizen-taxpayer suit, commenced in 2014 (the '2014 Action'). See Comp. ¶¶24, 35, 41, 49, 60, 70, 78, and 82, respectively. The Court further identified Plaintiffs' fifth cause of action in the Complaint as partially duplicative of two causes of action in the 2014 Action. Decision & Order at 3." (pp. 2-3, underlining added)

In fact, plaintiffs' September 2, 2016 complaint expressly states the pertinent facts pertaining to all ten causes of action, including the fifth. Indeed, ¶¶24, 35, 41, 49 of plaintiffs' September 2, 2016 complaint – to which AAG Kerwin cites – each identically read, as to the first, second, third, fourth causes of action – and encompassing the fifth, sixth, seventh, eighth, and ninth causes of action – that they are:

> "not barred by Justice McDonough's August 1, 2016 decision…– nor could it be as the August 1, 2016 decision is a judicial fraud, falsifying the record in all material respects to conceal plaintiffs' entitlement to summary judgment on causes of action 1-4 of their [March 28, 2014] verified complaint and causes of action 5-8 of their [March 31, 2015] verified supplemental complaint and, based thereon, to the granting of their motion for leave to file their [March 23, 2016] verified second supplemental complaint with its causes of action 9-16." (plaintiffs' September 2, 2016 complaint, ¶¶24, 35, 41, 49, underlining in the original).

This is further highlighted by plaintiffs' Exhibit U analysis – at pages 14-16.

As for AAG Kerwin's second paragraph (at p. 3), it copies Judge Hartman's December 21, 2016 decision in creating a fiction that Judge McDonough had rendered an "April 2016" decision dismiss[ing] the supplemental complaint and issu[ing] certain declarations validating the challenged budgets". There is no such "April 2016 decision" – and this error in Judge Hartman's December 21, 2016 decision is pointed out by plaintiffs' Exhibit U analysis – at page 14. The correct date of Judge McDonough's decision is August 1, 2016 – and its fraudulence is particularized by plaintiffs' Exhibit G analysis thereof, annexed to their September 2, 2016 complaint.

Subsection C: "Decision and Order Dated December 21, 2016" (at pp. 3-4)

The paragraphs under this subsection simply repeat, in conclusory fashion, the dispositions of Judge Hartman's December 21, 2016 decision – citing, the decision, in substantiation.

As for its final sentence "Defendants submitted their Verified Answer on January 30, 2017" (at p. 4), AAG Kerwin does not reveal that Judge Hartman's December 21, 2016 decision had directed defendants' answer within 30 days; or that the reason defendants' answer was verified was because plaintiffs' September 2, 2016 complaint was verified;[3] or that the verification of defendants' answer was not by any of the many defendants with personal knowledge of the facts, but, rather, by AAG Kerwin herself.

AAG Kerwin's "Argument" (at pp. 4-14)

AAG Kerwin's Point I (at pp. 4-6)
Conceals Plaintiffs' Entitlement to the First Branch of their February 15, 2017 Order to Show Cause

AAG Kerwin's Point I entitled "Plaintiff Does Not Identify Any Valid Ground to Disqualify Judge Hartman from Adjudicating this Litigation" is her response to the first branch of plaintiffs' February 15, 2017 order to show cause:

> "disqualifying Acting Supreme Court Justice Denise Hartman for demonstrated actual bias and interest, pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14, and vacating her December 21, 2016 decision & order by reason thereof for fraud and lack of jurisdiction; and, if denied, disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon her fairness and impartiality". (underlining in the original).

Her deceit begins with her concealment of the relief sought. She completely conceals plaintiffs' alternatively-requested disclosure.

As to disqualification, she states:

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3 Nowhere does AAG Kerwin reveal that plaintiffs' September 2, 2016 complaint was verified.

"Plaintiff's argument for disqualification appears to be that Judge Hartman is 'interested' in the litigation. This appears to be based on Judge Hartman's prior employment with Office of the New York Attorney General, as well as her position employment as a judge". (underlining added).

This is utterly deceitful – implying, as it does, that there is something uncertain as to the basis upon which plaintiffs are moving for Judge Hartman's disqualification. There is nothing uncertain about it. It is stated clearly by the first branch of plaintiffs' order to show cause – and elaborated upon further at ¶3 of plaintiff Sassower's February 15, 2017 moving affidavit, which reads:

"3. The overarching issue presented by plaintiffs' order to show cause is their entitlement to vacatur of the Court's December 21, 2016 decision and order... because it is legally and factually indefensible and fraudulent – the product of a judge disqualified by actual bias, born of financial interest and long-standing relationships with the named defendants, who made no disclosure, notwithstanding requested to do so, and then corruptly used her office to benefit herself and them. This is demonstrated by plaintiffs' annexed analysis of the decision (Exhibit U), which I wrote and to whose accuracy I swear." (underlining in the original).

In other words, the express and unequivocal first ground for Judge Hartman's disqualification is her "actual bias", demonstrated by her December 21, 2016 decision – as to which plaintiffs have furnished a substantiating analysis, annexed as Exhibit U.

It is without ever mentioning that Judge Hartman's disqualification is based on her "actual bias" and the proof thereof – plaintiffs' Exhibit U analysis – that AAG Kerwin's Point I declares:

"...Plaintiff should not be permitted to, by leveling baseless accusations of fraud and bias, create an artificial controversy to be used as an argument for recusal."

"...Plaintiff's general allegations of bias are not grounds for disqualification under 22 N.Y.C.R.R. §100.3(E) or Judiciary Law §14. Plaintiff is required to show proof that demonstrates bias or prejudice. See Modica v. Modica, 15 A.D.3d 635, 636 (2d Dep't 2005). Plaintiff offers nothing but her own circular reasoning and conclusory accusations. It is settled that '[a]bsent a legal disqualification under Judiciary Law 14, a court is the sole arbiter of the need for recusal, and its decision is a matter of discretion and personal conscience.' Galanti v. Kraus, 98 A.D.3d 559, 559 (2d Dep't 2012); see also Spremo, 155 Misc. 2d 796 at 800 ('A motion for recusal is addressed to the conscience of the court and in the absence of ill will to a litigant, a Judge has an affirmative duty not to recuse himself, but to preside over the case.').

Plaintiff has demonstrated no basis for disqualifying Judge Hartman from adjudicating this litigation." (at pp. 6-7).

This is utterly fraudulent – and establishing this, resoundingly, is plaintiffs' Exhibit U analysis, which is why AAG Kerwin's Point I never mentions it.

The foregoing is the sum total of AAG Kerwin's response to plaintiffs' "actual bias" ground for Judge Hartman's disqualification. As for her response to plaintiffs' second express ground for Judge Hartman's disqualification, *to wit*, her "interest", AAG Kerwin states as follows:

> "To the extent Plaintiff argues that Judge Hartman has an interest in the litigation because the 2016-2017 budget contains items regarding the judiciary, including salary recommendations, her argument is meritless. Courts have held that disqualification is not appropriate in cases involving judicial salaries. See Pines v. State of New York, 115 A.D.3d 80, 84-85 (2d Dep't 2014) (explaining that Rule of Necessity required adjudication, by judges, of a question whether statutory provision increased judicial salaries [fn1]). If disqualification is not appropriate in a case directly involving judicial salaries, it is certainly not appropriate here, where Plaintiff challenges a budget that contains recommendations regarding judicial salaries. Plaintiff commenced this litigation. She cannot reasonably be surprised that the official adjudicating the case is a judge. ..." (at pp. 5-6).

Her annotating footnote 1 reads:

> "Defendants do not suggest that the Rule of Necessity – which presumes the possibility of bias – applies here. Rather, the argument is that, even in cases directly involving, unlike here, judicial salaries, disqualification is not necessary or appropriate." (at p. 5).

This, too, is utterly fraudulent. There is nothing "to the extent" about plaintiffs' argument pertaining to Judge Hartman's financial interest – nor is it "meritless", either factually or legally.

As identified by plaintiffs' Exhibit U analysis (at pp. 3, 6), Judge Hartman has "HUGE" financial stake in this citizen-taxpayer action: a "$60,000-a-year judicial salary interest, plus the additional thousands of dollars in salary-based, non-salary benefits". Such financial interest is no less direct because it involves "salary recommendations". These "recommendations" have the "force of law" – and, indeed, this is not only challenged by plaintiffs' sixth cause of action, but it is

precisely how, since April 1, 2012, Judge Hartman's judicial salary has been boosted by $60,000 a year, with thousands of additional dollars in salary-based, non-salary benefits accruing to her. All such monies paid out to her – and to her judicial brethren – would be subject to a "claw back", upon an adjudication, in plaintiffs' favor, on the sixth, seventh, and eighth causes of action of their September 2, 2016 verified complaint – the ONLY adjudication the record supports.

As for AAG Kerwin's assertion that "Courts have held that disqualification is not appropriate in cases involving judicial salaries", this is false and she cites NO CASE for that proposition.

As for AAG Kerwin's citation to *Pines v. New York State*[4], it is for the "rule of necessity" – a proposition having NO RELEVANCE to the "actual bias" issue. As plaintiffs have repeatedly stated, including in the presence of AAG Kerwin:

> "the rule of necessity is that when all are disqualified, none are disqualified. However, where a judge cannot rise above his conflict of interest and manifests his bias..,by decisions that upend all cognizable adjudicative, evidentiary standards; that are in every respect fraudulent judicial decisions, then that judge must recognize his bias and step aside or be disqualified." (September 2, 2016 transcript of oral argument of plaintiffs' September 2, 2016 order to show cause, quoted at p. 8 of plaintiff Sassower's September 30, 2016 reply affidavit).

There is no legal authority that permits a judge who cannot or will not to rise above his financial interest to sit, let alone that requires him to do so.

AAG Kerwin then continues her deceit by purporting that plaintiffs have made a further argument pertaining to Judge Hartman's "interest in this litigation", which, they have never made. She states:

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[4] The relevant portion of *Pines v. State of New York* is as follows:

> "We also do not fail to recognize the perception that an inherent conflict of interest is presented by a case in which the pecuniary interests of the justices deciding it are implicated. We are nevertheless compelled, by the Rule of Necessity, to determine the merits of this appeal."

> "Nor does Judge Hartman's prior employment with the Office of the Attorney General constitute an interest in this litigation. Plaintiff fails to explain how Judge Hartman's former employment with the Office of the Attorney General constitutes a pecuniary interest in this litigation. To the extent Plaintiff suggests that some other provision of Judiciary Law §14 requires disqualification, Plaintiff is incorrect. Courts have consistently held that recusal of such judges is not required as a general matter, even where the judge had previously been involved in prosecuting the defendant. See, e.g., People v. Call, 287 A.D.2d 877, 878-79 (3d Dep't 2001) (holding defendant was not denied a fair trial because judge had been a district attorney years earlier who successfully prosecuted defendant); People v. Miller, 194 A.D2d 230, 231 (4th Dep't 1993) ('Defendant was not denied a fair trial by the failure of the Trial Judge to recuse himself on the ground that, several years earlier, the Trial Judge had served as District Attorney and he had prosecuted defendant on unrelated matters.')." (at pp. 5-6).

This is utterly false. Plaintiffs do not contend that Judge Hartman's former employment in the Attorney General's office gives her an "interest", pecuniary or otherwise. Rather, they contend that her actual bias is propelled not only by her own judicial compensation interest, but by her personal and professional relationships with the defendants, arising from her 30-year employment in the Attorney General's office, wherein she worked for defendant Attorney General Schneiderman – and, before that, for then Attorney General, now defendant Governor Cuomo – who appointed her to the bench, following which she was confirmed by defendant Senate. As to these and other defendants, as likewise with regard to supervisory levels at the Attorney General's office, plaintiffs have sought disclosure. AAG Kerwin's concealment of the requested disclosure concedes plaintiffs' entitlement thereto, *as a matter of law* – and, indeed, as reflected by plaintiffs' September 30, 2016 memorandum of law (at pp. 43-44), disclosure is a mandatory obligation.

AAG Kerwin's Point II (at pp. 7-12)
Conceals Plaintiffs' Entitlement to the Second Branch of their February 15, 2017 Order to Show Cause

AAG Kerwin's Point II entitled "Plaintiff Fails to Set Forth Grounds to Reargue or Renew Her Opposition to Defendants' Motion to Dismiss", is her response to the second branch of plaintiffs' February 15, 2017 order to show cause:

> "granting reargument and renewal, pursuant to CPLR §2221, of Justice Hartman's December 21, 2016 decision & order and, upon the granting of same, vacating it for fraud and lack of jurisdiction".

Only in the context of arguing in opposition to this second branch does AAG Kerwin identify plaintiffs' Exhibit U analysis of Judge Hartman's December 21, 2016 decision, disingenuously stating – as if there is some doubt:

> "Plaintiff appears to set forth her arguments supporting reargument and renewal in her 'Analysis of the December 21, 2016, Decision & Order of Acting Supreme Court Justice Denise A. Hartman," which Plaintiff deems to be a 'legal autopsy' of the Decision & Order. Pl.'s Ex U." (underlining added).

Tellingly, her citation is NOT to the relevant paragraph of plaintiff Sassower's February 15, 2017 moving affidavit, ¶7, which could not have been clearer in stating:

> "...not only does the analysis establish the Court's duty to disqualify itself and vacate its December 21, 2016 decision/order, but its duty to grant reargument. This, because in the euphemistic phrasing of CPLR §2221, the Court has 'overlooked or misapprehended' all the facts, law, and legal argument presented by the analysis...." (underlining in the original).

AAG Kerwin then asserts (at p. 7):

> "Plaintiff's 'analysis' consists of flawed reasoning, unsupportable assertions, and a fundamental misunderstanding of what questions are examined by a court in the context of a motion to dismiss a pleading."

The two subsections of her Point II, each fraudulent, then purport to demonstrate this.

AAG Kerwin's Subsection A – Reargument

This subsection, entitled "Plaintiff Fails to Show that She is Entitled to Reargue Her Opposition to [Defendants'] Motion to Dismiss" (pp. 7-12), opens with the claim that "Plaintiff fails to identify any relevant fact or law that was purportedly overlooked or misapprehended by the Court." (at p. 7). It similarly closes "Plaintiff's motion to reargue fails to identify any law or facts overlooked or misapprehended by the Court, or any other error by the Court justifying reargument." (at p. 12). These two declarations are utter frauds – as plaintiffs' Exhibit U analysis identifies a

mountain of facts and law that Judge Hartman "overlooked"– beginning with the threshold integrity issues presented by plaintiffs' September 30, 2016 memorandum of law (at pp. 1-6, 42-53).

As for the five pages spanning these two declarations, they are, in every paragraph, multiply false and deceitful. Thus, AAG Kerwin begins (at p. 8) by purporting that plaintiffs' analysis is "only partially correct" in asserting that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the reviewing court will 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" – because such does not apply in cases of "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity". Her inference is that plaintiffs' September 2, 2016 complaint and causes of action fit within that category. This is false – and, not surprisingly, AAG Kerwin furnishes no example of any of the supposedly "conclusory allegations" of any of the ten causes of action that would relieve Judge Hartman of the otherwise applicable standard.

Her next paragraph (at p. 8) then reprises: "Plaintiff also fails to identify any misapprehension of the law or facts in the specific rulings of the Decision & Order." She follows this by referencing the supposed correctness of Judge Hartman's dismissal of CJA as a party "because a corporation must appear by an attorney…and no attorney has entered an appearance in this action on behalf of CJA" – without reciting what plaintiffs' Exhibit U analysis had to say on the subject (at pp. 12-13), or contesting its accuracy in any respect. This, because it accuracy is unassailable and exposes, *inter alia*, Judge Hartman's failure to confront the threshold issue of plaintiffs' entitlement to the Attorney General's representation/intervention pursuant to Executive Law §63.1 and State Finance Law §123 *et seq*.

The next five paragraphs (at pp. 8-10) then purport to justify Judge Hartman's dismissals of nine of the ten causes of action of plaintiffs' September 2, 2016 complaint. To the extent AAG

Kerwin recites any fragment of what plaintiffs' Exhibit U analysis says about these dismissals, which she does in the most intentionally misleading, conclusory fashion, she does not contest its accuracy. Thus, she states:

> "As to causes of action one through four, Plaintiff alleges that her briefing in opposition [to] the Defendants' motion demonstrated that the judge in the 2014 Action was biased, and the Court in this action somehow 'concealed' Plaintiff's analysis. Pl.'s Ex. U at 14. Plaintiff also complains the Court 'concealed' causes of action one through four by not reciting them in their entirety [in] the Decision & Order, and 'concealed' Defendants (sic) arguments in their motion by not reciting them. Pl.s Ex. U at 15-16. Absent from Plaintiff's assertions is any demonstration, or any substantive discussion whatsoever, of the purported merits of causes of action one through four. The Court did not misapprehend or overlook any facts or law in its dismissal of causes of action one through four." (at pp. 8-9).

AAG Kerwin does not contest that Judge McDonough was biased, or that Judge Hartman's December 21, 2016 decision concealed plaintiffs' Exhibit G analysis of his August 1, 2016 decision establishing same, or any of the particulars plaintiffs presented in the cited pages 14-16 of their Exhibit U analysis. Suffice to add that the "merits" of plaintiffs' first four causes of action is obvious from their content – which is why Judge Hartman's December 21, 2016 decision concealed the ENTIRE content of each.

Likewise, as to plaintiffs' fifth cause of action, AAG Kerwin does not contest the accuracy of the Exhibit U analysis. Instead, she repeats the basis upon which Judge Hartman's December 21, 2016 decision dismissed the fifth cause of action as the basis for upholding that dismissal, thereupon comparably declaring that plaintiffs have not demonstrated the "merit" of their fifth cause of action. Her fraudulent, twisted presentation (at p. 9) is as follows:

> "Plaintiff argues that her fifth cause of action was not identical to any cause of action previously rejected in the 2014 Action because she never alleged violations of Article VII, §§4, 5, and 6 of the New York State Constitution in the 2014 Action until she filed her proposed second supplemental complaint in that action. Pl's Ex. U at 16. However, as the Court stated, the court in the 2014 Action rejected the causes of action Plaintiff sought to assert in her second supplemental complaint in that action as devoid of merit or materially unrelated to the legal theories and facts alleged in the

> earlier complaints. See Decision & Order at 3. Accordingly, the court in the 2014 Action did reject Plaintiff's claims based on Article VII, §§4,5, and 6 of the New York State Constitution. Therefore, a claim substantively identical to the fifth cause of action herein was rejected by the court in the 2014 Action. And, as with the first causes of action, Plaintiff alleges that the Court 'concealed' certain materials, but Plaintiff fails to address the purported merits of her fifth cause of action and fails to identify any relevant fact and law that the Court allegedly overlooked or misapprehended."

Obviously, violations of Article VII, §§4,5, and 6 of the New York State Constitution that plaintiffs never presented prior to their proposed March 23, 2016 second supplemental complaint – and which AAG Kerwin does not dispute they had not presented before then – were NOT "rejected" by Judge McDonough for any other purpose than for the granting of leave to plaintiffs to serve their March 23, 2016 second supplemental complaint, which he denied on grounds they were "materially unrelated to the legal theories and facts alleged in the earlier complaints". This is not a basis for their dismissal in a separate citizen-taxpayer action. Nor would such Article VII, §§4,5, 6 violations, aggregated by plaintiffs in the fifth cause of action of their September 2, 2016 complaint, be dismissible as "lack[ing] in merit". Apart from the fact that "lack[ing] in merit" not a ground for dismissal under CPLR §3211, controlling caselaw, such as *Korn v. Gulotta*, 72 NY2d 363 (1988), makes clear that budgets enacted in violation of governing provisions are null and void. Indeed, it is for this reason that plaintiffs' March 28, 2014 verified complaint in plaintiffs' first citizen-taxpayer action – Exhibit B to their September 2, 2016 verified complaint herein – is prefaced by a quote from *Korn v. Gulotta*:

> "A budget is a statement of the financial position of the government, for a definite period of time, based upon an estimate of proposed expenditures and anticipated revenues... The method by which public budgets are prepared is governed by the State Constitution and the applicable State statutes. The requirements contained in those documents are not particularly burdensome and permit the executive and legislative officials considerable freedom of action in implementing governmental operations and programs and providing for the revenues to fund them. The legal requirements they contain, however, are grounded in the general principles of fiscal responsibility and the accountability that underpins the regulation

> of all public conduct and they must be followed." (at 372-272, underlining added by plaintiffs' March 28, 2014 verified complaint).

As for AAG Kerwin's response to plaintiffs' analysis of Judge Hartman's dismissals of the seventh and eighth causes of action – which she misstates as plaintiffs' "causes of action eight and nine"— she also does not rebut plaintiffs' showing, including by any citation of law for Judge Hartman's *sua sponte* proposition that the Commission on Legislative, Judicial and Executive Compensation had to be named as a party, for which Judge Hartman had furnished no legal authority. The entirety of her presentation is as follows:

> "As for causes of action eight and nine, which are alleged against the Commission, Plaintiff only makes the unsupportable argument that an entity whose conduct is challenged does not need to be named as a party. Pl.'s Ex. U at 16. The Court did not overlook or misapprehend any facts or law in dismissing those causes of action." (at p. 9).

As for AAG Kerwin's response to plaintiffs' Exhibit U analysis of Judge Hartman's dismissal of their ninth cause of action, she also does not rebut plaintiffs' showing in any way. Rather, she reiterates argument from her September 15, 2016 memorandum of law in support of her cross-motion to dismiss the September 2, 2016 complaint – adopted by Judge Hartman's December 21, 2016 decision in dismissing the ninth cause of action, notwithstanding it had been rebutted by plaintiffs September 30, 2016 reply memorandum of law. Thus, she states:

> "As Defendants argued in their Memorandum of Law, Plaintiff fails to identify any violation of Article VII, §§3, 4, or 7 because nothing in those sections prohibits the Governor from meeting with the leaders of the Senate or Assembly to discuss the budget. Defs.' Mem. at 8-9. Plaintiff's motion to reargue does not identify any provision in Article VII, §§3, 4, or 7 that is violated by the Governor's meeting with leaders of the Legislature. Accordingly, Plaintiffs fail to identify any law or fact that the Court purportedly overlooked or misapprehended." (at p. 10).

This, in face of plaintiffs' Exhibit U analysis (at p. 18), stating:

> "As highlighted by plaintiffs' September 30, 2016 memorandum of law, plaintiffs' ninth cause of action (¶¶81-84) does not challenge budget 'negotiation' by the Governor, Temporary Senate President, and Assembly Speaker. It challenges their

budget dealmaking that includes the amending of budget bills – the unconstitutionality of which is compounded by the fact that they do it behind-closed-doors. Both are alleged by plaintiffs' ninth cause of action to unbalance the constitutional design – and, as set forth by the ninth cause of action, citing and quoting from the Court of Appeals' decision in *King v. Cuomo*, 81 N.Y.2d 247 (1993) – on which plaintiffs' ninth cause of action principally relies – and *Campaign for Fiscal Equity, Inc. v. Marino*, 87 N.Y.2d 235 (1995), also cited and quoted by plaintiffs' ninth cause of action – the standard for determining constitutionality of a practice is whether it unbalances the constitutional design. These two cases make plain that because the Constitution does not prohibit a practice does not make it constitutional – contrary to AAG Kerwin's deceit on her cross-motion – adopted by Justice Hartman.

As with AAG Kerwin, Justice Hartman's decision does not address, makes no showing, and does not even baldly claim, that three-men-in-a-room 'budget negotiations and amending of budget bills' – all taking place out of public view – is consistent with the text of Article VII, §§3 and 4 – or Article III, §10 of the New York State Constitution, 'The doors of each house shall be kept open', and Senate and Assembly rules consistent therewith: Senate Rule XI, §1; Assembly Rule II, §1; and Public Officers Law, Article VI. Similarly, the decision does not address, makes no showing, and does not even baldly claim, that three-men-in-a-room governance accords with the constitutional design, including as to size, reflected by Zephyr Teachout's law review article '*The Anti-Corruption Principle*', Cornell Law Review, Vol 94: 341-413 – legal authority to which plaintiffs' ninth cause of action also cites. As such, Justice Hartman's dismissal of the ninth cause of action is fraudulent." (at p. 18, underlining in the original).

As for AAG Kerwin's response to plaintiffs' Exhibit U analysis of Judge Hartman's dismissal of their tenth cause of action, she also does not rebut any aspect of its showing as to the fraudulence of that dismissal, which she entirely conceals, including by her twin falsehoods:

"Plaintiff fails to present any argument as to why the court purportedly erred by finding her tenth cause of action – regarding appropriations for district attorney salaries – was non-justiciable…Plaintiff fails to identify, in the Complaint, or in her motion to reargue, any provision of County Law §§700.10 or 700.11, or Judiciary Law 183-a, that was violated by the 2016-2017 budget bill…" (at p. 10).

As to these twin falsehoods, plaintiffs' Exhibit U analysis (at p. 19) could not have been more explicit, stating:

"…Justice Hartman's claim that "Plaintiff's itemization arguments are non-justiciable" is not only *sua sponte* – having not been advanced by AAG Kerwin – but fictional. Plaintiffs made no itemization arguments and the decision furnishes no

> detail as to what it is talking about. As for Justice Hartman's claim that 'the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary', her decision furnishes no law for the proposition that an appropriation can lawfully or constitutionally do so – and such contradicts plaintiffs' tenth cause of action that it cannot (¶¶92, 96-104)..." (at p. 19, underlining in the original).

With regard to plaintiffs' sixth cause of action – the only cause of action Judge Hartman's December 21, 2016 decision preserves as "cognizable" – AAG Kerwin offers no argument whatever to plaintiffs' assertion, in their Exhibit U analysis (at pp. 19-20), that the record before Judge Hartman not only establishes the "cognizability" of the sixth cause of action, but plaintiffs' entitlement to summary judgment on each of its five separate sections.

As for plaintiffs' Exhibit U analysis with respect to the indefensibility of Judge Hartman's denial of the preliminary injunction sought by their September 2, 2016 order to show cause (at pp.21-22), AAG Kerwin does not rebut any aspect of the analysis other than to besmirch it in false, conclusory terms, stating: "Plaintiff argues, in effect, that she has demonstrated likely success on the merits because she has demonstrated likely success on the merits. See Pl.'s Ex. U at 21." In other words, she reveals NONE of the specifics plaintiffs' Exhibit U analysis had furnished.

Finally, AAG Kerwin falsely purports (at p. 11) – citing "Pl's Ex. U at 23-24" – that "Plaintiff argues that the Decision & Order must be vacated because the Court did not set forth therein all of the papers relied upon, which is required by C.P.L.R. 2219(a)". In fact, plaintiffs' Exhibit U analysis never made such argument. Rather, plaintiff Sassower's February 15, 2017 moving affidavit (at ¶7) raised Judge Hartman's failure to furnish a CPLR §2219(a) listing as ground for reargument. AAG Kerwin does not deny that this was a proper ground for reargument, stating only (at p. 11): "Courts generally deem such a correction as a 'resettlement' of the recital paragraphs of the order."

AAG Kerwin's Subsection B – Renewal

This subsection, entitled "Plaintiff Fails to Show that She is Entitled to Renew Her Opposition to Defendants' Motion to Dismiss" (at pp. 12-13), is also predicated on falsehood and concealment. Thus, in the first of her two paragraphs under this heading, AAG Kerwin states:

> "...The main 'new fact[] not offered on the prior motion' by Plaintiff appears to be Judge Hartman's previous employment with the Office of the New York State Attorney General. See Sassower Aff ¶9-10. Plaintiff alleges that this fact was not available to her because she was awaiting a response to FOIL request for this information. Sassower Aff. ¶8. But C.P.L.R. 2221(e)(3) requires Plaintiff to set forth a reasonable justification for her failure to present that fact. That Plaintiff was awaiting FOIL responses does not justify her delay; because that information was publicly available on the website of the New York State Unified Court System. See https://iapps.courts.state.ny.us/judicialdirectory/Bio?JUDGE_ID=YWjtpJ3pEVHh6/pQwYGgiw%3D%3D ." (underling added to the word "appears").

Once again, AAG Kerwin uses the word "appears" in order to misidentify what plaintiff Sassower's moving affidavit had clearly stated, which was as follows:

> "9. The first FOIL request, dated September 23, 2016 (Exhibit L), sought 'all publicly-available records pertaining to the Court's nomination and May 5, 2015 confirmation to the New York Court of Claims. The responses from defendant Senate and defendant Cuomo are annexed (Exhibits W-1, W-2, and W-3).
>
> 10. The resume/curriculum vitae furnished by defendant Cuomo (Exhibit T-3) confirms what the Court was duty-bound to disclose and what plaintiffs' September 30, 2016 memorandum of law (at p. 5) requested the Court to disclose: its 30-year career in the office of the New York State Attorney General, spanning from 1985 to 2015 – in other words, working for defendant Attorney General Schneiderman and, before that, working for then Attorney General, now Governor, defendant Cuomo. Evident from the Court's concealment of this in its decision is that it was unwilling to even claim that it could be fair and impartial as to these defendants and as to the threshold issues before it relating to the Attorney General's office – and, as chronicled by the analysis (Exhibit U), it was not.
>
> 11. Insofar as the Court's resume description of its professional experience in the Attorney General's office describes itself as having:
>
> > 'briefed and argued hundreds of appeals in the New York State Appellate Divisions, the New York State Court of Appeals, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court. The subject matter...includes state and federal

constitutional law…'

> and that it had 'supervisory responsibility' over the workproduct of others, the Court clearly does not need the aid of plaintiffs' analysis to know that its December 21, 2016 decision is indefensible, legally and factually, and must be vacated/reversed on appeal, should it now fail to act, consistent with its duty, on this motion."

Thus, plaintiffs' renewal was, in essence, the new fact that by her December 21, 2016 decision Judge Hartman had not only failed to make the requested disclosure she was duty-bound to have made, but had failed to even claim that she could be fair and impartial. AAG Kerwin furnishes no justification for either.

No less deceitful is AAG Kerwin's second paragraph under this heading (at pp. 12-13), which was as follows:

> "Plaintiff also states that she sought, via FOIL, records related to the Office of the Attorney General's guidelines regarding conflicts of interest, and statutory obligations related to representation of clients. Sassower Aff. ¶12. But guidelines are not facts. Nor are those guidelines material to Defendants' motion. Plaintiff also identifies as a 'new fact' the 'Excellence Initiative' by Chief Judge Fiore (sic), but the Excellence Initiative is not a fact, and is not material to Defendants' motion."

AAG Kerwin furnished no legal authority for her bald assertion that the Attorney General's "guidelines" and the Chief Judge's "Excellence Initiative" are not facts. That they plainly are – and that such facts are "material" is evident from the further paragraphs of plaintiff Sassower's February 15, 2017 affidavit in support of renewal:

> "12. Plaintiffs' second FOIL request, dated September 28, 2016 FOIL (Exhibit N), sought publicly-available records pertaining to AAG Kerwin, as well as the Attorney General's 'guidelines, policies, and procedures' relating to conflict of interest, outside counsel, and his duties pursuant to Executive Law §63.1 and State Finance Law Article 7-A – information the Court would likely have been substantially knowledgeable of by virtue of its 30-year tenure in the Attorney General's office – including its eight-year overlap with AAG Kerwin, with whom it may have had professional and personal relationships. The responses from the Attorney General's office are annexed (Exhibits X-1, X-2, X-4).
>
> 13. Suffice to say that with regard to plaintiffs' request for

> 'the Attorney General's guidelines, policies, and procedures for determining the 'interest of the state', pursuant to Executive Law §63.1, and its duty to represent plaintiffs and/or intervene on their behalf in citizen-taxpayer actions, pursuant to State Finance Law Article 7-A',

the response came back that 'after a diligent search, the OAG located no responsive records.' (Exhibit X-4).

14. Finally, there is a further 'new fact' properly introduced in support of renewal –defendant Chief Judge DiFiore's so-called 'Excellence Initiative', whereby the Judiciary is purportedly striving for 'operational and decisional excellence in everything we do'. If so, this Court was obviously unaware of same when it rendered its December 21, 2016 decision – as was I, until I read those words in the Judiciary's executive summary to its December 1, 2016 budget request for fiscal year 2017-2018 – words repeated by Chief Administrative Judge Lawrence Marks in testifying before the Legislature on January 31, 2017 in support of the Judiciary's budget, at which I was present, awaiting my turn to testify in opposition.

15. The Court's decision on this motion will be another test of 'decisional excellence', nowhere evidenced by its December 21, 2016 decision, nor by the August 1, 2016 decision of Justice McDonough on which it substantially relies."

AAG Kerwin's Point III (at p. 13)
Conceals Plaintiffs' Entitlement to the Third Branch of their February 15, 2017 Order to Show Cause

AAG Kerwin's Point III, entitled "Plaintiff Fails to Establish any Basis to Vacate the Decision and Order", is her response to the third branch of plaintiffs' February 15, 2017 order to show cause:

> "vacating the December 21, 2016 decision & order, pursuant to CPLR §5015(a)(4) for 'lack of jurisdiction', by reason of Justice Hartman's disqualification for interest".

The two paragraphs under this title heading are each fraudulent and deceitful, beginning with their references to "subject matter jurisdiction" – to which AAG Kerwin refers five times. CPLR §5015(a)(4) makes no reference to "subject matter jurisdiction", but rather "lack of jurisdiction to render the judgment or order". Nor did plaintiffs refer to "subject matter jurisdiction".

The contrivance by AAG Kerwin that at issue is "subject matter jurisdiction" is seemingly motivated by her desire to purport – as she does in her final sentence of this section: "Moreover, in the absence of subject matter jurisdiction, the entire action must be dismissed." No dismissal of "the entire action" is warranted where, as here, the challenge to "jurisdiction" is based on a judicial disqualification for interest pursuant to Judiciary Law §14.

AAG Kerwin's opposition to this third branch of plaintiffs' February 15, 2017 order to show cause is as follows:

> "Plaintiffs' argument that the Court lacked subject matter jurisdiction is premised solely on Plaintiffs' groundless claim for disqualification of Judge Hartman. Because there is no basis to disqualify Judge Hartman, the Court had and has subject matter jurisdiction over this action." (at p. 13).

Here, as elsewhere in her March 22, 2017 opposition papers, AAG Kerwin's pretense that plaintiffs' February 15, 2017 order to show cause for Judge Hartman's disqualification is "groundless" and presents "no basis" is a flagrant fraud, so-established by plaintiffs' Exhibit U analysis – the accuracy of which her papers do not even contest, let alone controvert, in any respect.

AAG Kerwin's Point IV (at p. 14)
Conceals Plaintiffs' Entitlement to the Fourth Branch of their February 15, 2017 Order to Show Cause

AAG Kerwin's Point IV, entitled "Plaintiff is not Entitled to Costs", is her response to the fourth branch of plaintiffs' February 15, 2017 order to show cause:

> "granting such other and further relief as may be just and proper, including $100 motion costs pursuant to CPLR §8202".

"$100 motion costs" is the least of the relief embraced by plaintiffs' fourth branch – and mandated by the record before Judge Hartman – but this is the only relief she discloses, stating that "Motion costs are discretionary" and such discretion should not be exercised as:

> "Plaintiff filed an action with this Court in which nine of the ten causes of action she asserted had already been dismissed in prior litigation or were

> patently meritless. The Court properly dismissed those nine causes of action. See Decision & Order at 5-6. Plaintiff now files a groundless motion to disqualify the Judge and vacate the Decision & Order. Plaintiff should not be rewarded for filing a baseless and vexatious motion, in support of which she makes no substantive, reasoned argument" (at p. 14).

Such is utter fraud – repeating her prior frauds by her opposition papers, hereinabove demonstrated. Plaintiffs' February 15, 2017 order to show cause with its substantiating Exhibit U analysis presented a *prima facie* entitlement to the granting of the first three branches of their order to show cause – and, by reason thereof, the $100 motion costs specified by the fourth branch. AAG Kerwin's litigation fraud, by her opposition papers, only reinforce this.

AAG Kerwin's litigation fraud – triggering Judge Hartman's mandatory disciplinary responsibilities pursuant to §100.3(D)(2) – is properly addressed as part of the "other and further relief" requested by plaintiffs' fourth branch. Likewise, the further and related threshold integrity issues specified at the outset of plaintiffs' Exhibit U analysis as omitted, without adjudication, by the Court's December 21, 2016 decision – equally germane to this motion:

- plaintiffs' entitlement to the Attorney General's representation/intervention, pursuant to Executive Law §63.1 and State Finance Law Article 7-A;

- plaintiffs' entitlement to the disqualification of defendant Attorney General Schneiderman from representing his fellow defendants.

Such, moreover, would be consistent with the final words of AAG Kerwin's one-sentence "Conclusion" (at p. 15) that the Court "order such other and further relief as the Court shall seem (sic) just and equitable."

AAG Kerwin's "Conclusion" (at p. 15)

AAG Kerwin's final fraud – her single-sentence entreaty that "For all of the foregoing reasons" the Court "deny Plaintiff's motion and requests for relief in all respects" – is so-exposed by the foregoing analysis.