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Elena Ruth Sassower, Director

BY EXPRESS MAIL

August 28, 2019

New York Court of Appeals
Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

ATT: Chief Clerk/Legal Counsel to the Court John P. Asiello, Esq.

RE: NOW A THIRD TIME – Aiding the Court in Protecting Itself & Appellants…from the Litigation Fraud of the New York State Attorney General, NOW by its August 19, 2019 opposition to Appellants' August 8, 2019 Motion to Strike, to Disqualify the Attorney General, & for Other Relief (Mo. #2019-799)
Center for Judicial Accountability v. Cuomo, ...DiFiore – Citizen-Taxpayer Action

Dear Chief Clerk/Counsel Asiello:

This letter, pursuant to this Court's Rule 500.7, follows my phone conversation, on August 20, 2019, with Motion Clerk Rachel MacVean, Esq., stating that I had received, by e-mail, the Attorney General's August 19, 2019 opposition to appellants' August 8, 2019 motion (Mo. #2019-799) – and that it was yet a further fraud on the court.

I told Ms. MacVean that although this is so obvious that surely the Court does not need me to point it out, I nonetheless would do so – including so that I might expressly request further imposition of costs and sanctions pursuant to 22 NYCRR §130-1.1 *et seq*., which is capped at $10,000 in sanctions for "any single occurrence of frivolous conduct". This is now the third "occurrence of frivolous conduct" – and there are NO extenuating circumstances for the Court's exercising discretion and imposing less than a full $30,000 in sanctions:

- $10,000 for the Attorney General's frivolous March 26, 2019 letter opposing appellants' appeal of right and urging the Court to dismiss it, *sua sponte*, signed by Assistant Solicitor General Frederick Brodie, on behalf of Attorney General Letitia James and bearing the names of Solicitor General Barbara Underwood and Assistant Solicitor General Victor Paladino;

- $10,000 for the Attorney General's frivolous June 27, 2019 memorandum in opposition to both appellants' May 31, 2019 motion for reargument/renewal/vacatur, determination/certification of threshold questions, disqualification/disclosure by the Court, & other relief (Mo. #2019-645) and their June 6, 2019 motion for leave to appeal (Mo. #2019-646), signed by Assistant Solicitor General Brodie, on behalf of Attorney General James and bearing the names of Solicitor General Underwood and Assistant Solicitor General Paladino; and

- $10,000 for the Attorney General's frivolous August 19, 2019 opposition to appellants' August 8, 2019 motion to strike, to disqualify the Attorney General, and other relief (Mo. #2019-799), consisting of:

  (1) an August 19, 2019 affirmation of Assistant Solicitor General Brodie "under penalty of perjury pursuant to C.P.L.R. 2106"; and

  (2) an accompanying August 19, 2019 memorandum in opposition, signed by Assistant Solicitor General Brodie, on behalf of Attorney General James and bearing the name of Victor Paladino as "Senior Assistant Solicitor General" – without the name of Solicitor General Underwood.

There is no explanation why Solicitor General Underwood's name is absent from the instant submission – and I pointed this out to Ms. MacVean, inquiring about what would appear to be an *unprecedented* occurrence before the Court when the Attorney General is representing a party. Certainly, it is not consistent with the Solicitor General's function as head of the "Division of Appeals and Opinions", whose responsibility, as stated on its website[1], is:

> "preparing and arguing civil and criminal appeals in both state and federal courts. The Division determines which cases are to be appealed and determines which legal arguments will be advanced on behalf of the State of New York. The Division also provides advice and counsel to the Attorney General and to Attorneys throughout the Office."

Nor does the absence of Solicitor General Underwood's name relieve her of her supervisory responsibilities with respect to this case, pursuant to Rule 5.1 of New York's Rules of Professional Conduct "Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers" [R-1287], or reduce the willful and deliberate violations thereof for which she is liable, spanning the course of appellate proceedings in the Appellate Division, Third Department, when she was Attorney General, and before this Court, as Solicitor General – and as to which the fifth branch of appellants'

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1 https://ag.ny.gov/bureau/appeals-opinions-division.

August 8, 2019 motion seeks an order of referral to "appropriate disciplinary authorities". Indeed, clear from the record before this Court, containing the 14-month span of my initial letters and subsequent e-mails to then Attorney General/now Solicitor General Underwood, is that the whole catastrophic situation in which the State of New York – and this Court – now finds itself could have been easily avoided. All that was necessary was an appropriate response from then Attorney General Underwood to my May 16, 2018 NOTICE/complaint and my follow-up May 30, 2018 letter, each addressed to her.[2] Instead, she ignored each of these serious and substantial letters, without response – as likewise my May 18, 2018 letter and the succession of my subsequent e-mails apprising her of what was taking place, substantiated by the litigation papers. This includes my last e-mail to Solicitor General Underwood, on August 9, 2019, furnishing her with appellants' August 8, 2019 motion (Exhibit A)[3], to which the only response was Mr. Brodie's August 19, 2019 opposition, from which her name is omitted.

It doesn't take an attorney – let alone the experienced Mr. Brodie, working under the direct supervision of the experienced Mr. Paladino, both litigators in the prestigious "Division of Appeals and Opinions", operating under Solicitor General Underwood's direction – to know that any opposition to appellants' August 8, 2019 motion would not only be "frivolous", as defined by 22 NYCRR §131.1(c), but itself "fraud on the court", as defined by this Court's decision in *CDR Creances, S.A.S. v. Cohen, et al*, 23 NY3d 307 (2004), if it did not: (1) address *CDR Creances*, cited by appellants' notice of motion and pivotally discussed by my moving affidavit; and (2) rebut the four fact-specific, law-supported, record-referenced exhibits which my affidavit annexed and incorporated by reference, and to whose truth I swore. These four exhibits, which I stated to be dispositive of appellants' entitlement to all the relief sought by the notice of motion, are:

- Exhibit B: appellants' 37-page "legal autopsy"/analysis of the Attorney General's June 27, 2019 memorandum;

- Exhibit C: appellants' April 11, 2019 letter, constituting an 11-page "legal autopsy"/analysis of the Attorney General's March 26, 2019 letter;

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[2] My May 16, 2018 and May 30, 2018 letters to then Attorney General Underwood, so-significant that I furnished each twice to the Appellate Division, are Exhibits K-2 and L to appellants' May 31, 2019 motion to this Court, in substantiation of ¶¶56-57 of my moving affidavit, which is part of the section entitled: "The Financial and Other Interests of Attorney General Letitia James in this Appeal, and her Knowledge of, and Collusion in, the Corruption of the Proceedings Below and before this Court, Requiring her Disqualification & Appointment of Independent/Special Counsel" (at pp 32-41).

CJA's webpages for those letters, from which the enclosures and referred-to substantiating proof is accessible are here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/complaints-notice/5-16-18-notice-to-underwood.htm and here: http://www.judgewatch.org/web-pages/searching-nys/2018-legislature/5-30-18-ltr-to-underwood.htm.

[3] This August 9, 2019 e-mail (Exhibit A), with its chain of e-mails going back to July 3, 2019, is also attached to the affidavit of service for the August 8, 2019 motion.

- Exhibit D: appellants' 22-page March 26, 2019 letter in support of their appeal of right;

- Exhibit E: appellants' 33-page "legal autopsy"/analysis of the Appellate Division, Third Department's December 27, 2018 memorandum and order.

The Attorney General's opposition papers are BOTH "frivolous" and "fraud on the court".

Thus, Mr. Brodie's August 19, 2019 affirmation, although purporting (at ¶2) to "provide[] factual support for certain arguments made in the accompanying memorandum in opposition to plaintiff's motion", does NOT address either my moving affidavit or its exhibits – all mention of which it omits.

As for Mr. Brodie's "accompanying memorandum", it, like his affirmation, makes no mention of *CDR Creances v. Cohen*, and its only mention of my affidavit, six times, is in the context of citing to pages of its Exhibit B, without identifying what Exhibit B is – or refuting its accuracy, including of the cited pages. These six times are, as follows:

(1) at page 3, the August 19, 2019 memorandum, citing "Ex B at 23", states:

> "Plaintiffs disagree with respondents' reading of *Maron*, and therefore call respondents' statement 'fraudulent' (8/8/19 Sassower Aff., Ex B at 23). But the parties' disagreement over *Maron*'s meaning and application is not 'fraud': rather, it is a disputed issue of law that the Court may decide for itself." (underlining added).

Mr. Brodie here omits ALL specifics. He omits the proposition for which his June 27, 2019 memorandum had cited *Maron v. Silver*, namely, that this Court did not have to "formally" invoke "Rule of Necessity" in dismissing appellants' appeal of right, as well as appellants' rebuttal thereto, at page 23 to 25 of Exhibit B, explaining why it was "fraudulent", which began, as follows:

> "...Nothing in the Court's *Maron* decision stands for the proposition that judges need not 'formally' invoke 'Rule of Necessity' in situations where it might be applicable. To the contrary, in *Maron*, the Court 'formally' invoked 'Rule of Necessity', seemingly on its own initiative, without any disqualification motion having been made by the parties, stating, as follows:

> 'III. Rule of Necessity
>
> Members of the Court of Appeals are paid via the salary schedule delineated in Judiciary Law §221 and therefore will be affected by the outcome of these appeals. Ordinarily, when a judge has an interest in litigation, recusal is warranted. But this case falls within a narrow exception to that rule. Because no other judicial body with jurisdiction exists to hear the constitutional issues raised herein, this Court must hear and dispose of these issues pursuant to the Rule of Necessity (*see Maresca v Cuomo,* 64 NY2d 242, 247 n 1 [1984], *appeal dismissed* 474 US 802 [1985] [addressing a challenge to the State Constitution's mandatory retirement age requirements for certain state judges], citing *Matter of Morgenthau v Cooke,* 56 NY2d 24, 29 n 3 [1982]).' (underlining added).

Likewise, in BOTH *Maresca* and *Morgenthau*, the Court 'formally' invoked 'Rule of Necessity'.[fn] Consequently, the Attorney General has ZERO legal authority to support her concocted, utterly frivolous assertion that the Court did not have to 'formally' invoke 'Rule of Necessity' in rendering its May 2, 2019 Order – which is her euphemism for the Court's not referring to 'Rule of Necessity', at all."

In other words, the cited "Ex B at 23", is uncontested.

(2) at page 4, the August 19, 2019 memorandum, citing "Ex. B at 5-7, 10-11, 13-14, 16-17, 29-31", states:

> "At multiple points in their moving papers, plaintiffs attempt to refute the June 27 memorandum's arguments by citing their own motions for reargument and leave to appeal in this Court and their two SSD letters (*See, e.g.*, 8/8/19 Sassower Aff. Ex. B at 5-7, 10-11, 13-14, 16-17, 29-31.) The instant motion therefore amounts to a reply memorandum in support of plaintiffs' previous motions for reargument and leave to appeal." (underlining added).

Here, too, the cited "Ex. B at 5-7, 10-11, 13-14, 16-17, 29-31" – whose content Mr. Brodie omits – is uncontested. That content particularizes a multitude of frauds committed by the June 27, 2019 memorandum, entitling appellants to make a motion to strike it. Indeed, the August 19, 2019 memorandum furnishes NO law constraining appellants from making the motion they have made.

(3) at page 7, the August 19, 2019 memorandum, citing "Ex. B at 29", states:

> "Plaintiffs argue that the Attorney General has a financial interest in this case because a similar commission subsequently recommended increases in executive-branch pay. (8/8/19 Sassower Aff. Ex. B at 29.) Plaintiffs are incorrect. As explained in the June 27 memorandum (at 3-4), the complaint contained no claims as to any budget year after 2016-17. Plaintiffs' motion for leave to supplement the complaint to add claims based on subsequent years was denied. (Record on Appeal ['R'] 68-69.) The pay raise recommended in the challenged commission report affected only the judiciary. (See R1083-1102.)[fn2] Thus, the Attorney General has no financial stake in this case." (underlining added).

There is NOTHING "incorrect" about the cited "Ex B at 29", other than Mr. Brodie's mischaracterization of its content to remove its challenge to the constitutionality of Chapter 60, Part E, of the Laws of 2015, establishing the Commission on Legislative, Judicial and Executive Compensation. As correctly stated by "Ex B at 29":

> "the Attorney General HAS 'a financial interest in this case'. Appellants' sixth cause of action [R.109-112 (R.187-201)] challenges the constitutionality of the commission scheme through which the Attorney General will obtain future salary increases – Chapter 60, Part E, of the Laws of 2015. Indeed, a declaration of unconstitutionality will result in the voiding of the committee scheme through which the Attorney General has already obtained a salary increase and will obtain two more increases in each of the next two years. ¶55A of appellants' [May 31, 2019] motion specifies both of these aspects of 'financial interest' as follows – and its accuracy is not contested by the Attorney General:
>
> > '(A) [The Attorney General], like her fellow defendant-respondents and this Court's judges, has a HUGE salary interest in appellants' sixth cause of action for declarations that Part E, Chapter 60 of the Laws of 2015 is unconstitutional, *as written* and by its enactment [R.109-112 (R.187-201)]. The Commission on Legislative, Judicial and Executive Compensation it creates is scheduled to be re-established on June 1, 2019 – and her own salary increases are within the purview of its seven members, two of whom will be defendant DiFiore's appointees [R.1080-1082].
> >
> > And, already, Attorney General James is benefiting from the materially identical Part HHH, Chapter 59 of the Laws of 2018 that established the Legislative and Executive

> Compensation Committee, which, like Part E, Chapter 60 of the Laws of 2015, was an unconstitutional rider, inserted into the budget as a result of behind-closed-doors, three-men-in-a-room budget deal-making. By its December 10, 2018 Report – replicating ALL the violations which are the subject of appellants' seventh and eighth causes of action [R.112-114 (R.201-213)] – she benefited from a $38,5000 salary raise.
>
> On December 31, 2018, the Attorney General's salary, pursuant to Executive Law §60, was $151,500. As a result of the 'force of law' recommendations of the Committees' December 10, 2018 Report, it zoomed to $190,000, effective January 1, 2019. On January 1, 2020, this will shoot up another $20,000 to $210,000, and then, on January 1, 2021, by another $10,000 to $220,000." (capitalization, underlining, italics, in the original)

The August 19, 2019 memorandum does not contest this.

(4) at page 8, the August 19, 2019 memorandum, citing "Ex. B at 28", states:

> "...here, as the Third Department found, the Attorney General's interests and those of her clients are 'united.' (Brodie Aff. Ex. 2 at 4.) Plaintiffs do not contest the point. (See Sassower Aff. Ex. B at 28.)" (underlining added).

This conceals the content of "Ex. B at 28", which states:

> "The conflicts of interest from which the Attorney General suffers are NOT between her and her clients – and appellants' [May 31, 2019] motion, whose ¶55A-D specifies the Attorney General's conflicts of interests, does NOT assert that they are. Consequently, this [] paragraph is additionally meaningless." (capitalization in the original).

The August 19, 2019 memorandum does not contest this, but, instead, regurgitates the same "meaningless" argument as "Ex. B at 28" had exposed – ignoring, just as the June 27, 2019 memorandum had, the facts and law particularized by appellants' May 31, 2019 motion pertaining to the Attorney General's conflict of interest, summed up at its ¶54:

> "the Attorney General's 'preeminent duty of representation is not to his co-defendants who he has heretofore protected, but to the state, to

which he has a diametrically-conflicting interest by reason of his salary interest in the compensation issues':[fn30]

> 'the Attorney General acts *parens patriae,* asserting a 'quasi sovereign' interest for the common good of the people of the State of New York. *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S.492, 600-08, 102 S. Ct. 3260, 3265-69, 73 L. Ed. 2d 995 (1982); *People by Abrams v. 11 Cornwell Co.,* 695 F.2d 34, 38-40 (2d Cir.1982), *vacated in part on other grounds,* 718 F.2d 22 (2d Cir.1983) (en banc).',
>
> USA v. Terry,
> 806 Fed Supp. 490, 494 (SDNY 1992)

'in case of conflict of duties, the attorney general's primary obligation is to the body politic rather than its officers, departments, commissions, or agencies.',

7 American Jurisprudence 2d, §12:
'Attorney general as counsel for,
or employment of their own counsel by,
state officers and agencies'

> 'In case of a conflict of duties, the primary obligation of the attorney general is to the state rather than to its officers or agencies,[fn] and where he is charged with the duty of requiring performance by state officials or bodies of their duties, this duty is not overcome by a conflicting requirement that he shall represent such officials or bodies in court proceedings, but the duty to prosecute overcomes the duty to represent.[fn]'

7A Corpus Juris Secundum §11(b):
'Conflicting Interests'".

"[fn30] *See*, also, 6 New York Jurisprudence 2d 'Attorney at Law', §70: 'Representation of Conflicting Interests'

> 'An attorney owes to his client undivided loyalty unhampered by his obligations to any other person.[fn] The general rule is that a lawyer may not represent adverse interests or undertake to discharge conflicting duties[fn] and must avoid even the appearance of representing conflicting interests,[fn] except where the conflict of interest is nominal or negligible, or where there has been complete disclosure[fn] or consent.[fn]"

Mr. Brodie has not contested this.

(5) at page 9, the Attorney General's August 19, 2019 memorandum, citing "Ex. B at 31-32", states:

> "Plaintiffs argue that Executive Law §63(1) requires a determination that the Attorney General's representation of respondents is in 'the interest of the state.' (8/8/19 Sassower Aff. Ex. B at 31-32.) Although it is unnecessary to do so, respondents have provided evidence that such a determination was made. (Brodie Aff. ¶3)." (underlining added).

Once again, Mr. Brodie conceals the content of the cited pages – "Ex. B at 31-32" – these being a rebuttal of the paragraph of his June 27, 2019 memorandum (at p. 17) stating:

> "Conversely, the Attorney General's defense of respondents is expressly authorized by Executive Law §§63(1) and 71(1).[fn2]"
>
> [fn2] "Although such proof was unnecessary, respondents also provided the Third Department with their counsel's affirmation that '[t]he Office of the Attorney General has determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal.' (11/2/18 Brodie Aff., ¶3.)"

Appellants' rebuttal, by their "Ex. B at 31-32", was as follows:

> "The first sentence of Executive Law §63.1 – not quoted by the [Mr. Brodie's June 27, 2019] memorandum – specifies the Attorney General's duty to:
>
> > 'Prosecute and defend all actions and proceedings in which the state is interested…in order to protect the interest of the state.'
>
> In other words, Executive Law §63.1 also expressly authorizes the Attorney General to prosecute respondents – and the determination of whether to prosecute or defend is contingent on 'the interest of the state'.
>
> As for the quoted '¶3' of 'counsel's affirmation', dated '11/2/18', by Assistant Solicitor General Brodie, such was NOT 'unnecessary', as appellants' October 23, 2018 motion to strike respondents' brief – to

which his affirmation was in opposition – sought, by its second branch, an order:

> 'declaring Attorney General Underwood's appellate representation of respondents unlawful for lack of any evidence – or even a claim – that it is based on a determination pursuant to Executive Law §63.1 that such is in 'the interest of the state', with a further declaration that such taxpayer-paid representation belongs to appellants'.

Nor was Assistant Solicitor General Brodie's ¶3 'proof' of anything, except of 'obvious perjury'. Appellants' November 13, 2018 reply[fn11] stated this, as follows:

> '...¶3...is NOT evidence, as it is completely conclusory, failing even to provide the names of such persons in the attorney general's office as supposedly 'determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal.' – or any evidence in corroboration. Indeed, it is an obvious perjury, rebutted by ALL the EVIDENCE constituting the record of this citizen-taxpayer action below, as well as ALL the EVIDENCE constituting the record of the proceedings before this Court with respect to appellants' three motions, each intended to ensure the integrity of the appellate proceedings – each of which Mr. Brodie corrupted with litigation fraud, because he had NO legitimate defense.'

As for Executive Law §71.1, it merely authorizes the Attorney General to appear in cases involving 'the constitutionality of an act of the legislature, or a rule or regulation adopted pursuant thereto', it does not require him to do so. Nor could it, as the Attorney General could not be required to 'litigate in support of the constitutionality' where a statute, rule, or regulation is, in fact, unconstitutional. This is the situation at bar – and appellants pointed this out previously, including by their October 4, 2018 reply brief (at p. 11) and November 13, 2018 reply to the Attorney General's November 2, 2018 opposition to their October 23, 2018 motion.[fn12] The Appellate Division denied the motion, without facts, law, or reasons, by its

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"[fn12] See appellants' November 13, 2018 reply affidavit, at Exhibit S, p. 3."

> November 13, 2018 decision and order on motion." (underlining and capitalization in the original)."

It is without contesting the accuracy of this "Ex. B at 31-32", in any respect, that Mr. Brodie, in addition to baldly resting (at p. 9) on Executive Law §71.1, repeats the "obvious perjury" of ¶3 of his November 2, 2018 affirmation before the Appellate Division with the near identical ¶3 of his August 19, 2019 affirmation before this Court, reading:

> "The Office of the Attorney General has determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action in Supreme Court, Albany County; in the Appellate Division, Third Department; and in plaintiffs' attempted appeals to this Court."[4]

Such new ¶3 is – likewise— NOT evidence, as it is completely conclusory, also failing even to provide the names of such persons in the Attorney General's office as supposedly "determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action in Supreme Court, Albany County; in the Appellate Division, Third Department; and in plaintiffs' attempted appeals to this Court." It, too, is rebutted by ALL the EVIDENCE constituting the record, establishing that, at all levels, the Attorney General corrupted the judicial process with litigation fraud, because he/she had NO LEGITIMATE DEFENSE.

(6) at page 10, the August 19, 2019 memorandum, also citing "Ex. B at 31", states:

> "Plaintiffs are not entitled to a declaration that the Attorney General's representation 'belongs to' them (*see* Notice of Motion ¶2). The Attorney General is not authorized to represent private parties like plaintiffs. (*See* June 27 mem. at 16-17 and cases cited.) Plaintiffs' causes of action under the citizen-taxpayer statute are personal in nature. *See* State Finance Law §123 (stating that 'each individual citizen and taxpayer of the state has an interest' in proper disposition of state funds); *id.* §123-b (providing that 'any person' may 'maintain an action' under citizen-taxpayer statute). Plaintiffs' bare assertion that they, themselves represent the 'public interest' (Sassower Aff. Ex. B at 31) does not change the law on this point." (underlining added)."

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[4] ¶3 of Mr. Brodie's November 2, 2018 affirmation in the Appellate Division stated, in full:

> "The Office of the Attorney General has determined that it is in the interest of the State of New York to defend the respondents against the above-captioned action, both in Supreme Court, Albany County, and on appeal."

Here, again, Mr. Brodie conceals the content of the cited "Ex. B at 31", which had stated:

> "Apart from the fact that appellants are explicitly acting 'on behalf of the People of the State of New York and the public interest', the Attorney General is 'authorized' to represent private parties, pursuant to Executive Law §63.1, where such is in 'the interest of the state'. Likewise, the Attorney General is authorized to represent and/or intervene on behalf of private parties by State Finance Law Article 7-A. Nothing in the three cited cases is to the contrary – and the Attorney General's deceitful citation to *Cliff v. Vacco* and *Waldman v. State of New York* mirrors the even more deceitful citation to them in the Appellate Division, exposed by appellants' November 13, 2018 reply in further support of their October 23, 2018 motion to strike the Attorney General's September 21, 2018 respondents' brief.[fn10]" (underlining in the original).

The August 19, 2019 memorandum does not contest this – nor the proposition that the Attorney General's litigation fraud, detailed by the motion's Exhibits B and C, and by Exhibits D and E on which those exhibits materially rest, establishes, *prima facie*, that her duty, pursuant to Executive Law §63.1, is not to be defending, but prosecuting because there is NO LEGITIMATE DEFENSE to appellants' September 2, 2016 verified complaint [R.87-392] and to the course of proceedings thereon. Instead, the memorandum puts forward the further fraud that before this Court is only appellants' "bare assertion that they, themselves represent the 'public interest'".

* * *

Suffice to say that the Attorney General's August 19, 2019 memorandum, in addition to not rebutting the pages of "Ex. B" to which it six times cites, does not even refer to Exhibits C, D, and E. It references appellants' April 11, 2019 letter once (at p. 13) – without identifying that it is Exhibit C – stating:

> "...the Court has already considered – and apparently rejected – plaintiffs' argument for striking the [Attorney General's] March 26 SSD letter. On April 11, 2019, plaintiffs sent the Court a 16-page, single-spaced letter arguing that respondents' March 26 letter was a 'fraud on the court.' The Court took no action in response."

This does not contest the accuracy of appellants' April 11, 2019 letter – Exhibit C to my affidavit.

As for appellants' March 26, 2019 letter in support of their appeal of right and its accompanying "legal autopsy"/analysis of the Appellate Division, Third Department's December 27, 2018 memorandum and order, the August 19, 2019 memorandum makes no reference to them at all.

Their accuracy – Exhibits D and E to my affidavit – is, therefore, uncontested.

On top of this, the August 19, 2019 memorandum does not contest appellants' entitlement to the equal protection of the Court's *own* caselaw, identified by their notice of motion, *to wit*,

- *CDR Creances S.A.S. v. Cohen, et al*, 23 NY3d 307 (2014), in support of appellants' first branch – to strike;

- *Matter of Rowe*, 80 NY2d 336, 340 (1992), and *Greene v. Greene*, 47 NY2d 447, 451 (1979), in support of appellants' second branch – to disqualify the Attorney General from representing her fellow respondents herein;

- *Matter of AG Ship Maintenance Corp v. Lezak*, 69 NY2d 1 (1986), in support of appellants' third branch – for costs and sanctions pursuant to 22 NYCRR §130-1.1 *et seq.*;

- *Amalfitano v. Rosenberg*, 12 NY3d 8, 14 (2009), in support of appellants' fourth branch – for such determination as would afford them treble damages in a civil action pursuant to Judiciary Law §487(1) against Attorney General James and her culpable attorney-staff based on their June 27, 2019 memorandum and March 26, 2019 letter.

Instead, it is without confronting ANY of the facts and law presented by appellants' August 8, 2019 motion that Mr. Brodie pretends, in conclusory fashion, that there is nothing sanctionable or fraudulent about his June 27, 2019 memorandum and his March 26, 2019 letter – and regurgitates deceits and mischaracterizations that are rebutted not only by the motion, but by appellants' previous replies to his advocacy before the Appellate Division, Third Department, *to wit*, (1) his opposition to all four of their motions to safeguard the integrity of the appellate proceedings; (2) his September 21, 2018 respondents' brief; and (3) his November 13, 2018 oral argument of the appeal.[5] Indeed, Mr. Brodie's August 19, 2019 affirmation and memorandum are modeled, largely *verbatim*, from his November 2, 2018 affirmation and memorandum opposing appellants' October 23, 2018 motion to strike his September 21, 2018 respondents' brief. Here, as there, he purports, by his August 19, 2019 memorandum:

"Plaintiffs misapprehend the concept of 'fraud'" (at p. 2);

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[5] A copy of the record before the Appellate Division is in the Court's possession, having been furnished by appellants in substantiation of their March 26, 2019 letter in support of their appeal of right. CJA's website posts the Appellate Division record here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/record-app-div.htm – and includes the VIDEO of the November 13, 2018 oral argument (see VIDEO excerpt at 12 mins/33 sec.) and the VIDEO of the August 2, 2018 oral argument of the TRO sought by appellants' first appellate motion (at 28 mins/28 secs).

> "plaintiffs misunderstand the nature of advocacy in the adversary system, and consequently err in labeling as 'fraudulent' any argument by respondents that (a) does not repeat plaintiffs' claims verbatim; or (b) takes a legal position that plaintiffs oppose." (at pp. 2-3);
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> "Because plaintiffs' papers and the record are before the Court, and respondents' counsel have urged the Court to read them,[fn1] nothing has been concealed." (at p. 3);
>
> "counsel followed an objectively reasonable process [designed] to avoid errors..." (at pp. 4-5, 13) – "a process that objectively ensured accuracy" (at p. 12).
>
> "counsel also acted in subjective good faith." (at pp. 5, 14)

Now, as then, these statements – and others of that ilk as:

> "The June 27 memorandum was not fraudulent, but rather was filed in subjective good faith after an objectively reasonable process of research and preparation. Plaintiffs' disagreement with (seemingly) everything respondents say does not make respondents' papers sanctionable." (at p. 1);
>
> "The record before this Court presents no support for striking the June 27 memorandum as plaintiffs request (Notice of Motion ¶1)." (at p. 2)
>
> Specifically, counsel has no intent to defraud the Court and continues to believe that the arguments in the June 27 memorandum have merit..." (at p. 5)

are all brazen frauds, <u>proven</u> by the motion's Exhibits B, C, D, and E, which the August 19, 2019 memorandum does not address. Likewise, brazenly fraudulent, is the entirety of Mr. Brodie's August 19, 2019 affirmation, with its title headings, corresponding to those in the memorandum:

> "Respondents' June 27 Memorandum Was Prepared Through an Objectively Reasonable Process Designed to Avoid Errors" (at pp. 3-5);
>
> "Respondents' March 26 SSD Letter Was Prepared Through an Objectively Reasonable Process Designed to Avoid Errors" (at p. 5);
>
> "I Have Represented the Respondents On Appeal in Subjective Good Faith" (at pp. 5-7), whose concluding two paragraphs read:
>
> > "17. I have no desire to defraud the Court in this or any other appeal. To the contrary, I take care to ensure that the papers I submit to courts are trustworthy.

> 18. I continue to believe that the arguments in the June 27 memorandum and the March 26 SSD letter have legal and factual merit..."

As Mr. Brodie identifies himself as "experienced counsel",[6] he surely knows that it is frivolous, *per se*, for him to defend his June 27, 2019 memorandum with his June 27, 2019 memorandum and to defend his March 26, 2019 letter with his March 26, 2019 letter – rather than confronting appellants' Exhibit B and Exhibit C "legal autopsy"/analyses, demonstrating each to be indefensible factually and legally – which is what he does in stating:

> "The legal basis for each of respondents' arguments may be found in the various cases, statutes, and other legal authorities cited in the text and footnotes pertaining to that particular argument in the June 27 memorandum and the March 26 SSD letter. The basis for each factual statement in the June 27 memorandum and the March 26 SSD letter may be found in the citations to the record that pertain to the statement." (Brodie 8/19/19 affirmation, at ¶18).
>
> "The legal arguments in the June 27 memorandum are based on the statutes, case law, and other legal authorities cited therein. (Brodie Aff. ¶18.) Similarly, the memorandum's factual statements are supported by citations to the record. (Brodie Aff. ¶18.) The memorandum falls well within the boundaries for permissible advocacy in this Court." (Brodie 8/19/19 memorandum, at p. 11).
>
> "...like the June 27 memorandum, the March 26 SSD letter was prepared through an objectively reasonable process designed to avoid errors. (Brodie Aff. ¶12.) The basis for each factual statement in the March 26 SSD letter may be found in the record cites provided, and the basis for each legal argument may be found in the cases, statutes, and other authorities cited. (Brodie Aff. ¶18.) Moreover, the March 26 SSD letter was submitted in subjective good faith. (Brodie Aff. ¶18.)" (Brodie 8/19/19 memorandum, at pp. 13-14).

Similarly, Mr. Brodie is presumed to know that it is further fraud for him to defend himself and the Attorney General by resort to the judicial decisions below—as he does in stating:

> "Indeed, respondents prevailed on the merits (a) in Supreme Court before Justice McDonough; (b) in Supreme Court before Justice Hartman; (c) in the Appellate Division when it decided plaintiffs' appeal. The fact that two Supreme Court Justices and eight different Justices of the Appellate Division agreed with

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6 August 19, 2019 memorandum, at p. 4; affirmation at ¶¶13-16.

> respondents' position is a strong indication that the Attorney General's arguments are not frivolous." (Brodie 8/19/19 memorandum, at p. 11) –

when he has not contested the accuracy of the motion's Exhibit E "legal autopsy"/analysis of the Appellate Division's December 27, 2018 memorandum and order, establishing it to be:

> "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause' of the United State Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961), *Thompson v. City of Louisville*, 362 U.S. 199 (1960) – and, comparably, under Article I, §6 of the New York State Constitution, 'No person shall be deprived of live, liberty or property without due process' [,]...wip[ing out any semblance of 'due process of law', falsifying the record, *in toto*, and upending ALL ethical, adjudicative, and evidentiary standards" (Exhibit E, at p. 1) –

– replicating the decisions of Court of Claims Judges/Acting Supreme Court Justices Roger McDonough [R.335-337; R.226-334; R.315-325] and Denise Hartman [R.527-535; R.49-51; R.52-60; R.68-79; R.31-41], likewise the subject of comparable "legal autopsy"/analyses, whose accuracy neither he nor anyone else has contested:

- appellants' "legal autopsy"/analysis of Judge McDonough's August 1, 2016 amended decision and order, encompassing his prior two decisions [R.338-373];

- appellants' "legal autopsy"/analysis of Judge Hartman's December 21, 2016 decision [R.554-577];

- appellants' "legal autopsy"/analysis of Judge Hartman's May 5, 2017 decision and May 5, 2017 amended decision [R.1002-1007, at ¶¶5-8, 10-11];

- appellants' "legal autopsy"/analysis of Judge Hartman's June 26, 2017 decision [R.1293-1319];

- appellants' "legal autopsy"/analysis of Judge Hartman's November 28, 2017 decision and judgment [R.9-30].

Common to all these judicial decisions – and identified by the "legal autopsy"/analyses – is their concealment of essentially ALL the facts, law, and legal argument presented by appellants, including pertaining to the Attorney General's litigation fraud, conflicts of interest, and his duty, pursuant to Executive Law §63.1 and State Finance Law, Article 7-A, to represent and/or intervene on behalf of appellants "acting ...on behalf of the People of the State of New York & the Public Interest" in this citizen-taxpayer action and its predecessor, to which there was NO LEGITIMATE DEFENSE.

As for the caselaw cited by the Attorney General's August 19, 2019 memorandum, it fully substantiates appellants' entitlement to the relief sought on their motion, as appellants' Exhibits B, C, D, and E overwhelmingly meet the "high" evidentiary standard that caselaw demands, *to wit*, "a clear showing of willful and contumacious" conduct, *Strong v. Delemos*, 172 AD3d 940, 942 (2d Dep't 2019), "a clear showing of [] deliberate and willful" conduct, *Washington v. Alco Auto Sales*, 199 A.D.2d 165, 165 (1st Dep't 1993). "clearly demonstrated that the [conduct] was deliberate and contumacious", *Sayomi v. Rolls Kohn & Assocs.*, 16 A.D.3d 1069, 1070 (4th Dep't 2005); "the crucial element of deliberate or contumacious behavior", *Batra v. Office Furniture Service, Inc.*, 275 A.D.2d 228, 231 (1st Dep't 2000); "a clear showing that the [conduct] is willful, contumacious, or in bad faith", *Mohammed v. 919 Park Place Owners Corp.*, 245 A.D.2d 351, 352 (2d Dep't 1997); "conclusive showing of willful or contumacious conduct or bad faith necessary to justify the extreme and drastic sanction", *Mushatt v. Tompkins Community Hosp.*, 228 A.D.2d 925, 926 (3d Dep't 1996); "the only liability standard recognized in Judiciary Law §487 is that of an intent to deceive", *Dupree v. Voorhees*, 102 A.D.3d 912, 913 (2d Dep't 2013); "requires a showing of 'egregious conduct or a chronic and extreme pattern of behavior'…Allegations regarding an act of deceit or intent to deceive must be stated with particularity", *Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 615 (1st Dep't 2015), lv. denied, 28 N.Y.3d 903 (2016). Mr. Brodie's citations to these and other cases for propositions that appellants are not entitled to the relief sought by their notice of motion are BOTH frivolous and fraudulent.

Consequently, the Attorney General's August 19, 2019 opposition is no opposition, *as a matter of law* – and, by its fraud throughout, reinforces appellants' entitlement to all the relief sought on their motion. As highlighted by appellants' Exhibit E "legal autopsy"/analysis (at p. 2) – without contest from the Attorney General:

> "The law is clear that 'failing to respond to a fact attested to in the moving papers…will be deemed to admit it', Siegel, New York Practice, 281 (4th ed. 2005, p. 464), citing *Kuehne v. Nagel, Inc. v. Baiden*, 36 N.Y.2d 539 (1975), itself citing Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. 'If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it'." [R.476, R.557-8; R.929-31]
>
> "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) [R.477, R.558-9, R.928, R.1127, R.1298];
>
> "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 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)." [R.477, R.558-9, R.928, R.1127, R.1298].

Finally, mention must be made of Mr. Brodie's footnote 2 to his August 19, 2019 memorandum (at p. 7). This is where he tucks his fraudulent response to my August 9, 2019 letter (Exhibit B, at pp. 2-4) giving NOTICE to Attorney General James of her duty to furnish the Court with an "appropriate status report" on the six current lawsuits challenging the delegation of legislative powers to committees/commissions: four challenging Chapter 59, Part HHH, of the Laws of 2018, establishing the Committee on Legislative and Executive Compensation, and two challenging Chapter 59, Part ZZZ, of the Laws 2019, establishing a Public Campaign Financing and Election Commission. He states:

> "Because this case is limited to the 2016-2017 budget year, the Attorney General is not obligated to send the Court a 'status report' on litigation involving subsequent recommendations by other commissions as plaintiffs demand (8/9/19 ltr. from Elena R. Sassower to John P. Asiello, Esq. at 2-3)."

This is fraud. This case is NOT "limited to the 2016-2017 budget year" – and Mr. Brodie's fraud that it is undergirds his fraud that "The Attorney General has no financial interest in this case" (memo, at p. 7), which, as hereinabove shown (at pp. 6-7, *supra*), he accomplishes by concealing its challenge to the constitutionality of Chapter 60, Part E of the Laws of 2015, establishing the Commission on Legislative, Judicial and Executive Compensation.

My August 9, 2019 letter identifies this constitutional challenge and its significance to the six other lawsuits (Exhibit B, at pp. 2-4), but Mr. Brodie conceals this and the basis for my "demand" that the Attorney General furnish "a status report' on litigation involving…other commissions", *to wit*, that all six lawsuits challenging similar statutory delegations of legislative powers to committees/commissions will terminate upon the declarations of unconstitutionality here sought. This is uncontested by Mr. Brodie – and, following receipt of his August 19, 2019 affirmation and memorandum, I stated this publicly in a letter to the New York Law Journal entitled "*A Call for Scholarship, Civic Engagement & Amicus Curiae Before the NYCOA*", published on its website on August 20, 2019 and in its print edition on August 21, 2019, in response to a perspective column entitled "*It's Legally Perilous to Have a Commission Responsible for Election Laws*" (Exhibits C-1, C-2).

Suffice to say that Mr. Brodie, having attached the 19-page June 7, 2019 decision/judgment of Albany Supreme Court Justice Christina Ryba in *Delgado v. State of New York* to his June 27, 2019 memorandum – stating (at pp. 6-7) that it was part of "a uniform line of judicial decisions" that "permitted" "the Legislature's limited delegation of authority" and inferring that it was an independent endorsement of the Appellate Division's December 27, 2018 memorandum herein – is now loathe to even identify the *Delgado* decision, by name. His August 19, 2019 affirmation refers to it (at ¶6) only as:

> "a recent decision by Supreme Court, Albany County, which followed the Third Department's ruling in this case, and which I appended to the June 27 memorandum."

Presumably this is because there has been significant appellate activity in the *Delgado* case – most importantly, on August 9, 2019, the plaintiffs therein filed a notice of appeal directly to this Court, pursuant to Article VI, §3(b)(2) of the New York State Constitution and CPLR §5601(b)(2), solely on the issue of the constitutionality of Chapter 59, Part HHH, of the Laws of 2018. Indeed, promptly upon their e-filing their notice of appeal to this Court at 4:54 p.m., they e-filed a notice of cross-appeal to the Appellate Division, Third Department at 5:26 p.m. This was just about the time as I was at the post office mailing my August 9, 2019 letter to you. More than three weeks earlier, at 4:09 p.m. on July 15, 2019, the Attorney General had filed her own appeal to the Appellate Division, Third Department from that portion of Justice Ryba's June 7, 2019 decision as struck down the Committee's restrictions on legislators' outside income.

As the Court would be well-served by an appropriate status report from Attorney General James on the *Delgado* and other lawsuits – including as to what steps, if any, she has taken to apprise the plaintiffs therein and the courts of the two threshold integrity issues that exist in those cases: (1) her own direct and indirect financial and other interests in the suits; and (2) the judges' own interests, especially arising from the relatedness of those lawsuits to this – I request that such status report be ordered by this Court as part of the "other and further relief as may be just and proper", requested by appellants' August 8, 2019 notice of motion (at ¶7).

As required by Rule 500.7, attached is an affidavit of service attesting that I have furnished this letter to the Attorney General. For the convenience of all, this letter – and referred to evidentiary proof – is posted on CJA's website, here: http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/ct-appeals/8-28-19-ltr.htm.

Thank you.

Respectfully submitted,

Elena Ruth Sassower, unrepresented plaintiff-appellant, 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

Enclosures: Exhibits A-C

cc: Attorney General Letitia James
Solicitor General Barbara Underwood
Assistant Solicitor General Victor Paladino
Assistant Solicitor General Frederick Brodie