

SUPREME COURT OF STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

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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-Appellants,

December 15, 2018

**Reply Affidavit in Further Support
of Appellants' Order to Show Cause
(#4)**

-against-

App. Div. 3rd Dept. Docket #527081
Albany Co. Index # 5122-16

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-Respondents.

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the unrepresented individual plaintiff-appellant in this citizen-taxpayer action appeal, fully-familiar with all the facts, papers, and proceedings heretofore had, and submit this affidavit in reply to defendant-respondents' December 10, 2018 "Memorandum in Opposition to Appellants' Motion for Disqualification and Other Relief" – and in further support of the motion, brought on by order to show cause, signed by Associate Justice Christine Clark on December 3, 2018.

2. Such opposition memorandum, not purporting to be a memorandum of law and not supported by any sworn statement attesting to the truth of the factual assertions it makes, is signed by Assistant Solicitor General Frederick Brodie, on behalf of Attorney General Barbara Underwood as “Attorney for Defendants-Respondents”, and features the name of Mr. Brodie’s direct superior, Assistant Solicitor General Victor Paladino, on both its cover and signature page.

3. As with all Mr. Brodie’s advocacy before this Court, written and oral, the opposition memorandum he has signed is yet a further example of his litigation fraud, condoned, if not directed, by supervisory/managerial attorneys up to and including Attorney General Underwood herself, who, having NO legitimate defense to the appeal, have been corrupting the appellate process, flagrantly – secure in the belief that the Court will let them get away with everything, much as they have until now.

4. Prior to drafting this reply affidavit, I gave NOTICE to Attorney General Underwood that the memorandum was “fraudulent, from beginning to end” – and that as a result of Mr. Brodie’s continuum of litigation fraud, the People of the State of New York had suffered – and on January 1, 2019 would more catastrophically suffer – needless further injury. My December 13, 2018 e-mail, entitled “NOTICE: Your Duty to Withdraw Asst. Solicitor General Brodie’s Dec. 10, 2018 opposing memorandum in CJA v. Cuomo, No. 527081 – & to ENJOIN the ‘force of law’ salary & lulu recommendations of the NYS Compensation Committee prior to Jan. 1, 2019” (Exhibit H-2),¹ was as follows:

“As Assistant Solicitor General Brodie’s below December 10, 2018 e-mail to me does not cc you or any other supervisory/managerial attorneys of your office, including Assistant Solicitor General Paladino, **this is to give you NOTICE that his attached December 10, 2018 memorandum in opposition to appellants’ November 27, 2018 order to show cause (#4) to disqualify the appeal panel for**

¹ Exhibits F-K, annexed to this reply affidavit continue the sequence of exhibits annexed to my November 27, 2018 moving affidavit, Exhibits A-E.

demonstrated actual bias, to certify questions to the Court of Appeals, and for other relief, signed by Associate Justice Christine Clark on December 3, 2018, is fraudulent, from beginning to end – and your duty is to withdraw it forthwith. Absent your doing so, I will be filing reply papers, laying out its deceit – and seeking sanctions and disciplinary and criminal relief against you.

To assist you in comparing Mr. Brodie’s opposing memorandum to appellants’ order to show cause, from which his fraud is IMMEDIATELY obvious, here’s CJA’s webpage for the order to show cause, previously furnished to you, twice: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/11-27-18-osc.htm>.

Additionally, this is to give you NOTICE that the direct and foreseeable consequence of Mr. Brodie’s flagrant and unceasing fraud before the Appellate Division, Third Department, spanning from his July 23, 2018 letter to his December 10, 2018 opposing memorandum – which you and your supervisory/managerial attorneys have permitted, if not directed – is the unconstitutionality and fraud of the New York State Compensation Committee, perpetrated on the People of the State of New York, from its first meeting on November 13, 2018 to its December 10, 2018 report. **Based on the record of CJA’s second citizen-taxpayer action, entitling appellants to summary judgment on their ten causes of action – and, in particular, on its sixth cause of action (sub-causes A & B) -- it is your duty to enjoin the Compensation Committee’s “force of law” salary and lulu recommendations, resulting from its report – and to do so before January 1, 2019, the date the first phase of its recommendations takes effect.**

In the event you are unaware of my oral and written testimony to the Compensation Committee at its November 30, 2018 hearing identifying the DISPOSITIVE nature of the record of CJA’s second citizen-taxpayer action, here’s CJA’s menu webpage entitled ‘New York State Compensation Committee – Unconstitutionality in Plain Sight’, from which my testimony and the substantiating EVIDENCE is [accessible]: <http://www.judgewatch.org/web-pages/searching-nys/2018-legislature/hhh-compensation-committee/2018-compensation-committee.htm>. For your further convenience, my written testimony is also attached.

Suffice to note that on July 23, 2018, when Mr. Brodie interposed his fraudulent letter to the Appellate Division, Third Department, urging that it NOT sign appellants’ initial order to show cause, it was in face of ¶31 of my moving affidavit identifying yet a further reason why appellants were entitled to the relief sought by its third branch, ‘an accelerated schedule for briefing, oral argument, and decision...’, consistent with the expedition mandated by the citizen-taxpayer action statute:

‘31. ...this year’s behind-closed-doors three-men-in the-room, ‘amending’ of budget bills resulted in the insertion of a Part HHH into Budget Bill #S.7509-C/9509-C, establishing a compensation committee for legislative and executive pay raises (Exhibit H). Such

suffers from substantially the same constitutional and statutory infirmities as Part E of fiscal year 2015-2016 Budget Bill #S.4610-A/A.6721-A (Chapter 60, Part E, of the Laws of 2015), challenged by appellants' sixth and seventh causes of action [R.109-112 (R.187-201); R.112-113 (R.201-212)].^{fn.9} As the judicial declarations to which appellants are entitled herein would render that compensation committee and its work a nullity, the sooner that happens, the better for all concerned.'

The annotating footnote 9 read:

'One material difference is that Part HHH specifies (Exhibit H, at §3) that 'the parties' performance and timely fulfillment of statutory and Constitutional responsibilities' is among the 'appropriate factors' the compensation committee must 'take into account' (also see §4b). By contrast, Chapter 60, Part E, of the Laws of 2015 [R.1080-1082] does not so-specify 'performance' or 'fulfillment of statutory and Constitutional responsibilities' as among the 'all appropriate factors' for the Commission on Legislative, Judicial and Executive Compensation to 'take into account' – and this is a key ground upon which appellants' sixth cause of action challenges the statute as unconstitutional, phrasing the issue as follows, in three paragraphs from appellants' March 23, 2016 verified second supplemental complaint, followed by a new fourth paragraph [R.110-111]:

“400. It is unconstitutional to raise the salaries of judges who should be removed from the bench for corruption or incompetence – and who, by reason thereof, are not earning their current salaries. Consequently, a prerequisite to any judicial salary increase recommendation must be a determination that safeguarding appellate, administrative, disciplinary and removal provisions of Article VI of the New York State Constitution are functioning.

401. Likewise, it is unconstitutional to raise the salaries of other constitutional officers and public officials who should be removed from office for corruption – and who, by reason thereof, are not earning their current salaries. Consequently, a prerequisite to any salary increase recommendation as to them must be a determination that mechanisms to remove such constitutional and public officers are functional, lest these corrupt public officers be the beneficiaries of salary increases.

402. The absence of explicit guidance to the Commission that corruption and the lack of functioning

mechanisms to remove corrupt public officers are ‘appropriate factors’ for its consideration in making salary recommendations renders the statute unconstitutional, *as written.*’

65. As Judiciary Law §183-a statutorily links district attorney salaries with judicial salaries, the failure of the Commission statute to include an express provision requiring the Commission to take into account such ‘appropriate factor’ means that district attorneys become the beneficiary of judicial salary increase recommendations, without ANY evidence, or even claim, that existing district attorney salaries are inadequate – and, likewise, without ANY evidence, or even claim, that district attorneys are discharging their constitutional and statutory duties to enforce the penal law and that mechanisms to remove them for corruption are functional. Such additionally renders the Commission statute unconstitutional, *as written.*’ [underlining, italics, and capitalization in the original].’

One final observation is in order. Based upon the statement in the Compensation Committee’s report (at p. 11, #7) that the recommended ‘force of law’ salary increases for Executive Law §169 commissioners ‘will thus allow for other staff salaries to be increased accordingly’, it would appear that the same will happen in [the] attorney general’s office, namely, that the recommended ‘force of law’ salary increase for the attorney general will allow for increases in salaries for the attorney general’s staff. This includes for the solicitor general, whose compensation is fixed by the attorney general, pursuant to Executive Law §61. As you will be returning to that position on January 1, 201[9], upon the swearing-in of Attorney General-Elect Letitia James, please promptly advise how you will now address this further conflict of interest, afflicting you and, pursuant to Executive Law §62, other staff of the attorney general’s office.

Once again, I ask that you respond personally, or by a high-ranking supervisory/managerial attorney, not *via* the complained-against Mr. Brodie.
(Exhibit H-2, bold and underlining in the original December 13, 2018 e-mail).

5. After 24 hours, without response, I re-sent the e-mail on December 14, 2018 (Exhibit H-3), again addressed to Attorney General Underwood. The only response I received was from Mr. Brodie, stating that “the respondents will not withdraw their memorandum in opposition” (Exhibit H-4), to which he adhered as being “on behalf of respondents and the Attorney General’s office” (Exhibit H-6).

6. Rather than clutter this affidavit with refutation of the deceits and frauds that pervade virtually every paragraph of Mr. Brodie's opposing memorandum, I have annexed the refutation as an exhibit (Exhibit I) – an analysis/"legal autopsy", which I incorporate herein by reference, swearing to its truth. The particularized showing it presents triggers the Court's mandatory "disciplinary responsibilities", pursuant to §100.3(D)(2) of the Chief Administrator's Rules Governing Judicial Conduct, by "appropriate action" including imposition of maximum sanctions/costs upon, at very least, Mr. Brodie, Mr. Paladino, and Attorney General Underwood, pursuant to 22 NYCRR §130-1.1 *et seq.*, a determination entitling appellants to treble damages pursuant to Judiciary Law §487, and disciplinary and criminal referrals. It also reinforces appellants' entitlement to the relief requested by their order to show cause under applicable adjudicative principles, to which appellants have alerted the attorney general's office again and again and again:

"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 Secundum, Vol 31A, 166 (1996 ed., p. 339);

"It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause...and all similar 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 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).

7. Suffice to here give context to Mr. Brodie's concealment, by his memorandum, of all five of appellants' proposed questions for certification to the Court of Appeals – this being ¶19 of my moving affidavit which had stated:

"As the constitutional function of New York's attorney general is to ensure that the state and its public officers comply with the United

States and New York Constitutions and that laws promulgated are consistent therewith and, where consistent, complied with – including by state judges and the attorney general’s own office – Mr. Brodie must be expected to furnish the Court with guidance, by an appropriate memorandum of law on the suggested certified questions.”

8. The first four of these proposed questions pertain to the unprecedented, first-impression nature of the situation in which New York’s judiciary here finds itself by reason of the categorical jurisdictional bar that Judiciary Law §14 imposes on “interested” judges – and the seeming unavailability of “the rule of necessity”. Such mandates a judicial answer – and not only for this case, but for the cases expected to be brought challenging the constitutionality and lawfulness of Part HHH of Budget Bill #S.7509-C/9509-C – now Part HHH of Chapter 59 of the Laws of 2018 – establishing the New York State Compensation Committee.

9. In those prospective cases – and the first has already been commenced in Albany County Supreme Court (Exhibit J) – the Judiciary Law §14 jurisdictional bar is triggered because Part HHH is materially identical to the budget statute here, Chapter 60, Part E, of the Laws of 2015, both of which, additionally, were enacted in materially identical ways and thereafter violated in materially identical fashions. Consequently, no state judge can declare unconstitutional and unlawful Chapter 59, Part HHH, of the Laws of 2018, *as written and as applied*, without effectively declaring the same with respect to Chapter 60, Part E, of the Laws of 2015, *as written and as applied*, as to which this Court – and all other state judges – are HUGELY “interested” financially.

10. Conversely, the declarations of unconstitutionality, illegality and fraud herein sought by the sixth, seventh, and eighth causes of action pertaining to Chapter 60, Part E, of the Laws of 2015, the Commission on Legislative, Judicial and Executive Compensation, and its December 24, 2015 report – as to which the record establishes appellants’ summary judgment entitlement – will mandate comparable declarations with respect to Part HHH, the Compensation Committee, and its

December 10, 2018 report. This is what I stated to this Court 4-1/2 months ago by the above-quoted ¶31 of my moving affidavit in support of appellants' initial order to show cause, filed on July 25, 2018 with appellants' brief and three-volume record on appeal – and what I publicly stated by my testimony at the Compensation Committee's November 30, 2018 hearing, accompanied by all the briefs and the three-volume record on appeal (Exhibit K).

11. As for appellants' fifth proposed certified question pertaining to the attorney general, it is likewise one of first-impression that will arise, threshold, in any lawsuit challenge to Part HHH, the Compensation Committee, and its December 10, 2018 report – because, as here, the attorney general will have no legitimate “merits” defense – mandating that his litigation role, pursuant to Executive Law §63.1, be on behalf of the litigating plaintiffs – and this, *via* independent counsel because, *inter alia*, the attorney general suffers from mandatory disqualification because he is an actual beneficiary of the “force of law” salary raise recommendations of the December 10, 2018 report, not just, as at bar, a prospective beneficiary.²

12. Finally, a propos of Mr. Brodie's argument in his opposing memorandum (at p.4) that “At oral argument, the Court asked no substantive questions of appellant (See 11/27/18 Sassower Aff. Ex.D.) No Judge made any remark that would indicate bias. (See 11/27/18 Sassower Aff. Ex. D.)” – not responsive to why I appended Exhibit D and my ¶¶7-8 to which it relates – I filed a FOIL request with the Court to obtain a VIDEO of the oral argument of all the cases on its November 13, 2018 session calendar (Exhibit G-1) to see whether the panel justices had asked substantive

² See September 2, 2016 verified complaint, ¶14(c) [R.96]: “As Attorney General, defendant SCHNEIDERMAN benefits from the salary increase recommendations made by the Commission on Legislative, Judicial and Executive Compensation.”; September 30, 2016 memorandum of law [R.519-520] – identifying defendant Schneiderman's “direct, financial interest in the sixth, seventh, and eighth causes of action pertaining to the Commission on Legislative, Judicial and Executive Compensation.”

questions in other cases. They had – and seemingly the most consistent questioner was Associate Justice Lynch, absent from this case, without stated reason. Apart from *Dukes v. State of New York* (#526427) – the companion case to *Jones v. State of New York* (#526565), wherein there had been substantial questioning – this case was the only one without a single substantive question – and I do not consider Associate Justice Rumsey’s interjection “Initially the judge did not dismiss the sixth cause of action” to be any kind of substantive question.

13. One last observation is in order – and that concerns the signing of the order to show cause, which I had e-mailed and express-mailed to the Court on Tuesday, November 27, 2018 (Exhibit F-1) and which it received on Thursday, November 29, 2018. Faced with my oral and written communication to Chief Motion Attorney Amy Conway that, if the order to show cause were not signed, appellants would proceed by the notice of motion I had enclosed (Exhibit F-2), Associate Justice Clark signed the order to show cause on Monday, December 3, 2018, but not with an expeditious return date. Rather, she assigned to it the same December 17, 2018 return date as I had put on the notice of motion (Exhibit F-2) and – if that were not sufficiently subverting of the very purpose of an order to show cause – did not require the same service of answering papers as the notice of motion had designated: “seven days before the return date by e-mail and regular mail, *to wit*, December 10, 2018”. Instead, and notwithstanding I had furnished the unsigned order to show cause and notice of motion to the attorney general on November 27, 2018 (Exhibit F-1), she struck out the provision requiring service of its answering papers, in advance of the return date, thereby affording the attorney general nearly three weeks for opposition papers and no opportunity for me to reply. No fair and impartial judge could do such a thing – let alone in a case of this magnitude and consequence, where, as Justice Clark is presumed to know from the record with which she is expected to be fully familiar, the People of the State of New York have a *prima facie* entitlement to

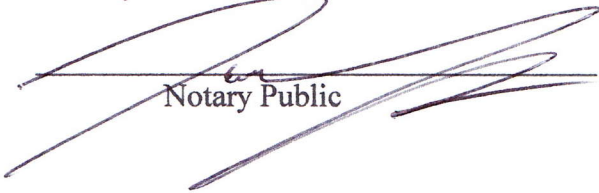
summary judgment on all ten of its causes of action and to its expressly requested additional relief that the Court refer the record evidence that “public officers and their agents” have engaged in “grand larceny of the public fisc and other corrupt acts” to prosecutorial authorities so that they can be “criminally prosecuted and removed from office, without further delay.”

Signed & mailed December 15, 2018



Elena Ruth Sassower, Unrepresented Plaintiff-Appellant

Sworn to before me this
17th day of December 2018



Notary Public

JOSEPH GONNELLA JR
NOTARY PUBLIC-STATE OF NEW YORK
No. 01GO6357364
Qualified in Westchester County
My Commission Expires 04-17-2021

TABLE OF EXHIBITS

- Exhibit F-1: Appellant Sassower's November 27, 2018 e-mail to Chief Motion Attorney Amy Conway (3:30 pm) – "CJA v. Cuomo Citizen-Taxpayer Appeal: 3rd Dept #527081 – Order to Show Cause (#4) to Disqualify the Appeal Panel for Demonstrated Actual Bias, Etc."
- Exhibit F-2: Appellants' accompanying November 27, 2018 notice of motion
- Exhibit G-1: Appellant Sassower's November 14, 2018 e-mail to Clerk Robert Mayberger (2:54 pm) – "FOIL/public access records request – VIDEO of the Appellate Division, Third Dept's Nov. 13, 2018 oral argument of the cases on its session calendar)
- Exhibit G-2: Deputy Clerk Sean Morton's November 16, 2018 letter
- Exhibit G-3: Deputy Clerk Morton's November 30, 2018 letter
- Exhibit H-1: Assistant Solicitor General Brodie's December 10, 2018 e-mail
- Exhibit H-2: Appellant Sassower's December 13, 2018 e-mail to Attorney General Underwood (12:27 pm) – "NOTICE: Your Duty to Withdraw Asst. Solicitor General Brodie's Dec. 10, 2018 opposing memorandum in CJA v. Cuomo, No. 527081 -- & to ENJOIN the 'force of law' salary & lulu recommendations of the NYS Compensation Committee prior to Jan. 1, 2019"
- Exhibit H-3: Appellant Sassower's December 14, 2018 e-mail to Attorney General Underwood (1:04 pm) – "AGAIN -- NOTICE: Your Duty to Withdraw Asst. Solicitor General Brodie's Dec. 10, 2018 opposing memorandum in CJA v. Cuomo, No. 527081 -- & to ENJOIN the 'force of law' salary & lulu recommendations of the NYS Compensation Committee prior to Jan. 1, 2019"
- Exhibit H-4: Asst. Solicitor General Brodie's December 14, 2018 e-mail (2:35 pm)
- Exhibit H-5: Appellant Sassower's December 14, 2018 e-mail (3:44 pm) – "CLARIFICATION..."
- Exhibit H-6: Asst. Solicitor General Brodie's December 14, 2018 e-mail (4:23 pm)

Exhibit I: Appellants' refutation – analysis/"legal autopsy" of Mr. Brodie's December 10, 2018 memorandum in opposition

Exhibit J *Delgado v. State of New York*, summons & verified complaint
(Supreme Court Albany Co. #907537-18)

Exhibit K: CJA Director Sassower's written testimony for the NYS Compensation Committee's November 30, 2018 hearing

Appellate Division Docket #527081

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

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**Appellants' Reply Affidavit
in Further Support of their Order to Show Cause (#4)
to Disqualify the Appeal Panel for Demonstrated Actual Bias,
including its Willful Violation of Judiciary Law §14,
for Certification of Questions to the Court of Appeals,
& Other Relief**

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

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