

CJA v. Cuomo, No. 527081

Exhibit to Respondents'
8/3/18 Opposition
Memorandum

(Record Excerpts)

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,

-against-

VERIFIED COMPLAINT
Index #5122-16

JURY TRIAL DEMANDED

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.
-----x

“It is the purpose of the legislature to recognize that each individual citizen and taxpayer of the state has an interest in the proper disposition of all state funds and properties. Whenever this interest is or may be threatened by an illegal or unconstitutional act of a state officer or employee, the need for relief is so urgent that any citizen-taxpayer should have and hereafter does have a right to seek the remedies provided for herein.”

State Finance Law Article 7-A, §123: “Legislative purpose”

Plaintiffs, as and for their verified complaint, respectfully set forth and allege:

1. By this citizen-taxpayer action pursuant to State Finance Law Article 7-A [§123 *et seq.*], plaintiffs seek declaratory judgments as to the unconstitutionality and unlawfulness of the Governor’s Legislative/Judiciary Budget Bill #S.6401/A.9001, both the original bill and the enacted amended bill #S.6401-a/A.9001-a. The expenditures of the enacted budget bill – embodying the

24. Plaintiffs' first cause of action herein is the ninth cause of action of their March 23, 2016 verified second supplemental complaint in their prior citizen-taxpayer action (Exhibit A: ¶¶301-316). Such is not barred by Justice McDonough's August 1, 2016 decision (Exhibit D)—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 verified complaint and causes of action 5-8 of their verified supplemental complaint and, based thereon, to the granting of their motion for leave to file their verified second supplemental complaint with its causes of action 9-16.

25. Establishing that the August 1, 2016 decision is a judicial fraud – and that Justice McDonough was duty-bound to have disqualified himself for pervasive actual bias born of his financial interest in the litigation – is plaintiffs' analysis of the decision, annexed hereto (Exhibit G).

26. As highlighted by the analysis (Exhibit G: pp. 24-28), plaintiffs' first and fifth causes of action (Exhibit B: ¶¶76-98; Exhibit C: ¶¶169-178) – which correspond to their ninth cause of action (Exhibit A: ¶¶301-316) – were each dismissed by Justice McDonough 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.

27. Plaintiffs analysis is accurate, true, and correct in all material respects.

28. In addition to the facts set forth by plaintiffs' ninth cause of action establishing that the Legislature's proposed budget, *on its face*, is not ‘itemized estimates of the financial needs of the legislature’ is yet a further fact: its section entitled “Senate and Assembly Joint Entities” (at pp. 11-15) omits most of the joint commissions that the Legislature is required to establish and fund pursuant to Legislative Law, Article 5-A (§§82, 83). Among these, the Legislative Commission on

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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

Plaintiffs,

-against-

AMENDED DECISION
AND ORDER¹

Index No.: 1788-14

RJI No.: 01-14-113240

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

Defendants.

(Supreme Court, Albany County All Purpose Term)

Appearances:

Elena Ruth Sassower
Self-Represented Plaintiff
10 Stewart Place, Apartment 2D-E
White Plains, NY 10603

Eric T. Schneiderman
Attorney General
State of New York
Attorney for All Defendants
The Capitol
Albany, NY 12224
(Adrienne J. Kerwin, Esq., Assistant

¹ The Court corrected two scrivener's errors on page eight where the Court inadvertently juxtaposed plaintiff and defendant.

ED

Roger D. McDonough, J.:

Previously, this Court dismissed three of plaintiffs' four causes of action set forth in their original verified complaint. The fourth cause of action survived defendants' motion to dismiss. Eventually, plaintiffs sought leave to supplement their verified complaint. The Court granted said leave. Defendants moved to dismiss the supplemental complaint in its entirety pursuant to CPLR § 3211(a)(7). Additionally, defendants moved for summary judgment as to plaintiffs' fourth cause of action. Plaintiffs opposed the motion and cross-moved for summary judgment and various other relief. During the pendency of the Court's consideration of said motions, plaintiffs brought an Order to Show Cause seeking various injunctive relief and leave to serve a second supplemental complaint. The Court heard oral argument upon the presentation of the Order to Show Cause and denied the temporary injunctive relief. Defendants oppose the remaining injunctive relief and ask the Court to deny plaintiffs' leave to serve a second supplemental complaint.²

Background

Familiarity with the relevant background to this action against the Governor and legislative leaders is presumed.

Discussion

Motions with respect to the Supplemental Complaint

The Supplemental Complaint adds four causes of action (causes of action 5-8) to the original four set forth in the complaint. Defendants' motion to dismiss relies upon CPLR § 3211(a)(1), (a)(2) and (a)(7).

Defendants argue that this Court's rationale in dismissing the original causes of action 1-3 should apply equally to the new causes of action numbered 5, 6 and 7. Specifically, defendants maintain that plaintiffs are merely alleging identical claims on indistinguishable facts.

² Plaintiffs' requests for oral argument are denied pursuant to 22 NYCRR 202.8(d) (*see, Niagara Venture v Niagara Falls Urban Renewal Agency*, 56 AD3d 1150, 1150 [4th Dept. 2008]).

Accordingly, relying on the "law of the case" doctrine, defendant assert that the fifth, sixth and seventh causes of action should be dismissed for the reasons cited by the Court in its prior Decision and Order.

As to the eighth cause of action, defendants assert that plaintiffs are impermissibly challenging internal rules of the Legislature. Additionally, as to the fourth³ and eighth causes of action, defendants argue that plaintiffs' claims of violations of Legislative Law § 32-A are directly disproved by documentary evidence. Specifically, defendants rely upon numerous public documents for the proposition that hearings were scheduled and held in connection with the 2014-15 and 2015-16 Legislative and Judiciary Budgets. Defendants also maintain that plaintiffs' challenges to the locations of the hearings, and the testimony allowed at said hearings, are non-justiciable. Specifically, defendants maintain that the actions/inactions at issue are protected from judicial review by the Speech or Debate Clause of the New York State Constitution.

In opposition/support⁴, plaintiffs primarily maintain that they have documentary evidence substantiating their claims of numerous violations of the Legislative Law, a Senate and Assembly Joint Rule and other Senate and Assembly Rules. Plaintiffs argue that these violations, as well as certain constitutional violations, were ignored in defendants' submissions. Additionally, plaintiffs maintain that both the Legislature's and the Judiciary's Proposed Budgets for Fiscal Year 2015-2016 are unconstitutional and unlawful. In particular, plaintiffs rely on the language of the transmittal letters accompanying the particular budgets. Further, plaintiffs cite the importance of the documentation handed up to the Legislature in February of 2013 in opposition to the Judiciary's budget and the second phase of judicial salary increases. Finally, plaintiffs stress that the Court's previous dismissal of the causes of action 1-3 was legally insupportable

³ As issue has been joined and discovery conducted on the fourth cause of action, defendants maintain that summary judgment is the appropriate vehicle for dismissal as to said cause of action.

⁴ Plaintiffs also ask the Court to convert defendants' dismissal motion into a motion for summary judgment in plaintiffs' favor. Defendants did not take any position on this request. As plaintiffs have cross-moved for summary judgment relief, the Court denies any such conversion as unnecessary.

and factually baseless. In particular, plaintiffs argue that this Court is not bound by the "law of the case" doctrine and can revisit its earlier erroneous rulings.

In reply/further support of their motion, defendants assert that they are unable to decipher any admissible, relevant evidence or reasoned argument "in plaintiffs' defamatory, rambling submissions . . ." Additionally, defendants maintain that plaintiffs have failed to set forth any facts establishing how Article VII, section 7 or Article III, sections 10 and 16 were violated. Further, defendants maintain that there are no allegations in the supplemental complaint that any of the relevant parties listed in Section 31 of the Legislative Law were precluded from appearing before Legislative committees and/or refused to appear pursuant to any committee request. Finally, defendants maintain that the documentary evidence establishes compliance with Section 54-A of the Legislative Law.

In reply/further support of their cross-motion, plaintiffs cite an amendment to the Budget Bill which recognizes the unconstitutionality of the Budget Bill. Said amendment pertains to the replacement of the Commission on Judicial Compensation with the Commission on Legislative, Judicial and Executive Compensation. In light of the amendment, plaintiffs question why defendants' motion for dismissal/summary judgment has not been withdrawn.

Fourth Cause of Action

The Court previously determined that plaintiffs' had adequately stated a fourth cause of action as to defendants' purported violation of Legislative Law § 32-a regarding public hearings for New York's Budget. The Court specifically noted that defendants' submissions did not include any documentary evidence establishing a defense to said cause of action. Defendants have now provide the Court with such documentary evidence. Accordingly, they seek summary judgment.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any genuine material issues of fact from the case. The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegard v. New York Univ. Med. Center, 64 NY2d 851 [1985]).

Once such a showing is made, the burden shifts to the party opposing the motion for

summary judgment to come forward with evidentiary proof, in admissible form, to establish the existence of material issues of fact which require a trial (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue. Averments merely stating conclusions are insufficient (Bethlehem Steel Corp. v. Solow, 51 NY2d 870 [1980]; Capelin Assoc. v. Globe Mfg. Corp., 34 NY2d 338 [1974]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v. Cornell University, 162 AD2d 922, 923 [3rd Dept. 1990]). The focus is upon issue finding, not issue resolving, and all inferences and evidence must be viewed in a light most favorable to the party opposing the motion for summary judgment (*see*, B. S. Industrial Contractors, Inc. v. Town of Wells, 173 AD2d 1053 [3rd Dept. 1991]).

The Court finds that the relevant, documentary evidence fully demonstrates that defendants complied with Legislative Law § 32-a. In response to defendants' prima facie showing of entitlement to summary judgment, plaintiffs failed to raise any triable issues of fact. Accordingly, summary judgment dismissing the fourth cause of action is mandated.

Fifth Cause of Action

Plaintiffs allege that the Legislature's Proposed Budget for Fiscal Year 2015-2016 is unconstitutional and unlawful. The gist of this cause of action is that the Proposed Budget was not adequately certified and does not contain itemized estimates of the financial needs of the legislature. The Court again concludes that the itemization challenge must be dismissed as it is nonjusticiable (*see*, Urban Justice Ctr v Pataki, 38 AD3d 20, 30 [1st Dept. 2006]). As to the certification issue, the Court finds that the documentary evidence submitted by defendants conclusively demonstrates that defendants have complied with the letter and spirit of the constitutional requirement for certification (*see generally*, Matter of Schneider v Rockefeller, 31 NY2d 420, 434 [1972]). Accordingly, the fifth cause of action must be dismissed.

Sixth Cause of Action

Plaintiffs allege that the Judiciary's Proposed Budget for Fiscal Year 2015-2016 is unconstitutional and unlawful. The sixth cause of action principally alleges that the Senate and

the Assembly are unable to comprehend the Judiciary's proposed budget for 2015-2016 because the cumulative dollar amount and percentage increase over the prior year's budget cannot be discerned. The Court again finds that the documentary evidence submitted by defendants clearly and conclusively establishes a defense to this cause of action. Said information is readily discernible throughout the Judiciary's proposed budget. Accordingly, the sixth cause of action must be dismissed. Regardless, this cause of action would also appear to fall under the type of itemization argument already found to be nonjusticiable.

Seventh Cause of Action

Plaintiffs' seventh cause of action again alleges that certain reappropriations constitute revisions in violation of New York's Constitution. The Court finds that the documentary evidence submitted by defendants clearly and conclusively establishes a defense to this cause of action. Said submissions clearly establish that the "reappropriations" at issue do not constitute executive revisions to the proposed Budget. Accordingly, the seventh cause of action must be dismissed.

Eighth Cause of Action

The eighth cause of action principally relates to defendants' purported violations of Legislative Law § 32-a regarding public hearings for New York's Budget. The Court finds that the documentary evidence submitted by defendants clearly and conclusively establishes a defense to this portion of the cause of action. To the extent other claims were raised in this cause of action, the Court concludes: (1) that plaintiffs have failed to set forth any facts in the supplemental complaint as to how Article VII, section 7 or Article III, sections 10 and 16 were violated; (2) that there are no allegations in the supplemental complaint that any of the relevant parties listed in Section 31 of the Legislative Law were precluded from appearing before Legislative committees and/or refused to appear pursuant to any committee request; and (3) that the documentary evidence establishes compliance with Section 54-A of the Legislative Law. Accordingly, dismissal of this cause of action is warranted pursuant to CPLR § 3211(a)(1) & (7).

Declaratory Relief

The Court notes that no issues of fact have been raised herein. Rather, the matters are purely questions of law and statutory interpretation. As such, in the context of a motion to

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dismiss, the Court may render a determination and declare the rights of the parties (Spilka v Town of Inlet, 8 AD3d 812, 813 [3rd Dept. 2004]). Now that this matter is fully concluded, the Court will issue said declarations below in compliance with CPLR § 3001 (*see*, Stonegate Family Holdings, Inc. v Revolutionary Trails).

Remaining Requested Relief from Plaintiffs' Summary Judgment Motion

The Court notes that plaintiffs' papers are replete with wholly unsubstantiated accusations against the Assistant Attorney General sounding primarily in fraud upon the Court, deceit and making frivolous submissions. In conjunction with the accusations, plaintiffs seek sanctions, costs, penal law punishment, treble damages, referral to disciplinary authorities, disqualification of the Attorney General and an Order directing the Assistant Attorney General to provide certain disclosure.

The Court has reviewed the allegations and finds no basis to impose/award any of the requested relief. Moreover, the Court finds that plaintiffs' request for this Court to vacate its prior Order pursuant to CPLR § 5015 is wholly without merit.

Leave to Serve a Second Supplemental Complaint

The Court has considered the parties' respective arguments as to the issue of plaintiffs' request for leave to serve a second supplemental complaint. Plaintiffs' second supplemental complaint asserts eight new causes of action. The Court denies leave to serve a second supplemental complaint as to causes of action 9-12, based on the Court's dismissal of plaintiffs' original eight causes of action. Under these circumstances, the Court finds that causes of action 9-12 are "patently devoid of merit" (Lucido v Mancuso, 49 AD3d 220, 229 [2nd Dept. 2008]). As to causes of action 13-16, the Court finds that the allegations therein arise out of materially different facts and legal theories as opposed to the original four causes of action and the additional four causes of action set forth in the supplemental complaint. Accordingly, the Court finds that defendants have adequately established the prejudice that would flow from allowing a second supplemental complaint setting forth entirely new facts, theories and causes of action several years after service of the original complaint (*see generally*, Brunetti v Musallam, 59 AD3d 220, 223 [1st Dept. 2009]).

Finally, the Court finds no basis in the record, Judiciary Law, Administrative Code or any

relevant statute or case law, for recusal. The Court again notes that the alleged financial conflict that plaintiffs describe is equally applicable to every Supreme and (Acting Supreme Court Justice in the State of New York, rendering recusal on the basis of financial interest a functional impossibility (*see, Matter of Maron v Silver*, 14 NY3d 230, 248-249 [2010])).

Plaintiffs' remaining arguments and requests for relief have been considered and found to be lacking in merit. In light of the Court's dismissal of the supplemental complaint and denial for leave to serve a second supplemental complaint, the Court also concludes that injunctive relief is unwarranted here.

Based upon the foregoing, it is hereby

ORDERED that the supplemental complaint is hereby dismissed in its entirety pursuant to CPLR §§ 3211 and 3212; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is hereby denied in its entirety; and it is further

ORDERED that plaintiff's remaining requests for relief, as set forth in their cross-motion, are hereby denied in their entirety; and it is further

ORDERED that plaintiffs' request for injunctive relief is hereby denied in its entirety; and it is further

ORDERED that plaintiffs' motion for leave to serve a second, supplemental complaint is hereby denied in its entirety; and it is further

ORDERED that, as an alternative basis for dismissal, the supplemental complaint must

be dismissed as to plaintiff Center for Judicial Accountability, Inc., based upon CPLR § 321(a) and the relevant caselaw (*see, Cinderella Holding Corp. v Calvert Ins. Co.*, 265 AD2d 444, 444 [2nd Dept. 1999]); and it is further

DECLARED that the Legislature's proposed budget for fiscal year 2014-2015 embodied in Budget Bill # S.6351/A.8551 is not: (1) a wrongful expenditure; (2) a misappropriation; (3) illegal; or (4) unconstitutional; and it is further

DECLARED that the Judiciary's proposed budget for fiscal year 2014-2015 embodied in Budget Bill # S.6351/A.8551 is not: (1) a wrongful expenditure; (2) a misappropriation; (3) illegal; or (4) unconstitutional; and it is further

DECLARED that Budget Bill # S.6351/A.8551 is not: (1) a wrongful expenditure; (2) a misappropriation; (3) illegal; or (4) unconstitutional; and it is further

DECLARED that the Legislature's proposed budget for fiscal year 2015-2016 embodied in Budget Bill # S.2001/A.3001 is not: (1) a wrongful expenditure; (2) a misappropriation; (3) illegal; or (4) unconstitutional; and it is further

DECLARED that the Judiciary's proposed budget for fiscal year 2015-2016 embodied in Budget Bill # S.2001/A.3001 is not: (1) a wrongful expenditure; (2) a misappropriation; (3) illegal; or (4) unconstitutional; and it is further

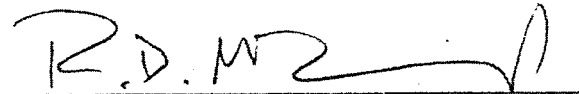
DECLARED that Budget Bill # S.2001/A.3001 is not: (1) a wrongful expenditure; (2) a misappropriation; (3) illegal; or (4) unconstitutional.

This shall constitute the Decision and Order of the Court. The original decision and order is being returned to the counsel for defendants who is directed to enter this Decision and Order without notice and to serve plaintiffs with a copy of this Decision and Order with notice of entry.

The Court will transmit a copy of the Decision and Order and the papers considered to the Albany County Clerk. The signing of the decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER.

Dated: Albany, New York
August 1, 2016



Roger D. McDonough
Supreme Court Justice

Papers Considered⁵:

- 1) Defendants' Notice of Motion, dated July 28, 2015;
- 2) Affirmation of Adrienne J. Kerwin, Esq., A.A.G., received by the Court on July 29, 2015⁶, with annexed exhibits;
- 3) Plaintiffs' Notice of Cross-Motion, dated September 22, 2015;
- 4) Affidavit in Opposition/Support of Plaintiff Sassower, sworn to September 22, 2015, with annexed exhibits;
- 5) Affirmation of Adrienne J. Kerwin, Esq., A.A.G., dated October 23, 2015, with annexed exhibits;
- 6) Affidavit in Reply & Further Support of Plaintiff Sassower, sworn to November 5, 2015, with annexed exhibits;
- 7) Order to Show Cause executed by this Court on March 23, 2016;
- 8) Affidavit of Plaintiff Sassower, sworn to March 23, 2016, with annexed exhibits;
- 9) Plaintiffs' Verified Second Supplemental Complaint, with annexed exhibits and corrections;
- 10) Affirmation of Adrienne J. Kerwin, Esq., A.A.G., dated April 8, 2016, with annexed exhibits;

⁵ The parties also submitted several memoranda of law in support of their respective positions. Pursuant to relevant caselaw, it is the Court's policy not to list memoranda of law in the papers considered (*see, Lyndaker v Board of Education of West Canada Valley Central School District*, 129 AD3d 1561 [4th Dept. 2015]).

⁶ The affirmation was incorrectly dated July 28, 2014 by virtue of a scrivener's error. The letter accompanying the affirmation was dated July 28, 2015.

- 11) Affidavit in Reply & Further Support of Plaintiff Sassower, sworn to April 22, 2016, with annexed exhibits;
- 12) Plaintiffs' 2011 Exhibits regarding the Commission of Judicial Compensation;
- 13) Plaintiffs' 2002 Exhibits regarding motions before the Court of Appeals in a prior proceeding against the Commission on Judicial Conduct of the State of New York;
- 14) Plaintiffs' Exhibits pertaining to their action (Index # 302951-12) heard in Supreme Court, Bronx County;
- 15) Plaintiffs' 2015 Exhibits to Commission on Legislative, Judicial & Executive Compensation.

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Albany at the Courthouse, located at 16 Eagle Street, New York, New York on the 29th day of March, 2017.

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,

**ORDER TO SHOW CAUSE
WITH PRELIMINARY INJUNCTION
& TRO**

-against-

Index # 5122-16
RJI #01-16-122174

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.
----- x

Upon the annexed affidavit of the unrepresented individual plaintiff ELENA RUTH SASSOWER, sworn to on March 29, 2017, the exhibits annexed thereto, plaintiffs' accompanying March 29, 2017 verified supplemental complaint, and upon all the papers and proceedings heretofore

had in this citizen-taxpayer action and in the predecessor citizen-taxpayer action, *Center for Judicial Accountability, et al. v. Cuomo, et al.* (Albany Co. #1788-2014),

LET defendants show cause before Acting Supreme Court Justice Denise Hartman at 16 Eagle Street, Albany, New York 12207 on the 28th day of April 2017 at 9:30 a.m. or as soon thereafter as the parties or their counsel may be heard, why an order should not issue:

- (1) pursuant to CPLR §3212, granting summary judgment to plaintiffs on each of the five sections of the sixth cause of action of their September 2, 2016 verified complaint (¶¶59-68) – and declaring null and void the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation and enjoining further disbursement of monies pursuant to its “force of law” judicial salary increase recommendations;
- (2) pursuant to CPLR §3025(b), granting leave to plaintiffs to supplement their September 2, 2016 verified complaint (pertaining to fiscal year 2016-2017) by their March 28, 2017 verified supplemental complaint (pertaining to fiscal year 2017-2018);
- (3) declaring null and void, by reason of the legislative defendants’ fraud and violation of Article III, §10 of the New York State Constitution, the eight budget bills for fiscal year 2017-2018 they purport to have “amended” on March 13, 2017¹, but which, in fact, they did not “amend” – and enjoining all budget actions based thereon;
- (4) declaring null and void, by reason of the legislative defendants’ fraud and violation of Article III, §10 of the New York State Constitution, Debt Service Budget Bill #S.2003-A/A.3003-A for fiscal year 2017-2018 they purport to

¹ **These eight bills are:**

three “appropriation bills”, purportedly amended by defendant Senate and, separately, by defendant Assembly – resulting in six bills:

State Operations: #S.2000-B; #A.3000-B;

Aid to Localities: #S.2003-B; #A.3003-B;

Capital Projects: #S.2004-B; #A.3004-B;

And five “Article VII bills”, purportedly amended by defendant Senate and, separately, by Defendant Assembly – resulting in ten bills:

Public Protection & General Government: #S.2005-B; #A.3005-B.

Education, Labor & Family Assistance: #S.2006-B; #A.3006-B

Health and Mental Hygiene Budget: #S.2007-A; #A.3007-A;

Transportation, Economic Development, & Environmental Conservation: #S.2008-B; #A.3008-B

Revenue: #S.2009-B; #A.3009-B.

have identically “amended” on March 20, 2017, but which, in fact, they did not amend – and enjoining all budget actions based thereon;

- (5) declaring null and void, by reason of the legislative defendants’ violation of Article VII, §§4, 5, 6 of the New York State Constitution and the controlling consolidated decision of the Court of Appeals in *Pataki v. Assembly* and *Silver v. Pataki*, 4 NY3d 75 (2004), each of their March 13, 2017 “amended” budget bills that altered appropriations by increases and additions, directly to the bills, not “stated separately and distinctly from the original item” and removing and inserting qualifying language – and enjoining all budget actions based thereon;
- (6) enjoining defendants from enacting the unamended Legislative/Judiciary Budget Bill #S.2001/A.3001 and/or disbursing monies pursuant thereto; or, alternatively: (i) as to the legislative portion, enjoining enactment of its §1 appropriations and §4 reappropriations (pp. 1-9; 27-53) and disbursement of monies therefrom, *inter alia*, because, in violation of Article VII, §1 of the New York State Constitution, they are not certified; and; (ii) as to the judiciary portion, enjoining enactment of its §3 reappropriations (pp. 23-26) and disbursement of monies therefrom, *inter alia*, because, in violation of Article VII, §1 they are not certified;
- (7) for such other and further relief as may be just and proper, including \$100 motion costs pursuant to CPLR §8202.

~~SUFFICIENT CAUSE APPEARING THEREFORE, let a temporary restraining order issue~~

~~pursuant to State Finance Law §123-e(2)², enjoining defendants as hereinabove set forth pending hearing and determination of this motion.~~

² State Finance Law §123-e(2) reads:

“The court, at the commencement of an action pursuant to this article, or at any time subsequent thereto and prior to entry of judgment, upon application by the plaintiff or the attorney general on behalf of the people of the state, may grant a preliminary injunction and impose such terms and conditions as may be necessary to restrain the defendant if he or she threatens to commit or is committing an act or acts which, if committed or continued during the pendency of the action, would be detrimental to the public interest. A temporary restraining order may be granted pending a hearing for a preliminary injunction notwithstanding the requirements of section six thousand three hundred thirteen of the civil practice law and rules, where it appears that immediate and irreparable injury, loss, or damage will result unless the defendant is restrained before a hearing can be had.” (underlining added).

LET SERVICE of this order to show cause, together with the papers on which it is based, be made on or before the 31st day of March 2017 upon the defendants herein by personal service be deemed good and sufficient service.

ANSWERING PAPERS, if any, are to be served by defendants, via e-mail and regular

DH
3/29/17

mail, at least ~~by _____ days prior to the return date of this order to show cause, to wit, April 2~~

21, 2017.

Denise A. Hartman
Acting Supreme Court Justice

* Plaintiff's request for an evidentiary hearing on March 31, 2017 is denied.

COMMISSION ON LEGISLATIVE, JUDICIAL & EXECUTIVE COMPENSATION
Chapter 60 of the Laws of 2015 (Part E)

Section 1.

Chapter 567 of the laws of 2010 relating to establishing a special commission on compensation, and providing for their powers and duties; and to provide periodic salary increases to state officers is REPEALED.

Section 2.

1. On the first of June of every fourth year, commencing June 1, 2015, there shall be established a commission on legislative, judicial and executive compensation to examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits for members of the legislature, judges and justices of the state-paid courts of the unified court system, statewide elected officials, and those state officers referred to in section 169 of the executive law.

2. (a) In accordance with the provisions of this section, the commission shall examine:

(1) the prevailing adequacy of pay levels and other non-salary benefits received by members of the legislature, statewide elected officials, and those state officers referred to in section 169 of the executive law; and

(2) the prevailing adequacy of pay levels and non-salary benefits received by the judges and justices of the state-paid courts of the unified court system and housing judges of the civil court of the city of New York and determine whether any of such pay levels warrant adjustment; and

(b) The commission shall determine whether: (1) for any of the four years commencing on the first of April of such years, following the year in which the commission is established, the annual salaries for the judges and justices of the state-paid courts of the unified court system and housing judges of the civil court of the city of New York warrant an increase; and (2) on the first of January after the November general election at which members of the state legislature are elected following the year in which the commission is established, and on the first of January following the next such election, the like annual salaries and allowances of members of the legislature, and salaries of statewide elected officials and state officers referred to in section 169 of the executive law warrant an increase.

3. In discharging its responsibilities under subdivision two of this section, the commission shall take into account all appropriate factors including, but not limited to: the overall economic climate; rates of inflation; changes in public-sector spending; the levels of compensation and non-salary benefits received by executive

branch officials and legislators of other states and of the federal government; the levels of compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise; and the state's ability to fund increases in compensation and non-salary benefits.

Section 3.

1. The commission shall consist of seven members to be appointed as follows: three shall be appointed by the governor; one shall be appointed by the temporary president of the senate; one shall be appointed by the speaker of the assembly; and two shall be appointed by the chief judge of the state, one of whom shall serve as chair of the commission. With regard to any matters regarding legislative or executive compensation, the chair shall preside but not vote. Vacancies in the commission shall be filled in the same manner as original appointments. To the extent practicable, members of the commission shall have experience in one or more of the following: determination of executive compensation, human resource administration or financial management.

2. The commission shall only meet within the state, may hold public hearings, at least one of which shall be open for the public to provide comments and shall have all the powers of a legislative committee pursuant to the legislative law. It shall be governed by articles 6, 6-A and 7 of the public officers law.

3. The members of the commission shall receive no compensation for their services but shall be allowed their actual and necessary expenses incurred in the performance of their duties hereunder.

4. No member of the commission shall be disqualified from holding any other public office or employment, nor shall he or she forfeit any such office or employment by reason of his or her appointment pursuant to this section, notwithstanding the provisions of any general, special or local law, regulation, ordinance or city charter.

5. To the maximum extent feasible, the commission shall be entitled to request and receive and shall utilize and be provided with such facilities, resources and data of any court, department, division, board, bureau, commission, agency or public authority of the state or any political subdivision thereof as it may reasonably request to carry out properly its powers and duties pursuant to this section.

6. The commission may request, and shall receive, reasonable assistance from state agency personnel as necessary for the performance of its function.

7. The commission shall make a report to the governor, the legislature and the chief judge of the state of its findings, conclusions, determinations and recommendations, if any, not later than the thirty-first of December of the year in which the commission is established for judicial compensation and the fifteenth of

November the following year for legislative and executive compensation. Any findings, conclusions, determinations and recommendations in the report must be adopted by a majority vote of the commission and findings, conclusions, determinations and recommendations with respect to executive and legislative compensation shall also be supported by at least one member appointed by each appointing authority. Each recommendation made to implement a determination pursuant to section two of this act shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of article 7-B of the judiciary law, section 169 of the executive law, and sections 5 and 5-a of the legislative law, unless modified or abrogated by statute prior to April first of the year as to which such determination applies to judicial compensation and January first of the year as to which such determination applies to legislative and executive compensation.

8. Upon the making of its report as provided in subdivision seven of this section, each commission established pursuant to this section shall be deemed dissolved.

Section 4.

Date of entitlement to salary increase. Notwithstanding the provisions of this act or of any other law, each increase in salary or compensation of any officer or employee provided by this act shall be added to the salary or compensation of such officer or employee at the beginning of that payroll period the first day of which is nearest to the effective date of such increase as provided in this act, or at the beginning of the earlier of two payroll periods the first days of which are nearest but equally near to the effective date of such increase as provided in this act; provided, however, the payment of such salary increase pursuant to this section on a date prior thereto instead of on such effective date, shall not operate to confer any additional salary rights or benefits on such officer or employee. The annual salaries as prescribed pursuant to this act whenever adjusted pursuant to the provisions of this act, shall be rounded up to the nearest multiple of one hundred dollars.

Section 5.

This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2015.

COMMISSION ON LEGISLATIVE, JUDICIAL AND EXECUTIVE COMPENSATION

FINAL REPORT ON JUDICIAL COMPENSATION

December 24, 2015

R-1083

Ex J

COMMISSION ON LEGISLATIVE, JUDICIAL AND EXECUTIVE COMPENSATION

P.O. BOX 454, NEW YORK, NEW YORK 12224

December 24, 2015

The Honorable Andrew M. Cuomo
Governor of the State of New York
State Capitol
Albany, New York 12224

The Honorable John J. Flanagan
Temporary President and Majority Leader
State Capitol Building, Room 330
Albany, New York 12247

The Honorable Carl E. Heastie
Speaker of the New York State Assembly
Legislative Office Building, Room 932
Albany, New York 12248

The Honorable Jonathan Lippman
Chief Judge of the State of New York
20 Eagle Street
Albany, New York 12207

Dear Governor Cuomo, Temporary President Flanagan, Speaker Heastie and
Chief Judge Lippman:

I am pleased to submit this report on behalf of the Commission on Legislative, Judicial and Executive Compensation. Pursuant to chapter 60 of the Laws of 2015, this report sets forth the Commission's recommendations with respect to the compensation levels of judges and justices of the State-paid courts of the Unified Court System over the next four fiscal years.

In furtherance of its statutory mandate, the Commission considered a broad range of pertinent data, beginning with the factors delineated in Part E of chapter 60. The Commission held a day-long public hearing and public meetings that were broadcast live over the Internet. The Commission carefully reviewed the public testimony and extensive written submissions received in connection with the question of appropriate compensation for New York State

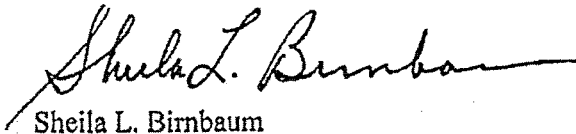
R-1084

judges. Witness lists, written submissions and other information about the Commission's work, including transcripts and videos of the Commission's public hearing and meetings, are available on our website at: www.nyscommissiononcompensation.org/index.shtml.

In recommending the restoration by 2018 of parity between the salary of a New York State Supreme Court Justice and that of a Federal District Court Judge, I believe the Commission has come to a fair and reasoned conclusion that is well supported by the factual record and historical precedent. Each of the last two adjustments to judicial compensation – by the Legislature in 1999 and by the Commission in 2012 – were premised on the principle of pay parity between Supreme Court Justices and Federal District Court Judges. I believe that implementation of the Commission's recommendations will result in equitable, appropriate and competitive judicial salary levels that will attract highly-qualified lawyers to the New York State bench, retain those judges and ensure the strong and independent judicial system that all New Yorkers need and deserve.

I would like to commend the members of the Commission for the hard work and expertise they have contributed to this initial phase of our statutory mission. I look forward to working closely and productively with them as we move forward with the next phase of our important mission – determining appropriate levels of legislative and executive compensation.

Respectfully submitted,

A handwritten signature in black ink, reading "Sheila L. Birnbaum". The signature is written in a cursive style with a long horizontal flourish at the end.

Sheila L. Birnbaum

Chair

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Members of the Commission on Legislative, Judicial and Executive Compensation

Sheila L. Birnbaum, the co-Head of the Global Products Liability and Mass Torts practice at Quinn Emanuel Urquhart & Sullivan, has been national counsel or lead defense counsel for numerous Fortune 500 companies in some of the largest and most complicated tort cases in the country. She was chosen as the leading products liability lawyer in the world by *The International Who's Who of Product Liability*, one of the 10 most admired product liability attorneys in 2010 by *Law 360*, and one of the 25 most influential women in New York by *Crain's New York Business*. As a court-appointed mediator in federal court, she mediated a \$500 million settlement for 92 families of victims of the 2001 terrorist attack on the World Trade Center. In 2011, Attorney General Eric Holder appointed Ms. Birnbaum to serve as Special Master of the reactivated September 11th Victim Compensation Fund program. She oversees the administration of the \$2.7 billion fund created under the James Zadroga 9/11 Health and Compensation Act. Ms. Birnbaum is an appointee of the Chief Judge.

Barry A. Cozier is Senior Counsel in the litigation practice of LeClairRyan, where he represents institutions and individuals in complex business and commercial litigation, real estate litigation, estates litigation, federal and state appeals, arbitration and mediation. He also serves as a Special Master in state and federal court discovery proceedings. From 2006 to 2011, Mr. Cozier was a member of Epstein Becker & Green, P.C., in the firm's national litigation and labor and employment practice groups. He was formerly an Associate Justice of the Appellate Division of the Supreme Court, Second Judicial Department (2001-2006), Justice of the New York Supreme Court (1993-2001), Deputy Chief Administrative Judge for the NYS Courts (1994-1998), and a Judge of the Family Court (1986-1992). From 1998 to 2007, he also was an Adjunct Professor at Fordham University School of Law. Prior to his judicial service, Mr. Cozier was in private practice with a concentration in civil litigation, and served in various public sector legal positions. Mr. Cozier is an appointee of the Chief Judge.

Roman B. Hedges was Deputy Secretary of the New York State Assembly Committee on Ways and Means where he managed legislative operations, supervised research, and directed the budget, fiscal, and economic activities of the committee. He also served in a number of other positions in the Assembly. He was an Associate Professor of Political Science and Public Policy at the State University of New York at Albany where he taught graduate and undergraduate courses in American politics, research methodology, and public policy and conducted a research program in government, politics, and policy which resulted in numerous scholarly publications, professional papers, and reports. He is a member of the Board of the Dormitory Authority of the State of New York. He holds a Doctor of Philosophy and a Master of Arts degree from the University of Rochester, and a Bachelor of Arts degree from Knox College. Mr. Hedges is the appointee of the Speaker of the New York State Assembly.

Mitra Hormozi is General Counsel & Chief Compliance Officer for Revlon. Ms. Hormozi has significant experience in corporate law, compliance and complex litigation. Prior to Revlon, she was a partner at Zuckerman Spaeder LLP. Ms. Hormozi is a former Assistant U.S. Attorney,

who worked on high profile cases in the Eastern District of New York, and who also worked as a Special Deputy Chief of Staff to Governor Andrew Cuomo when he served as New York State Attorney General. She has a bachelor's degree from the University of Michigan and a J.D. degree from New York University School of Law. Ms. Hormozi is an appointee of the Governor.

Gary Johnson serves as Executive Legal Counsel at Medgar Evers College in Brooklyn, New York. He was Director of the New York State Governor's Office of Employee Relations (GOER) from 2007 to 2013. Admitted to the practice of law in 1986, he also served as an assistant counsel at GOER, and as an associate counsel at the New York State Office of Court Administration and the New York State United Teachers. Mr. Johnson served for 10 years as director of litigation at the NYS Public Employment Relations Board. Mr. Johnson is an appointee of the Governor.

James J. Lack was elected 12 times to the New York State Senate, beginning in 1978. He served successively as Chair of the Senate Elections, Labor and Judiciary Committees, retiring in 2002. Subsequently, he was appointed a Judge of the New York Court of Claims, where he served from 2003 to 2011. While in the Senate, Mr. Lack was elected Vice-President, President-Elect and President of the National Conference of State Legislatures (NCSL), and thereafter, as President of the Foundation of State Legislatures. He currently serves as a member of the New York State Advisory Committee on Judicial Ethics. Mr. Lack is a graduate of the University of Pennsylvania and the Fordham University School of Law. Mr. Lack is the appointee of the Temporary President and Majority Leader of the New York State Senate.

Fran Reiter is a partner with The Reiter Giuliani Group. Ms. Reiter served as Executive Deputy Director for State Operations under Governor Andrew Cuomo, and as both the Deputy Mayor for Economic Development and Planning and the Deputy Mayor for Planning and Community Relations in the administration of Mayor Giuliani. She has held several positions in the not-for-profit community, including Executive Director of the New York Shakespeare Festival/Joseph Papp Public Theater, and the President and CEO of the NY Convention & Visitors Bureau. In addition, Ms. Reiter has taught at Baruch College and New York University, and has served on the boards of many organizations, including the New York Public Library and the Weissman Center for International Business at Baruch College. Ms. Reiter is an appointee of the Governor.

I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

New York State has long had one of the largest, busiest, and most distinguished court systems in the world. In 2014 alone, over 3.7 million new cases were filed in our state courts. These cases reflect every conceivable legal conflict arising in our complex society. New York State judges routinely face sophisticated commercial, banking and contract issues; cutting-edge constitutional questions of government powers and individual rights; high-stakes criminal prosecution and defense; difficult questions of family dissolution and violence; protection of vulnerable children and adults; issues involving tort injuries, and many more. Such cases, and such a court system, require judicial service of the highest quality and commitment. New York's Judiciary over the generations has produced many of the leaders of the American legal system, including John Jay, Benjamin N. Cardozo, Irving Lehman, Stanley Fuld, Charles Breitel and countless others who have contributed decisively to the State's stature as a world center of business, law, communications and culture. To sustain and enhance that stature, New York must maintain and strengthen its ability to attract the best and brightest legal minds to its Judiciary and retain them.

In recognition of this necessity, a Commission on Legislative, Judicial and Executive Compensation was established by statute in April 2015 with the charge of, *inter alia*, examining, evaluating and recommending appropriate levels of compensation for New York's judges over the next four fiscal years. Pursuant to its enabling act (L. 2015, c. 60), the Commission must issue its recommendations on judicial salaries by December 31, 2015; and each of these recommendations shall thereafter take effect and have the force of law on April 1 of the year to which it applies, unless sooner modified or abrogated by statute. In formulating its recommendations and fulfilling this mandate, the Commission has studied a broad range of pertinent data, held public meetings and a day-long public hearing, and engaged in extensive discussion and reflection. Its recommendations are as follows:

Recommendations

This Commission has determined that the salary of a New York State Supreme Court Justice shall be adjusted as follows. Effective April 1, 2016, the salary of such a Supreme Court Justice shall be fixed at 95% of the salary of a Federal District Court Judge in effect at that time. Effective April 1, 2017, the salary of a Supreme Court Justice shall be adjusted to remain at 95% of the salary of a Federal District Court Judge in effect at that time. Effective April 1, 2018, the salary of a Supreme Court Justice shall be fixed at 100% of the salary of a Federal District Court Judge in effect at that time. Effective April 1, 2019, the salary of a Supreme Court Justice shall be adjusted to remain at 100% of the salary of a Federal District Court Judge in effect at that time. All other state judges shall receive proportionate adjustments, except that certain judges identified in section IV(B) of this Report shall receive adjustments intended to address longstanding inter- and intra-court pay disparities among judges of countywide and citywide courts.

Three members of the Commission dissented from the Commission's recommendation in section IV(A) relating to the benchmark salary of a New York State Supreme Court Justice.¹ The Commission voted unanimously in favor of the recommendation in section IV(B) relating to amelioration of pay disparities among judges of countywide and citywide courts.

This Commission believes that implementation of these recommendations will establish equitable, appropriate and competitive judicial salary levels that will attract well-qualified lawyers to the New York State bench, retain the skilled and experienced judges now serving, and ensure a strong and independent judicial system into the future.

¹ Commission members Mitra Hormozi, Gary Johnson and Fran Reiter dissent from the recommendations set forth in Section IV(A). A Dissenting Statement is set forth in Section V of this Report.

II. STATUTORY MANDATE

In March 2015, Part E of chapter 60 of the Laws of 2015 was enacted, providing for a quadrennial commission to “examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits” for judges, members of the Legislature, and certain Statewide elected officials and Executive Branch officers named in Executive Law § 169. The Commission is charged, first, with issuing “findings, conclusions, determinations and recommendations” to the Governor, the Legislature and the Chief Judge with regard to judicial compensation, by December 31, 2015. A separate report, relating to legislative and executive compensation, is due by November 15, 2016.

Chapter 60 sets forth a number of factors to guide the Commission’s work of determining appropriate judicial salary levels, including, but not limited to, the overall economic climate in New York; rates of inflation; changes in public-sector spending; levels of compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise; and the state’s ability to fund increases in compensation.

The Commission is authorized to recommend adjustments in judicial salary levels during the four state fiscal years commencing on April 1, 2016.² Pursuant to chapter 60, each recommendation of the Commission for a salary adjustment carries the force of law as of April 1st of the year for which the adjustment has been recommended, unless sooner modified or abrogated by statute.

As prescribed in chapter 60, the Commission consists of seven members appointed by the leaders of all three branches of New York State government. Three members are appointed by

² The Commission may recommend up to two adjustments in legislative and executive salary levels, each commencing on January 1 following a November general election of members of the Legislature (January 1, 2017 and January 1, 2019). The Commission is deemed dissolved following issuance of its report on November 15, 2016.

the Governor; two (including the Chair) by the Chief Judge; and one each by the Temporary President of the Senate and the Speaker of the Assembly. The Commission's findings and recommendations must be supported by majority vote.³

In furtherance of its statutory mission, the Commission held public meetings in New York City on November 2, December 7, and December 14. It also held a day-long public hearing in New York City on November 30, at which witnesses for 15 organizations and one individual testified. The public hearing and meetings were televised live on the Internet. In addition, the Commission invited written commentary and established post office and email addresses (nyscompensation@nycbar.com) through which it received 23 written submissions from judicial associations, bar associations, corporate and business groups, good government groups, institutional litigants and other interested individuals and organizations. The written submissions, totaling many hundreds of pages, contributed greatly to the Commission members' independent research. The witness lists, written submissions, and other information about the work of the Commission, including transcripts and videos of the Commission's public hearing and meetings, are all available on its website at:

www.nyscommissiononcompensation.org/index.shtml.

³ The findings and recommendations concerning executive and legislative compensation likewise require a majority vote but they must also be supported "by at least one member appointed by each appointing authority." The Commission's Chair shall preside but not vote on matters relating to legislative and executive compensation.

III. FINDINGS

Based upon the public testimony and extensive written submissions, and upon its own research and deliberations, the Commission's findings are as follows:

- (1) With brief exceptions, the compensation of New York's Judicial Branch has failed to keep pace with the rate of inflation since the 1970s. Since 1977, when the State assumed responsibility for paying judicial salaries, New York's judges have received seven pay adjustments, with the two most recent adjustments taking effect in 1999 and 2012. On January 1, 1999, pursuant to legislative enactment, the salaries of State Supreme Court Justices were equalized with the salaries of Federal District Judges, at \$136,700. No further adjustment in State judicial compensation was made for a 13-year period until April 1, 2012. In the interim, inflation, as measured by the Consumer Price Index, increased by over 40%.⁴
- (2) In December 2010, the Legislature enacted chapter 567 of the Laws of 2010, establishing a Commission on Judicial Compensation. That Commission's report and recommendations, issued in August 2011, following public meetings and a public hearing, recommended a judicial salary increase restoring pay parity between Supreme Court Justices and Federal District Court Judges at \$174,000 by April 2014. Noting that State judicial pay had been on par with the federal judiciary in the late 1990's and at various times throughout the history of the court system, the 2011 Commission determined that such parity was the proper norm for judicial compensation in New York: "The Federal judiciary sets a benchmark of both quality and compensation – New York State should seek to place its judiciary on par."⁵ In response to the serious fiscal challenges then facing the state, the Commission determined that parity would be phased-in over a three-year period.
- (3) Before such parity could be achieved, the salary of a Federal District Court Judge was reset to \$197,100 in 2013, as a result of Beer v. United States, wherein the U.S. Court of Appeals for the Federal Circuit determined that Congress had improperly withheld six cost-of-living salary adjustments ("COLAs") authorized by the Ethics Reform Act of 1989.⁶ With the COLAs

⁴ See Submission of the Chief Administrative Judge to the 2015 Commission on Legislative, Judicial and Executive Compensation, at 17.

⁵ Final Report of the Special Commission on Judicial Compensation, August 29, 2011, at 8.

⁶ 696 F.3d 1174, 1185-86 (Fed. Cir. 2012), cert. denied, 133 S. Ct. 1997. In December 2013, the

provided to the federal judiciary in January of 2014 and 2015, the salary of a Federal District Court Judge is now \$201,100, and is expected to be reset to \$203,100 on January 1, 2016, based on a scheduled 1.0% COLA for civilian federal employees.⁷

- (4) New York State is in a strong fiscal condition at the present time, as evidenced by recent statements of the Governor, the State Comptroller and the Division of the Budget declaring that the state is enjoying a period of sustained economic growth and has moved from a period of budget deficits to projected budget surpluses. By all indications, New York State expects to experience continued economic growth for the foreseeable future.⁸ The projected additional cost to the state for the first phase of the Commission's recommendations is approximately \$26.5 million for the next fiscal year, representing 19 one-thousandths of one percent (0.019%) of the overall state budget.
- (5) Salary data for Legislators and high-ranking State government officials are not a reliable guide for judicial compensation, inasmuch as those public officers – whose salaries this Commission will address in 2016 – have not received pay adjustments since 1999. The Commission analyzed salary data for, among others, lawyers, including lawyers working in private practice and the public sector throughout New York State, executives in the non-profit sector, professionals in academia and public education, and government officials in New York City. New York State judges are underpaid relative to the compensation of the various categories of lawyers and professionals reviewed.
- (6) The salary of a New York State Supreme Court Justice ranks 47th nationally among trial courts of general jurisdiction when adjusted for cost of living.⁹ In terms of actual salary, New York ranks behind other jurisdictions such as the District of Columbia (\$201,100), Hawaii (\$193,248), Illinois (\$190,758),

holding in Beer was made applicable to all Article III federal judges by virtue of Barker v. United States, (No. 12-826 [Fed. Cl. Filed Nov. 30, 2012]).

⁷ See Letter from the President – Alternative Pay Plan for Federal Civilian Employees, at <https://www.whitehouse.gov/the-press-office/2015/08/28/letter-president-alternative-pay-plan-federal-civilian-employees>. The expected Executive Order of the President giving effect to a COLA of 1.0% for 2016 has not yet been issued as of this writing.

⁸ See Submission of the Associations of Justices of the Supreme Court of the State of New York and of the City of New York, at 31-34.

⁹ Submission of the Chief Administrative Judge, at 19.

California (\$189,041) and Alaska (\$185,088). In terms of adjusted salary, New York ranks well behind every high-population state to which it is typically compared.¹⁰

- (7) There is a generally accepted connection between a strong, well-qualified judiciary and a healthy state economy. The New York business community relies on the state courts to resolve complex disputes, and the quality and efficiency of the state judiciary is a significant factor in deciding whether or not to do business in a particular state. Representatives of the business community urged the Commission to recommend competitive judicial salaries capable of attracting and retaining highly qualified and experienced judges on the state bench, and expressed support for federal judicial pay as a benchmark.
- (8) Competitive judicial salaries are essential to attracting well-qualified lawyers to the bench, retaining the skilled and experienced judges now serving, and maintaining a high quality judicial system commensurate with New York's status as a world leader. The New York State court system is among the busiest and most complex in the world, with over 3.7 million new cases filed in 2014 alone, more than two and a half times the number of filings for the entire Federal Judiciary.¹¹ Most New York State Judges come to the bench after practicing law for a minimum of 10 years.¹² Judges are highly trained and experienced lawyers who often must accept a pay cut in order to serve the public.¹³ Upon joining the bench, judges generally are barred from engaging in any other occupation or from earning outside income, and must abide by a strict ethical code that limits the ambit of their professional and personal activities.
- (9) Current judicial salaries in New York reflect a number of anachronistic internal pay disparities. When the state assumed responsibility for paying the salaries of county- and city-level judges in 1977, it inherited a judicial salary

¹⁰ Id. at 18-19. For example, judicial compensation in Delaware (\$180,733), a state known for its sophisticated commercial courts, ranks third nationally when adjusted for cost of living.

¹¹ Id. at 9-10.

¹² Exceptions are Judges of the County Courts, District Courts on Long Island, City Courts outside New York City, and Housing Judges of the New York City Civil Court, who must be members of the bar for at least 5 years.

¹³ In many instances, they come to the Judiciary only after having served in other high public office or in prominent legal or business positions in the private sector – service that is essential to their later effectiveness on the bench.

structure that lacked consistency or logic. As a result, there are presently seven different salary levels for County Court judges; four salary levels for Family Court Judges; six salary levels for Surrogates; and six salary levels for City Court Judges. The state's judicial salary structure is beset by various anomalies, including county-level judges who earn different salaries even within the same county.

IV. RECOMMENDATIONS

A. Restoring Salary Parity Between Supreme Court Justices and Federal District Court Judges

In light of these findings, the Commission has determined that the appropriate benchmark for the New York State Judiciary remains the salary of a Federal District Court Judge, and that pay parity between Supreme Court Justices and Federal District Court Judges shall be restored in two phases.

- Effective April 1, 2016, the salary of a New York State Supreme Court Justice shall be fixed at 95% of the salary of a Federal District Court Judge in effect at that time. Effective April 1, 2017, the salary of a Supreme Court Justice shall be adjusted to remain at 95% of the salary of a Federal District Court Judge in effect at that time.
- Effective April 1, 2018, the salary of a Supreme Court Justice shall be fixed at 100% of the salary of a Federal District Court Judge in effect at that time. Effective April 1, 2019, the salary of a Supreme Court Justice shall be adjusted to remain at 100% of the salary of a Federal District Court Judge in effect at that time.
- The salaries of all other state judges (including appellate and administrative judges) shall be adjusted on April 1, 2016, and April 1, 2018, to reflect their present proportion to the salary of a Supreme Court Justice, except that:

No County Court Judge, Family Court Judge or Surrogate's Court Judge shall earn less than 95% of a Supreme Court Justice's salary. Any such judicial position now being paid a percentage of a Supreme Court Justice's salary that is greater than 95% shall continue to be paid at that same percentage;

Judges of the New York City Civil Court, the New York City Criminal Court, and the District Court, shall earn 93% of a Supreme Court Justice's salary;

Full-time City Court Judges of courts outside New York City shall earn 90% of a Supreme Court Justice's salary (part-time City Court Judges shall earn the same proportion of the salaries of full-time City Court Judges that they

now earn); and

Housing Judges of the New York City Civil Court shall earn 90% of a Supreme Court Justice's salary.

Equalizing the salary levels of State Supreme Court Justices and Federal District Court Judges is a reasonable, appropriate step well supported by historical precedent. As the prior Commission on Judicial Compensation stated four years ago:

The Commission recognizes the importance of the New York State Judiciary as a co-equal branch of government and recognizes the importance of establishing pay levels that make clear that the judiciary is valued and respected. The Federal Judiciary sets a benchmark of both quality and compensation – New York should seek to place its judiciary on par. That is where New York State judicial compensation was in the late 1990's and our recommendation is to re-establish this benchmark with a phase-in period that takes account of the State's current financial challenges.

In 1999, the last time the Legislature adjusted state judicial compensation, it fixed the salary of a Supreme Court Justice at \$136,700 – identical to the pay of a Federal District Court Judge at that time. At other times, including in 1978 and for the period 1985-1990, Supreme Court Justices earned salaries that were in close proximity with, or even higher than, those of their federal counterparts.

Moreover, given that the salary of a Federal District Court Judge has been indexed to annual COLAs received by federal employees since enactment of the Ethics Reform Act of 1989, restoring parity with the federal judiciary has the added virtue of bringing state judicial compensation in line with historic changes in the cost of living. Put simply, reestablishing parity with the federal judiciary means that state judicial salary levels will finally catch up to inflation. Given the history of judicial pay stagnation in New York, the size of that catch-up increase is not insignificant, but it is a fair and appropriate one that restores the purchasing power of their salaries by April 2018. Between the judicial pay adjustment of January 1, 1999, and the next

raise that took effect on April 1, 2012, New York's judges did not receive a single COLA. It has been estimated that a sitting Supreme Court Justice lost over \$350,000 to inflation over that time period, while the same Justice serving from January 1999 through 2015 lost over \$460,000 in salary dollars.¹⁴ Unlike New York's judges, the vast majority of lawyers, comparable professionals, state employees and judges of other jurisdictions continued to receive fairly regular pay adjustments throughout this long time period.

Restoring parity with the federal judiciary reflects the importance that New York State attaches to providing competitive judicial salaries designed to attract and retain the best possible judges. Representatives of the state's business and legal communities expressed strong support for this principle. New York is a world center of business and finance, and its judiciary regularly faces some of the most complex banking, contract and commercial real estate issues in the nation. New York is home to a large and sophisticated legal community that includes many of the world's leading law firms and legal practitioners. New York is a center of journalism, education, entertainment, art, culture and communications, and its judges address cutting edge constitutional questions of freedom of expression and protection of intellectual property rights. New Yorkers are extraordinarily diverse in terms of income, ethnicity, religion, language and culture, and its judges are challenged to provide justice to persons who are impoverished, vulnerable, victimized and often unrepresented. Competitive judicial salaries are critical to the state's ability to attract and retain highly qualified, diverse and experienced judges who are capable of handling these challenging caseloads.

What constitutes a competitive judicial salary in a state as large, diverse and unique as New York is a difficult, complex question. For example, the average salary of a large law firm partner in New York City in 2014 was \$1.1 million. Clearly, this is not an appropriate salary for a public servant. On the other hand, the mid-range salary level for lawyers in private practice with 10-plus years of experience (not necessarily partners) at mid-sized law firms (35-75 lawyers) in the Albany and Buffalo areas is approximately \$200,000. The Commission's

¹⁴ Submission of Chief Administrative Judge, at 17.

recommendation to implement pay parity with federal judges over three years, beginning at approximately \$193,000 in 2016 and rising to a projected salary of at least \$203,100 in 2018 (and possibly higher if the federal judiciary receives COLAs in 2017 and 2018), attempts to strike a reasonable balance between the financial sacrifices that rightly come with public service and the need to adequately compete for highly-qualified and experienced lawyers in New York's highly competitive marketplace for legal talent.¹⁵

Reestablishing pay parity between state and federal judges has the added benefit of ensuring that judicial salaries in New York do not fall too far behind those paid to judges of other states. At the present time, the \$174,000 salary of a Supreme Court Justice ranks 47th in the nation when adjusted for New York's high cost of living.¹⁶ The first phase of this Commission's recommendations will fix the pay of Supreme Court Justices at 95% of the pay of a Federal District Judge – or \$193,000 – on April 1, 2016. As of this writing, this salary level would be among the highest nationally in terms of nominal dollars, but New York's judicial pay would still rank no higher than 36th nationally when appropriate adjustments are made for our state's high cost of living. On April 1, 2016, Supreme Court Justices are expected to earn less in nominal dollars than their counterparts in the District of Columbia (\$201,100) and Hawaii (\$193,248), and slightly more than those in Illinois (\$190,758) and California (\$189,041). However, even then, New York would lag well behind all those states when salaries are adjusted for cost of living.¹⁷ These national rankings are not trivial statistics. They measure the extent of

¹⁵ On December 14, 2015, the New York City Quadrennial Advisory Commission recommended that District Attorneys in New York City receive a base salary increase of 12%, resulting in a raise of \$22,800, from \$190,000 to \$212,800, effective January 1, 2016. See [http://www.nyc.gov/html/nyccadvisory/html/2015-Quadrennial-AC-Report-12-14-15/2015-Quadrennial-AC-Report-12-14-15.html](#). The Advisory Commission's recommendations do not have the force of law.

¹⁶ Submission of the Associations of Justices of the Supreme Court of the State of New York and of the City of New York, at 19-20.

¹⁷ Judicial salaries in Illinois, Hawaii and California rank 2nd, 15th and 20th, respectively, when adjusted for cost of living. See Submission of Chief Administrative Judge, at 19.

New York's understanding, relative to that of other states, that attracting and retaining highly qualified judges is a necessity in a state that wishes to maintain its national and international prominence.

While the Judiciary and many bar and judicial associations have urged immediate restoration of parity with Federal District Court Judges on April 1, 2016, the Commission has determined that parity should be implemented in two stages. All available evidence suggests that the state is in a strong fiscal condition and could fund the entirety of the recommended increase in the next fiscal year. Nonetheless, the Commission understands that a commitment to conservative budgeting and spending has contributed greatly to the state's present economic health. The Commission therefore recommends that restoration of full parity with the federal judiciary take place in two phases in order to stagger the budgetary impact on the state and ease its ability to fund the recommended salary increases.

B. Redressing Pay Disparities Among Comparable Judges

In addition to the recommendation to reestablish pay parity between Supreme Court Justices and Federal District Judges, with proportionate increases for all other state judges, the Commission recommends adoption of the Judiciary's proposal to implement a revised judicial pay schedule that eliminates many longstanding, inappropriate pay anomalies among judges other than Supreme Court Justices. Accordingly, the Commission has determined that the following pay relationships shall be adopted for non-Supreme Court Justices, effective April 1, 2016.

- County, Family and Surrogate's Court Judges shall not be paid less than 95% of a Supreme Court Justice's salary. Any such judicial position now being paid a percentage of a Supreme Court Justice's salary that is greater than 95% thereof shall continue to be paid that same percentage.
- New York City Civil Court, New York City Criminal Court Judges, and District Court Judges shall be paid 93% of a Supreme Court Justice's salary.
- Full-time City Court Judges outside New York City and New York City Housing Court

Judges shall be paid 90% of a Supreme Court Justice's salary. Each part-time City Court Judge shall continue to maintain the same pay relationship with full-time City Court Judges as heretofore.

These salary relationships embody a far more equitable and rational judicial salary structure for New York State.

V. DISSENTING STATEMENT

We dissent from that part of the Commission's Final Report that fixes the salary of a New York State Supreme Court Justice at 95 percent of the salary of a federal District Court Judge, effective April 1, 2016, and 100 percent of that salary, effective April 1, 2018. By pegging the salary of a State Supreme Court Justice to a percentage of the salary of a federal District Court Judge, the Commission's Final Report fails to satisfy its statutory charge to examine "the prevailing adequacy" of the pay levels of the judges and justices of the state-paid courts, taking into account the overall economic climate, rates of inflation, changes in public sector spending, levels of compensation received by professionals in government, academia and private and nonprofit enterprise, and the State's ability to pay.

We agree that New York needs to "attract well-qualified lawyers to the New York State bench and ensure a strong and independent judicial system into the future,"¹⁸ and we recognize "the need to adequately compete for highly-qualified and experienced lawyers in New York's highly competitive marketplace for legal talent."¹⁹ But we dissent from finding that simply benchmarking state judicial salaries to federal judicial salaries discharges our duty to recommend adequate compensation based on the statutory criteria.

The Final Report recommends implementing pay parity with federal judges over three years, by raising a Supreme Court Justice's salary from \$174,000 to \$193,000 in 2016, and raising it again to at least \$203,100 in 2018—"possibly higher if the federal judiciary receives

¹⁸ Final Report, p. 2

¹⁹ Final Report, p. 12

[cost-of-living adjustments] in 2017 and 2018.”²⁰ This constitutes almost an 11 percent salary increase in 2016, followed by at least a five percent increase in 2018.

As to the overall economic climate, rates of inflation, and changes in public sector spending, increases of such proportions are far out of alignment with the fiscal restraint that has contributed to the State’s improved economic outlook. Five straight state budgets have held spending growth below two percent, and inflation for the past two years has been about one and a half percent.²¹

As to the duty to consider levels of compensation received by professionals in government, academia and private and nonprofit enterprise, the Final Report’s analysis focuses on state judicial salaries, adjusted for cost of living, in comparison to: lawyers in private practice and the public sector in New York; executives in the non-profit sector; professionals in academia and public education; government officials in New York City; and judges in courts of general jurisdiction in other high-population states, and finds that New York’s judicial salaries do not favorably compare. While the judiciary is an independent branch of state government, the Final Report fails to consider the appropriateness of judicial salaries in the totality of the State’s salary plan, and ignores the inflationary impact of the Commission’s recommendations on determining the salaries of other state employees in all three branches, by collective bargaining or otherwise. In addition, simply tying State judicial salaries to federal judicial salaries fails to recognize differences in fiscal resources, history, and statutory authority that should apply to determining pay for those two groups. Such benchmarking effectively defers the Commission’s statutory duty

²⁰ Id.

²¹ U.S. Department of Labor, Bureau of Labor Statistics, Nov. 6, 2015.

to recommend State judicial salaries to a remote federal process, and adds an unnecessary element of uncertainty to budgeting each year.

For these reasons, we dissent as stated here.