

**APPELLATE DIVISION #527081**

SUPREME COURT OF THE 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,

August 6, 2018

Plaintiffs-Appellants,

**Affidavit in Reply to  
“Respondents’ Memorandum  
in Opposition to Relief Sought  
in Appellants’ Order to Show  
Cause”**

-against-

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.

-----X  
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 herein, fully familiar with all the facts, papers and proceedings heretofore had, and submit this affidavit in reply to Assistant Solicitor General Frederick Brodie’s August 3, 2018 “Respondents’ Memorandum in Opposition to Relief Sought in Appellants’ Order to Show Cause” and in further support of appellants’ order to show

cause, as to which oral argument was held on August 2, 2018 before Associate Justice Eugene Devine, during which he signed the order to show cause, but struck its TRO.

2. The reason Justice Devine struck the TRO was not because appellants failed to establish their entitlement to its granting, either by their submissions or their argument. Rather, it was because, as he expressly stated, the TRO was not needed because he fixed a short return date for the motion, Tuesday, August 7, 2018 – selecting that date because judges would not be paid until the following day, Wednesday, August 8, 2018, there being “no pay period until Wednesday”

3. The preliminary injunction will now be decided by a four-judge panel – together with other significant issues, including whether Attorney General Underwood is properly before the Court, representing respondents inasmuch as neither she nor Assistant Solicitor General Brodie has claimed that her representation comports with “the interest of the state”, as required by Executive Law §63.1— determination of which she has not disgorged because of conflicts of interest she has not contested – as well as the related issue as to whether Assistant Solicitor General Brodie, with the knowledge, if not the direction, of Attorney General Underwood and other supervisory/managerial attorneys under her, has engaged in litigation fraud, in the absence of any legitimate defense to the appeal and the order to show cause. As these threshold issues were discussed at the August 2<sup>nd</sup> oral argument and detailed by appellants’ supporting papers – I believe the panel would benefit from having the video of the oral argument available to it.<sup>1</sup> The videographer, who I retained and paid a most nominal sum, has posted the video on VIMEO, here: <https://vimeo.com/282952995> – and I have, additionally posted it on the Center for Judicial Accountability’s website, accessible *via* the prominent homepage link “CJA’s Citizen-Taxpayer Actions to End NYS’ Corrupt Budget ‘Process’

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<sup>1</sup> At my request, the Court also had a court reporter present at the oral argument. As his notes have already been transcribed (Exhibits BB), the panel may procure same, upon such payment to him, as is required. Presumably, his stenographic transcription would include the minute or so of appearances and the like which the videographer apparently failed to record.

and Unconstitutional ‘Three Men in a Room’ Governance”. The direct link is here: <http://www.judgewatch.org/web-pages/searching-nys/budget/citizen-taxpayer-action/2nd/appeal/8-2-18-oral-argument.htm>.

4. With respect to Assistant Solicitor General Brodie’s August 3<sup>rd</sup> “memorandum in opposition”, Justice Devine asked Assistant Solicitor General Brodie, at the outset of the August 2<sup>nd</sup> oral argument, whether he intended to put in additional papers. His initial response was “at the moment I’m content with what we have submitted”. His referred-to submissions consisted of his July 23, 2018 letter to the Court, requesting that it not sign appellants’ order to show cause, which, by a July 26, 2018 letter, he reiterated. As for his expressed “content[ment]”, such was in face of my August 1<sup>st</sup> reply affidavit, e-mailed to him and his attorney supervisors, including Attorney General Underwood (Exhibits CC-1, CC-2)<sup>2</sup>, demonstrating, by a 32-page “legal autopsy”/analysis, annexed as Exhibit Z, that his July 23<sup>rd</sup> letter was “from beginning to end and in virtually every line, a ‘fraud on the court’, as that term is defined”.

5. During my ten-minute oral argument before Justice Devine, I challenged that the attorney general was properly before the Court, representing respondents, and referred to my August 1<sup>st</sup> reply affidavit as showing that “in every respect, Mr. Brodie has misrepresented, misrepresented...” Assistant Solicitor General Brodie then followed with his own ten-minute oral argument, blithely regurgitating the deceits that my August 1<sup>st</sup> reply affidavit had exposed – and citing no legal authority for the attorney general’s representation of respondents, nor purporting same to be in “the interest of the state”. I thereupon requested to be permitted to rebut his argument, identifying that I might otherwise not have an opportunity “to correct his misrepresentations here,

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<sup>2</sup> The exhibits annexed to this reply affidavit, being Exhibits BB-EE, continue the sequence begun by my July 24, 2018 moving affidavit, which annex Exhibits A-U. Exhibits V-AA are annexed to my August 1<sup>st</sup> reply affidavit.

before the Court”. Upon Justice Devine affording me two minutes to do so, my opening words were: “Virtually everything that Mr. Brodie said is rebutted by the reply papers that I worked hard to submit so that I could help this Court understand that the attorney general misrepresents throughout”.

6. The stratagem of “misrepresent[ation] throughout” – making manifest that Attorney General Underwood has no legitimate defense to this appeal and order to show cause – and that her duty, pursuant to Executive Law §63.1 and “the interest of the state”, is to be representing appellants and/or intervening on our behalf – is now repeated by Assistant Solicitor General Brodie’s August 3<sup>rd</sup> “memorandum in opposition”, Its first paragraph states:

“In addition to the arguments set forth below, we rely upon respondents’ letter to the Clerk, dated July 23, 2018. This memorandum supplements that letter...” (at p. 1).

7. Consequently, the panel’s first order of business is to determine:

(a) whether my August 1<sup>st</sup> reply affidavit, by its Exhibit Z “legal autopsy”/analysis of Assistant Solicitor General Brodie’s July 23<sup>rd</sup> letter, establishes it to be a “fraud on the court” – and, simultaneously, his August 2<sup>nd</sup> oral argument and August 3<sup>rd</sup> “memorandum” resting on the July 23<sup>rd</sup> letter; and

(b) appellants’ entitlement to the additional “other and further relief” requested by my August 1<sup>st</sup> reply affidavit, *to wit*, an order:

“(1) pursuant to 22 NYCRR §130-1.1 et seq., imposing maximum costs and \$10,000 sanctions against Assistant Solicitor General Brodie, as well as against Attorney General Underwood and all complicit supervisory/managerial attorneys under her;

(2) pursuant to Judiciary Law §487(1), assessing penal law penalties against Assistant Solicitor General Brodie, as well as against Attorney General Underwood and all complicit supervisory/managerial attorneys under her, as well as such determination as would afford appellants treble damages against them in a civil action;

(3) pursuant to 22 NYCRR §100.3D(2), referring Assistant Solicitor General Brodie, as well as Attorney General Underwood and all complicit supervisory/managerial attorneys under her to:

(i) the Third Department’s Attorney Grievance Committee for their knowing and deliberate violations of New York’s Rules of Professional Conduct for Attorneys and, specifically, Rule 3.1 ‘Non-Meritorious Claims and Contentions’, Rule 3.3 ‘Conduct Before A Tribunal’; Rule 8.4 ‘Misconduct’; Rule 5.1 ‘Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers’; and Rule 5.2 ‘Responsibilities of a Subordinate Lawyer’;

(ii) criminal authorities such as Albany County District P. David Soares and the United States Attorney for the Northern District of New York for their penal law violations and for prosecution, including pursuant to Penal Law §496 ‘Corrupting the government’ [‘The Public Trust Act’];

(4) pursuant to the Court’s inherent power to protect itself, the judicial process, and the public from corruption and fraud, directing Attorney General Underwood – if she has not appeared at the August 2, 2018 oral argument of the TRO – to appear before the Court and/or to immediately furnish the Court with a sworn statement setting forth her answers to each of the five paragraphs of appellant Sassower’s July 24, 2018 moving affidavit under the title heading ‘Appellants’ Entitlement to a TRO and Preliminary Injunction’ (¶¶44-49), beginning with its final two paragraphs, cited by Assistant Solicitor General Brodie’s [s] July 23, 2018 letter for the proposition:

‘Although she attempts to shift the burden to respondents (e.g. Sassower Aff. ¶¶47-48), the burden of establishing her case rests solely on Ms. Sassower – as plaintiff, as appellant, and as the movant seeking emergency relief.’” (August 1, 2018 reply affidavit, at pp. 2-3, underlining in the original).

8. Indeed, inasmuch as Assistant Solicitor General Brodie’s litigation fraud embraces the threshold integrity issues pertaining to the Court and attorney general that are the first and second branches of appellants’ order to show cause, the panel cannot address those two threshold branches without confronting Assistant Solicitor General Brodie’s deceit with respect thereto, demonstrated by my August 1<sup>st</sup> reply affidavit.

9. The panel, of course, will want to examine such specific rebuttal to my August 1<sup>st</sup> reply affidavit as Assistant Solicitor General Brodie made, both at the August 2<sup>nd</sup> oral argument and by his August 3<sup>rd</sup> “memorandum”. However, *as a matter of law*, the panel has no probative

opposition to the facts sworn-to in support of the order to show cause by my August 1<sup>st</sup> reply affidavit or by my July 24<sup>th</sup> moving affidavit – as such required Assistant Solicitor General Brodie’s response by affidavit or affirmation, attesting to personal knowledge of the facts or stating the source of his information and belief. Indeed, by reason thereof – and his complete failure to offer any denial of the readily-verifiable particulars of appellants’ brief, establishing appellants’ entitlement to summary judgment on their causes of action, reiterated by me, over and over again, in support of injunctive relief (CPLR §6312(a))– Assistant Solicitor General Brodie has presented NO “evidence sufficient to raise any issue of fact” to defeat appellants’ entitlement to a preliminary injunction.<sup>3</sup>

10. Presumably, it is because Assistant Solicitor General Brodie has NO facts and NO law that his August 3<sup>rd</sup> answering papers consist of neither an affidavit nor affirmation furnishing the facts, nor a memorandum of law furnishing the law, but a new species of paper, *to wit*, a “memorandum”.

11. My “legal autopsy”/analysis of Assistant Solicitor General Brodie’s August 3<sup>rd</sup> “memorandum” is annexed hereto as Exhibit DD and I incorporate it herein by reference as if more fully set forth, swearing to the truth of its presentation of fact and law.

12. As for the controlling standards and law germane to the attorney misconduct chronicled by the Exhibit DD and Exhibit Z “legal autopsy”/analyses herein and entitling appellants to the relief requested by their order to show cause, by my August 1<sup>st</sup> reply affidavit, and by this reply

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<sup>3</sup> CPLR §6312(c) “Issues of fact.”

“Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff’s papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.”

affidavit, I refer the Court to appellants' reply memoranda of law contained in their reproduced record on appeal [R.517-525, R.980-987, R.1152-1159, R.1376-1381].

13. Finally, inasmuch as CPLR §6312(c) states:

“...the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists” (underlining added)<sup>4</sup>,

I reiterate my readiness to appear at a hearing,<sup>5</sup> if the panel deems it useful that I prove under oath, by live testimony, what the record makes obvious: appellants' *prima facie* entitlement to a preliminary injunction. This includes before a judicial hearing officer designated by the panel to preside over a settlement conference, as suggested by ¶54 of my July 24<sup>th</sup> moving affidavit. Suffice to say that I came to the August 2<sup>nd</sup> oral argument on the TRO, ready to proceed to a hearing, if Justice Devine so chose – and brought with me the documentary evidence that my July 24<sup>th</sup> and July 27<sup>th</sup> e-mails to Attorney General Underwood had alerted her to bring as establishing “the People’s entitlement, *as a matter of law*, to the voiding of the commission-based judicial salary increases” (Exhibits W-1, Y-1; CC-1), *to wit*,

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<sup>4</sup> See, also, CPLR §6301. “Grounds for preliminary injunction and temporary restraining order”.

“A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had. (underlining added).

§6313. “Temporary restraining order.”

“(a) ... Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time.” (underlining added).

<sup>5</sup> According to the commentary appearing in *Civil Practice Law & Rules*, 7B – C.5518:1 “Preliminary Injunction from Appellate Division” (Richard C. Reilly), CPLR §5518 “In effect, [] gives the appellate division during the appeal stage the same powers that the supreme court has during the action’s pretrial and trial stage.”

- (1) Chapter 567 of the Laws of 2010;
- (2) Chapter 60, Part E, of the Laws of 2015;
- (3) the August 29, 2011 report of the Commission on Judicial Compensation;
- (4) the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation;
- (5) a FULL copy of appellants' October 27, 2011 opposition report to the Commission on Judicial Compensation's August 29, 2011 report;
- (6) appellants' March 28, 2012 verified complaint in their declaratory judgment action, *CJA v. Cuomo, et al.* (Bronx Co. #302951-12 / NY Co. #401988-12), with its compendium of substantiating exhibits;
- (7) the free-standing and compendium exhibits substantiating appellants' March 23, 2016 verified second supplemental complaint in the prior citizen-taxpayer action, *CJA v. Cuomo, et al.* (Albany Co. #1788-14) (inventoried by Exhibit G to my July 24, 2018 moving affidavit in support of the OSC) – and, especially, my December 31, 2015 letter to Chief Judge DiFiore; my January 15, 2016 letter to Temporary Senate President Flanagan and Assembly Speaker Heastie, with its 12-page “Statement of Particulars in Further Support of Legislative Override of the ‘Force of Law’ Judicial Salary Increase Recommendations, Repeal of the Commission Statute, Etc”.<sup>6</sup>

14. To counter the fraud that Assistant Solicitor General tried to commit by his August 3<sup>rd</sup> “memorandum” (at p. 10), purporting under the title heading “*Commission’s Compliance with Enabling Statute*”, that the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation [R.1083-1105] is not violative of Chapter 60, Part E, of the Laws of 2015 [R.1080-1082], when it flagrantly is – and *on its face*, as I recited it to be at the August 2<sup>nd</sup> oral argument – attached is the same copy of the “Statement of Particulars” as I had brought to the oral argument (Exhibit EE).

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<sup>6</sup> I had not had time to also bring appellants' November 30, 2015 written statement and subsequent submissions to the Commission on Legislative, Judicial and Executive Compensation – which I had requested Attorney General Underwood to furnish.



*Elena Ruth Sassower*

Elena Ruth Sassower

Sworn to before me this  
6<sup>th</sup> day of August 2018

*Nandhini Sundaram*

Notary Public

NANDHINI SUNDARAM  
NOTARY PUBLIC STATE OF NEW YORK  
ROCKLAND COUNTY  
LIC. # 01SU6192640  
COMM. EXP. Sept. 9<sup>th</sup> 2020

## TABLE OF EXHIBITS

- Exhibit BB: August 3, 2018 exchange of e-mails with court reporter & videographer
- Exhibit CC-1: Appellant Sassower's August 1, 2018 e-mail (4:41 pm)
- Exhibit CC-2: Appellant Sassower's August 2, 2018 e-mail (6:31 am)
- Exhibit DD: "Legal autopsy"/analysis of Assistant Solicitor General Brodie's August 3, 2018 "Respondents' Memorandum in Opposition to Relief Sought by Appellant's Order to Show Cause"
- Exhibit EE: Appellants' "Statement of Particulars in Further Support of Legislative Override of the 'Force of Law' Judicial Salary Increase Recommendations, Repeal of the Commission Statute, Etc."

**Appellate Division Docket #527081**

SUPREME COURT OF THE STATE OF NEW YORK  
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**APPELLANTS' AFFIDAVIT IN REPLY TO RESPONDENTS' MEMORANDUM  
IN OPPOSITION TO RELIEF SOUGHT  
BY APPELLANTS' ORDER TO SHOW CAUSE**  
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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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