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

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

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

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September 10, 2018

Moving Affidavit

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

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

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the unrepresented individual plaintiff-appellant in the appeal of this citizen-taxpayer action brought pursuant to Article 7-A of the State Finance Law (§123 *et seq.*) for declarations of unconstitutionality and unlawfulness with respect to the state budget – including with respect to the Judiciary budget and the commission-based judicial salary increases it embeds.

2. I am fully-familiar with all the facts, papers, and proceedings heretofore had and submit this affidavit in support of plaintiffs-appellants' order to show cause for this Court's disqualification for the actual bias demonstrated by its August 7, 2018 decision and order on motion

(Exhibit A), for vacatur of the decision and order, and for transfer of the appeal to another judicial department or to the New York Court of Appeals.[1]

3. Simultaneously, this affidavit is being filed with the Commission on Judicial Conduct as a judicial misconduct complaint against the four justices whose names are attached to the August 7, 2018 decision, signed not by them, but by the Court's clerk, Robert Mayberger. The four justices are this Court's presiding justice, Elizabeth Garry, and three associate justices, John Egan, Jr., Eugene Devine, and Stan Pritzker, whose disqualification for financial interest and relationships, pursuant to the mandatory directive of §100.3E of the Chief Administrator's Rules Governing Judicial Conduct[2], absent "remittal of disqualification" by disclosure pursuant to §100.3F, is particularized by ¶¶4-10 and ¶52 of my July 24, 2018 moving affidavit in support of the first branch of the motion, concealed by their August 7, 2018 decision.

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1 The reargument/renewal relief is timely. Assistant Solicitor General Brodie's notice of entry is dated August 8, 2018 and was served by regular mail in an envelope bearing an August 9, 2018 postmark (Exhibit B).

2 §§100.3(E) and (F), entitled "Disqualification" and "Remittal of Disqualification", respectively, state, in pertinent part:

> "E. **Disqualification.**
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:...
>
> (F) **Remittal of Disqualification.**
>
> A judge disqualified by the terms of subdivision (E)...may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

4. Additionally, this affidavit is being filed with defendant Chief Judge Janet DiFiore, in response to her "Excellence Initiative" (Exhibit C), so that, consistent therewith and pursuant to her mandatory disciplinary responsibilities under §100.3D(1) of the Chief Administrator's Rules Governing Judicial Conduct,[3] she can discharge supervisory oversight, including by her own referral of Justices Garry, Egan, Devine, and Pritzker to the Commission on Judicial Conduct for their violation of mandatory disqualification/disclosure rules, whose enforcement must be compelled, absent their adherence to them, *via* the granting of this motion.

5. As this is a citizen-taxpayer action, plaintiffs-appellants proceed by order to show cause, consistent with the command of State Finance Law §123-c(4):

> "An action under the provisions of this article shall be heard upon such notice to such officer or employee as the court, justice or judge shall direct, and shall be promptly determined. The action shall have preference over all other causes in all courts" (underlining added).

6. The August 7, 2018 decision conceals that this is a citizen-taxpayer action and, *sub silentio*, repudiates the expedition mandated by State Finance Law §123-c(4). Indeed, the decision repudiates ALL law and adjudicative standards, stating, in full, by its four sentences:

> "Motion for injunctive and further relief.
> Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is
> ORDERED that the motion is granted, without costs, only to the extent that the appeal is set down for the November 2018 term of this Court. The brief of respondents shall be filed and served on or before September 21, 2018. Appellants' reply brief, if any, shall be filed and served on or before October 5, 2018."

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[3] 100.3(D) entitled **"Disciplinary Responsibilities"**, reads as follows in its paragraphs 1 and 2, both germane herein:

> "(1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.
>
> (2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."

7. Such decision, *on its face*, is improper. It cites NO law, it recites NO facts, it furnishes NO specifics as to the "injunctive and further relief" sought, and it offers NO explanation of the Court's determination with respect to same. And that is the BEST that can be said about it. More accurately, the decision is a criminal fraud, including by its concealment that the motion before the Court is appellants' and that the Court is either denying it, in its entirety, or NOT, in fact, determining it. Certainly, completely FALSE is its assertion, "the motion is granted...only to the extent that", thereby making it appear that the Court has granted some part of the motion.

8. As to this, the facts and law, concealed by the decision, are as follows:

(a) Appellants' motion, which the decision does not identify as having been brought on by order to show cause, requested, by its third branch:

> "pursuant to State Finance Law §123-c(4), expediting this appeal by an accelerated schedule for briefing, oral argument, and decision, as likewise for answering papers and determination of this order to show cause".

(b) The purpose of State Finance §123-c(4) is to safeguard against unlawful disbursement of public monies. Absent accelerated scheduling pursuant thereto, the Court's Rule 800.9(b) governed the due date for respondents' brief. Entitled "Respondent's brief", it states, in pertinent part:

> "After the record on appeal and appellant's brief, or brief and appendix, have been accepted for filing, the clerk shall mail to each respondent a scheduling memorandum which shall require respondent to serve and file respondent's brief within 45 days from the date of the memorandum or within such shorter time as the memorandum may direct." (underlining added).

(c) On Wednesday, July 25, 2018, I hand-delivered an "original" and nine copies of appellants' record on appeal and brief to the Clerk's office, with the understanding that they were "accepted for filing", each "original" appending an affidavit of service reflecting mailed service upon respondents' counsel, the attorney general, on Saturday, July 7, 2018, and delivery on Monday, July 9, 2018.

(d) Upon information and belief, the standard practice is for the clerk to have mailed the scheduling memorandum on July 25, 2018 or within a day or two thereafter. 45 days from July 25, 2018 would have given respondents until

Saturday, September 8, 2018 for filing their respondents' brief – thereby pushing it over to Monday, September 10, 2018.

(e) The Clerk's office did not assign a docket number to the perfected appeal until August 2, 2018. However, even then, the Clerk did not issue a scheduling memorandum – which could not have given respondents beyond 45 days, *to wit*, Sunday, September 16, 2018, thereby pushing it over to Monday, September 17, 2018.

(f) Instead, on August 7, 2018, the Court, by its four-sentence decision, signed by its Clerk, ignoring that Rule 800.9(b) explicitly provides for shortening of the 45 days, and making no reference to State Finance Law §123-c(4), nor to any of the facts presented by my July 24, 2018 moving affidavit (at ¶¶24-35) and or by my August 1, 2018 and August 6, 2018 reply affidavits[4] in support of appellant's third branch establishing that a court order requiring respondents' brief by Friday, July 27, 2018 would have been undeservedly generous, gave respondents a full 45 days from August 7, 2018 – *to wit*, until Thursday, September 21, 2018 for their respondents' brief.

(g) The August 7, 2018 decision thereby gave respondents MORE TIME than they would have had, had appellants not made their motion. Indeed, it conferred upon respondents the benefit of having made a motion to extend their time, without having made a motion – and without even having interposed either an affirmation or affidavit to support their opposition to appellants' third branch of requested relief – or any other.

9. Thus, for the decision to imply – as it does – that it "granted" anything to appellants is an outright LIE.

10. Likewise an outright LIE is the decision's inference, by its second sentence, that its adjudication is based on "the papers filed in support of the motion and the papers filed in opposition". It is absolutely NOT – and the most cursory examination of "the papers" establishes this, readily and beyond question. Indeed, what "the papers" establish is that appellants were entitled to ALL their requested relief, *as a matter of law*, including because respondents' opposition was unsupported by ANY affirmation or affidavit – a fact pointed out by my August 6, 2018 reply affidavit, whose ¶¶9 and 10 stated, with underlining for emphasis:

"9. ...*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 1st reply affidavit or by my July 24th 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.[fn3]

10. Presumably, it is because Assistant Solicitor General Brodie has NO facts and NO law that his August 3rd 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'." (italics, underlining, and capitalization in the original).

11. My August 6, 2018 reply affidavit furnishes a road-map of the state of the record before the Court on "the papers" before it[5] – and its accuracy is uncontested by the August 7, 2018 decision. On this motion, the Court must confront that showing – and an appropriate place for the Court to begin is its record-referenced showing of appellants' entitlement, *as a matter of law*, to the granting of the first branch of their motion for disclosure by the justices of their financial interests and relationships, absent their disqualifying themselves. Such is set forth at pages 3-4 of the

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[4] See, my August 1, 2018 reply affidavit, at Exhibit Z, pp. 30-32; and my August 6, 2018 reply affidavit, at Exhibit DD, p.8.

"[fn3] 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.'"

[5] Further supplementing my August 6, 2018 reply affidavit is my August 7, 2018 letter, expressly requesting that it be furnished to the Court and made part of the record (Exhibit D-1), not opposed by Assistant Solicitor General Brodie, who responded with his own August 7, 2018 letter (Exhibit D-2).

affidavit's Exhibit DD "legal autopsy"/analysis of Assistant Solicitor General Brodie's August 3, 2018 "memorandum", which, after demonstrating its deceitful opposition to the first branch, states:

> "Appellants' entitlement to the granting of their first branch is set forth by ¶¶4-10 and ¶52 of appellant Sassower's moving affidavit in support of the order to show cause and reinforced by pages 25-28 of the 'legal autopsy'/analysis, annexed as Exhibit Z to her August 1st reply affidavit, whose accuracy is uncontested by Assistant Solicitor General Brodie."

12. The Court must then address *seriatim* the other six branches of relief sought by appellants' motion – the record with respect to each also highlighted by that same Exhibit DD "legal autopsy"/analysis.

13. Then, too, there is the additional relief, itemized at ¶3 of my August 1, 2018 reply affidavit and at ¶7 of my August 6, 2018 reply affidavit, for costs, sanctions, and other appropriate action against Assistant Solicitor General Brodie and his conspiring attorney superiors in the attorney general's office, including Attorney General Underwood, arising from their litigation fraud by their "papers filed in opposition" and at the August 2, 2018 oral argument of appellants' TRO. As the August 7, 2018 decision is a "green light" endorsement of their litigation fraud, such now constitutes grounds for vacatur of the August 7, 2018 decision pursuant to CPLR §5015(a)(3) "fraud, misrepresentation, or other misconduct of an adverse party".

14. Assistant Solicitor General Brodie will have an opportunity to assist this Court in justifying its August 7, 2018 decision – "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause" of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). However, based on the documented facts, particularized by my August 6, 2018 reply affidavit, such assistance must include an affirmation or affidavit – and from Attorney General Underwood herself.

15. Suffice to say that based on the Court's August 7, 2018 decision, it is impossible to conclude anything but that the Court is intending to "throw" the appeal by a comparable decision that will conceal ALL the facts, law, and legal argument presented by appellants, which is the ONLY way Judge Hartman's appealed-from November 28, 2017 decision and judgment can be sustained. Certainly, for the Court to confront the indefensibility and unconstitutionality of Judge Hartman's November 28, 2017 decision and judgment, beginning with the threshold integrity issues of her concealment of, and failure to disclose, her financial interests and relationships, and her concealment of, and failure to adjudicate, the lawfulness of the attorney general's defense representation, would require it to expose the indefensibility and unconstitutionality of its own August 7, 2018 decision.

16. As the Court "overlooked" all the facts, law, and legal argument presented by appellants' "papers filed in support of the motion" – none identified or addressed by its August 7, 2018 decision – such constitutes grounds for reargument, pursuant to CPLR §2221(d). As for "new facts not offered on the prior motion", constituting a basis for renewal, pursuant to CPLR §2221(e), it is the actual bias of the justices demonstrated by the August 7, 2018 decision. The "reasonable justification" for appellants not having presented this actual bias "on the prior motion" is that it is a supervening occurrence. Indeed, the very purpose of the first branch of appellants' "prior motion" was to PREVENT the actuality of the justices' financial interests and relationships, detailed at ¶¶4-10 of my July 24, 2018 moving affidavit, from becoming actual bias.

17. Finally, because disqualification for financial interest is a mandatory disqualification under Judiciary Law §14, divesting the so-interested judge of jurisdiction, such also constitutes grounds for vacatur of the Court's August 7, 2018 decision pursuant to CPLR §5015(a)(4) for "lack of jurisdiction".

18. Beyond appellants' particularized presentation of law and argument on the issue of judicial disqualification and disclosure, and the lawfulness of the attorney general's representation, set forth by my August 1, 2018 reply affidavit,[6] the black-letter law pertaining to judicial disqualification, disclosure, and the integrity of judicial proceedings – of which each justice is presumed to be fully knowledgeable – was presented by appellants, over and again, to Judge Hartman, by their successive reply memoranda of law, contained in the record on appeal [R.473-475, R.515-525], [R.924-926, R.973-987], [R.1330-1331, 1334; 1376-1381]. In the interest of economy, appellants refer the Court to those memoranda of law now, as previously, in support of their requested relief.

19. Appellants have made no prior application for the same or similar relief to this Court, except as embodied by their prior motion fraudulently disposed of by the August 7, 2018 decision, as hereinabove recited.

Elena Ruth Sassower, Unrepresented Plaintiff-Appellant

Sworn to before me this
10th day of September 2018

Notary Public

JOSEPH GONNELLA JR
Notary Public – State of New York
NO. 01GO6357364
Qualified in Westchester County
My Commission Expires Apr 17, 2021

6 See pp. 25-28; pp. 23-25 of Exhibit Z thereto, my "legal autopsy"/analysis of Assistant Solicitor General Brodie's July 23, 2018 and July 26, 2018 letters.

TABLE OF EXHIBITS

Appellate Division Docket #527081

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Appellants' Order to Show Cause for the Court's Disqualification for Demonstrated Actual Bias, Vacatur of its August 7, 2018 Decision and Order on Motion, & Transfer of the Appeal to Another Judicial Department or to the New York Court of Appeals

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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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