Appellate Division Docket #

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

To be Argued by:
Elena Ruth Sassower
(15 Minutes Requested)

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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,

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

-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.

APPELLANTS' BRIEF

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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QUESTIONS PRESENTED

Is the lower court's appealed-from November 28, 2017 decision and judgment defensible -- indeed, constitutional?

1. Was the lower court duty-bound to have disqualified itself for demonstrated actual bias – and is its November 28, 2017 decision and judgment [R.31-41] and all prior decisions void by reason thereof?

   The lower court concealed appellants' particularized demonstration of its actual bias in denying their requests that it disqualify itself.

2. Is the lower court's concealment of appellants' requests that it disclose its financial interests and relationships with defendants – and its failure to make any disclosure – sufficient, in and of itself, to mandate vacatur of its November 28, 2017 decision and judgment – and of its underlying prior decisions – *as a matter of law*?

   The lower court concealed plaintiffs' requests for disclosure – of which it made none.

3. Is the lower court's concealment of appellants' three threshold issues pertaining to the attorney general – and its failure to adjudicate same – sufficient, in and of itself, to mandate vacatur of its November 28, 2017 decision and judgment – and of its underlying prior decisions – *as a matter of law*?

   The lower court concealed and did not adjudicate any of the below three threshold issues:

   a) appellants' entitlement to an order imposing sanctions and costs upon respondents' counsel, the attorney general, for litigation fraud – and referring him and the culpable attorneys under his supervision to disciplinary and criminal authorities;

   b) appellants' entitlement to an order disqualifying respondents' counsel, the attorney general, himself a respondent, from representing his co-respondents for conflict of interest;

c) appellants' entitlement to an order pursuant to Executive Law §63.1 and State Finance Law Article 7-A directing the attorney general to represent appellants and/or to intervene on their behalf – including *via* independent counsel.

4. Based on the evidentiary record and controlling law, was the lower court duty-bound to grant appellants summary judgment on each of the ten causes of action of their September 2, 2016 verified complaint [R.99-130, R.159-219] – and the preliminary injunction and TRO sought by their September 2, 2016 order to show cause [R.80-82, R.131]?

   The lower court did not base its adjudications on the record or controlling law in disposing of any of the ten causes of action of appellants' September 2, 2016 verified complaint – and in denying the requested injunctive relief.

5. Based on the evidentiary record and controlling law, was the lower court duty-bound to grant appellants all branches of their March 29, 2017 order to show cause – and the preliminary injunction and TRO it sought [R.635-638]?

   The lower court did not base its denial of appellants' March 29, 2017 order to show, with preliminary injunction and TRO, on the record or controlling law.

6. Based on the evidentiary record and controlling rules of judicial and attorney conduct, was the lower court duty-bound to grant appellants the "other and further relief" specified by their September 2, 2016 verified complaint and March 29, 2017 verified supplemental complaint?, *to wit*:

   "restoring public trust by referring to prosecutorial authorities the evidence particularized by [these verified pleadings] as [they] establish[], *prima facie*, grand larceny of the public fisc and other corrupt acts, requiring that the culpable public officers and their agents be criminally prosecuted and removed from office, without further delay." [R.131, at ¶4; R.742, at ¶4, italics in the original].

   The lower court concealed and did not determine its duty with respect to this "other and further relief".

INTRODUCTION: Whither the Ten Causes of Action?[1]

> "[A] plaintiff's cause of action is valuable property within the generally accepted sense of that word, and, as such, it is entitled to the protections of the Constitution.", *Link v. Wabash Railroad Co*, 370 U.S. 626, 646 (1962), U.S. Supreme Court Justice Hugo Black writing in dissent, with Chief Justice Earl Warren concurring.

On September 2, 2016, plaintiffs, "acting on their own behalf and on behalf of the People of the State of New York & the Public Interest", commenced a citizen-taxpayer action challenging the constitutionality and lawfulness of the New York state budget for fiscal year 2016-2017 [R.85-392]. It presented ten causes of action [R.99-123, R-159-219] – and, as to each, plaintiffs had a *prima facie* entitlement to summary judgment – and to the preliminary injunction and TRO they simultaneously sought by a September 2, 2016 order to show cause [R.80-84]. This was made obvious, within that very month, when Attorney General Eric Schneiderman, a named defendant representing himself and his co-defendants, made a cross-motion to dismiss [R.403-428] that was so fraudulent and insufficient, *as a matter of law*, that plaintiffs responded by seeking summary judgment on all ten causes of action pursuant to CPLR §3211(c) based on the

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[1] The record of the citizen-taxpayer action, *Center for Judicial Accountability, et al. v. Cuomo, et al.,* (Albany Co. #5122-2016) as well its predecessor citizen-taxpayer action, *Center for Judicial Accountability, et al., v. Cuomo, et al*. (Albany Co. #1788-2014), is posted on CJA's website, www.judgewatch.org, accessible from the prominent homepage link: "CJA's Citizen-Taxpayer Actions to End NYS' Corrupt Budget 'Process' & Unconstitutional 'Three

showing made by their September 30, 2016 reply memorandum of law [R.471-526]. This, in addition to raising threshold integrity issues for determination pertaining to the attorney general:

(1) their entitlement to the attorney general's representation/intervention, pursuant to Executive Law §63.1 and State Finance Law Article 7-A (§123 *et seq.*);

(2) their entitlement to the attorney general's disqualification as defense counsel by reason of his conflicts of interest;

(3) their entitlement to sanctions and costs against the attorney general for litigation fraud, and his referral to disciplinary and criminal authorities.

The judge assigned to the case, Court of Claims Judge/Acting Supreme Court Justice Denise Hartman was, like virtually every other judge, financially interested in the citizen-taxpayer action – as four causes of action directly involved the Judiciary budget, the judicial pay raises embedded therein, and the statutes that had established judicial pay commissions. However, unlike most of her fellow judges, she additionally had personal and professional relationships of a significant and extensive nature with defense counsel, the attorney general's office, in which she worked for 30 years – including under two of the named defendants: the then attorney general, Eric Schneiderman, and his predecessor attorney general, the now Governor Andrew Cuomo, who, in 2015, had appointed her to the bench. Based

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Men in a Room' Governance".

on the causes of action, Judge Hartman would be required to refer them and their co-defendants – all constitutional officers of New York's three government branches – to criminal authorities for prosecution for corruption [R.129]. For this reason, plaintiffs' September 30, 2016 reply memorandum of law made a threshold request that she disclose her interests and relationships bearing upon her fairness and impartiality [R.477-478; R.515-517].

Despite the fact that State Finance Law §123-c(4) requires that citizen-taxpayer actions proceed with expedition:

> "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",

Judge Hartman did not render a decision until nearly three months later, December 21, 2016, when, without making any disclosure of facts bearing upon her fairness and impartiality – or addressing any of the three threshold integrity issues pertaining to the attorney general – she dismissed nine of plaintiffs' ten causes of action [R.527-535]. In so doing, she failed to include a CPLR §2219(a) recitation of papers read on the motion – thereby concealing the very existence of plaintiffs' September 30, 2016 reply memorandum of law [R.471-526] and their

accompanying affidavit swearing to its truth [R.429-470] – whose entire content she essentially concealed.

In response, on February 15, 2017, plaintiffs moved, by order to show cause, to disqualify Judge Hartman for "demonstrated actual bias and interest, pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct and Judiciary Law §14", vacatur of her December 21, 2016 decision "by reason thereof for fraud and lack of jurisdiction; and, if denied, disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon her fairness and impartiality", further seeking reargument, renewal, as well as vacatur "pursuant to CPLR §5015(a)(4) for fraud and lack of jurisdiction" [R-536-612]. Substantiating the requested relief was a "legal autopsy"/analysis of Judge Hartman's December 21, 2016 decision, annexed as Exhibit U to plaintiffs' order to show cause [R.554-577].

In blunt terms, the first page of plaintiffs' Exhibit U analysis [R.554] described the December 21, 2016 decision [R.527-535] as "a criminal fraud" "falsif[ying] the record in all material respects to grant defendants relief to which they [were] not entitled, *as a matter of law*, and to deny plaintiffs relief to which they [were] entitled, *as a matter of law*" – stating that this was verifiable, "within minutes", by comparing it to plaintiffs' 53-page September 30, 2016 reply

memorandum of law [R-471-526], constituting "a 'paper trail' of the record before [Judge Hartman]." The next 23 pages of the Exhibit U analysis then demonstrated this [R.554-577].

Below is an excerpting of how Judge Hartman's December 21, 2016 decision [R.527-535] disposed of plaintiffs' ten causes of action [R.99-123, R-159-219], juxtaposed with the rebuttals from plaintiffs' Exhibit U analysis [R.554-577]. This is followed by a recitation of "Subsequent Procedural History" culminating in Judge Hartman's November 28, 2017 decision and judgment [R.31-41].

Plaintiffs' First, Second, Third, and Fourth Causes of Action, as Dismissed by Judge Hartman's December 21, 2016 Decision

Judge Hartman's December 21, 2016 decision dismissed the first four causes of action of plaintiffs' September 2, 2016 verified complaint [R.99-107, R.159-187] by two sentences, as follows:

> "In [his] April 2016 decision [in plaintiffs' predecessor citizen-taxpayer action], [Judge McDonough] held that causes of action 9-12 in the [March 23, 2016] proposed second supplemental complaint [pertaining to fiscal year 2016-2017] were 'patently devoid of merit,' given [his] dismissal of similar causes of action regarding prior budget years (citing *Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Because causes of action 1-4 [of the September 2, 2016 verified complaint] are identical to those [Judge McDonough] held 'patently devoid of merit,' they are barred (*see Maki v. Bassett Healthcare*, 141 AD3d 979, 981 3d Dept 2016])." [R.531].

In rebuttal, plaintiffs' Exhibit U "legal autopsy"/analysis stated [R.567-568]:

"Apart from the fact that Justice McDonough's referred-to 'April 2016' decision was rendered in August 2016 – as Justice Hartman's own 'Background' section of her [December 21, 2016] decision reflects [R.529] – and the fact that this same 'Background' section describes the first four causes of action of the September 2, 2016 verified complaint as 'essentially identical' to causes of action 9-12 in the predecessor citizen taxpayer action – Justice Hartman now proclaims the <u>first four causes of action</u> herein as 'identical' to 9-12.

This is <u>false</u>. A total of 16 paragraphs – four paragraphs at the outset of <u>each</u> of the first four causes of action of the September 2, 2016 verified complaint (¶¶24-27 [R.100], ¶¶35-38 [R.103], ¶¶41-44 [R.104], ¶¶49-52 [R.106]) identify that each is not barred by Justice McDonough's August 1, 2016 decision [R.315-325] – and furnish the reason and substantiating proof, *to wit*, plaintiffs' Exhibit G analysis [R.338-373] showing the August 1, 2016 decision to be a 'judicial fraud' by a judge duty-bound to have disqualified himself for actual bias born of financial interest, who dismissed plaintiffs' causes of action:

> '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 <u>not</u> exist." (¶¶26, 37, 43, 51 of plaintiffs' September 2, 2016 verified complaint, underlining in original).

Justice Hartman's concealment of these prominent, material, and <u>fully-documented</u> allegations of the September 2, 2016 verified complaint (¶¶24-27 [R.100], ¶¶35-38 [R.103], ¶¶41-44 [R.104-5], ¶¶49-52 [R.106-7]) reflects her knowledge that they preclude dismissal of the first four causes of action as failing to state a cause of action based on the August 1, 2016 decision [R.315-325]. Indeed, her single cited case, the Appellate Division, Third Department decision in *Maki v. Bassett Healthcare*, 141 AD3d 979, 981 [3d Dept

2016], is not to the contrary. Rather, it recites the governing principal she has ignored:

> ''we proceed to determine the motion 'in accordance with the requirements of CPLR 3211' (*Lockheed Martin Corp. v Atlas Commerce, Inc.,* 283 AD2d at 803), and, in so doing, we ''afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference'' (*Stainless Broadcasting Co. v Clear Channel Broadcasting Licenses, L.P.,* 58 A.D.3d 1010, 1012 [2009], quoting *EBC I, Inc. v Goldman, Sachs & Co.,* 5 N.Y.3d 11, 19 [2005]).' (at 980-981).

Justice Hartman's concealment of the allegations of the first four causes of action replicates AAG Kerwin's identical concealment by her dismissal cross-motion, objected to by plaintiffs. And, tellingly, Justice Hartman does not reveal either the grounds upon which AAG Kerwin had cross-moved to dismiss the first four causes of action [R.415] – nor plaintiffs' response by their September 30, 2016 memorandum of law (at pp. 15-16) [R.488-489]."

**<u>Plaintiffs' Fifth Cause of Action,
as Dismissed by Judge Hartman's December 21, 2016 Decision</u>**

Judge Hartman' December 21, 2016 decision dismissed the fifth cause of action of plaintiffs' September 2, 2016 verified complaint [R.108-109, R.177-186, R.214-219] by a single sentence, as follows [R.531]:

> "…the fifth cause of action, which alleges violations of New York State Constitution Article VII §§4, 5, 6, must be dismissed because it restates arguments and claims already rejected by [Justice McDonough] in [his] prior decisions."

<u>In rebuttal, plaintiffs' Exhibit U "legal autopsy"/analysis</u> stated [R.568-569]:

"Likewise founded on fraud and concealment is Justice Hartman's dismissal of <u>plaintiffs' fifth cause of action</u> (¶¶54-58) [R.108-109, R.177-186, R.214-219]. She identifies NONE of its allegations, other than that it pertains to violations of Article VII, §§4, 5, and 6 of the New York State Constitution, which is its title. These violations, particularized by ¶57 [R.108-109] of the fifth cause of action as:

> 'the failure of the Senate and Assembly, by their committees and by their full chambers, to amend and pass the Governor's appropriation bills and to reconcile them so that they might 'become law immediately without further action by the governor', as mandated by Article VII, §4 of the New York State Constitution;
>
> the so-called 'one-house budget proposals', emerging from closed-door political conferences of the Senate and Assembly majority party/coalitions;
>
> the proceedings of the Senate and Assembly Joint Budget Conference Committee and its subcommittees, conducted by staff, behind-closed-doors, based on the 'one-house budget proposals';
>
> the behind-closed-doors, three-men-in-a-room budget deal-making by the Governor, Temporary Senate President, and Assembly Speaker'

do NOT 'restate[] arguments and claims already rejected by [Justice McDonough] in [his] prior decisions' – and Justice Hartman does NOT identify which of Justice McDonough's 'prior decisions' she is talking about. Apart from the fact that plaintiffs' Exhibit G analysis [R.338-373] detailed the fraudulence of <u>all</u> Justice McDonough's decisions [R.315-325, R.326-334, R.335-337], plaintiffs never alleged violations of Article VII, §§4, 5, and 6 until their March 23, 2016 second supplemental complaint [R.135-225] and such were <u>not</u> 'rejected' by Justice McDonough's August 1, 2016 decision [R.315-325], which did <u>not</u> even mention these constitutional provisions.

> And here, too, Justice Hartman neither identifies AAG Kerwin's arguments pertaining to the fifth cause of action [R.418] – nor that their deceitfulness had been exposed and objected to by plaintiffs' September 30, 2016 memorandum of law (at pp. 19-20) [R.492-493]."

Plaintiffs' Seventh and Eighth Causes of Action,
as Dismissed by Judge Hartman's December 21, 2016 Decision

Judge Hartman's December 21, 2016 decision dismissed the seventh and eighth causes of action of plaintiffs' September 2, 2016 verified complaint [R.112-114, R.201-213] by two sentences, as follows [R.531]:

> "Causes of action seven and eight both challenge the actions of the Commission on Legislative, Judicial and Executive compensation, which is not a party to this action. Accordingly, these causes of action must be dismissed."

In rebuttal, plaintiffs' Exhibit U "legal autopsy"/analysis stated [R.569]:

> "Justice Hartman's description that plaintiffs' seventh and eighth causes of action (¶¶69-76, ¶¶77-80) [R.112-114, R.201-213] 'both challenge the actions of the Commission on Legislative, Judicial, and Executive compensation' is false. The seventh cause of action (¶¶69-76) [R.112, R.201] is explicitly – and by its title – a challenge to the constitutionality of Chapter 60, Part E, of the Laws of 2015 'As Applied' – and the 'first and overarching ground' of this unconstitutionality, highlighted at ¶71 of plaintiffs' complaint, is as follows:
>
> > 'Defendants' refusal to discharge ANY oversight duties with respect to the constitutionality and operations of a statute they enacted without legislative due process renders the statute unconstitutional, *as applied*. Especially is this so, where their refusal to discharge

> oversight is in face of DISPOSITIVE evidentiary proof of the statute's unconstitutionality, *as written and as applied* – such as plaintiffs furnished them (Exhibits 38, 37, 39, 40, 41, 42, 43, 44, 46, 47, 48).' (underlining and capitalization in plaintiffs' ¶71 [R-112, R.201]).

Obvious from such key ground of unconstitutionality, *as applied*, is that it does not require that the Commission on Legislative, Judicial and Executive Compensation be a party – which is why the decision does not identify ¶71 [R.112, R.201]. For that matter, Justice Hartman does not identify ANY of the allegations of the seventh cause of action (¶¶69-76) [R.112, R.201-212] – or ANY of the allegations of the eighth causes of action (¶¶77-80) [R.114, R.212-213] in purporting, without legal authority, that these two causes of action 'must be dismissed' because the Commission is not a party. Indeed, such legally-unsupported ground for dismissal is Justice Hartman's own – having not been advanced by AAG Kerwin.

Here, too, Justice Hartman does not refer to AAG Kerwin's argument in cross-moving to dismiss the seventh and eighth causes of action — which she had combined with her argument for dismissing the sixth cause of action (¶¶59-68) [R.109-112, R.187-201]. Plaintiffs' September 30, 2016 memorandum of law (at pp. 27-31) [R.500-504] particularized the fraudulence of AAG Kerwin's cross-motion for dismissal of these three causes of action [R.421-422] – but here, too, AAG Kerwin gets a 'free pass'."

Plaintiffs' Ninth Cause of Action,
as Dismissed by Judge Hartman's December 21, 2016 Decision

Judge Hartman's December 21, 2016 decision dismissed the ninth cause of action of plaintiffs' September 2, 2016 verified complaint [R.115, R.214-219] by five sentences, as follows [R.531-532]:

"The ninth cause of action challenges the constitutionality of 'three-

men-in-a-room' budget negotiation. As defendants point out, the negotiation of the 2016-2017 budget is moot, because the budget has passed (*see N.Y. Pub. Interest Research Group, Inc. v Regan*, 91 AD2d 774 [3d Dept 1982], *lv denied* 58 NY2d 610 [1983]). Assuming without deciding that the exception for issues capable of repetition but evading review applies, plaintiff has failed to state a cause of action. Taking all the allegations in the complaint as true, plaintiff has not alleged a violation of law. None of the authority cited by plaintiff prohibits the Governor and leaders of the Senate and Assembly from holding budget negotiation (*see Pataki v. N.Y. State Assembly*, 4 NY3d 75, 85 [2004]; *Urban Justice Ctr. v. Pataki*, 38 AD3d 20, 27-30 [1st Dept 2006], *appeal dismissed, lv denied* 8 NY 3d 958 [2007])."

<u>In rebuttal, plaintiffs' Exhibit U "legal autopsy"/analysis</u> stated [R.570-571]:

"This is one of only three places in the decision where Justice Hartman refers to AAG Kerwin's argument [R.419-421] – giving it knee-jerk acceptance, without mention of plaintiffs' refutation by their September 30, 2016 memorandum of law (at pp. 20-26) [R.493-499]. Plaintiffs' refutation included the following:

> 'AAG Kerwin asserts:
>
> > 'Any claims as to how the 2016-17 budget was negotiated are moot, since the budget was subsequently enacted…' (at p. 7) [R.419].
>
> This is false. The enactment of the budget on or about April 1, 2016 does not change the fact that there are yet six months left to fiscal year 2016-2017 against which a citizen-taxpayer lies for declarations that it was unconstitutionally and unlawfully procured, that its disbursement of state funds is unconstitutional and illegal, and for such injunctive relief as is appropriate to the circumstances. Moreover, the recognized exceptions

> to mootness are <u>all</u> here present: (1) likelihood of repetition; (2) a phenomenon typically evading review; (3) involves a novel issue or significant or important questions not previously passed upon; (4) involves a matter of widespread public interest or importance or of ongoing public interest; *Winner v. Cuomo*, 176 A.D.2d 60 (3rd Dept. 1992); *Schulz v. Silver*, 212 A.D.2d 293 (3rd Dept. 1995); 43 <u>New York Jurisprudence</u> §25 'Exceptions to mootness doctrine'.
>
> That AAG Kerwin pretends that the ninth cause of action is moot reflects that she has no answer, whatever, to its showing that three-men-in-a-room, budget deal-making is unconstitutional, either *as unwritten* or *as applied*. Indeed, <u>she confronts virtually none of the allegations of the ninth cause of action</u>.' (September 30, 2016 memorandum of law, at pp. 20-21 [R.493-494], underlining in the original).

Apart from the fact that as of the December 21, 2016 date of the decision, there were more than three full months to fiscal year 2016-2017 in which state monies were to be disbursed, Justice Hartman dismisses plaintiffs' ninth cause of action without identifying ANY of its allegations. Indeed, her assertion that it 'challenges three men in a room budget negotiation' is <u>false</u> – replicating AAG Kerwin's deceit in her dismissal cross-motion.

As highlighted by plaintiffs' September 30, 2016 memorandum of law, plaintiffs' ninth cause of action (¶¶81-84) [R.115, R.214-219] does <u>not</u> challenge budget 'negotiation' by the Governor, Temporary Senate President, and Assembly Speaker. It challenges their budget dealmaking that includes <u>the amending of budget bills</u> – the unconstitutionality of which is compounded by the fact that they do it behind-closed-doors. Both are alleged by plaintiffs' ninth cause of action to unbalance the constitutional design – and, as set forth by the ninth cause of action, citing and quoting from the Court of Appeals' decision in *King v. Cuomo*, 81 N.Y.2d 247 (1993) – on which

> plaintiffs' ninth cause of action principally relies – and *Campaign for Fiscal Equity, Inc. v. Marino*, 87 N.Y.2d 235 (1995), also cited and quoted by plaintiffs' ninth cause of action – the standard for determining constitutionality of a practice is whether it unbalances the constitutional design. These two cases make plain that because the Constitution does not prohibit a practice does not make it constitutional – contrary to AAG Kerwin's deceit on her cross-motion – adopted by Justice Hartman.
>
> As with AAG Kerwin, Justice Hartman's decision does not address, makes no showing, and does not even baldly claim, that three-men-in-a-room 'budget negotiations and amending of budget bills' – all taking place out of public view – is consistent with the text of Article VII, §§3 and 4 – or Article III, §10 of the New York State Constitution, 'The doors of each house shall be kept open', and Senate and Assembly rules consistent therewith: Senate Rule XI, §1; Assembly Rule II, §1; and Public Officers Law, Article VI. Similarly, the decision does not address, makes no showing, and does not even baldly claim, that three-men-in-a-room governance accords with the constitutional design, including as to size, reflected by Zephyr Teachout's law review article '*The Anti-Corruption Principle*', Cornell Law Review, Vol 94: 341-413 – legal authority to which plaintiffs' ninth cause of action also cites [R.218]. As such, Justice Hartman's dismissal of the ninth cause of action is fraudulent."

Plaintiffs' Tenth Cause of Action,
as Dismissed by Judge Hartman's December 21, 2016 Decision

Judge Hartman's December 21, 2016 decision dismissed the tenth cause of action of plaintiffs' September 2, 2016 verified complaint [R.115-123] by four sentences, as follows [R.532]:

> "The tenth cause of action must also be dismissed. Plaintiff's itemization arguments are non-justiciable (*Pataki*, 4 NY3d at 96;

Urban Justice Ctr., 38 AD3d at 30). And the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary. Lastly, the reference to fiscal year 2014-2015 rather than 2016-2017 is a typographical error that does not invalidate the challenged legislation (*see Matter of Morris Bldrs., LP v Empire Zone Designation Bd.*, 95 AD3d 1381, 1383 [3d Dept 2012])."

In rebuttal, plaintiffs' Exhibit U "legal autopsy"/analysis stated [R.571-572]:

"This, too, is fraudulent – as Justice Hartman well knows in not identifying ANY of the allegations of plaintiffs' tenth cause of action, other than that it includes a 'reference to fiscal year 2014-2015'. Thus, Justice Hartman's claim that 'Plaintiff's itemization arguments are non-justiciable' is not only *sua sponte* – having not been advanced by AAG Kerwin – but fictional. Plaintiffs made no itemization arguments and the decision furnishes no detail as to what it is talking about. As for Justice Hartman's claim that 'the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary', her decision furnishes no law for the proposition that an appropriation can lawfully or constitutionally do so – and such contradicts plaintiffs' tenth cause of action that it cannot (¶¶92, 96-104) [R.117-120]. As for Justice Hartman's claim that 'reference to fiscal year 2014-2015 rather than 2016-2017 is a typographical error that does not invalidate the challenged legislation', such disposes of the least of the several grounds of the cause of action, indeed, only ¶¶90-91 [R.117], leaving the balance, all concealed, not only stating a cause of action, but establishing an entitlement to summary judgment by its three recited FOIL requests – and so identified by plaintiffs' September 30, 2016 memorandum of law (at pp. 32-35) [R.505-508]."

Plaintiffs' Sixth Cause of Action
as Preserved by Judge Hartman's December 21, 2016 Decision

Judge Hartman's December 21, 2016 decision preserves the sixth cause of action of plaintiffs' September 2, 2016 verified complaint [R.109-112, R.187-201],

stating, as follows, under a title heading reading, "Cause of Action Six States a Claim" [R.532-533]:

> "'When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference' (*Chanko v. Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). The key question before the court on a CPLR 3211(a)(7) motion to dismiss is 'whether the facts alleged fit within any cognizable legal theory (*Loch Sheldrake Beach & Tennis Inc. v. Akulich*, 141 AD3d 809, 814 [3d Dept 2016]).
>
> Plaintiff argues that the 2015 legislation that created the Commission on Legislative, Judicial & Executive Compensation (Commission) violates the New York State Constitution (see Chapter 60, Law of 2015 [Part E]). In particular, she argues that the provision therein that gives the Commission's recommendations the 'force of law' violates the separation of powers doctrine and improperly delegates legislative function to the Commission. She further argues that the legislation violates Article XIII, §7 of the New York State Constitution, which states that the compensation of public officers 'shall not be increased or diminished during the term for which he or she shall have been elected or appointed.' Plaintiff raises additional challenges to the form and timing of the bill by which the legislation was introduced, among other things.
>
> Here, on the record before it, the Court cannot say that plaintiffs' claim is not cognizable. Defendants argue that the Appellate Division has already approved of commissions similar to the Commission here (*see McKinney v. Commr. of the N.Y. State Dept. of Health*, 41 AD3d 252 [1st Dept 2007]). But the Court does not consider *McKinney* to be sufficiently analogous to this case to foreclose any and all challenges to the Commission legislation. Nor does *McKinney* address all the arguments raised by plaintiff."

<u>In rebuttal, plaintiffs' Exhibit U "legal autopsy"/analysis</u> stated [R.572-573]:

“Having disposed of nine of plaintiffs’ ten causes of action, *seriatim*, except for the sixth cause of action, the decision turns to the sixth. It is only here, after dismissing nine causes of action for failing to state a cause of action, that Justice Hartman recites the adjudicative standard for such dismissals, which she had <u>not</u> observed as to <u>any</u> of the nine:

…

<u>This is the only place in the decision where Justice Hartman recites any allegations of the cause of action she purports to be addressing.</u> However, she materially understates the record before her, as it establishes not only ‘cognizab[ility]’, but plaintiffs’ entitlement to summary judgment on each of the five separate sections of their sixth cause of action, whose content she could have more accurately described by relying on their title headings:

A. Chapter 60, Part E, of the Laws of 2015 <u>Unconstitutionally Delegates Legislative Power by Giving the Commission’s Judicial Salary Recommendations ‘the Force of Law’ (¶¶ 61-62) [R.110], (¶¶388-393) [R.188-192]</u>

B. Chapter 60, Part E, of the Laws of 2015 <u>Unconstitutionally Delegates Legislative Power Without Safeguarding Provisions (¶¶63-65) [R.110-111], (¶¶394-402) [R.192-193]</u>

C. Chapter 60, Part E, of the Law of 2015 <u>Violates Article XIII, §7 of the New York State Constitution (¶66) [R.111], (¶¶ 403-406) [R.193-194]</u>

D. Chapter 60, Part E, of the Law of 2015 <u>Violates Article VII, §6 of the New York State Constitution – and, Additionally, Article VII, §§2 and 3 (¶67) [R.111], (¶¶407-412) [R.194-196]</u>

E. Chapter 60, Part E, of the Laws of 2015 is Unconstitutional because Budget Bill #4610-A/A.6721-A was <u>Procured Fraudulently and Without Legislative Due Process (¶68) [R.112], (¶¶413-423) [R-197-201].</u>

> Plaintiffs' September 30, 2016 memorandum of law (at pp. 27-31) [R.500-504] summarized the record that was before Justice Hartman on the sixth, seventh, and eighth causes of action, which AAG Kerwin sought to have her collectively dismiss [R.421-422] based on two judicial decisions – the first being *McKinney* – neither decision having any relevance except to subsections A and B of the sixth cause of action and both decisions, in fact, substantiating those subsections. Plaintiffs demonstrated that AAG Kerwin's dismissal cross-motion had falsified the facts relating to each decision, and, in addition to concealing that plaintiffs' A and B subsections of their sixth cause of action had explicitly cited *McKinney*, in substantiation of their allegations, concealed ALL the approximately 80 allegations of plaintiffs' sixth, seventh, and eighth causes of action."

SUBSEQUENT PROCEDURAL HISTORY

Judge Hartman's Long Return Date for Plaintiffs' February 15, 2017 Order to Show Cause for her Disqualification for Demonstrated Actual Bias & Vacatur of her December 21, 2016 Decision

Plaintiffs' February 15, 2017 order to show cause [R.536-612] – to which their Exhibit U "legal autopsy"/analysis of Judge Hartman's December 21, 2016 decision [R.554-577] was the dispositive exhibit – stated that consistent with the directive of State Finance Law §123(c), it was Judge Hartman's "duty…to fix a short return date and then render decision promptly"– additionally pointing out that "a longer return date would not benefit defendants in the slightest" because:

> "No amount of time will enable defendants to refute the analysis as it is factually and legally accurate, mandating the granting of the disqualification/vacatur relief sought by this order to show cause, *as a matter of law*". [R.540, at ¶6, italics in the original]

Nonetheless, Judge Hartman did not sign the order to show cause until February 21, 2017, setting a return date that was more than a month away – March 24, 2017 [R.536-537] – and adding "No personal appearances are required".

AAG Kerwin's March 22, 2017 Opposition to Plaintiffs' February 15, 2017 Order to Show Cause

On March 22, 2017, AAG Kerwin served opposition papers [R.613-634]. In requesting that Judge Hartman deny plaintiffs' February 15, 2017 order to show cause "in all respects", she concealed that disclosure was among the relief sought. Nor did she contest the accuracy of plaintiffs' Exhibit U analysis [R.554-577]. Rather, she besmirched and mischaracterized it as "consist[ing] of flawed reasoning, unsupportable assertions, and a fundamental misunderstanding of what questions are examined by a court in the context of a motion to dismiss a pleading." [R.626].

Plaintiffs' March 24, 2017 Letter to Judge Hartman, with Notice to AAG Kerwin's Superiors

On the March 24, 2017 return date, plaintiffs sent a letter to Judge Hartman [R.634a; R.838]. Stating that she had given defendants more than a month to respond to the February 15, 2017 order to show cause and plaintiffs less than two days to reply, plaintiffs requested a four-day adjournment so as to have the opportunity to reply, in writing, if not orally, in conjunction with oral argument of

a further order to show cause they would be presenting for a preliminary injunction and TRO with respect to the budget bills for fiscal year 2017-2018. Plaintiffs stated that until then, they would endeavor to have the Attorney General withdraw AAG Kerwin's March 22, 2017 opposition papers as they were "utterly fraudulent, revealed as such by the most cursory examination of Exhibit U to plaintiffs' February 15th order to show cause" – and asked that the letter "be deemed their reply" if the requested adjournment were denied. Simultaneously, the letter gave notice to AAG Kerwin and her superiors that the upcoming oral argument would focus on the fourth and fifth causes of action of plaintiffs' September 2, 2016 verified complaint and that they should come prepared with relevant documents pertaining to the "amended" budget bills for fiscal year 2017-2018, as to which plaintiffs asserted they had a *prima facie* summary judgment entitlement. The letter stated that those "amended" budget bills – "like [the] 'amended' budget bills for fiscal year 2016-2017 – [were] not only unconstitutional, *on their face*, but frauds, having not been 'amended' in fact" and, in substantiation, enclosed plaintiffs' just-filed FOIL/records requests to the Senate and Assembly [R.634a].

By a March 24, 2017 so-ordered letter [R.840], Judge Hartman, though granting the adjournment, denied plaintiffs the opportunity to reply at the oral argument of their further order to show cause.

Plaintiffs' March 29, 2017 Order to Show Cause with Preliminary Injunction & TRO; for Summary Judgment on their Sixth Cause of Action; Leave to File a Supplemental Complaint for Fiscal Year 2017-2018; & Other Relief

On March 29, 2017, plaintiffs presented their order to show cause, with preliminary injunction and TRO, seeking seven branches of relief [R.635-746]. The first branch was for summary judgment on all five sections of plaintiffs' sixth cause of action of their September 2, 2016 verified complaint, 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 thereto [R.636]. In support, their moving affidavit stated [R.640]:

> "3. All the facts and law sufficient for granting plaintiffs summary judgment on their sixth cause of action were before the Court when it rendered its December 21, 2016 decision. This is why, as to the sixth cause of action and the other nine, plaintiffs' September 30, 2016 memorandum of law in opposition to AAG Kerwin's cross-motion to dismiss their complaint, had requested the Court grant summary judgment to plaintiffs pursuant to CPLR §3211(c) – relief the decision concealed when it concealed the existence of plaintiffs' September 30, 2016 opposition papers."

The second branch was for leave to file a verified supplemental complaint pertaining to the budget for fiscal year 2017-2018 [R.636]. In support, plaintiffs' moving affidavit stated [R.640-641]:

> "5. As demonstrated by plaintiffs' accompanying verified supplemental complaint [R.671-743], virtually all defendants' constitutional, statutory, and rule violations with respect to the budget

for fiscal year 2017-2018 are identical repetitions of their violations with respect to the budget for fiscal year 2016-2017 – the subject of plaintiffs' September 2, 2016 verified complaint [R.87-392]. Likewise, the judicial salary increases recommended by the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation, that will take effect, by 'force of law', on April 1, 2017 – funding for which is embedded in the Legislative/Judiciary budget bill for fiscal year 2017-2018 – suffer from the identical constitutional and statutory violations as the judicial salary increases recommended by the same December 24, 2015 report, that took effect, by 'force of law', on April 1, 2016, with funding embedded in the Legislative/Judiciary budget bill for fiscal year 2016-2017.

6. Based on these replicated violations of constitutional provisions, statutes, and legislative rules for fiscal year 2017-2018, the supplemental complaint simply reiterates the ten causes of action of the September 2, 2016 verified complaint pertaining to fiscal year 2016-2017, as applicable to fiscal year 2017-2018.

7. It would be wasteful to bring a separate citizen taxpayer action when the facts and law are identical – and when any such separate citizen taxpayer action would doubtless be assigned to the Court as a related proceeding.

8. As to the 'merit' of plaintiffs' supplemental complaint, its reiterated sixth cause of action (pp. 67-68) [R.737-738] is 'cognizable' in the same way as the sixth cause of action of plaintiffs' September 2, 2016 complaint (¶¶59-68) [R.109-112], preserved by the Court's December 21, 2016 decision [R.527-535], as to which plaintiffs are herein moving for summary judgment pursuant to CPLR §3212.

9. As to the supplemental complaint's other nine causes of action (pp. 63-71) [R.733-741], reiterated from the September 2, 2016 complaint (pp. 13-23, 26-37) [R.109-112, 112-133] , the record before the Court, entitling plaintiffs to summary judgment as to those nine, was highlighted by their September 30, 2016 memorandum of law – and reinforced further by their Exhibit U to their February 15, 2017 order to show cause for this Court's disqualification for the

actual bias that its December 21, 2017 decision demonstrates, *prima facie*."

As to the third, fourth, and fifth branches of the order to show cause [R.636-637], plaintiffs' moving affidavit highlighted their *prima facie* entitlement to the granting of its requested declaratory and injunctive relief, *as a matter of law,* based on their *prima facie* entitlement to summary judgment on the reiterated fourth and fifth causes of action pertaining to the "amended" budget bills for fiscal year 2017-2018 – whose violation of Article III, §10 of the state Constitution concealed that they had not been "amended", in fact, and which, *on their face*, violated Articles VII, §§4, 5, 6 of the Constitution and the controlling decision of the Court of Appeals in *Pataki v. Assembly* and *Silver v. Pataki*, 4 NY3d 75 (2004). In pertinent part, plaintiffs' moving affidavit stated [R.642-643]:

> "11. To further establish the evidentiary facts as to the legislative defendants' flagrant violations of their own legislative rules and of Article III, §10 with respect to their 'amending' of these budget bills, annexed…are plaintiffs' FOIL requests to the records access officers of both defendant SENATE and defendant ASSEMBLY for pertinent documents.
>
> 12. Absent production of evidentiary proof of the legislative defendants' compliance with their own procedures for amending bills – including a vote to amend what are non-sponsor amendments – the bills were not 'amended' in fact – and the so-called 'amended' bills are nullities.
>
> 13. To ensure there would be no impediment to the Court's granting of a TRO to enjoin defendants from taking further budget action on 'amended' budget bills that are each nullities, plaintiffs

gave repeated notice to defendants' counsel, the Attorney General, to bring to the oral argument herein the documents sought by plaintiffs' FOIL requests.

14. With respect to the fifth branch of relief, 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 decision of the Court of Appeals in *Pataki v. Assembly* and *Silver v. Pataki*, 4 NY3d 75 (2004), the eight '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 – plaintiffs' supplemental complaint furnishes the particulars of the legislative defendants' *sub silentio* repudiation of Article VII, §§4, 5, 6 of the New York State Constitution and of the controlling Court of Appeals caselaw with respect to their alterations of defendant CUOMO's budget bills at ¶¶234-237, 253-259 [R.713-714, R.724-727].

15. As stated at the very outset of plaintiffs' supplemental complaint – at its ¶112 [R.672]:

> 'the legislative defendants have so brazenly repudiated Article VII, §§4, 5, 6 of the New York State Constitution – and the controlling consolidated Court of Appeals decision in the budget lawsuits to which they were parties: *Silver v. Pataki* and *Pataki v. Assembly*, 4 N.Y.3d 75 (2004) – that nothing more is required for summary judgment to plaintiffs on their reiterated fifth cause of action (¶¶54-58)[fn] [R.108-109] than to compare defendant Governor's budget bills for fiscal year 2017-2018 with the legislative defendants' 'amended' budget bills. And facilitating the comparison are the legislative defendants' one-house budget resolutions and their accompanying summary/report of recommended budget changes, already embodied in their 'amended' budget bills – as well as their own press releases and public statements.'

16. The Attorney General was furnished with this paragraph more than a day before the oral argument – and comparable notice

> four days earlier – ample time to confront the cited evidence, all available to him from his legislative clients, including their websites, over and beyond from plaintiff CJA's website, so as to be ready to confront plaintiffs' *prima facie* entitlement to declarations of unconstitutionality with respect to the 'amended' budget bills – and for immediate injunctive relief."

Likewise, with respect to the sixth branch of the order to show cause [R.637], plaintiffs' moving affidavit highlighted their *prima facie* summary judgment entitlement to injunctive relief with respect to the unamended legislative/judiciary budget bill for fiscal year 2017-2018, "or, alternatively, for an injunction as to the §1 and §4 legislative portions, *inter alia*, because, in violation of Article VII, §I, they are not certified; and, as to the Judiciary's §3 reappropriations, because, *inter alia*, they are not certified", stating [R.643-644]:

> "17. …Plaintiffs' entitlement to summary judgment as to these, constituting their reiteration, for fiscal year 2017-2018, of the first, second, and third causes of action of their September 2, 2016 verified complaint pertaining to fiscal year 2016-2017 (¶¶23-47) [R.99-106], is established by their entitlement to summary judgment on the causes of action of their September 2, 2016 verified complaint. Here, too, dispositive of the state of the record before the Court as to these three causes of action is plaintiffs' September 30, 2016 memorandum of law [R.471-526] – reinforced further by their Exhibit U to their February 15, 2017 order to show cause for this Court's disqualification for the actual bias that its December 21, 201[6] decision demonstrates, *prima facie*."

Plaintiffs' seventh branch of the order to show cause was for "such other and further relief as may be just and proper, including $100 motion costs pursuant to

CPLR 8202" [R.637].

At the March 29, 2017 oral argument [R.816-837], plaintiffs not only summarized the *prima facie*, summary judgment nature of the record that was before Judge Hartman, but brought further EVIDENTIARY proof, including full copies of the "amended" budget bills for fiscal year 2017-2018 [R.823-829, R. 835, R.791, at ¶8]. AAG Helena Lynch – who appeared instead of the usual AAG Adrienne Kerwin – came with NO EVIDENCE, NO WITNESSES, and unprepared for ANY argument [R.827-828, R.866]. Nevertheless, Judge Hartman denied the TRO, *without reasons*, denied plaintiffs' request for an immediate evidentiary hearing to establish their entitlement to a TRO, *without reasons*, and, also *without reasons*, made the March 29, 2017 order to show cause returnable nearly a month later, on April 28, 2017, giving defendants more than three weeks, until April 21, 2017, for their answering papers [R.637-638].

<u>Plaintiffs' March 30, 2017 "URGENT/TIME-SENSITIVE" Reconsideration Request to Judge Hartman</u>

By a March 30, 2017 e-mail to Judge Hartman [R.861], plaintiffs requested that she reconsider her previous day's dispositions on their March 29, 2017 order to show cause – stating that they were insupportable and reinforced her disqualification for actual bias – the subject of their *sub judice* February 15, 2017

order to show cause. In pertinent part, plaintiff Sassower's e-mail stated:

> "This is a citizen-taxpayer action, required to be 'promptly determined' and 'have preference over all other causes in all courts' (State Finance Law §123-c(4)). Please furnish, forthwith, your decision on plaintiffs' February 15th order to show cause for your disqualification –- one addressing the particulars of its Exhibit U analysis of your December 21, 2016 decision – which, presumably, you read before fixing a March 24th return date.
>
> Based on the mountain of prima facie, summary judgment evidence I furnished yesterday – and which I highlighted at the argument, and by my sworn affidavit, and by the particulars of plaintiffs' verified supplemental complaint in support of the order to show cause – plaintiffs established their entitlement, AS A MATTER OF LAW, to a TRO – no hearing being required. In any event, there is still time to schedule an evidentiary hearing for tomorrow – before another judge, upon your disqualification.
>
> …
>
> Please respond forthwith, so that I may know how to proceed. …"

Judge Hartman did not respond.

**<u>AAG Lynch's April 21, 2017 Opposition
to Plaintiffs' March 29, 2017 Order to Show Cause</u>**

On April 21, 2017, AAG Lynch served opposition papers to the March 29, 2017 order to show cause [R.747-786], making no mention, let alone rebuttal, of plaintiffs' moving affidavit [R.639-646] and contending, over and over again, that plaintiffs had failed to provide any evidence in substantiation of the relief sought.

In opposing plaintiffs' first branch – for summary judgment on each of the five sections of their sixth cause of action – AAG Lynch purported that the second,

fourth, and fifth sections of plaintiffs' sixth cause of action had not survived defendants' dismissal cross-motion, furnishing NO EVIDENCE to support that bald proposition [R.774].

As for the two sections of the sixth cause of action she claimed the December 21, 2016 decision had preserved – the first and the third sections – she did not identify the allegations of either, let alone rebut them [R.775].

In opposing plaintiffs' second branch of the order to show cause – for leave to file plaintiffs' March 29, 2017 verified supplemental complaint – AAG Lynch rested on Judge Hartman's December 21, 2016 decision. In so doing, she made no mention of plaintiffs' Exhibit U analysis, establishing its fraudulence – the accuracy of which she did not deny or dispute [R.776-779].

As for the third, fourth, and fifth branches of the order to show cause – for declaratory and injunctive relief – AAG Lynch furnished NO EVIDENCE rebutting plaintiffs' EVIDENCE-established entitlement to summary judgment on the reiterated fourth and fifth causes of action of their March 29, 2017 verified supplemental complaint [R.735-737], on which those branches rested [R.778-784].

Likewise, with respect to the sixth branch of the order to show cause – for injunctive relief pertaining to the legislative/judiciary budget bill for 2017-2018 – AAG Lynch furnished NO EVIDENCE to rebut plaintiffs' EVIDENTIARY

showing of entitlement to summary judgment on their reiterated first, second, and third causes of action of their March 29, 2017 verified supplemental complaint [R.733-735], on which their sixth branch of relief rested [R.784-785].

Judge Hartman's April 25, 2017 Letter

On April 25, 2017, Judge Hartman notified plaintiffs and AAG Kerwin, by a one-sentence letter, that "personal appearances are neither required nor permitted" on the April 28, 2017 return date of plaintiffs' March 29, 2017 order to show cause [R.787].

Plaintiffs' April 28, 2017 Letter to Judge Hartman, with Notice to the Attorney General – and her Responding May 5, 2017 So-Ordered Letter

By an April 28, 2017 letter to Judge Hartman [R.810], plaintiffs requested that she adjourn the return date of their March 29, 2017 order to show cause until after she had decided their February 15, 2017 order to show cause for her disqualification and vacatur of her December 21, 2016 decision. The letter identified that the March 29, 2017 order to show cause was materially impacted by the February 15, 2017 order to show cause – giving, as an example, that AAG Lynch had made the December 21, 2016 decision "the ONLY basis" for opposing the second branch of plaintiffs' March 29, 2017 order to show cause for leave to

file their supplemental verified complaint with its reiterated ten causes of action for fiscal year 2017-2018.

Alternatively, plaintiffs requested a two-week adjournment so that they would have roughly the same three weeks to reply to AAG Lynch's opposition papers as Judge Hartman had given AAG Lynch to interpose them. Plaintiffs explained that this additional time was "necessitated because AAG Lynch's opposition papers are, from beginning to end, utterly fraudulent" – and that it would enable "supervisory personnel in the Attorney General's office, including Attorney General Schneiderman, to discharge their supervisory responsibilities and obligation to the Court by withdrawing [them]". To "put them on notice of their duty to do so", plaintiffs identified that a copy of the letter was being furnished to Attorney General Schneiderman and his highest-ranking supervisory staff [R.811].

Additionally, the letter noted that Judge Hartman had not responded to plaintiffs' March 30, 2017 e-mail for reconsideration of her March 29, 2017 denial of a TRO and for a prompt evidentiary hearing on plaintiff's entitlement to a preliminary injunction [R.861].

Judge Hartman's response, by a so-ordered May 5, 2017 letter [R.815], was to grant plaintiffs until May 15, 2017 to file their reply papers, to deny plaintiffs'

request for reconsideration of the TRO, and to "reserve[] decision" on the request for an evidentiary hearing on the pending application for a preliminary injunction.

Judge Hartman's May 5, 2017 Decision,
Denying Plaintiffs' February 15, 2017 Order to Show Cause

On the same day as Judge Hartman's so-ordered May 5, 2017 letter [R.815], she issued a 1-1/2 page decision [R.49-51] which, without identifying plaintiffs' Exhibit U analysis of her December 21, 2016 decision – or contesting its accuracy in any respect – "denied in its entirety" plaintiffs' February 15, 2017 order to show cause for her disqualification, vacatur of the December 21, 2016 decision, and reargument/renewal [R.536-612]. In so doing, she made no disclosure of her interests and relationships – concealing even that disclosure had been requested. Instead, she baldly purported that plaintiffs' "allegations of bias and fraud" were "conclusory" and "meritless"; that she had "no interest in this litigation…or affinity to any party hereto"; and that plaintiffs had "not established 'matters of fact or law' that the Court 'overlooked or misapprehended,' or new facts that would warrant renewal or reargument.".

By an accompanying May 5, 2017 "amended decision" [R.52-60], Judge Hartman re-issued her December 21, 2016 decision, whose only change was the recitation required by CPLR §2219(a) of "papers used on the motion".

<u>Plaintiffs' May 15, 2017 Reply in Further Support of their March 29, 2017 Order to Show Cause</u>

On May 15, 2017, plaintiffs served their reply papers in further support of their March 29, 2017 order to show cause for summary judgment on their sixth cause of action, leave to file their verified supplemental complaint, and injunctive relief [R.788-990]. The "Introduction" to their 64-page May 15, 2017 reply memorandum of law [R.922-988] stated, as follows [R.925-927]:

> "…As hereinafter shown, AAG Lynch's opposition is no opposition, *as a matter of law*, and is, from beginning to end, a 'fraud on the court', as that term is defined.[fn] As such, it continues the *modus operandi* of her predecessor, Assistant Attorney General Adrienne Kerwin, whose identically pervasive litigation fraud, detailed by plaintiffs' September 30, 2016 memorandum of law [R.471] and covered up by the Court's December 21, 2016 decision [R.527], is chronicled by plaintiffs' analysis of the decision [R.554], annexed as Exhibit U to their February 15, 2017 order to show cause to disqualify the Court for <u>actual bias</u> and to vacate the decision [R.536]. As with all evidentiary proof dispositive of the true facts, AAG Lynch's approach to the Exhibit U analysis – twice cited by plaintiff SASSOWER's March 29, 2017 affidavit [R.639] as establishing plaintiffs' entitlement to the granting of their March 29, 2017 order to show cause (¶¶9, 17) [R.641, R.643] – is to conceal it entirely, while arguing for denial of the March 29, 2017 order to show cause based on the Court's December 21, 2016 decision.
>
> Evidenced by AAG Lynch's litigation fraud, as likewise the litigation fraud of AAG Kerwin, is that defendants have <u>no</u> legitimate defense – and that the Attorney General's duty, pursuant to State Finance Law §123 *et seq.* and Executive Law §63.1, is to be representing plaintiffs or intervening on their behalf, as plaintiffs have repeatedly requested. It also bespeaks their view – and that of supervisory personnel in the Attorney General's office, including

> defendant Attorney General SCHNEIDERMAN himself – that they can obliterate ALL rules of professional conduct and litigation standards because the Court, having a $60,000-plus salary interest in this citizen-taxpayer action and having worked for 30 years in the Attorney General's office, including under defendant Attorney General SCHNEIDERMAN and, before that, under defendant Governor CUOMO when he was Attorney General, will let them get away with everything. Certainly, no disinterested, impartial tribunal would tolerate the misconduct that AAG Lynch exhibited at the March 29, 2017 oral argument and now again by her April 21, 2017 opposing papers, let alone the 'green light' given to her by supervisory authorities at the Attorney General's office, including defendant SCHNEIDERMAN, in a case of such magnitude and consequence to the People of the State of New York.
>
> Plaintiffs' Exhibit U analysis (at pp. 7-8) [R.560-561] identified the four threshold integrity issues that AAG Kerwin's litigation fraud presented the Court, concealed by its December 21, 2016 decision. Likewise, AAG Lynch's litigation fraud presents the Court with four comparable threshold integrity issues…"

The ensuing pages then reiterated and further demonstrated what plaintiffs had shown by their March 29, 2017 affidavit in support of their order to show cause [R. 639] and at the March 29, 2017 oral argument [R.816], *to wit*, that they had a "*prima facie* summary judgment 'merits' entitlement" to all seven branches of the order to show cause – and, "AS A MATTER OF LAW, to a TRO – no hearing being required".

As for plaintiffs' accompanying May 15, 2017 reply affidavit [R.788-921], it not only supplied additional EVIDENCE establishing their summary judgment "merits" entitlement to the granting of the reiterated fourth and fifth causes of

action of their March 29, 2017 verified supplemental complaint – and the third, fourth, and fifth branches of their order to show cause relating thereto – but identified [R.797, at ¶17] that subpoenas would be furnished "to the Court, for its signature, so that it can have the benefit of the FOIL records…that AAG Lynch has withheld". It also annexed plaintiffs' voluminous correspondence with supervisory personnel at the Attorney General's office, including defendant Attorney General Schneiderman himself [R.804-805]. By letter dated May 19, 2017, plaintiffs' furnished subpoenas to Judge Hartman for signature [R.991-995a].

<u>Plaintiffs' June 12, 2017 Order to Show Cause for Reargument/Renewal of Judge Hartman's May 5, 2017 Decision and Amended Decision – & for their Vacatur</u>

By order to show cause, dated June 12, 2017 [R.997-1066], plaintiffs moved for reargument/renewal of Judge Hartman's May 5, 2017 decision and May 5, 2017 amended decision –

> "and, upon the granting of same, vacating them by reason of her demonstrated actual bias – and, in conjunction therewith, as well as if denied, disclosure... of facts bearing upon her fairness and impartiality, specifically as to her financial interest and personal and professional relationships with defendants and their counsel, including in the supervisory ranks of the Attorney General's office"

Additionally, plaintiffs sought vacatur of the May 5, 2017 decision and

amended decision, pursuant to CPLR §5015(a)(4), for "lack of jurisdiction" by reason of Judge Hartman's disqualification for interest.

Plaintiffs' moving affidavit summarized the situation, as follows [R.1002-1003]:

> "5. The basis for the requested relief is that the Court's two May 5, 2017 decisions are factually and legally insupportable and fraudulent, further demonstrating the actual bias that this Court demonstrated by its December 21, 2016 decision that was the basis for plaintiffs' February 15, 2017 order to show cause, whose substantiating proof was plaintiffs' 23-page, single-spaced analysis of the December 21, 2016 decision, annexed as Exhibit U.
>
> 6. In denying plaintiffs' February 15, 2017 order to show cause, this Court's barely 1-1/2-page May 5, 2017 decision…makes no mention of plaintiffs' Exhibit U analysis, whose accuracy it does not contest. Nor does it mention or contest the accuracy of plaintiffs' 53-page September 30, 2016 memorandum of law on which the Exhibit U analysis principally relies. Instead, the decision disposes of the February 15, 2017 order to show cause by two short conclusory paragraphs of two sentences and three sentences, respectively, neither identifying a single fact other than that 'Plaintiff correctly points out that the Court['s December 21, 2016 decision] failed to 'recite the papers used on the motion,' as required by CPLR 2219(a).' These two paragraphs follow upon a two-sentence introductory paragraph which conceals the alternative relief specified by the first branch of the February 15, 2017 order to show cause in the event the Court did not disqualify itself, *to wit*, 'disclosure, pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, of facts bearing upon [its] fairness and impartiality.' The May 5, 2017 decision makes no disclosure."

In further support of the requested relief, plaintiffs appended, as Exhibit E [R.1014-1038], an analysis of AAG Kerwin's March 22, 2017 opposition to their

February 15, 2017 order to show cause for the two-fold purpose of substantiating their March 24, 2017 letter to Judge Hartman, with its notice to the Attorney General's office, that AAG Kerwin's opposing papers were fraudulent [R.838] and to establish what Judge Hartman's May 5, 2017 decision 'overlooked' in omitting all reference to AAG Kerwin's opposing papers, other than in its CPLR §2219(a) listing of them.

Once again, in violation of the expedition which State Finance Law §123-c(4) commands – and defeating the very purpose of an order to show cause, as opposed to a notice of motion – Judge Hartman set a return date of July 28, 2017.

**Judge Hartman's June 26, 2017 Decision,
Denying Plaintiffs' March 29, 2017 Order to Show Cause**

By decision dated June 26, 2017 [R.68-79], Judge Hartman "denied in its entirety" plaintiffs' March 29, 2017 order to show cause for summary judgment on their sixth causes of action, leave to file their verified supplemental complaint, and injunctive relief.

In denying plaintiffs summary judgment on their sixth cause of action [R.70-77], Judge Hartman concealed virtually the entire content of its first two sections – which she denominated sub-causes – and the state of the record with respect thereto [R.72-74]; concealed that her argument for denying plaintiffs' third sub-

cause was her own *sua sponte* argument, not advanced by AAG Lynch [R.74-76]; concealed that her argument for denying plaintiffs' fourth sub-cause was her own *sua sponte* argument, not advanced by AAG Lynch [R.76]; and with respect to the fifth sub-cause – that "the budget bills creating the Commission were enacted fraudulently and in violation of due process" – she disposed of it with a single-sentence: "These allegations have already been rejected by the Court in its Amended Decision." [R.77], replicating AAG Lynch's unsupported assertion to that effect in her April 21, 2017 opposition papers – whose fraudulence had been highlighted by plaintiffs' May 15, 2017 reply papers, to which Judge Hartman made <u>no</u> reference.

As to the other relief sought by plaintiffs' March 29, 2017 order to show cause – leave to file their verified supplemental complaint pertaining to fiscal year 2017-2018 – Judge Hartman denied it based on her December 21, 2016 decision – without any reference to plaintiffs' Exhibit U analysis demonstrating its fraudulence, the accuracy of which was unchallenged in the record before her. She then denied plaintiff' requested injunctive relief and subpoenas as moot [R.77-78].

<u>AAG Kerwin's July 21, 2017 Opposition</u>
<u>to Plaintiffs' June 12, 2017 Order to Show Cause</u>
<u>& her Cross-Motion for Summary Judgment to Defendants</u>
<u>on Plaintiffs' Sixth Cause of Action</u>

On July 21, 2017, AAG Kerwin served opposition to plaintiffs' June 12,

2017 order to show cause, combined with a cross-motion [R.1069-1273]. The cross-motion sought summary judgment on plaintiffs' sixth cause of action and additional relief including dismissing plaintiffs' September 2, 2016 verified complaint "in its entirety, with prejudice pursuant to CPLR 3212" and sanctions against plaintiffs.

Much of AAG Kerwin's cross-motion for summary judgment on plaintiffs' sixth cause of action rested on, or replicated, Judge Hartman's June 26, 2017 decision, whose arguments for denying plaintiffs summary judgment became AAG Kerwin's arguments for granting summary judgment to defendants. With respect to the fourth and fifth sub-causes of the sixth causes of action – pertaining to introduction and enactment of the budget bill that established the Commission on Legislative, Judicial and Executive Compensation— AAG Kerwin's July 21, 2017 memorandum of law disposed of them, as follows, in a single paragraph, under the title heading "The Remaining Claims in the Sixth Cause of Action Must Also Fail" [R.1263]:

> "First, plaintiff's claims that the Act was enacted fraudulently and/or in violation of due process were dismissed in connection with defendants' motion to dismiss. See Kerwin aff. at Exhs. G & H. Second, plaintiff's claims that the Act violates Article VII, §§2, 3 & 6 of the New York State Constitution must also fail for the reasons stated by this court in its June 26, 2017 decision and order. See id. at

Exh. H, p. 9."[2]

In other words, AAG Kerwin rested, entirely, on Judge Hartman's December 21, 2016 decision [R.527-535] with respect to the fifth sub-cause and on her June 26, 2017 decision [R.68-79] with respect to the fourth sub-cause.

Plaintiffs' July 27, 2017 Letter to Judge Hartman, with Notice to the Attorney General

By letter to Judge Hartman, dated July 27, 2017 [R.1282-1291], plaintiffs advised that AAG Kerwin and those charged with supervising her at the Attorney General's office had improperly made defendants' cross-motion to plaintiffs' June 12, 2017 order to show cause returnable on September 1, 2017, not on the same July 28, 2017 date that Judge Hartman had fixed for the order to show cause, thereby sabotaging the expedition to which State Finance Law §123-c(4) entitled them. Plaintiffs stated they were willing to waive their procedural objection and consent to adjournment of the return date of their order to show cause to September 1, 2017, "so as to allow AAG Kerwin's superiors ample time to discharge their supervisory responsibilities, inasmuch as her July 21, 2017 opposition/cross-motion is not just procedurally improper, but founded,

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[2] AAG Kerwin's cited Exhibit H to her affirmation is Judge Hartman's June 26, 2017 decision. Her cited Exhibit G is a hodge-podge combination of plaintiffs' 4-page March 29, 2017 signed order to show cause and, behind it, plaintiffs' May 15, 2017 reply memorandum of law. [R.1074, ¶¶11, 12].

throughout, on flagrant fraud and violation of black-letter law and standards".

By a so-ordered August 7, 2017 letter [R.1292], Judge Hartman adjourned the return date of plaintiffs' June 12, 2017 order to show cause to September 1, 2017.

Plaintiffs' August 25, 2017 Reply in Further Support of their June 12, 2017 Order to Show Cause & in Opposition to AAG Kerwin's July 21, 2017 Cross-Motion

On August 25, 2017, in the absence of any response from AAG Kerwin and her superiors to the notice furnished them by plaintiffs' July 27, 2017 letter [R.1282-1291], plaintiffs served their reply in further support of their June 12, 2017 order to show cause and in opposition to defendants' July 21, 2017 cross-motion [R-1274-1386]. Their 52-page August 25, 2017 reply memorandum of law [R.1328-1382] stated, as follows, in its "Introduction" [R.1331-1334]:

> "…As hereinafter demonstrated, [AAG Kerwin's opposition/cross-motion papers] are 'frauds on the court', as that term is defined[fn] – and replicate her *modus operandi* of litigation fraud that plaintiffs chronicled by each of their five memoranda of law in their prior citizen-taxpayer action[fn] and, in this citizen-taxpayer action, by their September 30, 2016 memorandum of law and then by their analysis of AAG Kerwin's March 22, 2017 opposition to their February 15, 2017 order to show cause for the Court's disqualification for actual bias and interest and for vacatur of its December 21, 2016 decision by reason thereof, annexed as Exhibit E to their June 12, 2017 order to show cause [R.1014-1038]– the same as is now before the Court.[fn]

Plaintiff Sassower's June 12, 2017 moving affidavit herein describes the purpose of the Exhibit E analysis it annexed, stating:

> "11. As the May 5, 2017 decision makes no comment or finding with respect to AAG Kerwin's March 22, 2017 opposition papers – as was its obligation to do pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct – annexed is plaintiffs' analysis thereof (Exhibit E), which I wrote and to whose accuracy, both factually and legally, I swear. Chronicled therein is the flagrant fraud of AAG Kerwin's March 22, 2017 opposing affirmation and memorandum of law that the Court 'overlooked' when it 'Considered' them. Such defense fraud, to which the Court gave a 'free pass', reinforces the four threshold integrity issues highlighted by plaintiffs' Exhibit U analysis (at pp. 3-8) [R.556-561] and, prior thereto, by their September 30, 2016 memorandum of law (at pp. 1-6, 42-52) [R.474-479, R.515-525] — beginning with the Court's duty to make disclosure of its personal and professional relationships with defendants, with AAG Kerwin, and with supervisory levels at the Attorney General's office, absent its disqualifying itself, as no lawyer would do what AAG Kerwin did by her March 22, 2017 opposition papers unless confident that a biased and self-interested court would let her get away with it.'

Fair to say that Exhibit E [R.1014-1038] is the most important exhibit to plaintiffs' June 12, 2017 order to show cause – and not the least reason because it establishes that, wading through the flagrant deceits of AAG Kerwin's March 22, 2017 opposition papers [R.613-634], she had not denied or disputed the accuracy of plaintiffs' Exhibit U analysis of the Court's December 21, 2016 decision, upon which plaintiffs' February 15, 2017 order to show cause to disqualify the Court for actual bias was based. This sufficed to make her opposition to plaintiffs' February 15, 2017 order to show cause frivolous, *as a matter of law*...

AAG Kerwin's July 21, 2017 opposition/cross-motion [R.1069-1273] never identifies what plaintiffs' Exhibit E is – and does not contest its showing that her March 22, 2017 opposition papers had not contested the accuracy of plaintiffs' Exhibit U analysis of the Court's December 21, 2016 decision.[fn] Nor does she take the opportunity to now contest the accuracy of plaintiffs' Exhibit U analysis – or justify how the Court's May 5, 2017 decision, in denying plaintiffs' February 15, 2017 order to show cause, could do so without denying or disputing its accuracy – indeed, by concealing its very existence. Nevertheless, she blithely purports that the Court should deny reargument/renewal of its May 5, 2017 decision and May 5, 2017 amended decision pertaining to its December 21, 2016 decision. She then takes these three fraudulent judicial decisions – all three proven as such by plaintiffs' Exhibit U analysis – and, adding to them the Court's subsequently-rendered, comparably fraudulent, June 26, 2017 decision, makes them the basis for her cross-motion.

The record herein is one of symbiosis – the Court, which has a HUGE financial interest in this citizen-taxpayer action and has relationships with defendants, especially with defendants CUOMO and SCHNEIDERMAN, under whom it worked during its 30 years in the Attorney General's office, covers up and facilitates the Attorney General's litigation fraud, by its assistant attorneys general, who, in turn, cover up for the Court's fraudulent judicial decisions.

This Court's fraud, by its June 26, 2017 decision [R.68-79], encompassing and building upon the frauds of its prior three decisions, is particularized by plaintiffs' analysis of the June 26, 2017 decision, annexed to plaintiff Sassower's accompanying affidavit as Exhibit I [R.1293-1319]. AAG Kerwin's fraud, by her July 21, 2017 opposition/cross-motion to plaintiffs' instant order to show cause is below.

Bottom line is that the relief compelled by plaintiffs' June 12, 2017 order to show cause, beginning with adjudication of <u>the threshold integrity issues relating to the Court and the Attorney General</u>, identified at ¶7 of plaintiff Sassower's moving affidavit [R.1003], is even more compelled by the subsequent record, of which these reply papers are a road map."

In blunt terms, the first page of plaintiffs' Exhibit I analysis [R.1293] described the June 26, 2017 decision as identical to Judge Hartman's December 21, 2016 decision, to her May 5, 2017 decision which had upheld it, and to the May 5, 2017 amended decision which had re-issued it. Like them, it was "a criminal fraud" that "falsif[ied] the record in all material respects to grant defendants relief to which they [were] not entitled, *as a matter of law*, and to deny plaintiffs relief to which they [were] entitled, *as a matter of law*" – and this, too, was verifiable, "within minutes". All that was necessary was to compare it to plaintiffs' May 15, 2017 reply memorandum of law [R.922-988], constituting "a 'paper trail' of the record before [Judge Hartman]." The next 26 pages of the Exhibit I analysis then demonstrated this [R.1293-1319].

Insofar as plaintiffs' sixth cause of action, the Exhibit I analysis showed that the June 26, 2017 decision had denied plaintiffs the summary judgment to which they were entitled, *as a matter of law* [R.1308-1316]. The analysis also showed that its one-sentence description of the December 21, 2016 decision as having "dismissed nine of the ten causes of action asserted in the complaint for failure to state a cause of action" [R-70] was a "re-write of the facts". Its rebuttal to that description was as follows [R.1300-1303]:

"Judge Hartman's dismissal of the first four causes of action (¶¶23-53) [R.531] was not for failure to state a cause of action, but as barred because they were allegedly 'identical' to the four causes of action of plaintiffs' March 23, 2016 proposed verified second supplemental complaint in the prior citizen-taxpayer action that Judge Roger McDonough had deemed 'patently devoid of merit' by reason of his dismissals of comparable causes of action in plaintiffs' March 28, 2014 verified complaint and March 31, 2015 verified supplemental complaint. However of the eight causes of action in those pleadings, Judge McDonough had dismissed three on grounds of 'documentary evidence', exclusively – these being plaintiffs' third, fourth, and seventh causes of action [R.331; R.318-319; R.320]; – had dismissed four based on both 'documentary evidence' and 'non-justiciability' – these being the first, second, fifth, and sixth causes of action [R.330; R.319; R.319-320] – and had dismissed one based on 'documentary evidence' and failure to state a cause of action – this being the eighth cause of action [R.320]. The fraudulence of these dismissals, including because the unidentified 'documentary evidence' upon which ALL eight causes of action were dismissed does NOT exist, is detailed plaintiffs' analysis of Judge McDonough's August 1, 2016 decision (at pp. 21-29) [R.358-366], annexed as Exhibit G to their September 2, 2016 verified complaint.[fn2]

Judge Hartman's dismissal of the fifth cause of action (¶¶54-58) [R.531] pertaining to violations of Article VII, §§4, 5, and 6 of the New York State Constitution was because it allegedly 'restate[ed] arguments and claims' that Judge McDonough had 'already rejected' in his prior decisions. This is false. As highlighted by plaintiffs' Exhibit U analysis (at p. 15) [R.568], there were no decisions of

" [fn2] Inasmuch as Judge McDonough predicated his dismissals of the pleadings in the prior citizen-taxpayer action on purported 'documentary evidence', Judge Hartman's dismissals of the first four causes of action of plaintiffs' September 2, 2016 verified complaint as 'patently devoid of merit' based on Judge McDonough's dismissals required her to find that plaintiffs, likewise, had failed to furnish 'documentary evidence' in support of their first four causes of action. This she did not do – nor could she inasmuch as AAG Kerwin's September 15, 2016 dismissal cross-motion did not move pursuant to CPLR §3211(a)(1), 'a defense is founded upon documentary evidence'."

Judge McDonough that ever ‘rejected’ violations of Article VII, §§4, 5, and 6. Such violations were never even alleged by the eight causes of action he dismissed, let alone ‘rejected’ as failing to state a cause of action.

Judge Hartman’s dismissal of the seventh and eighth causes of action (¶¶69-80) [R.531] was on the ground that the Commission on Legislative, Judicial and Executive Compensation was ‘not a party to this action’. Not only is this not failure to state a cause of action, but AAG Kerwin’s September 15, 2016 cross-motion did not seek dismissal based on the Commission not being a party – which would have been pursuant to CPLR §3211(a)(10): ‘the court should not proceed in the absence of a person who should be a party’. As highlighted by plaintiffs’ Exhibit U analysis (at p. 16) [R.569], this was Judge Hartman’s own *sua sponte* ground for dismissal, which she popped into her December 21, 2016 decision without citation to ANY legal authority – because dismissal on such ground ‘is only a last resort’ where the absent party is a ‘necessary party’, which she did not claim the Commission to be, nor claim any prejudice to defendants by reason of the non-joinder[fn3]– just as AAG Kerwin never had. Nor did Judge Hartman identify that the Commission could not be joined since, pursuant to the statute establishing the Commission – Chapter 60, Part E of the Laws of 2015 – it was by then no longer in existence;

Judge Hartman’s dismissal of the ninth cause of action (¶¶81-84) [R.531-532], challenging the constitutionality of behind-closed-doors, three-men-in-a-room budget dealmaking, including the amending of bills, is the ONLY cause of action of plaintiffs’ September 2, 2016 verified complaint that she dismissed on the express grounds that it failed to state a cause of action. …

“[fn3] *Chamber of Commerce v. Pataki*, 100 NY2d 801 (2003), quoting Siegel, NY Practice ‘Dismissal of the action for nonjoinder of a given person is a possibility under the CPLR, but it is only a last resort’. Also see CPLR §2001, ‘At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.’”

> Plaintiffs' rebuttal to this was succinctly presented by their Exhibit U analysis (at p. 17) [R.570-571], whose factual and legal accuracy is uncontested by Judge Hartman, as likewise by defendants…"
>
> Judge Hartman's dismissal of the tenth cause of action (¶¶85-110) [R.532] was, inferentially, on grounds arguably constituting failure to state a cause of action…
>
> Here, too, plaintiffs' Exhibit U analysis (at pp. 18-19) [R.571-572] had furnished a rebuttal, stating that Judge Hartman's dismissal of the tenth cause of action was fraudulent, accomplished by concealing ALL the allegations of their tenth cause of action, other than that it includes a 'reference to fiscal year 2014-2015'. …"

The Attorney General Defaults in Replying to Plaintiffs' August 25, 2017 Opposition to Defendants' Cross-Motion

AAG Kerwin did not contest the accuracy of plaintiffs' August 25, 2017 opposition to her cross-motion, including its Exhibit I "legal autopsy"/analysis of Judge Hartman's June 26, 2017 decision [R.1293-1319] – and, on the September 1, 2017 return date, submitted no reply papers, although entitled to do so.

Judge Hartman's November 28, 2017 Decision and Judgment

Notwithstanding the expedition commanded by State Finance Law §123-c(4), it was not until November 28, 2017 – almost three months after the September 1, 2017 return date – that Judge Hartman rendered decision on plaintiffs' June 12, 2017 order to show cause and AAG Kerwin's July 21, 2017 cross-motion [R.31-41].

ARGUMENT[3]

As with all her prior decisions, Judge Hartman's November 28, 2017 decision and judgment is "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). Indeed, like them it is "a criminal fraud", "falsifying the record in all material respects to grant defendants relief to which they were not entitled, *as a matter of law*, and to deny plaintiffs relief to which they were entitled, *as a matter of law*".

This is verifiable, within minutes, from plaintiffs' August 25, 2017 reply memorandum of law [R.1328-1382] – a "paper trail" of the record before her. Virtually ALL the facts, law, and legal argument presented by plaintiffs' August 25, 2017 reply memorandum of law – and by plaintiff Sassower's reply affidavit accompanying it [R.1274-1327] – are omitted from Judge Hartman's November 28, 2017 decision. As for AAG Kerwin's opposition to plaintiffs' June 12, 2017 order to show cause, contained within her July 21, 2017 cross-motion [R.1069-1273], the decision only minimally mentions it, without reference to its

[3] The "Argument" herein is extracted from plaintiffs' "legal autopsy"/analysis of Judge Hartman's November 28, 2017 decision and judgment [R.9-30], appended to their pre-calendar statement [R.3-8] accompanying their January 10, 2018 notice of appeal [R-1].

fraudulence, demonstrated, from beginning to end and in virtually every line, by plaintiffs' August 25, 2017 reply memorandum of law [R.1328-1382] in support of requested threshold relief:

> (1) for sanctions, and disciplinary and criminal referrals of AAG Kerwin and those supervising her in the Attorney General's office, responsible for her litigation fraud;
>
> (2) for the disqualification of Attorney General Schneiderman, himself a defendant, from representing his co-defendants; and
>
> (3) for the Attorney General's representation of plaintiffs or intervention on their behalf, pursuant to Executive Law §63.1 and State Finance Law Article 7-A (§123 *et seq.*).

None of these three threshold issues are adjudicated by Judge Hartman's November 28, 2017 decision, which conceals them all. Ditto, the even more threshold issue of Judge Hartman's duty to make disclosure, absent her disqualifying herself for demonstrated actual bias, as to which plaintiff Sassower's August 25, 2017 reply affidavit had stated [R.1280]:

> "12. Unless this Court is able to do the impossible – refute plaintiffs' record-based analyses (*see* ¶6, *supra*) [R.1276-1277], particularizing with facts and law, that its December [2]1, 2016 decision, its May 5, 2017 decision and May 5, 2017 amended decision, and its June 26, 2017 decision each obliterate all cognizable adjudicative standards and flagrantly falsify the record – it must disqualify itself forthwith based on its demonstrated actual bias and vacate those decisions. Absent its doing so, it must make the disclosure as to its judicial compensation interest in the lawsuit, its relationships with defendants and personnel in the Attorney General's office, and other facts

bearing upon its fairness and impartiality[fn2] that it has willfully failed and refused to make throughout the nearly full year it has had this case, all the while concealing, without adjudication, the Attorney General's litigation fraud, by its AAGs Kerwin and Lynch, which plaintiffs meticulously laid out in the record before it." (underlining in the original).

The referred-to "record-based analyses" are:

- plaintiffs' "legal autopsy"/analysis of Judge Hartman's December 21, 2016 decision [R.554-577], annexed as Exhibit U to their February 15, 2017 order to show cause for her disqualification for the actual bias manifested by her December 21, 2016 decision [R.527-535] – relief her May 5, 2017 decision denied [R.49-51];

- plaintiffs' analysis of Judge Hartman's May 5, 2017 decision and May 5, 2017 amended decision [R.1002-1007], furnished at ¶¶5-8, 10-11 of their June 12, 2017 order to show cause for their reargument/renewal/vacatur – relief her November 28, 2017 decision and judgment denied [R.31-41];

- plaintiffs' "legal autopsy"/analysis of Judge Hartman's June 26, 2017 decision [R.1293-1319], annexed as Exhibit I to plaintiff Sassower's August 25, 2017 reply affidavit in further support of their June 12, 2017 order to show cause – which her November 28, 2017 decision and judgment denied [R.31-41].

Judge Hartman's Indefensible and Fraudulent Denial of Plaintiffs' June 12, 2017 Order to Show Cause

Judge Hartman's November 28, 2017 decision [R.31-41] does NOT contest the accuracy of plaintiffs' analyses of her prior decisions, uncontested in the record before her. Instead, and because each analysis makes manifest her duty to have

disqualified herself for demonstrated actual bias, Judge Hartman conceals them entirely, as likewise plaintiffs' request for disclosure, in disposing of plaintiffs' June 12, 2017 order to show cause in four sentences, as follows [R.32-33]:

> "Plaintiff now moves, by order to show cause, for disqualification, reargument, renewal, and vacatur of the Court's May 5, 2017 Decision and Order and the May 5, 2017 Amended Decision and Order. Once again plaintiff has failed to establish matters of fact or law that the Court overlooked or misrepresented that would warrant reargument, or new facts that would warrant renewal (*see* CPLR 2221 [d, [e]]). Nor has she established grounds for disqualification and vacatur (*see Matter of Maron v. Silver*, 14 NY3d 230, 249 [2012] [Rule of Necessity]; *Pines v. State of N.Y.*, 115 AD3d 80, 90-91 [2d Dept 2014] [same], *appeal dismissed* 23 NY3d 982 [2014]). Plaintiff's motion is therefore denied."

In other words, Judge Hartman denies plaintiffs' June 12, 2017 order to show cause in completely conclusory fashion:

- without identifying ANY of the facts, law, or legal argument it had presented;
- without identifying defendants' July 21, 2017 response thereto – or plaintiffs' August 21, 2017 reply; and
- without identifying plaintiffs' request that she make disclosure of her financial interest and relationships with defendants, of which she made none.

As for Judge Hartman's citations to *Maron v. Silver* and *Pines v. State* for the "Rule of Necessity", which she precedes by an inferential "*see*",[4] such has:

[4] The Bluebook: A Uniform System of Citation (18th ed. 2004), at p. 4: "Use see to

- no applicability to her disqualification for actual bias, as manifested by each and every one her decisions;

- no applicability to her disqualification based on her personal, professional, and political relationships with defendants, including defendants Cuomo and Schneiderman for whom she worked in the attorney general's office; and

- no applicability to her disqualification for the HUGE financial interest she shares with other judges – inasmuch as her May 5, 2017 decision LIES that she has NO financial interest [R.50].

Judge Hartman's Indefensible and Fraudulent Grant of Summary Judgment to Defendants on Plaintiffs' Sixth Cause of Action

As for AAG Kerwin's July 21, 2017 cross-motion, the November 28, 2017 decision purports [R.33]:

> "because defendants have demonstrated entitlement to judgment as a matter of law and plaintiff has not raised a material issue of fact in opposition, the motion for summary judgment is granted."

The decision then furnishes particulars – starting with a four-sentence paragraph under the title heading "Procedural Background". It reads [R.33-34]:

> "By Decision and Order dated December 21, 2016, as amended on May 5, 2017, the Court dismissed all of the complaint's causes of action but the sixth, which challenged as unconstitutional the 2015 legislation that created the Commission on Legislative, Judicial and Executive Compensation (Commission) (L 2015, ch 60, Part E §3[5]; S4610/A6721 2015). In its Decision and Order dated June 26, 2017, the Court denied plaintiff's motion for summary judgment on the sixth cause of action. In that decision, the Court divided the sixth cause of action into six sub-causes, labelled A-E. As the Court held,

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introduce an authority that clearly supports, but does not directly state, the proposition".

> the law of the case disposes of Sub-Cause E – allegations that the budget bill that created the Commission was procured by fraud and in violation of due process failed to state a cause of action. The remaining sub-causes must also be resolved in favor of defendants."

This so-called "Procedural Background" is materially false. The sixth cause of action of plaintiffs' September 2, 2016 verified complaint (¶¶59-68) [R.109-112] contained five sections, not six. Plaintiffs moved for summary judgment on all five by their March 29, 2017 order to show cause – and AAG Lynch, in the absence of any defense, purported by her April 21, 2017 opposition papers that the December 21, 2016 decision had preserved only the first and third sections – a fraud exposed by plaintiffs' May 15, 2017 reply memorandum of law [R.940-942].

By her June 26, 2017 decision [R.68-79], Judge Hartman denied plaintiffs' March 29, 2017 order to show cause [R.635-743] without identifying ANY of the facts, law, or legal argument presented therein or by their May 15, 2017 reply papers [R.788-995a]. The decision did not "divide" the sixth cause of action into six sub-causes. It simply substituted the nomenclature of sub-causes for sections, of which there were five, not six, denominated A-E. And, in the complete absence of any grounds for denying plaintiffs summary judgment on their sub-cause E, the June 26, 2017 decision adopted AAG Lynch's deceit that it had not been preserved by the December 21, 2016 decision, stating [R.77]:

> "The final allegation in plaintiff's sixth cause of action is that the budget bills creating the Commission were enacted fraudulently and in violation of due process. These allegations have already been rejected by the Court in its Amended Decision and Order dated December 21, 2016."

Plaintiffs responded, by their "legal autopsy"/analysis of the June 26, 2017 decision – annexed as Exhibit I to their August 25, 2017 reply/opposition – as follows [R.1316]:

> "This is outright fraud. The December 21, 2016 decision [R.527-535] does not 'reject[]' sub-cause E – and Judge Hartman does not identify where and by what language her December 21, 2016 decision does so. Indeed, her summarizations of her December 21, 2016 decision, at the outset of the June 26, 2017 decision [R.69] and at the outset of her May 5, 2017 decision [R.49], also do not purport that the sixth cause of action was not fully preserved by her December 21, 2016 decision. That she here makes such bald claim is completely contrived – and replicates AAG Lynch's deceit, by her April 21, 2017 opposition papers [R.772, 774], that only the first and third of the sub-causes had been preserved, exposed by pages 16-18 of plaintiffs' May 15, 2017 reply memorandum of law [R.940-942], to which Judge Hartman makes no reference. Such deceit is because – as the allegations of sub-cause E plainly reveal [R.112, R.197-201] – plaintiffs have a summary judgment entitlement to a declaration of unconstitutionality based thereon."

The accuracy of this was not denied or disputed by AAG Kerwin, who chose not to interpose reply papers. And Judge Hartman's November 28, 2017 decision does not deny or dispute its accuracy either. Rather, by this paragraph of "Procedural Background" [R.33-34], she conceals that her euphemistically described "law of

the case" is her December 21, 2016 decision [R.527]; that it did not dismiss plaintiffs' sub-cause E as having "failed to state a cause of action"; and that the record establishes plaintiffs' entitlement to summary judgment, *as a matter of law*, on their sub-cause E: AAG Kerwin having furnished NO evidence to substantiate the bald denials of her January 20, 2017 answer [R.548-553] and, by her litigation fraud, reinforcing that she has NONE.

The November 28, 2017 decision then continues with a further paragraph [R.34], seemingly still part of "Procedural Background", consisting of two generic sentences about the "strong presumption of the constitutionality of legislative enactments". These sentences materially replicate what the June 26, 2017 decision had recited [R.72] under its title heading "Motion for Summary Judgment". However, the November 28, 2017 decision presents no comparable "Summary Judgment" title heading. Nor does it recite the threshold procedural standards governing summary judgment, enunciated by the "Summary Judgment" section of the June 26, 2017 decision [R.72], *to wit*:

> "The party moving for summary judgment bears the burden of submitting evidence in admissible form demonstrating entitlement to judgment as a matter of law. Once the moving party has met its burden, the burden shifts to the party opposing summary judgment to submit evidence in admissible form that establishes that a material issue of fact exists (*Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]; *Staunton v.*

Brooks, 129 AD3d 1371, 1372 [3d Dept 2015])."

Instead, the decision [R.35-40] directly proceeds to three section headings for sub-causes A-D of plaintiffs' sixth cause of action, all seemingly part of "Procedural Background". None of these three sections furnish content consistent with the above-quoted procedure for granting summary judgment – a procedure requiring substantiation for the decision's conclusory claim [R.33] that "defendants have demonstrated entitlement to judgment as a matter of law and plaintiff has not raised a material issue of fact in opposition" – a claim without the slightest basis in the record.

"Sub-Causes A & B – Improper Delegation of Authority Claims"

The deceit of Judge Hartman's three paragraphs under this title heading [R.35-36] begins with the title heading itself, as the issue is NOT "Improper Delegation", but delegation that is unconstitutional, violating separation of powers and the presentment clause:

> "As a general rule, the lawmaking powers conferred upon the Senate and Assembly are exclusive, and the Legislature may neither abdicate its constitutional powers and duties nor delegate them to others."
> …
> "In the enactment of delegative statutes certain formalities must be met which are second only to the requirement that the function itself be one which is susceptible of delegation." McKinney's Consolidated Laws of New York Annotated, Book 1: Statutes, Chapter 1, §3 "Delegation of legislative power" (underlining added).

Because Judge Hartman has no answer to the separation of powers, presentment clause violations of plaintiffs' sub-cause A [R.110, R.188-192], nor to the insufficiency of "safeguarding" provisions, which is plaintiffs' sub-cause B [R.110-111, R.192-193], she combines these two separate sub-causes – just as she had by her June 26, 2017 decision [R.72-74][5]. She then conceals ALL the allegations of these separate sub-causes. Thus, she does not identify the specific delegation of legislative power which sub-cause A particularizes as unconstitutional, this being the "force of law" power of the Commission's judicial salary recommendations, superseding existing law – nor any of the facts, law, or legal argument furnished by plaintiffs in substantiation. Nor does she identify any of the deficiencies identified by sub-cause B as rendering the statute unconstitutional, over and above its unconstitutional delegation, *to wit*, the inadequacy of such statutory "safeguards" as the Commission's membership and the six enumerated factors the Commission is mandated to evaluate in making its salary recommendations.

AAG Kerwin's July 21, 2017 cross-motion for summary judgment had also concealed ALL the allegations of sub-causes A and B and materially rested on

[5] The June 26, 2017 decision furnished a materially different, but more accurate, section heading: "Sub-Causes A and B – Separation of Powers Claims" [R.72].

Judge Hartman's June 26, 2017 decision [R.1257-1261] – but all this is concealed by the November 28, 2017 decision. Likewise, the ENTIRETY of plaintiffs' rebuttal by their August 25, 2017 memorandum of law [R.1358-1362], and encompassing their "legal autopsy"/analysis of the June 26, 2017 decision, whose pages 16-20 [R.1308-1312] rebutted Judge Hartman's denial of summary judgment to plaintiffs on sub-causes A and B.

It is because plaintiffs' August 25, 2017 rebuttal [R.1308-1312] so resoundingly established no basis for anything but summary judgment to plaintiffs on their sub-causes A and B that the three paragraphs that Judge Hartman's November 28, 2017 decision offers up consist, virtually entirely, of selective quotations and paraphrasing of the statute and generic, unresponsive citations [R.35-36]. This includes her bald citation [R.36] to "*McKinney v. Commr. of the N.Y State Dept. of Health*, 41 AD3d 252, 253 [1st Dept 2007], lv denied 9 NY3d 815 [2007], appeal dismissed 9 NY3d 891 [2007]" for the proposition "Enabling statutes even broader than this one have been found constitutional" and "*compare St. Joseph's Hospital v Novello*, 43 AD3d 139 [4th Dept 2007] [declining to address constitutionality of delegation of authority that allowed for de facto legislative veto]" – nowhere addressing plaintiffs' showing that these decisions establish their summary judgment entitlement, demonstrated by: (1) the very

allegations of their sub-causes A and B (¶¶390-391, 393, 394-395) [R.190-192]; (2) their September 30, 2017 reply memorandum of law [R.502-504, R.459]; (3) their May 15, 2017 reply memorandum of law [R.945]; and (4) their "legal autopsy"/analysis of the June 26, 2017 decision [R.1308-1312], on which their August 25, 2017 reply memorandum of law additionally relied [R.1358-1362].

"Sub-Cause C – New York Constitution Article XIII, Section 7"

Judge Hartman's single paragraph under this heading [R.37], granting summary judgment to defendants on sub-cause C of plaintiffs' sixth cause of action, rests on her unspecified "earlier decision" – this being her June 26, 2017 decision [R.76], in which her argument was entirely *sua sponte*, having not been advanced by defendants – a fact pointed out by plaintiffs' "legal autopsy"/analysis [R.1312-1313], furnished by their August 25, 2017 reply.

"Sub-Cause D – Article VII, Sections 2, 3, and 6"

Notwithstanding the five paragraphs under this subheading [R.37-39], only one disposes of sub-cause D of plaintiffs' sixth cause of action.

The first two paragraphs recite the allegations of sub-cause D in a general, truncated fashion. The third paragraph then states [R.38-39]:

> "Assuming without deciding justiciability (*see Pataki v. N.Y. State Assembly*, 4 NY3d 75, 97 [2004]; *Saxton v Carey*, 44 NY2d 545, 549-551 [1978]), this sub-cause must also be denied. With regard to

> timeliness, Article VII, Section 3 allows the submission of budget bills 'at any time' with the consent of the Legislature. Although no formal consent appears in the record, the Legislature's consideration and passage of the bill is effective consent in itself. In any event, the 30-day timeframe appears to be precatory, not mandatory. Unlike, for instance, Article III, Section 14, which states that '[n]o bill shall be passed or become a law unless it has been printed and upon the desk of the members, in its final form, at least three calendar legislative days prior to its final passage,' Article VII, Section 6 contains no such mandatory language (*cf. Maybee v State*, 4 NY3d 415, 419-421 [2005] [holding that rationale underlying a Governor's statement of necessity to allow a bill to be passed without being before the Legislature for three days is not susceptible to judicial review]). Nor does the Commission bill violate Article VII, Section 6 of the State Constitution. The creation of the Commission relates specifically to items of appropriation in the 2015 budget for judicial and legislative pay and is not 'essentially non-budgetary' (*Pataki*, 4 NY3d at 98-99; *see Schuyler v S. Mall Constructors*, 32 AD2d 454 [3d Dept 1969])."

Aside from being materially <u>different</u> from Judge Hartman's June 26, 2017 decision denying plaintiffs summary judgment on sub-cause D, which, as detailed by plaintiffs' "legal autopsy"/analysis [R.1313-1315], was completely *sua sponte* and fraudulent, this paragraph – abandoning or expanding upon the already-exposed deceits of her June 26, 2017 decision [R.76] – is also *sua sponte* and completely fraudulent.

<u>As to justiciability</u>, Judge Hartman does not decide it because, as evident from plaintiffs' "legal autopsy"/analysis [R.1313-1315] and the cases cited therein, *Korn v Gulotta*, 72 NY2d 363, 369-370 (1988), and *New York Bankers Assn v.*

Wetzler, 81 NY2d 98, 102 (1993), in addition to the two cases plaintiffs' sub-cause D itself cites and quotes [R.196]: *Winner v. Cuomo*, 176 AD2d 60 (3rd Dept. 1992) and *Pataki v. Assembly*, 4 NY3d 75 (2004), and by *Saxton v Carey*, 44 NY2d 545, 551 (1978) and *King v. Cuomo*, 81 NY2d 247, 251 (1993), plaintiffs' challenges based on Article VII, §2, 3 and §6 are justiciable.

As to the violation of Article VII, §3, Judge Hartman states [R.38] that the record before her contains "no formal consent". Yet, rather than acknowledging that such PRECLUDES summary judgment to defendants, she purports – *unsupported by any law* – that "consideration and passage of the bill is effective consent" – completely ignoring that the facts in the record PRECLUDE "effective consent", *as a matter of law*. These are the facts detailed by sub-cause E [R.197-201] as to the fraud by which Budget Bill #S4610-A/A.6721-A was introduced and enacted – facts unrefuted by defendants – and which, by the particulars and evidence recited, are clearly irrefutable and dispositive of plaintiffs' entitlement to summary judgment on sub-cause E,[6] as well as on sub-cause D pertaining to the Article VII, §3 violation [R.193-196].

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[6] McKinney's Consolidated Laws of New York Annotated, Book 1: Statutes – Chapter 2, §11: "Legislative procedure generally": "…the Constitution not only permits, but it requires an examination into the procedure followed in the consideration of a bill.", citing *Franklin Nat. Bank of Long Island v Clark*, 1961, 26 Misc.2d 724, 212 N.YS.2d 942, motion denied 217 N.Y.S.2d 615.

Having neither "formal consent", nor "effective consent" – in other words, in the complete absence of the "consent" requisite to defeating plaintiffs' entitlement to summary judgment on sub-cause D based on violation of Article VII, §3 – Judge Hartman offers up the deceit that consent is not necessary because "the 30-day timeframe appears to be precatory, not mandatory" [R.38]. This is utterly false. The definition of precatory is "a wish or advisory suggestion which does not have the force of a demand or a request which under the law must be obeyed"[7]. There is nothing in the 30-day time frame of Article VII, §3 that fits that description – as Judge Hartman may be presumed to know in not quoting or analyzing the pertinent text of Article VII, §3, which is clear and unambiguous. It reads:

> "At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein.
>
> The governor may at any time within thirty days thereafter and, with the consent of the legislature, at any time before the adjournment thereof, amend or supplement the budget and submit amendments to any bills submitted by him or her or submit supplemental bills."

The meaning of "shall" is mandatory:

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[7] *See* also Black's Law Dictionary (eighth edition: 2004): "requesting, recommending, or expressing a desire for action, but usu. in a nonbinding way".

> "The courts ordinarily…view the word 'shall' as an indication of the mandatory character of the provision." 20 New York Jurisprudence 2nd, §39: "Provision as mandatory or directory".

Were "the 30-day timeframe" to be only "precatory", it would undo the mandatory nature of the first sentence AND render meaningless the distinction in the second sentence for the Governor's amending and supplementing before and after the 30 days.

> "The starting point for any constitutional question must be the language of the constitution itself. The same general rules that govern the construction and interpretation of statutes and written instruments generally apply to, and control in, the interpretation of written constitutions.
> … there is no room for application of rules of construction so as to alter a constitutional provision that is not ambiguous…"
> 20 New York Jurisprudence 2nd, §17 "Mode of construction: applicability of principles of statutory construction"

> "…When the language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers as indicated by the language employed and approved by the people. ….
> The courts should not permit explicit language of the constitution to be rendered meaningless, and, in its construction of clear constitutional and statutory provisions, a court may not read out any requirement.", 20 New York Jurisprudence 2nd, §25 "Conformity to language";

> "It is a well-settled rule, in accord with obvious good sense, that in construing the language of the constitution, the courts should give the language its ordinary, natural, plain meaning. The words of the constitution must be taken to mean what they most directly and aptly express in their usual and popular significance…It is not allowable to interpret what has no need of interpretation or, when the words have a definite precise meaning, to go elsewhere in search of conjecture in order

> to restrict or extend the meaning." 20 New York Jurisprudence 2nd, §27 "Ordinary meaning";
>
> "In dealing with constitutional language, the courts are not inclined to adopt technical or strained constructions. Neither will they give to the language of the constitution a construction that leads to manifestly unintended results or makes a constitutional provision absurd. .." 20 New York Jurisprudence 2nd, §29 "Strained interpretations; absurd results"

In lieu of any recitation of the principles governing interpretation of constitutional provisions, or any textual analysis of Article VII, §3, or any citation to caselaw or treatise authority for the seemingly first-ever proposition that "the 30-day timeframe appears to be precatory", Judge Hartman substitutes [R.38-39] a truncated quote of a completely separate constitutional provision, Article III, §14, quoting the beginning language of its first sentence as to its mandatory three-day aging requirement for bills, but not the balance, which sets forth the requisite for dispensing with it. She then crowns her expurgation of Article III, §14 with the assertion "Article VII, Section 6 contains no such mandatory language", when at issue is Article VII, §3 – whose mandatory language she has not fully quoted, nor explicated by textual analysis.

As for her concluding citation [R.39], in a parenthesis and by a *cf.*[8] to *Maybee v. State*, it is relevant ONLY to the irrelevant Article III, §14. Indeed, for

[8] According to The Bluebook: A Uniform System of Citation (18th ed. 2004, p. 47), *cf.* means: "Cited authority supports a proposition different from the main proposition but

Maybee to be relevant to Article VII, §3, it would have to stand for the proposition that Article III, §14 is not violated when there is NO message of necessity for a bill enacted without being on legislators' desk for three days – which it does NOT – and that the omission of a message of necessity for such bill is NOT justiciable – which it does NOT.

As to the violation of Article VII, §6, Judge Hartman disposes of it in two conclusory sentences [R.39]: the first simply declaring no violation, with the second purporting, without specificity, that "The creation of the Commission relates specifically to items of appropriation in the 2015 budget for judicial and legislative pay". This is false – and Judge Hartman conspicuously does not identify where in the budget the purported "items of appropriation" might be found. There are no such "items of appropriation", none were alleged by defendants, and sub-cause D, by its ¶407 [R-194], contains the admission of the six legislative defendants who sponsored A.7997 that there was "no appropriation in the budget bill relating to the salary commission" – quoting their introducers' memorandum to A.7997, as follows:

> "Article VII, Section 6 of the New York State Constitution states in relevant part that '(n)o provision shall be embraced in any appropriation

sufficiently analogous to lend support. Literally, '*cf.*' means 'compare.' The citation's relevance will usually be clear to the reader only if it is explained. Parenthetical explanations, however brief, are therefore strongly recommended."

> bill unless it relates specifically to some particular appropriation in the bill,' yet there was no appropriation in the budget bill relating to the salary commission. Thus, this legislation was improperly submitted and considered by the legislature as an unconstitutional rider to a budget bill."

Judge Hartman's citations to *Pataki*, 4 NY3d at 98-99, and *Schuyler v S. Mall Constructors*, 32 AD2d 454 [3d Dept 1969], reinforce the violation of Article VII, §6, which the six legislative sponsors of A.7997 themselves revealed.

As to "Prudential considerations": Having no facts and no law for granting summary judgment to defendants on sub-cause D, Judge Hartman then whips out "prudential considerations", stating, as follows, in a three-sentence paragraph [R.39]:

> "Prudential considerations further weigh against invading the province of the Governor and Legislature. '[T]he consequences of judicial second-guessing of the Governor's and the Legislature's choice' to create the Commission by budget bill outside the 30-day window could be 'draconian' (*Maybee*, 4 NY3d at 420; *see Schulz v. State*, 81 NY2d 336, 348-349 [1993]). If the Court 'accepted plaintiff's argument here, any statute, no matter how important to the state,' would be subject to invalidation if passed under similar circumstances (*Maybee*, 4 NY3d at 420)."

This is a conclusory deceit. Judge Hartman does not assert that a declaration striking down the commission statute as violative of Article VII, § 3 would be "draconian", but only that it "could be 'draconian". She provides not a single fact in substantiation and, indeed, its consequences would be beneficial to everyone

except those whose "gravy train" of larcenous salary increases would come to an end: Judge Hartman, her judicial brethren, and district attorneys whose salaries are linked to judicial salaries. The sixth, seventh, and eighth causes of action of plaintiffs' September 2, 2016 verified complaint [R.109-114, R.187-213] furnish a multitude of grounds mandating invalidation of the statute – as to which the record establishes plaintiffs' entitlement to summary judgment on all three causes of action, *as a matter of law*.

As to timeliness/laches: Judge Hartman then finishes off with a further paragraph [R.39-40] – seemingly embracing the entirety of plaintiffs' sixth cause of action [R.109-112, R.187-201], not just its sub-cause D:

> "Finally, the particular circumstances of this case also counsel restraint. Plaintiff did not commence this action until September 2016, well after the Commission bill was signed by the Governor in April 2015, the Commission issued its Final Report on Judicial Compensation on December 24, 2015, and its recommendations took on the force of law on April 1, 2016. While the Court recognizes that invalidation of the Commission and of the raises that followed is precisely the relief plaintiff seeks, the relief she requests in her sixth cause of action must be denied (*see Schulz*, 81 NY2d 336, 348-349 [1993])."

This factual recitation infers, without so-stating and by citing *Schulz*, that plaintiffs did not timely commence their litigation challenge and are barred by laches. This is completely false.

On March 31, 2015, the date Budget Bill #S.4610/A.6721 was introduced, amended, and passed by the Senate, and in the wee morning hours of April 1, 2015, passed by the Assembly – repealing Chapter 567 of the Laws of 2010 that had created the Commission on Judicial Compensation and replacing it with a materially identical statute creating the Commission on Legislative, Judicial and Executive Compensation – plaintiffs already had a citizen-taxpayer action, which they had commenced on March 28, 2014 [R.226-272], challenging Chapter 567 of the Laws of 2010 and the August 29, 2011 report the Commission on Judicial Compensation had rendered. On September 22, 2015, by opposition/cross-motion papers[9], they sought a summary judgment declaration of unconstitutionality as to Chapter 567 of the Laws of 2010, identifying that it had been repealed and replaced by the materially identical Chapter 60, Part E, of the Laws of 2015 [R.1080-1082]. In further support of their summary judgment entitlement, plaintiffs' November 5, 2015 reply papers[10] furnished the introducers' memorandum to A.7997, the bill to amend Chapter 60, Part E, of the Laws of 2015, by, *inter alia*, removing the "force of law" aspect of the commission's salary

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9 *See* plaintiffs' September 22, 2015 memorandum of law (at p. 48) and September 22, 2015 affidavit (at ¶8) [R.1179].

10 *See* plaintiffs' November 5, 2015 reply/opposition memorandum of law (at pp. 19-25) and November 5, 2015 reply/opposing affidavit, at ¶¶3-8.

recommendations – and additionally cited and quoted the New York City Bar's *amicus curiae* brief to the Court of Appeals in *McKinney* as to the unconstitutionality of the similar "force of law" provision in Chapter 63, Part E, of the Laws of 2005. At that point, the Commission on Legislative, Judicial and Executive Commission was already in violation of Chapter 60, Part E, of the Laws of 2015 – its full complement of seven members not having been appointed until October 31, 2015. Three weeks later, on November 30, 2015, at the Commission on Legislative, Judicial and Executive Compensation's one and only hearing on judicial compensation, plaintiff Sassower, in support of her testimony, handed up the pertinent lawsuit papers to establish plaintiffs' summary judgment entitlement to declarations of unconstitutionality with respect to Chapter 567 of the Laws of 2010 – whose effect would be the voiding of Chapter 60, Part E, of the Laws of 2015. The Commission ignored and concealed the entirety of plaintiff Sassower's testimony in rendering its December 24, 2015 report [R.1083-1105], and materially rested on the Commission on Judicial Compensation's August 29, 2011 report to recommend its own further "force of law" judicial salary increases. Immediately, plaintiffs sought oversight from defendant Chief Judge (nominee) DiFiore and, thereafter, the legislative defendants and, in the complete absence of any oversight, on March 23, 2016, brought an emergency order to show cause, with TRO

[R.1182-1188] to enjoin disbursement of monies to pay for the "force of law" judicial salary increases for fiscal year 2016-2017 recommended by the December 24, 2015 report, stating:

> "3. … 'the force of law' judicial salary increases recommended by the Commission on Legislative, Judicial and Executive Compensation suffer from the identical constitutional and statutory violations as 'the force of law' judicial salary increases recommended by the Commission on Judicial Compensation.
>
> 4. It would be wasteful to bring a separate citizen taxpayer action when the facts and law are identical – and when any such separate citizen-taxpayer action would doubtless be assigned to the Court as a related proceeding." [R.1186, underlining in the original].

In support, plaintiffs sought leave to file their March 23, 2016 verified second supplemental complaint pertaining to fiscal year 2016-2017 [R.135-225], with its pertinent thirteenth, fourteenth, and fifteenth causes of action [R.187-213]. Despite plaintiffs' entitlement to the TRO relief requested, *as a matter of law*, because they were entitled to summary judgment on all their causes of action, *as a matter of law*, Judge McDonough denied the TRO – and then delayed decision on the March 23, 2016 order to show cause until July 15, 2016, when he denied it, in its entirety, in the same decision as denied, in its entirety, plaintiffs' September 22, 2015 cross-motion for summary judgment. The fraudulence of this decision, as to which Judge McDonough made a slight correction by an August 1, 2016 amended decision [R.315-225], was demonstrated by plaintiffs' "legal autopsy"/analysis

thereof, annexed as Exhibit G [R.338-373] to their September 2, 2016 verified complaint commencing this citizen-taxpayer action – whose sixth causes of action [R.109-112] rests on the thirteenth cause of action of the March 23, 2016 verified second supplemental complaint [R.187-201]. Thus, Judge Hartman's claim that "restraint" is warranted because plaintiffs' challenge was not timely commenced is completely bogus – indeed, so-revealed by footnote 22 of the thirteenth cause of action [R.188].

CONCLUSION

The November 28, 2017 decision and judgment is both indefensible and unconstitutional – manifesting Judge Hartman's pervasive actual bias, born of interest and relationships she refused to disclose. The same is true of her underlying December 21, 2016 decision, May 5, 2017 decision, May 5, 2017 amended decision, and June 26, 2017 decision. All must be vacated, *as a matter of law*, with determinations in plaintiffs' favor on the threshold integrity issues pertaining to the attorney general, which none of them identified or adjudicated. Likewise, as a *matter of law*, plaintiffs are entitled to summary judgment declarations in their favor on each of the ten causes of action of their September 2, 2016 verified complaint pertaining to fiscal year 2016-2017 – and on the reiterated ten causes of action of their March 29, 2017 verified supplemental complaint

pertaining to fiscal year 2017-2018, as well as such injunctive relief as may yet be granted, first and foremost, enjoining the ongoing disbursement of monies for the judicial salary increases resulting from the August 29, 2011 report of the Commission on Judicial Compensation and from the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation – and for the district attorney salary increases based thereon. Finally, this Court is duty-bound to grant the "other and further relief" specified by plaintiffs' pleadings:

> "restoring public trust by referring to prosecutorial authorities the evidence particularized by this [September 2, 2016] verified complaint as it establishes, *prima facie*, grand larceny of the public fisc and other corrupt acts, requiring that the culpable public officers and their agents be criminally prosecuted and removed from office, without further delay." [R.131, ¶4, underlining added, italics in the original].

> "restoring the public trust by referring to prosecutorial authorities the evidence particularized by this [March 29, 2017] verified supplemental complaint as it establishes, *prima facie*, grand larceny of the public fisc and other corrupt acts, requiring that the culpable public officers and their agents be criminally prosecuted and removed from office, without further delay." [R.742, ¶4, underlining added, italics in the original].

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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

Dated: White Plains, New York
July 4, 2018