SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, DEAN G. SKELOS and JEFFREY D. KLEIN, as members and as Temporary Presidents of the New York State Senate, and SHELDON SILVER, as member and as Speaker of the New York State Assembly,

Plaintiffs,

-against-

KATHLEEN RICE, WILLIAM J. FITZPATRICK, and MILTON L. WILLIAMS, Jr. in their official capacities as Co-Chairs of the Moreland Commission on Public Corruption and THE MORELAND COMMISSION TO INVESTIGATE PUBLIC CORRUPTION,

Defendants.

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Affidavit in Support of Order to Show Cause for Intervention, TRO, & Other Relief

Index #160941/2013

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

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the Director and co-founder of the Center for Judicial Accountability, Inc. (CJA), a non-partisan, non-profit citizens' organization, based in White Plains, New York, "that documents corruption in the judiciary involving judicial selection, judicial discipline, the judicial process itself"[1]. I submit this affidavit in support of my accompanying order to show cause to intervene as a plaintiff in this declaratory action: (a) to oppose its dismissal for "mootness"[2]; and

[1] Quote from my oral testimony before the Commission to Investigate Public Corruption at its September 17, 2013 public hearing. The video is posted on CJA's website, www.judgewatch.org, accessible *via* the prominent homepage link: "CJA's People's Campaign to Hold the Commission to Investigate Public Corruption True to its Name and Announced Purpose". The stenographic transcript of that oral testimony is part of Exhibit M.

[2] The parties' so-ordered stipulation of adjournment, filed on April 4, 2014, opens as follows:

(b) to secure a summary judgment declaration as to the unconstitutionality of Governor Andrew Cuomo's still-live Executive Order #106, whose establishment of the Commission to Investigate Public Corruption violated separation of powers, *as written and as applied*, including by the December 2, 2013 Preliminary Report it left behind, on which the public has been detrimentally led to rely.

2. Like CJA's many New York members and supporters, I am among the public whose trust in government defendant Commission to Investigate Public Corruption was established to restore and whose hundreds of thousands of tax dollars have been used by both plaintiffs and defendants in bringing and defending this declaratory action, as well as the related proceedings to quash the Commission's subpoenas, for protective orders, and intervention motions. As hereinafter demonstrated, neither plaintiffs nor defendants are protecting the public or the interest of the state by their submissions to this Court, filled with material deceits, prejudicial to proper determination of the important separation of powers constitutional issues.

3. Indeed, by reason of the true facts misrepresented and concealed by the parties, there is a question as to whether the individual plaintiffs, Temporary Senate Presidents Skelos and Klein and Assembly Speaker Silver, have standing to raise the separation of powers issue which belongs to the institutional plaintiffs, the New York State Senate and the New York State Assembly – and whether their divergent interests, including as to mootness, make it improper for Michael J. Garcia, Esq., of Kirkland & Ellis, LLP, to be representing both plaintiffs Senate and

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> "In light of statements by Governor Andrew Cuomo that he will end the investigation of the Commission to Investigate Public Corruption after enactment of the New York State budget, and in light of the budget having been enacted, and in anticipation of the proceedings, motions, and underlying subpoenas in the above-captioned cases therefore becoming moot…"

Skelos, and Marc E. Kasowitz, Esq., of Kasowitz, Benson, Torres & Friedman, LLP, to be representing both plaintiffs Assembly and Silver.

4. Certainly, it deserves note, as a threshold matter, that Mr. Garcia and Mr. Kasowitz have not established that they are entitled to represent the Senate and Assembly, let alone "those bodies' individual members"[3]. They have not alleged or furnished a resolution of either chamber[4] – notwithstanding *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001). Tellingly, they have furnished no statement, sworn or otherwise, for their failure to do so. That Mr. Garcia relies, exclusively, on Senate Rule III, §5 authorizing the Temporary Senate President to engage legal representation on behalf of the Senate to enforce and defend the rights, privileges, and prerogatives of the Senate only reinforces that where the interests of the Temporary Senate Presidents diverge from those of the Senate – as at bar – the client is the Senate[5].

5. Despite my phone messages for Mr. Garcia on December 12 and 16, 2013, offering "valuable information", and my phone messages for Mr. Kasowitz on December 16, and 17, 2013, neither they nor anyone on their behalf returned my calls.

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[3] In their related proceeding to quash the Commission's subpoenas and for a protective order (#160935/2013), counsel purports in a footnote to their November 22, 2013 memorandum of law (#57) that the institutional plaintiffs include "those bodies' individual members". However, such does not appear in their Complaint herein, whose ¶9 seems to slip and reveal that the actual plaintiffs are "the leadership of the legislative branch of government".

[4] See, my FOIL/ records request herein (Exhibits 1-7).

[5] The Attorney General's challenge to plaintiffs' standing is at pp. 52-55 of its January 10, 2014 memorandum of law in support of the Commission's dismissal motion. See, also, plaintiffs' February 21, 2014 reply memorandum (pp. 25-29).

6. In the interest of judicial economy, I rest on all the law presented by plaintiffs and defendants as to the standards governing intervention pursuant to CPLR §§1012 and 1013[6] – as it all supports the intervention herein sought. Pursuant to CPLR §1014, the "proposed pleading setting forth the claim…for which intervention is sought" accompanies this motion.

7. This intervention motion is timely, being made prior to the return date of all motions in this and the related proceedings. Pursuant to the April 4, 2014 so-ordered stipulation, the motions are all returnable on April 28, 2014.

8. I proceed by order to show cause, with a TRO, to stay the parties from filing a stipulation of discontinuance before that date or otherwise seeking dismissal based on mootness before this motion is heard. There is no prejudice to the parties by the granting of the TRO and no prior application for the same or similar relief has been made to this or any other Court.

9. For the convenience of the Court, a Table of Contents follows:

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[6] *See* plaintiffs' November 27, 2013 memorandum of law in support of their intervention motions (p. 16-23); the Attorney General's January 10, 2014 memorandum of law in support of the Commission's dismissal motion (pp. 55-60).

* * *

The Proposed Intervener Has Direct, First-Hand Knowledge, Enabling Her to Expose the Parties' Material Falsehoods and Conflicts of Interest

10. Since shortly after Governor Cuomo issued his July 2, 2013 Executive Order #106 establishing the Commission (Exhibit A-1)[7], with an assist by Attorney General Schneiderman at a press conference filled with rhetoric about the public for whose benefit it was created (Exhibit A-2), I have had direct, first-hand, and sustained interaction with defendants, both the full Commission and its three Co-Chairs.

11. Such enables me to attest to the material falsity of the Commission's submissions to this Court, including its December 2, 2013 Preliminary Report[8], designed to conceal the flagrantly invidious and selective reality of its nine-month operation in which it protected from investigation and prosecution a documentably corrupt Governor and Attorney General, as well as the plaintiffs herein and a "who's who" of other top public officers and agencies, including those vested with investigative, supervisory, and prosecutorial powers – the predictable result of a Commission disrespecting the most basic conflict of interest rules it was seeking to enforce as to others.

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[7] As the same exhibits as support this affidavit support my proposed pleading, the exhibits are annexed to my accompanying proposed verified complaint.

[8] The Preliminary Report is Exhibit H to the January 10, 2014 affirmation of the Commission's then Chief of Investigations, E. Danya Perry.

12. I also have had direct, first-hand, and sustained interaction with the Senate and Assembly, purported plaintiffs herein, and, in recent years, with plaintiffs Skelos, Klein, and Silver. As a consequence, I am also able to attest to the material falsity of their court submissions, designed to conceal the Legislature's actual corruption, emanating from its leadership, which the Commission was mandated to investigate, but did not because, *inter alia*, the Governor and Attorney General are active participants therein. This includes ¶8 of plaintiffs' complaint:

> "The Legislature and its members are fully committed to ensuring that the state's laws are adequately preventing corruption and other improprieties…"

13. The particulars of my interactions with both plaintiffs and defendants are set forth by my accompanying proposed verified complaint, which, in the interest of judicial economy, I incorporate herein by reference.

No Relevant Sworn Statements Support the Parties' Submissions, Except for the Affirmation of the Commission's Chief of Investigations Reflecting the Commission's Violation of Executive Order #106 in the Authorization of Investigations

14. By contrast to this sworn affidavit and my proposed verified complaint with its substantiating exhibits – all of which I incorporate by reference and whose recitations, where written by me, I swear to as true – the parties have essentially submitted no sworn statements attesting to the truth of the factual recitations their counsel have placed before the Court. Presumably, this is to avoid the penalties of perjury for factual assertions they know to be false.

15. Plaintiffs' November 22, 2013 complaint initiating this declaratory judgment action, signed by its three counsel, is not verified. No affidavits or affirmations have been filed by plaintiffs or their counsel attesting to the truth of the complaint's factual assertions or of the

factual assertions in counsel's February 21, 2014 memorandum of law in opposition to defendant Commission's dismissal motion.

16. As for defendant Commission, which, by virtue of Executive Law §63.8 is, in effect, an extension of the Attorney General's office, it is represented by Attorney General Schneiderman. It has furnished no sworn statement from any of its three defendant Co-Chairs attesting to the truth of the factual allegations in its January 10, 2014 memorandum of law in support of its dismissal motion, nor attesting to compliance with Executive Order #106, nor attesting to the fairness and impartiality of the Commission's operations, uninfluenced by the Governor and Attorney General, to whom, pursuant to Executive Law §63.8, "each" Commission member and deputy was required to furnish "a weekly report in detail".

17. The sole attestations of compliance are limited to the issuance of Commission subpoenas in the January 10, 2014 affirmation of E. Danya Perry, the Commission's then Chief of Investigations and a Deputy Attorney General (¶18).[9]

18. Perhaps the greatest value of Ms. Perry's affirmation is what it reveals about the Commission's violation of Executive Order #106 relating to investigations. Thus, Ms. Perry's ¶4 states: "…I pursue investigations approved by the Co-Chairpersons of the Commission" and her ¶5 states: "…Each of these investigations has been discussed by the full Commission, and approved unanimously by the Co-Chairpersons." (underlining added). Both seemingly indicate that the Commission's investigations were not launched by votes of the Commission's 25 members, but by only three: its Co-Chairs. Yet, Executive Order #106 does not confer the

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[9] Six weeks after the affirmation, Ms. Perry stepped down from her important position amidst rumors that she was "'frustrated' over interference from the governor's office and commission infighting" "*Chief Prober For Gov. Cuomo's Anti-corruption Commission Stepping Down*", February 28, 2014, Daily News, Ken Lovett. On the web, here: http://www.nydailynews.com/blogs/dailypolitics/2014/02/chief-prober-for-gov-cuomos-anti-corruption-commission-stepping-down.

investigative power of Executive Law §§6 and 63.8 on the Co-Chairs, but on the Commission members. The only additional powers it gives the Co-Chairs is in ¶V: approving subpoenas and promulgating "procedures and rules" (Exhibit A-1).

19. Obviously, if, behind the Commission's closed doors, the three Co-Chairs usurped the power of the 25 Commission members to determine the Commission's investigative course[10], the Governor and Attorney General would more easily be able to dominate and influence the investigations it pursued.

20. Assuming, *arguendo*, that the 25 Commissioners could delegate their investigative powers to the Co-Chairs, such would have to be embodied in "procedures and rules". Yet, inferentially, from the Attorney General's January 10, 2014 dismissal memorandum of law (pp. 33-35), no "procedures and rules" were promulgated.[11]

The Legislative Course of the Governor's "Clean-Up Albany Package", whose Supposed Rejection by the Legislature Underlies his Establishing the Commission

21. Plaintiffs' constitutional, separation of powers argument with respect to the Commission is largely focused on the assertion that because the Legislature did not pass the Governor Cuomo's reform legislation, the Governor established the Commission in retaliation, tasking it with investigating the Legislature in such fashion as would compel its passage of the legislation it had determined not to pass. Thus, at the very outset of the complaint:

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[10] The apparent ease with which the Co-Chairs usurp power may be seen from their April 10, 2014 letter to U.S. Attorney Bharara, wherein they state: "As the co-chairpersons of the Commission, we have decided that referrals to law enforcement shall be made only upon unanimous vote of the co-chairs." (Exhibit V-3, p. 2).

[11] Unidentified in either the Attorney General's January 10, 2014 memorandum of law herein or Ms. Perry's affirmation is that the Commission initially purported that it "has adopted such internal policies as to the commencement of investigations, the issuance of subpoenas and the drafting of the Interim Report." See footnote 69 of plaintiffs' November 22, 2013 memorandum in support of their petition to quash subpoenas and for a protective order in #160935/2013, referring to the Commission's October 29, 2013 letter to counsel for the New York State Senate Republican Campaign Committee. *See*, also, plaintiffs' February 21, 2014 reply memorandum therein (p. 25).

"Frustrated with the Legislature's exercise of its exclusive constitutional responsibilities and prerogative of passing only legislation deemed appropriate by its democratically-elected members, the Governor took the extraordinary step of empanelling a Moreland Commission to, by his own admission, 'investigate the Legislature.'" (¶2, underlining added).

22. Countless paragraphs of the Complaint are of this ilk:

"…punishing a legislature for considering the necessity and propriety of legislation prior to enactment, which is a legislator's constitutional obligation." (¶8);

"….bald attempt to eviscerate the Legislature's law making responsibilities" (¶9);

"…the 2013 Proposed Bills, which the Legislature…had determined were not in the best interests of New York and its citizens." (¶28);

…to punish the Legislature for failing to pass legislation…" (¶49);

"blatant attempt to encroach on the Legislative function and coerce a legislative result in clear violation of the separation of powers doctrine and, if not halted, would provide the Executive Branch with an unprecedented and constitutionally impermissible role in the democratic process." (¶50);

"…if the Legislature does not pass legislation through the constitutionally prescribed mechanism…" (¶55);

"…the Legislature in its judgment determined not to pass [the proposed bills] before adjournment in June…

the Legislature…opting not to pass the legislation the Governor demanded…

interference in the discharge of the Legislature's own functions and particular duties in violation of the Constitution." (¶56);

"…to punish and harass the Legislature for its decision to exercise its Constitutional responsibilities and not pass the 2013 Proposed Bills. The actions of the Commission amount to interference in the discharge of the Legislature's own functions and particular duties." (¶57);

"...impinging on the legislative process" (¶58);

"...to punish and harass the Legislature for exercising its constitutional function in deciding which laws to pass and not to pass. The Commission's actions amount to an unconstitutional interference in the discharge of the Legislature's functions and particular duties..." (1st cause of action: separation of powers violation: ¶62);

"...to harass and punish legislators for actions taken in their official capacity as duly-elected representatives of the People of this State...." (2nd cause of action: separation of powers violation: ¶68).

23. All this is materially false. The Legislature played NO part in the fate of the Governor's 2013 reform legislation. Upon the Governor's delivery of his Program Bills # 3, #4, #5, and #12 to the Legislature, plaintiffs Skelos, Klein, and Silver prevented "the duly-elected representatives of the People of this State" from undertaking any consideration of the bills by neither introducing them nor circulating them for introduction. As a consequence, the bills had no legislative sponsors, were never assigned bill numbers, were never introduced in either the Senate or Assembly, never debated in committee or on the Senate and Assembly floor, and never voted upon. (Exhibit B-1, pp. 2-3; Exhibit G-2, pp. 6-7).

24. Plaintiffs' counsel may be presumed knowledgeable of this. Certainly plaintiffs Skelos, Klein, and Silver knew that within two weeks of the Governor's establishment of the Commission, I had already uncovered that they had aborted the legislative process by withholding all four of the Governor's program bills from the Legislature, for which I sought appropriate documentation by FOIL/records requests to them and the Governor (Exhibits C, D, E).

25. Tellingly, no specifics of the "legislative process" pertaining to the Governor's Program Bills #3, #4, #5, and #12 appear in plaintiffs' complaint. Rather, there are a mere two

paragraphs, each of two sentences (¶¶26, 27). ¶27 is especially laced with misleading, contradictory, and outrightly false claims. Its first sentence reads:

> "Throughout the 2013 legislative session, Governor Cuomo explicitly threatened to empanel a Moreland Commission to investigate the Legislature if it did not pass the 2013 Proposed Bills, which were delivered to the legislature with only weeks, or in one case, days, to consider them prior to the scheduled end of the session on June 20. When the Legislature, after extensive debate and efforts at compromise, decided against introducing and enacting the Governor's proposed bills, the Governor made good on his threat, issuing Executive Order Number 106 empanelling a Moreland Commission purportedly to study the efficacy of certain anti-corruption laws pursuant to N.Y. Executive Law §6 and §63(8), but actually intended to pressure the Legislature into passing the 2013 Proposed Bills." (underlining added).

In fact, the Governor delivered his Program Bill #3, the Public Trust Act, to the Legislature by the end of April 2013 – in other words almost two months "prior to the scheduled end of the session on June 20." Nor was there "extensive debate" by "the Legislature", because plaintiffs Skelos, Klein, and Silver withheld it and the Governor's three other program bills from introduction. As for the Legislature having "decided against introducing and enacting the Governor's proposed bills", this is the complaint's only reference to the bills not being "introduced" – and its meaning is lost by the supposed "extensive debate", which never happened.

26. Obviously, if what plaintiffs Skelos, Klein, and Silver did in withholding the Governor's program bills from the Legislature could support plaintiffs' separation of powers constitutional argument, their complaint would not conceal it. However, the actual separation of powers violation is in what plaintiffs Skelos, Klein, and Silver did, in collusion with the Governor, in depriving the "democratically-elected members" of the Senate and Assembly of

their "constitutionally-ordained legislative function"[12] – and in the Governor's out-sourcing to a commission "duties of a properly-functioning legislature, discharging its oversight and law-making functions." (Exhibit G-2, p. 1, underlining in the original). Having colluded with the Governor to deprive the Senate and Assembly of their constitutional role – and bearing primary responsibility for the Legislature's dysfunction – plaintiffs Skelos, Silver, and Klein are without standing to raise the Senate and Assembly's separation of powers constitutional objection.

27. Normally, in an adversarial system, opposing counsel would expose misrepresentations and supply the true facts and corresponding law. Defendants were fully knowledgeable as to what plaintiffs Skelos, Klein, and Silver did in aborting the legislative process, as I provided them with this information repeatedly. In addition to the recitation in my July 19, 2013 corruption complaint to Commission member/Albany County District Attorney Soares (Exhibit B-1, at pp. 2-3), I publicly spoke on the subject on the Capitol Pressroom radio show on August 21, 2013, identifying the letter I would be hand-delivering to the Governor later that day (Exhibit G-2, at pp. 6-7). On September 17, 2013, I personally furnished it to the Commission in support of my September 17, 2013 written testimony (Exhibit G-1, Exhibit H-1, at pp. 6-7, Exhibit H-2).

28. Here, however, the Commission did not take exception to plaintiffs' false presentation because the true facts would require it to expose the Governor's collusion with plaintiffs Skelos, Klein, and Silver in withholding his separate Program Bills #3, #4, #5, and #12 from the Legislature, as well as his collusion with Co-Chair Fitzpatrick in conflating his rhetorical "clean-up Albany package", whose components are not specified, with his Public Trust

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[12] *See*, *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001) as to legislators being prevented from exercising their "functional responsibility to consider and vote on legislation" resulting in "the legislator and the thousands of New Yorkers he or she represents [being] unlawfully precluded from participating in the governmental process."

Act, to make it appear that all 62 district attorneys endorsed the "package", when what they endorsed was limited to his Program Bill #3.[13]

29. The Attorney General's January 10, 2014 dismissal memorandum of law disposes of the true facts about the Governor's program bills by a single sentence (at p. 6) "But the Legislature did not ultimately pass any ethics reforms" – even though the Legislature played no part in the demise of the Governor's 2013 "package of proposed legislative reforms". As for the Commission's December 2, 2013 Preliminary Report, annexed to Ms. Perry's affirmation, it entirely conceals the Governor's repeatedly announced reason for establishing the Commission in asserting: "The Commission was created in response to an epidemic of public corruption that has infected this State." (p. 3).

30. That Governor Cuomo could have easily secured legislative passage of his Public Trust Act/Program Bill #3, is implicit in the July 19, 2013 corruption complaint to Commission member/District Attorney Soares (Exhibit B-1, p. 3). It is explicit, however, in my August 21, 2013 letter to the Governor, entitled:

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[13] At the July 2, 2013 press conference, the Governor seized upon Co-Chair Fitzpatrick's ambiguous assertion that New York's 62 district attorneys had "signed on to and helped craft" his "legislative agenda" to falsely state:

> "As DA Fitzpatrick said, we're in this room. 62 DAs supported our clean-up Albany package, legislative package. That was extraordinary. That really was extraordinary. 62 DAs from all across the state, different regions, different political parties. I think it was emblematic of the situation, where you had that unanimity, 62 district attorneys. Now, the legislation was sweeping. I said that. I understand it was difficult for the Legislature because it was so dramatic a reform. And I also said to you, frankly, that I was unwilling to compromise the legislation because I didn't want to water-down the reforms..." (Exhibit A-2, underlining added).

Such deliberate conflation of the Public Trust Act with the "package" of other program bills has been continuous – and to the present. *See*, especially, Co-Chair Fitzpatrick's April 14, 2014 article "*My Moreland Mission*" in Huffington Post (Exhibit W-2).

> "Achieving BOTH a Properly Functioning Legislature & Your Public Trust Act (Program Bill #3) – the *Sine Qua Non* for 'Government Working' & 'Working for the People'" (Exhibit G-2).

31. The Governor never responded to this decisive August 21, 2013 letter, including its questions as to his knowledge of the true facts.

The Absence of Commission Rules and Procedures Pertaining to Conflicts of Interest, Without Which It Could Not Constitutionally Operate

32. Executive Order #106, ¶V states, in pertinent part:

> "...the Co-Chairpersons shall unanimously approve such procedures and rules as they believe necessary to govern the exercise of the powers and authority given or granted to the Commissioners pursuant to such Section Six and Subdivision Eight of Section Sixty-Three, including rules designed to provide transparency while protecting the integrity of the investigation and rights to privacy."

33. According to plaintiffs' Complaint, because their counsel were concerned that the Commission's actions were "inconsistent with the Commission's role as a neutral fact-finding body", counsel wrote the Commission on September 23, 2013 requesting its "procedures and rules", but it "refused to respond". The Complaint asserts that promulgation of such procedures and rules is "a condition" of Executive Order #106 for the Commission's exercise of its powers, which the Commission "apparently...failed to fulfill" (¶¶43-45, 73).

34. The Attorney General's dismissal memorandum argues that plaintiffs' objection is that the Commission "may not exercise its subpoena authority until it has publicly disseminated 'procedures and rules' related to transparency and privacy" (p. 33, underlining added). In fact, plaintiffs did not so-limit their objection.

35. However, if the concern of plaintiffs' counsel was whether the Commission was a "neutral fact-finding body", there was no reason for their September 23, 2013 letter to the

Commission not to have posed a specific question as to its "procedures and rules" governing conflicts of interest, as without these, the Commission could have no legitimacy.

36. At the Commission's September 17, 2013 public hearing, I repeatedly posed that precise question to the Commission. My words, live-streamed *via* the internet, were:

> "There are threshold issues relating to conflicts of interest. You are presuming to judge others as to conflicts of interest....What are your rules and procedures? What is your protocol for conflicts of interest?" (Exhibit M).

37. This reiterated the question I had raised six weeks earlier in an August 5, 2013 letter to the Commission (Exhibit F-1) – and my September 17, 2013 oral testimony made prominent reference to that letter, requesting that all Commission members read it so that they could see for themselves how their Co-Chairs and Executive Director were "operating" (Exhibit M). The letter, entitled "Keeping the Commission to Investigate Public Corruption True to its Name and Announced Purpose", quoted the language of Executive Order #106 pertaining to "procedures and rules" and stated:

> "Kindly provide a copy of all such 'procedures and rules' – and, in any event, furnish the Commission's protocol for dealing with conflicts of interest, whether of Commission members, special advisors, or staff." (Exhibit F-1, at p. 5).

38. Presumably, the reason plaintiffs' counsel did not themselves pursue such straight-forward inquiry with the Commission was their knowledge that an unconflicted Commission, whose agenda was not driven by the Governor and Attorney General, would be a more serious threat to plaintiffs – pursuing, for example, the kind of open-and-shut, *prima facie*, documented corruption complaint I had filed on July 19, 2013 with Commission member/District Attorney Soares (Exhibit B-1) and publicly presented to the full Commission at the September 17, 2013 public hearing (Exhibits M, H-1, H-2).

39. Certainly, it is disingenuous in the extreme for plaintiffs' Complaint to snipe at the Commission by fleeting and qualified references to the "purportedly independent Moreland Commission" (¶1); "purportedly neutral fact-finding body" (¶4); "purported role as a neutral, fact-finding body" (¶43) – when the evidence dispositive of the Commission's actual bias was so readily and plentifully before them.

The Evidence of the Commission's Actual Bias and Corruption – Accomplished by its Wilful and Deliberate Violation of Executive Order #106

40. Just as plaintiffs' complaint falsifies the true facts that gave rise to the Commission's establishment, having NOTHING to do with the Legislature, and fails to directly confront the Commission's already-demonstrated actual bias, conflicts of interest, and refusal to supply "procedures and rules" with respect thereto, so the Attorney General's dismissal motion falsifies the true facts as to the Commission's narrow focus, designed to achieve a pre-ordained result for the Governor and Attorney General. Thus, its repeated use of the adjectives "broad", "comprehensive", "extensive", "wide-ranging" to describe the Commission's work and – and its description of the Commission's endeavors as those of "fact-finding" throughout the Attorney General's January 10, 2014 dismissal memorandum of law:

> "…The Commission's purpose is to conduct a broad investigation into the laws and public agencies that regulate and oversee government ethics, conflicts of interest, and campaign finance…the Commission is an investigatory body tasked with achieving a comprehensive understanding of the problems facing New York's current government-ethics regime…As just one piece of its broad inquiry into government ethics, the Commission is evaluating legislators' practice of earning income from employment outside of the Legislature…" (p. 1);
>
> "The Executive Order's Broad Mandate – The Executive Order directs the Commission to investigate weaknesses in a wide range of anticorruption laws, regulations, and procedures…." (p. 7);

"As just one piece of this extensive investigation, the Commission is evaluating weaknesses in current laws, regulations, and procedures addressing legislators' outside employment and lobbying activities." (p. 8);

"As part of its broad inquiry into the anti-corruption regimes overseen by JCOPE …" (p. 19);

"The Commission is a 'fact-finding body' that seeks, pursuant to its statutory powers, to 'subpoena and collect any information reasonably related to' its goal of analyzing weaknesses in the current ethics regime…the Commission is gathering facts and presenting recommended legislative solutions to the problems it uncovers…" (p. 27-28);

"…the Commission has a broad fact-finding mandate 'to secure information'…" (p. 28);

"…the Commission's subpoenas to the Law Firms are just one small part of an extensive investigation… In furtherance of this inquiry, the Commission issued almost two-hundred subpoenas and information requests, collected millions of pages of documents, conducted dozens of interviews and depositions, heard testimony, and issued the ninety-eight page *Preliminary Report*. This in-depth endeavor is not about the legislators themselves, but about trying to convince a majority of the Legislature through facts and recommendations that it should enact the Commission's wide-ranging proposals." (p. 30-1);

"The Commission is a 'fact-finding body' tasked with comprehensively examining the weaknesses in current government-ethics laws, such as PIRA, and the regulations and procedures of the two agencies that oversee those laws, JCOPE and BOE… This broad purpose is not limited to investigating particular misdeeds…Rather, the Commission's investigation is intended to produce a comprehensive understanding of the operation and enforcement of existing government-ethics laws in order to evaluate how those laws may be reformed to address potential weaknesses or to better promote the public's confidence in government….this broad investigation…" (p. 36);

"…the Commission's civil fact-finding mandate…" (p. 39, fn. 9);

"…The fact that the Commission's subpoenas do not solely target suspected wrongdoing is thus not a flaw – the very breadth of the investigation underscores the Commission's intent to study and

address government ethics systemically, rather than case by case." (at p. 40);

"governmental fact-finding body tasked with an important public investigation" (p. 43);

"the Commission is gathering facts and *recommending* to the Legislature potential legislative or policy changes." (p. 52, italics in original).

41. This is utterly false, designed to conceal the Commission's wilful and deliberate violation of Executive Order #106, whose sweeping charge, not limited to the Legislature, was enunciated by the Governor and Attorney General at the July 2, 2013 press conference announcing the Commission:

> GOVERNOR: "The jurisdiction here is broad and sweeping. That's why initially I said broad or sweeping legislative changes, through the Clean Up Albany Act, or broad and sweeping jurisdiction through the Moreland Commission."
>
> "They have very broad jurisdiction."
>
> ATTORNEY GENERAL: "This Commission will be uniquely empowered to take a top to bottom review of all aspects of our state government, to refer findings of specific cases of misconduct, and to recommend reforms."
>
> "And their jurisdiction is as broad as it can be."
> ...
> They are empowered to investigate everything, any aspect of New York State and local governments...
> ...
> We have a belt and suspenders here. There's jurisdiction to look at any aspect of the state government. It is not specifically directed at the Legislature by any means. The Commission is empowered to investigate any and every aspect of the state government that relates to the issues the Governor has pointed to in his Executive Order. But this is going to be a commission uniquely empowered to take a full top to bottom review and identify wrongdoing and make recommendations for reform."[14] (Exhibit A-2, underlining added).

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[14] Similarly, the Governor's July 2, 2013 press release, quoting Attorney General Schneiderman's assertion: "This commission will be able to conduct a top to bottom investigation of New York State's government." (underlining added).

42. Significantly, the Attorney General's dismissal memorandum of law does not claim that the Commission complied with Executive Order #106.

43. Thus, its skimpy section entitled "The Executive Order's Broad Mandate" (pp. 7-8) identifies only two paragraphs of Executive Order #106. The first is ¶II, pertaining to what the Commission "shall" investigate and make recommendations about, whose expansive subparagraph (c) relating to:

> "'weaknesses in existing laws, regulations and procedures relating to addressing public corruption, conflicts of interest, and ethics in State Government'…",

the Attorney General places before its more circumscribed subparagraphs (a) and (b). The second paragraph is ¶VIII, relating to the Commission's preliminary and "additional report or reports", which, as to the latter, the Commission would not be complying with. This is then followed by a declaration:

> "Pursuant to its investigatory powers under Section 6 and Section 63(8), the Commission has, among other things, issued approximately two-hundred subpoenas and information requests; reviewed millions of pages of documents; conducted dozens of interviews and depositions, including of current legislators, lobbyists, and their clients; and heard testimony from prosecutors, good-government groups, and members of the public. *See* Commission to Investigate Public Corruption, *Preliminary Report* 6 (2013) (Affidavit of E. Danya Perry ('Perry Aff.'), Ex. H). As just one piece of this extensive investigation, the Commission is evaluating weaknesses in current laws, regulations, and procedures addressing legislators' outside employment and lobbying activities." (p. 8, underlining added).

This does not say that the Commission exercised its "investigatory powers" in compliance with Executive Order #106 – and as noted in ¶¶18-20, *supra*, it would appear that the Commission's "investigatory powers" were exercised by its three Co-Chairs, not its 25 Commission members,

thereby violating Executive Order #106, whose ¶¶IV and V did not confer such power on the Co-Chairs (Exhibit A-1).

44. Nor is this the Commission's only significant violation of Executive Order #106. Thus, the above-quoted reference to having "heard testimony from prosecutors, good-government groups, and members of the public" conceals that Executive Order #106 contains a ¶IX, which – in mandatory "shall" language – states:

> "The Commission shall conduct public hearings around the State to provide opportunities for members of the public and interested parties to comment on the issues within the scope of its work." (Exhibit A-1, underlining added).

45. The Attorney General does not purport that the Commission complied with ¶IX. Nor does the Attorney General purport that the Commission complied with another mandatory directive in Executive Order #106, also concealed.[15] That directive, in ¶VI, states:

> "If in the course of its inquiry the Commission obtains evidence of a violation of existing laws, such evidence shall promptly be communicated to the Office of the Attorney General and other appropriate law enforcement authorities, and the Commission shall take steps to facilitate jurisdictional referrals where appropriate...." (Exhibit A-1, underlining added).

46. These two provisions are defining paragraphs of Executive Order #106, whose prefatory "WHEREFORE" clauses repeatedly refer to the People's "trust" and "confidence" and conclude with the ringing words "restore public trust in New York State government." The Commission could hardly restore the public's "trust" and "confidence" in state government without, as ¶IX mandates, affording opportunities for the public to comment at "public hearings around the State", and without, as ¶VI mandates, making referrals to "the Attorney General and

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[15] The Attorney General's January 10, 2014 memorandum of law only reveals ¶VI's referral requirement in a footnote, as if insignificant, at page 39 in its argument entitled "No Suspicion of Wrongdoing Is Required To Support the Subpoenas".

other appropriate law enforcement authorities", where it had "evidence of a violation of existing laws".[16]

47. Nor are referrals an ancillary aspect of the Commission's functioning. In seeking to restore "public trust", the Governor was unequivocal in emphasizing that wrong-doing public officials would be punished. Evidence his words in announcing his Public Trust Act at his April 9, 2013 press conference – quoted by my July 19, 2013 corruption complaint to Commission Member/District Attorney Soares:

> "...Let us affirm and expand a simple fact: If you are a public official and if you break the law, you will get caught, you will be prosecuted, and you will go to jail' (03:00 mins)" (Exhibit B-1, p. 2).

48. Of course, "public hearings around the State" were the most dangerous part of Executive Order #106 for a rigged, stacked Commission – such as the Governor and Attorney General established – because that is where everyone could see the broad range of public corruption that members of the public were presenting to the Commission – and hear what they had to say about the very public agencies and officers charged with investigative and enforcement functions.

49. Certainly, too, the testimony by members of the public would predictably be about actual corruption, actual conflicts of interest, and actual abuses, as opposed to the appearance or possibility of same – making farcical, in the eyes of the public, a Commission quest for information from legislators and subpoenas to their outside employers, just to see

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[16] This provision is identified in the Governor's July 2, 2013 press release as follows:

> "During its investigation, the Commission is mandated to promptly communicate any evidence of violations of existing law to the appropriate law enforcement agencies, including the Attorney General. In such cases, the State Police will make jurisdictional referrals to the Attorney General where appropriate." (underlining added).

> "whether there are serious conflicts of interest that remain hidden from the public or what legislative changes could remedy such problems." (Attorney General's January 10, 2014 dismissal memorandum, p. 37, underlining added).[17]

50. That the Commission knew that "public hearings around the State" posed a danger to its predetermined agenda can be seen by how it disposed of them. The evidentiary record of this is furnished by my correspondence with the Commission, spanning from my August 5, 2013 letter to my January 7, 2014 letter (Exhibits F – T) – and encompassing the videos of the Commission's three hearings and my oral testimony at the September 17, 2013 hearing, wherein I publicly protested what had occurred up to that point (Exhibit M). Such chronicles what the Commission did in giving but 1-1/2 hour at a single hearing – the September 17, 2013 hearing in Manhattan – for members of the public to testify about the breadth of public corruption within their knowledge and experience. Indeed, it constitutes irrefutable, *prima facie*, proof of the Commission's wilful and deliberate violation of Executive Order #106, ¶IX.

51. The video of the testimony of the 17 ordinary New Yorkers who testified at the Commission's September 17, 2013 first public hearing[18] in and of itself evidences why the

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[17] *See* Commission's December 2, 2013 Preliminary Report:

> "The Commission is investigating whether there are real or perceived conflicts inherent in legislators' outside income, and how many such conflicts may be redressed or eliminated." (p. 17);
>
> "The Commission is investigating…to examine potential misuse of campaign funds…" (p. 25).

Also, see Plaintiffs' complaint: "Here, by the Moreland Commission's own admission, its subpoenas issued to legislators are designed to unearth 'whether there are real or perceived conflicts' affecting the Legislature…" (¶35).

[18] These ordinary New Yorkers, myself included, were: (1) Cie Sharp; (2) Janice Schacter; (3) Karlene Gordon; (4) Frederick Little; (5) Nora Drew Renzulli; (6) Elena Sassower; (7) Ellen Oxman; (8) Leon Koziol; (9) Cynthia Nebel; (10) Michael Krichevsky; (11) Carl Lanzisera; (12) Dale Javino; (13) Marie Tooker; (14) Catherine Wilson; (15) William Galison; (16) Margarita Walter; (17) Barbara Stephenson Demeri.

Commission, thereafter, topic-limited its September 24, 2013 Albany hearing to "campaign finance, outside income of state elected officials or political party housekeeping accounts" and barred the public, entirely, from testifying at its October 28, 2013 Manhattan hearing on the Board of Elections: namely, because what ordinary New Yorkers had to say at the first hearing diverged from the Governor's script. Overwhelmingly, their "comment" was not about corruption in the Legislature, but about corruption in New York's other branches, such as the Judiciary, covered up by the Commission on Judicial Conduct, court-controlled attorney disciplinary committees, district attorneys, Attorneys General, U.S. Attorneys, etc.

52. Upon information and belief, not a single one of these 17 witnesses who testified at the September 17, 2013 public hearings was subsequently contacted by the Commission for "interviews and depositions", let alone any of the scores of other ordinary New Yorkers who had registered to testify and who the Commission turned away. The Commission ignored my October 4, 2013 letter requesting disclosure of their numbers, identities, and the written statements they furnished in support of their registration (Exhibit J), thereafter ignoring my October 24, 2013 letter requesting public access to the written testimony of witnesses and would-be witnesses at the September 17, 2013 and September 24, 2013 public hearings, consistent with the Commission's registration webpages for those hearings which had stated:

> "...time constraints may require that those wishing to provide oral testimony provide written testimony only. All written testimony that is submitted will be included in the record of the proceedings." (Exhibit L, underlining added).[19]

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[19] Specifically requested was the written testimony of Cynthia Nebel and her referred-to 10-page August 1, 2013 letter to Commission Co-Chair Rice. Her oral testimony was about "Governor Cuomo's firing, without reasons, of the first Medicaid Inspector General, James Sheehan, who had recovered $1.5 billion in improper Medicaid payments during his four-year tenure" – and she was cut off "as she was seemingly connecting Mr. Sheehan's firing to campaign contributions made by medical providers to political party housekeeping accounts" (Exhibit L, p. 2).

53. Thus may be seen that the reality of the Commission's purported "dozens of interviews and depositions" and "two-hundred subpoenas and information requests" is that they all share the narrow focus that was the Governor's agenda. Likewise, the Commission's supposed review of "millions of pages of documents".

54. Certainly, it would not have required review of the hundreds of pages of documents that I furnished to the Commission in support of my September 17, 2013 testimony – whose volume may be seen from the video of my appearance – for the Commission to have verified, "in minutes", the "grand larceny of the public fisc and other corrupt acts" by Governor Cuomo, Attorney General Schneiderman, and plaintiffs that was the subject of my July 19, 2013 corruption complaint to Commission member/District Attorney Soares (Exhibits B). All it required was review of select pages, which the complaint identified. This sufficed for triggering the Commission's mandatory duty under Executive Order #106, ¶VI to "promptly" communicate same "to the Office of the Attorney General and other appropriate law enforcement authorities" so that investigations and prosecutions could be commenced – unravelling the mountain of public corruption with Governor Cuomo at its top and Attorney General Schneiderman beside him.

55. Upon information and belief, the Commission also violated its duty under Executive Order #106, ¶VI with respect to the evidence of violations of law furnished and proffered by ALL the ordinary New Yorkers who testified at the September 17, 2013 hearing – and by ALL other ordinary New Yorkers who sought to testify or who filed complaints with the Commission deviating from its pre-fixed agenda. There is no reason to believe that a single one was "promptly" communicated to enforcement authorities.

56. Indeed, the Commission's December 2, 2013 Preliminary Report makes no claim that in the five months of the Commission's operation it made even a single referral pursuant to Executive Order #106, ¶VI. To the contrary, it appears to concede the Commission's violation of that provision by its statement "this Commission will make appropriate criminal refers at such time as it deems appropriate." (at p. 7, underlining added). That is not consistent with Executive Order #106, ¶VI, whose non-discretionary directive was that "evidence of a violation of existing law" obtained "in the course of [the Commission's] inquiry…shall promptly be communicated" (Exhibit A-1, underlining added).

57. The Commission's only response to my correspondence with it – and my September 17, 2013 testimony relating thereto – was its February 7, 2014 letter, signed by Executive Director Calcaterra, that my "matter" was "outside of our mandate" (Exhibit U-1). Such generic form letter, whose text, two weeks later, it would recycle in a February 20, 2014 letter to the Cie Sharp (Exhibit U-2), the first ordinary witness who had testified at the September 17, 2013 hearing (video, at 1:52:50 hours), evidentiarily establishes how the Commission operated with respect to the breadth of "tips"; "comments"; complaints, and testimony it received about public corruption not within the narrow focus identified by its form letter: "campaign finance, disclosure of third party contributions, compliance with NYS lobbying laws and matters dealing with the structure and enforcement of the NYS Board of Elections" – a letter not only making no mention of Executive Order #106, but no referrals to other investigative authorities of the unidentified "matter" supposedly "outside [its] mandate".

The December 2, 2013 Preliminary Report Manifests the Commission's Actual Bias and Self-Interest, Vitiating its Reliability and Endangering the Public in Material Respects

58. NONE of the information and evidence of actual corruption publicly presented by myself and the ordinary members of the public in the 1-1/2 hour allotted to us at the Commission's September 17, 2013 public hearing in Manhattan – mostly relating to judicial corruption – is reflected by the Commission's December 2, 2013 Preliminary Report.

59. The Preliminary Report invidiously focused on the Legislature, consistent with the Governor's agenda, amplified, if not shaped, by progressive "good government" groups whose driving issue was public campaign financing. Indeed, they so had the "inside track" (Exhibit F-1, pp. 1-2; Exhibit H-1, p. 6) that the Commission's Co-Chairs were apparently ready to hire a Brennan Center senior counsel and, thereafter, the director of public policy for advocacy of Citizens Union to write the Preliminary Report (Exhibit W-3)[20].

60. Illustrative of its undisguised bias and brazen falsehoods is how the Preliminary Report opens its discussion of the reforms that are the Public Trust Act – which it places as its final section under the title heading: "Tools to Fight Corruption" (pp. 86-97). Although such tools are applicable to all public officials and candidates, they are made to appear as particularly essential for dealing with legislative corruption. Here's how the first paragraph of that final section opens:

> "New Yorkers are justifiably concerned about the steady stream of corruption cases involving their elected and appointed officials. Lawmakers who should exemplify the highest of ethical standards have violated the public trust invested in them. New Yorkers now question who their elected officials represent – their constituents or their own self-interests. A recent Siena poll found that 91% of all respondents believed corruption in the New York State Legislature was either somewhat serious or very serious.[fn.330]"

[20] Characteristic of prevailing media bias, such individuals are portrayed as "independent candidates" for the writing position (Exhibit W-3).

The sentence about the Siena poll is false – established as such by the October 21, 2013 Siena press release identified by the annotating footnote 330.[21] Indeed, its falsity is revealed from the very title of the press release, which continues beyond how it appears in the footnote to read: "…Serious Problem: Corruption in Legislature – 82%; Rest of State Govt. – 77%..." (Exhibit R-1). In other words, the press release's expanded title not only reveals that 82%, not the Report's asserted 91%, of respondents believe legislative corruption to be a "somewhat serious or very serious" problem, but that the public does not think corruption is appreciably greater in the Legislature than elsewhere in the state. And if the Commission members missed the large type title of the press release, the statistics were repeated twice on the first page of the press release that the public did not view public corruption as confined to the Legislature (Exhibit R-1), with the two pertinent Siena poll questions appearing as questions 25 and 26 on its survey (Exhibit R-2).

61. Of course the Preliminary Report's first section, "Outside Income, Member Items, and Personal Use of Campaign Funds" (pp. 14-27) was wholly about the Legislature. It, too, was introduced by falsehood: opening with the following misleading, a-contextual, and inflammatory assertions and comparisons:

> "New York law allows our 'part-time' legislators to earn income outside of their legislative salaries…

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[21] The annotating footnote 330 is as follows:

> "Siena Research Institute, 'Moreland and Its Work Largely Unknown to Voters, Who Strongly Want Commission to Continue Investigations," Siena College, Loundonville, NY, October 21, 2013, *available at* http://www.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY%20October%202013%20Poll%20Release--FINAL.pdf."

> Lawmakers' service is considered 'part-time' throughout the year and lawmakers are allowed to earn outside income in addition to their legislative salaries." (p. 14).

By putting "part-time" in quotes and further hedging by the word "considered", the Preliminary Report infers that legislators are not "part time". Yet, notwithstanding, the Commission is supposed to be "fact-finding", it makes no findings on so crucial a subject.[22]

That New York's Legislature is not "part time" – and that this was one of the deceits put forward by the Judiciary and judicial pay raise advocates in purporting that New York State judges were underpaid – thereafter adopted by the Special Commission on Judicial Compensation's August 29, 2011 Report in recommending its three-phase 27% judicial salary increase – would have been evident to the Commission had it reviewed the evidence substantiating my July 19, 2013 corruption complaint to Commission member/District Attorney Soares, most importantly, CJA's October 27, 2011 Opposition Report (at pp. 26-27). Such not only identified that neither Legislative Law §5 nor the New York State Constitution designate the legislature "part-time", but furnished the following authority as to their full-time status from "Legislative Pay Daze", by Jack Penchoff, State News, February 2007 issue, summarizing State Legislator Compensation: A Trend Analysis, report of the Council of State Government, by Keon S. Chi):

> "Professional legislatures are generally comprised of full-time legislators who have no legal limits on their regular sessions. The nine states with professional legislatures also are the highest paid – California, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania and Wisconsin."
>
> "In New York, for example, where the legislature is full-time, the annual legislative salary declined 8.3 percent between 1975 and

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[22] Indeed, the Commission's August 14, 2013 informational request to the legislators similarly stated – albeit without the quotation marks: "The position of state legislator is one that has been considered a part-time role…" (See plaintiffs' complaint, ¶39).

> 2005. Meanwhile, per capita income for residents of the Empire State rose 56.92 percent."

Having made no findings as to whether Legislators are "part time" in law or whether, by reason of the duties of their office, they should be so-considered "part time" in fact[23], indeed, by ignoring the obvious that just because New York law does not bar legislators from earning outside income does not, *ipso facto*, convert their positions to part-time, any more than a full-time worker who takes on a second job or earns referral fees, etc. is not, *ipso facto*, a part-time worker at his first job, the Commission proceeds to improper salary comparisons, serving no purpose but to inflame the public:

> "Legislators' base salary for their public service is $79,500 per year, significantly higher than the average income of New Yorkers.[fn.2] In addition, many lawmakers earn stipends for leadership positions – so-called 'lulus' – that, as of 2012, can range from $9,000 to $41,500 for committee chairs, ranking members, and leaders. As of 2012, the average legislative income for currently sitting legislators, including these 'lulus,' is approximately $89,500 for members of the Assembly, and approximately $95,500 for members of the Senate." (p. 14, underlining added).

The annotating footnote 2 states:

> "According to the 2010 US Census, the average median per-capita income in New York was $31,796 (2011 dollars)…."

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[23] Plaintiffs, for their part, lent support to this deceit in their February 21, 2014 memorandum of law in opposition to the Commission's dismissal motion whose page 10 states, in parenthesis: "(New York has had a part-time legislature since 1777.[fn41])" The annotating footnote 41 reads:

> "*See, e.g., United States v. Rosen*, 809 F. Supp. 2d 263, 268 (S.D.N.Y. 2011),*aff'd*, 716 F.3d 691 (2d Cir. 2013) ("The New York state legislature is a part-time body . . . ."); *see* also Deborah Wenig, *The Legislative Branch*, A Guide to New York State Government 43, 46 (Mary Jo Fairbanks ed., 7th ed. 1995)."

The referred-to case is hardly authority, as it provides no legal authority for the proposition that "The New York State legislature is a part-time body…"

Apart from the fact that judicial salaries were NEVER compared to "the average income of New Yorkers", the appropriate comparison for legislative salaries – evident from CJA's October 27, 2011 Opposition Report (pp. 26-27) – would be the salaries of the constitutional officers of the Executive branch: the Governor, Lieutenant Governor, Attorney General, Comptroller, and the constitutional officers of the Judicial branch, inasmuch as we have three co-equal branches of government, and legislators are the constitutional officers of the Legislative branch.

With the third phase of the judicial salary increase, the Chief Judge of the Court of Appeals now earns $198,600 and associate judges earn $192,500 – considerably more than the Governor who earns $179,000. As for Supreme Court justices, their salaries are now $174,000 – considerably more than the $151,000 that the Lieutenant Governor, Attorney General, and Comptroller each earn.

62. Likewise false are the Preliminary Report's passing references to federal and state prosecutorial authorities – completely contradicting what I and ordinary members of the public presented at the September 17, 2013 public hearing. Thus, the Preliminary Report states:

> "Federal prosecutors like United States Attorneys Preet Bharara and Loretta Lynch – both of whom testified before this Commission[fn337] – should be applauded for their efforts to root out and punish illegal conduct by our public officials" (p. 87)[24]

and blithely portrays district attorneys as "up to the job" of pursuing public corruption, except for "lack[ing] many of the necessary tools available to their federal counterparts" (at p. 86).[25] Here, too, my correspondence chronicles the true facts – and, in particular, my October 17, 2013 letter

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[24] The annotating footnote is to the transcript of their testimony at the September 17, 2013 hearing.

[25] Other references to the district attorneys, all in the section pertaining to the Board of Elections, are at pages 65, 69, 73, 74, 75, 77, 78.

to the Commission, which I directly e-mailed to virtually all its members. In pertinent part, it stated:

> "...the Commission has thus far afforded the public only an hour and a half at a single public hearing – the Manhattan hearing – to testify as to the breadth of public corruption. Indeed, following the September 17th Manhattan hearing, the Commission restricted the subject areas of the September 24th Albany hearing to effectively bar the public from testifying as to the public corruption within its knowledge and experience. Presumably, this was to prevent a replay of what took place in the hour and a half of public testimony at the Manhattan hearing when so many members of the public presented oral and written testimony of pervasive judicial corruption in which U.S. Attorneys, District Attorneys, the New York State Attorney General, and other public officers and agencies are complicit. This is, of course, diametrically opposite to the Commission's pretense, born of its personal, professional, and political relationships and interests, that U.S. Attorneys, District Attorneys, the New York State Attorney General, and others are corruption fighters.
>
> Indeed, based on our July 19, 2013 corruption complaint to Commission member Albany County District Attorney P. David Soares, to which I referred when I testified and which our August 5th letter identified (at p. 5) as having been e-mailed to the Commission on July 22, 2013, nothing could have been more obscene than for the Commission, presumably by its Co-Chairs, to have invited U.S. Attorney Preet Bharara and U.S. Attorney Loretta Lynch to testify at the September 17th hearing, to be heralded as heroes by District Attorney Fitzpatrick[fn3] and allowed to posture themselves and be portrayed as crusaders against public corruption[fn4] – without a question from the Co-Chairs or District Attorney Soares as to their inaction on the open-and-shut, *prima facie*, April 15, 2013 and May 13, 2013 corruption complaints we filed with them against Governor Cuomo, Attorney General Schneiderman and New York's other highest public officers for grand larceny of the public fisc and other corrupt acts in connection with the judicial pay raises and unitemized, slush fund budget appropriations – inaction giving rise to our July 19th corruption complaint to District Attorney Soares.
>
> Certainly, too, for District Attorney Fitzpatrick to have trumpeted District Attorney Soares' Public Integrity Unit as 'one of the innovative things' he has done (at 0:8:50) – as if it is properly functioning – was a further deceit, unless he was unaware of that

> unit's inaction on our July 19th complaint, born of District Attorney Soares' financial and other conflicts of interest – conflicts afflicting other Commission members, special advisors, and staff, as well. (Exhibit K, pp. 2-3, underlining in the original).

My October 17, 2013 letter (pp. 4-6) also quoted, extensively, from former Erie County Assistant District Attorney Sacha's powerful, insider's testimony as to district attorney conflict of interest in handling public corruption and election law cases, which he called the "elephant in the room". Yet the Commission's Preliminary Report did not address, or even identify, this – instead making it appear as if the most serious conflict of interest problems are those afflicting legislators.

Suffice to note that within three days of the December 2, 2013 Preliminary Report, a column entitled "*Corruption Thrives in Albany: Why Don't Prosecutions?*" (City & State, December 5, 2013) commented on what should have been the subject of examination by the Commission, but was not. Written by Steven M. Cohen, a former Secretary to the Governor, it identified that "few, if any meaningful [political corruption] cases have been pursued by Albany's own prosecutors". It gave no reason why this should be so with respect to Albany County District Attorney Soares, who was not even mentioned, nor for that matter the "elephant in the room" of political relationships identified by Marc Sacha's testimony. Instead, the column confined itself to stating:

> "When lawyers discuss the lack of Albany-originated corruption cases, the explanation offered is that it is very difficult to pursue these cases in the state criminal justice system. Experts are also quick to note that most district attorneys have relatively small budgets and staffs, and tend to put violence, drugs and street crime – not political corruption – at the top of their list of prosecutorial priorities."

As for U.S. Attorney for the Northern District Hartunian, the column explained this "more baffling situation" by speculating that public corruption was not a priority for him because it was not part of his expertise and experience, an observation then extended as follows:

> "By the way, it's not just Hartunian. You would be hard-pressed to find any prosecutor, federal or local, in the Northern District with serious corruption experience."

63. As for the Preliminary Report's section on "The Board of Elections and Election Law Enforcement" (pp. 59-86), ostensibly presenting a devastating examination of that agency, my November 8 – 15, 2013 correspondence relating to the Commission's October 28, 2013 public hearing on the Board of Elections puts it in perspective:

> "the Commission's focus on the Board of Elections is to give the appearance that it is being tough – when, in fact, it is covering up for the ten sitting district attorneys who are among its 25 Commissioners and for other public officers with whom it has personal, professional, and political relationships." (Exhibit O-1).

As that correspondence demonstrates (Exhibits O), the State Board of Elections is simply "low-hanging fruit" – and the same questions posed to district attorneys as were asked of the State Board as to their handling of complaints, etc., would produce a picture equally scandalous, if not more so. These questions were particularized by my November 13, 2013 letter to District Attorney Soares (Exhibit P), which requested his answers, stating:

> "…inasmuch as the questions that the State Board of Elections was required to answer at the October 28, 2013 hearing are questions that an unconflicted Commission to Investigate Public Corruption would be requiring of all 62 of this state's district attorneys, please furnish your answers to the following:
>
> 1. What is the budget of your district attorney's office?
>
> 2. How does the budget compare with your requested budget?
>
> 3. How many people are employed by your district attorney's office?

4. How are public corruption complaints handled? Does the district attorney's office have a specifically designated public integrity unit to handle public corruption complaints – and is it identified by your district attorney's website and informational brochure?

5. Are public corruption complaints required to be on a special form? Must they be signed and or notarized? How about anonymous complaints?

6. Does your district attorney's office initiate public corruption complaints based on news reporting – if not, why not.

7. What is the intake procedure for public corruption complaints? Are all public corruption complaints logged? What kind of log is it? What kinds of information does it contain? Is it accessible to you and others in supervisory positions?

8. Are all public corruption complaints acknowledged? What is the length of time between receipt and acknowledgment and who does it?

9. Following acknowledgment, is there a preliminary review process preceding investigation? Who does it and what does it consist of?

10. Who decides whether a public corruption complaint is to be investigated and what is the criteria for investigation?

11. Who does the investigation and what does it consist of?

12. What system is in place to inform you and supervising staff of the status of corruption complaints?

13. Does your district attorney's office have a backlog of public corruption complaints? If so, what have you done to address it? Are public corruption complaints prioritized?

14. Do you inform complainants of the disposition of their public corruption complaints? Who does it and is it in writing?

15. How many public corruption complaints have been received in each of the past six years?

a. how many public corruption complaints have been investigated, including by issuance of subpoenas and subpoenas duces tecum?

b. How many public corruption complaints have resulted in criminal prosecutions? How many have been the subject of grand jury presentments? How many resulted in grant jury indictments?

c. How many public corruption complaints have ended in convictions or pleas?" (Exhibit P, underlining in the original).

64. These are the types of questions that the ten district attorney members of the Commission should have been honest enough to put on record as to themselves – and to have requested the state's other 52 district attorneys to answer – so that the beginnings of an accurate assessment could have been made on the subject. Indeed, true accuracy would have required the Commission not to accept "self-reporting", but to have requested, and, if necessary, subpoenaed, district attorney files pertaining to complaints of public corruption – and to have interviewed complainants. Certainly, it would have been a simple matter for the Commission to have availed itself of the witnesses from the September 17, 2013 hearing as a "control group" to assess how district attorneys had handled the public corruption complaints to which they referred.

65. Likewise, the Commission could have used the September 17, 2013 hearing witnesses as a "control group" for assessing U.S. Attorneys' handling of their referred-to public corruption complaints – and, of course, could have requested responses from the U.S. Attorneys to a similar list of questions as to their public corruption complaint set-up. Ditto, the Commission could have used the September 17, 2013 hearing witnesses as a "control group" for examining the Attorney General's operations with respect to public corruption issues. Similarly,

as to the Commission on Judicial Conduct, the court-controlled attorney disciplinary system, the Office of Court Administration's Inspector General – indeed, all state agencies and entities having an oversight, investigation, enforcement function.

66. Truth be told, the Commission could have even whittled the "control group" to one – myself – as it was perfectly clear from my September 17, 2013 written testimony (Exhibit H-1) and the massive documentary proof that I provided (Exhibit H-2) – and could yet provide – that I could easily prove the truth of what the other ordinary citizen witnesses were all saying.

67. It deserves note that again and again, and particularly, in the Preliminary Report's section on "Our Campaign Finance System" (pp. 27-58), the Commission refers to how important it is to promote "democratic engagement" and "empower ordinary New Yorkers" and "ordinary citizens" so that they do not "feel left out" of participating "in the decisions of our government"; "in politics and…our government's agenda" (p. 28). This is supposedly a key benefit of public campaign financing: bringing "regular New Yorkers", "ordinary citizens into the political process"; "magnifying the voice of ordinary citizens" to create "more accountable government"; and "accountability of elected officials" (p. 29); "leveraging the power of ordinary individuals" and "increasing the impact of ordinary citizens" (p. 41). According to the Preliminary Report:

> "Public funding makes it likely that more and different voices – ordinary citizens and the candidates they support – will be heard in the political process." (p. 49).

Yet, the none of this rhetoric about the participation and voices of "ordinary citizens" and "regular New Yorkers" found its way into how the Commission went about its operations. As my correspondence with the Commission proves, resoundingly, the Commission not only closed down its public hearings to testimony by "ordinary citizens" and "regular New Yorkers", in brazen violation of Executive Order ¶IX, but took no discernible steps to investigate and make

recommendations with respect to their allegations and evidence, in violation of Executive Order ¶II(c) or to make referrals, in violation of ¶VI (Exhibit A-1). Instead, and so-stated by my very first August 5, 2013 letter to the Commission (Exhibit F-1, pp. 1-2), the Commission utilized supposed "good government" groups with a progressive agenda of public campaign financing and other reforms, who were working hand-in-glove with the Governor and the Attorney General and had an inside-track throughout (Exhibit H-1, p. 6). Such groups were the Commission's "stand-ins" for "ordinary citizens" and "regular New Yorkers", as likewise polls rigged by a self-serving, complicitous press.

68. There is, of course, total hypocrisy in the Preliminary Report's emphasis on how public trust and government integrity require transparency, disclosure, and "policing of conflicts of interest" (p. 10):

> "Our investigation reveals that corruption and the appearance of corruption thrive when actual and potential conflicts of interest are shrouded in darkness. The Commission strongly urges greater transparency from our legislators, and within the legislative process." (at p. 10);
>
> "Our State needs stronger disclosure rules to avoid conflicts of interest – or even the appearance of such conflicts, which likewise can erode public confidence in the integrity of government." (p. 14);
>
> "...additional disclosure would be a strong step toward exposing potential conflicts of interest for public servants." (p. 18).

Over and again, the Commission repeats the importance of "expanding that disclosure" (p. 18); "more disclosure"; "greater disclosure" (p. 19); "Strengthened Disclosure Requirements" (p. 54); "Creating an effective disclosure regime" (p. 55), "Disclosure – "Accessible Disclosure" (p. 58) all the while concealing how brazenly it has refused to apply such principles to itself.

As my correspondence demonstrates, the Commission not only wilfully and deliberately made no disclosure with respect to conflicts of interest of its members, special advisors, and staff, even when such were identified to it, but it wilfully and deliberately refused to set forth the Commission's protocol for handling its own conflicts of interests – the subject of my correspondence spanning from my initial August 5, 2013 letter (Exhibit F-1) to my final January 7, 2014 letter (Exhibits T), in addition to my oral testimony before the Commission on September 17, 2013 (Exhibit M).

The Still-Live Executive Order #106

69. In his July 2, 2013 press conference announcing the establishment of the Commission (Exhibit A-2), Governor Cuomo extolled the quality of the 25 members, 3 special advisors, and 1 special counsel he appointed, virtually all attorneys. Yet despite being touted as such a superior assemblage of legal talent, with a particular expertise in enforcement, they proved themselves utterly servile to the Governor. Upon his announcement on March 29, 2014 that he would close the Commission upon the Legislature's approval of the behind-closed-doors budget deal he had reached with plaintiffs Skelos, Klein, and Silver, incorporating pieces of his reform legislation, they compliantly packed up, without a peep. Not a single one saw fit to protest – or to even point out that Executive Order #106, ¶VIII, commanded them, in mandatory language, to issue "an additional report or reports on or before January 1, 2015, or on or before a date to be determined" (Exhibit A-1) and that, unless and until the Governor issued a superseding Executive Order, their service was not concluded.

Parting Observations

70. Based on the state of the record in this declaratory action, I believe that one of the reasons motivating Governor Cuomo to close down the Commission was to prevent a judicial determination that would go against him, resoundingly – and result in its closure. That now, as throughout, the Governor and Co-Chair Fitzpatrick continue to mislead the public to believe that there was nothing improper in the Governor establishing the Commission as a means to achieve his agenda of legislative reforms and then shuttering it upon a claim of having achieved that goal only reinforces how imperative it is that the People of this State, whose tax dollars have paid for both sides to brief the separation of powers constitutional issues for the Court, to have the benefit of the judicial determination the record warrants.

71. This is additionally essential as that the Governor and Co-Chair Fitzpatrick are continuing to regurgitate the same falsehoods about the circumstances giving rise to the Commission. As the Governor recently stated:

> "'It was created because the Legislature wouldn't pass something called the Public Trust Act.'
>
> 'Last session I said if they didn't pass it, I would empanel a Moreland Commission. I also said when they do pass it I would disband the Moreland Commission…'"(Exhibit W-1).[26]

And here, again, the deceit that this Public Trust Act was far more extensive than the Governor's Program Bill #3, which, in fact, was all that the Public Trust Act was – and that such extensive content was unanimously endorsed by all 62 of New York's district attorneys, when it was not. Here's Co-Chair Fitzpatrick's repeat:

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[26] *See*, also, "*U.S. Attorney takes control of Cuomo commission probes*", April 10, 2014, Albany Times Union (James Odato):

> "Cuomo said continued action by the commission isn't necessary because it helped accomplish the goal of government reform worked out with the Legislature in concluding talks on the state budget last month. He suggested his victory was the Public Trust Act."

> "Governor Cuomo…proposed new legislation law year called the Public Trust Act. It included new bribery laws that allowed district attorneys to do their job, an independent enforcement capacity at the Board of Elections, and more disclosure laws, as well as a call for public financing of campaigns. In an unprecedented move, all 62 elected District Attorneys supported the Public Trust Act.
>
> Last year, the Governor told the legislature if they ended the session without passing the Public Trust Act, he would empanel a Moreland commission to identify weaknesses in the current law and help make the new law a reality. True to form the legislature failed to act …" (Exhibit W-2)[27]

73. Of course, these falsehoods pale against the mammoth deceit that with passage of this "new law", the Commission was redundant:

> "'We have plenty of enforcement mechanisms by and large,' Cuomo said, referring to district attorneys and U.S. Attorneys who prosecute corruption. 'I don't believe we needed yet another bureaucracy for enforcement. We needed laws changed.'"

74. Here, too, Co-Chair Fitzpatrick's echo:

> "The problem was not that the state lacked adequate prosecution capacity. After all, we have sixty-two District Attorneys, four U.S. Attorneys, and a statewide Attorney General. The problem was the weakness of laws addressing official misconduct and the failure of the Board of Elections to enforce regulatory compliance."

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[27] Other extraordinary statements in Co-Chair Fitzpatrick's April 14, 2014 column "*My Moreland Mission*" (Exhibit W-2) include the following, which does not appear in the parties' submissions:

> "We negotiated directly with the legislature to try to achieve reform. This lasted for several weeks. It was an interesting experience to say the least. Our negotiation was complicated by the legislature's questioning of our authority in court and also their position that the Governor was overstepping his authority in using a Moreland Commission to get the legislature to accept reforms. The co-chairs had several meetings with representatives of both the Assembly and the Senate, and briefed the remainder of the commission, but it was clear we were nowhere close to agreement on a suitable law."

Executive Order #106 (Exhibit A-1) does not vest the Commission with any power other than to investigate and report. It did not confer powers to negotiate with the Legislature to achieve "agreement on suitable law" so that the Commission could "go out of existence once it fulfilled its intended purpose" of the Governor's purported legislative reforms.

75. The overarching mandate of the Commission was to ensure that "enforcement mechanisms" were working (Exhibit A-2). What it did, instead, was to manifest the very corruption of the "enforcement mechanisms" to which the ordinary witnesses at the September 17, 2013 were attesting – and to which my July 19, 2013 corruption complaint and January 7, 2014 supplement (Exhibit B-1, T-1) gave the most resounding, breath-taking proof.

WHEREFORE, it is respectfully prayed that the relief requested by the accompanying Order to Show Cause be granted in all respects.

ELENA RUTH SASSOWER

Sworn to before me this
23rd day of April 2014

Notary Public

JANE ROMERO
Notary Public, State of New York
No. 01RO6176895
Qualified in Westchester County
Commission Expires Nov. 5, 2015

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NEW YORK STATE SENATE, NEW YORK STATE ASSEMBLY, DEAN G. SKELOS and JEFFREY D. KLEIN, as members and as Temporary Presidents of the New York State Senate, and SHELDON SILVER, as member and as Speaker of the New York State Assembly,

Index #160941/2013

Plaintiffs,

-v-

KATHLEEN RICE, WILLIAM J. FITZPATRICK, and MILTON L. WILLIAMS, Jr. in their official capacities as Co-Chairs of the Moreland Commission on Public Corruption and THE MORELAND COMMISSION TO INVESTIGATE PUBLIC CORRUPTION,

Defendants.

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ORDER TO SHOW CAUSE TO INTERVENE & FOR TRO, With Supporting Affidavit & Exhibits

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ELENA RUTH SASSOWER, Proposed Intervening Plaintiff, *Pro Se*, individually and 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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