ANALYSIS OF THE AUGUST 1, 2016 AMENDED DECISION & ORDER OF ACTING SUPREME COURT JUSTICE ROGER McDONOUGH[1]

Center for Judicial Accountability, et al. v. Cuomo, et al.,
Albany Co. #1788-2014
(Citizen-Taxpayer Action: Fiscal Years 2014-2015 & 2015-2016)

This analysis constitutes a "legal autopsy" of the August 1, 2016 amended decision and order of Acting Supreme Court Justice Roger McDonough, consistent with what is proposed in "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*", 73 Albany Law Review 1 (2009), by Gerald Caplan, recognizing that the legitimacy of judicial decisions can only be determined by comparison with the record ("…Performance assessment cannot occur without close examination of the trial record, briefs, oral argument and the like…" (p. 53)).

It also is consistent with what plaintiff Elena Sassower stated on November 29, 2015 in testifying before the Commission on Legislative, Judicial and Executive Compensation at its one and only hearing on judicial compensation – quoting what she said in testifying before the Commission to Investigate Public Corruption at its September 17, 2013 hearing: "Cases are perfect papers trails. There is a record. So it's easy to document judicial corruption."[2]

The "Papers Considered" by Justice McDonough in rendering his decision are listed at the end of the decision (at pp. 10-11). An annotating footnote reads:

> "The parties also submitted several memoranda of law in support of their respective positions. Pursuant to relevant caselaw, it is the Court's policy not to list memoranda of law in the papers considered (*see*, Lyndaker v. Board of Education of West Canada Valley Central School District, 129 AD3d 1561 [4th Dept. 2015])." (at p. 10, fn. 5).

Justice McDonough's "policy" is at odds with CPLR §2219(a), which does not except memoranda of law in requiring that "An order determining a motion made upon supporting papers shall recite the papers used on the motion…". Treatise authority holds:

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[1] Justice McDonough is not an elected Supreme Court justice. He is a Court of Claims judge, whose appointment, in 2006, was by then Governor George Pataki, for whom he was then an assistant counsel. Upon information and belief, in 2009, Governor David Paterson reappointed him to the Court of Claims. He sits on the Supreme Court as an acting Supreme Court justice.

[2] Plaintiff Sassower's written testimony, from which she read at the Commission on Legislative, Judicial and Executive Compensation's November 29, 2015 hearing, is part of the record, having been furnished on March 23, 2016 as a free-standing exhibit to plaintiffs' March 23, 2016 verified second supplemental complaint.

> "An order must indicate papers on which the court exercised its discretion so as to subject it to meaningful appellate review…." (1-3 New York Appellate Practice §3.04 "Appealable Paper", Matthew Bender & Co., citing *In re Dondi*, 63 N.Y.2d 331, 339 (1984).

Nor does Justice McDonough's cited case of *Lyndaker* stand for the proposition that memoranda are excludable, let alone where, as here, they are sworn-to as true by the affidavits accompanying them, thereby giving "probative value" to their "allegations of fact"[3] and where, additionally, they are "incorporated by reference" into those affidavits.

In any event, Justice McDonough had good reason to omit plaintiffs' memoranda of law, as they are the speediest means to verify, within minutes, that his 11-page decision is a criminal act – and violative of a multitude of provisions of New York's Penal Law. Among these:

> Penal Law §195 ("official misconduct");
> Penal Law §496 ("corrupting the government") – part of the "Public Trust Act";
> Penal Law §175.35 ("offering a false instrument for filing in the first degree");
> Penal Law §155.42 ("grand larceny in the first degree");
> Penal Law §190.65 ("scheme to defraud in the first degree");
> Penal Law §195.20 ("defrauding the government");
> Penal Law §105.15 ("conspiracy in the second degree");
> Penal Law §20.00 ("criminal liability for conduct of another").

Indeed, plaintiffs' memoranda of law not only establish that the decision is a judicial fraud, falsifying the record in all material respects to grant defendants relief to which they are not entitled, *as a matter of law*, and to deny plaintiffs relief to which they are entitled, *as a matter of law*, but that the evidence for criminally prosecuting and removing Justice McDonough from the bench for corruption is *prima facie* and "open-and-shut". There is NO doubt as to what he did, that it was willful and deliberate, and that he has no defense to it. He used his judicial office not to render justice, as was his duty, but to protect the public officer defendants, beginning with defendant New York State Attorney General Schneiderman, from causes of action in the verified complaint, verified supplemental complaint, and verified second supplemental complaint to which they had no defense – and his motive for doing so was his huge financial interest in the judicial salary increases challenged by those causes of action, which he concealed.

Plaintiffs' memoranda of law, each a "road-map" of the record and the best place to start in reviewing the decision, are:

> (1) plaintiffs' September 22, 2015 memorandum of law in opposition to defendants' July 28, 2015 dismissal/summary judgment motion & in support of plaintiffs'

[3] *Zawatski v. Cheektowaga-Maryvale Union Free School District*, 261 A.D.2d 860 (1999, 4th Dept.), cited by *Lyndaker*.

September 22, 2015 cross-motion for summary judgment and other relief;

(2) plaintiffs' November 5, 2015 reply memorandum of law in further support of their cross-motion;

(3) plaintiffs' April 22, 2016 memorandum of law in reply and in further support of their March 23, 2016 order to show cause for leave to file their verified second supplemental complaint and for a preliminary injunction.

These are posted, with the rest of the record on which they are based, on the website of plaintiff Center for Judicial Accountability, www.judgewatch.org, accessible from the prominent homepage links

"CJA's Citizen-Taxpayer Actions to End NYS's Corrupt Budget 'Process' & Unconstitutional 'Three Men in a Room' Governance";

"NO PAY RAISES FOR NEW YORK's CORRUPT PUBLIC OFFICERS -- The Money Belongs to Their Victims!";

"What's Taking You So Long, Preet?: CJA's Three Litigations whose Records are Perfect 'Paper Trails' for Indicting New York's Highest Public Officers for Corruption"

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The Decision's Title Page & Footnote

The amended decision and order begins with a title page, its page 1. It contains a footnote 1 explaining why Justice McDonough amended his original decision and order, which had been dated July 15, 2016. It reads:

> "The Court corrected two scrivener's errors on page eight where the Court inadvertently juxtaposed plaintiff and defendant." (at p. 1).

The referred-to two errors, in the second and third ordering paragraphs of the decision (at p. 8), had read:

> "**ORDERED** that defendants' cross-motion for summary judgment is hereby denied in its entirety; and it is further
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> "**ORDERED** that defendants' remaining requests for relief, as set forth in their cross-motion, are hereby denied in their entirety…". (at p. 8, bold in the original, underlining added).

It was plaintiffs who made the cross-motion. However, there is further glaring error in the decision's six ordering paragraphs. The first ordering paragraph is also erroneous – and it continues to read:

> "**ORDERED** that the supplemental complaint is hereby dismissed in its entirety pursuant to CPLR §§3211 and 3212" (at p. 8, bold in the original, underlining added).

This is false – implying, as it does, that defendants had moved to dismiss plaintiffs' supplemental complaint pursuant to CPLR §§3211 and 3212. That is not correct. Defendants moved to dismiss the supplemental complaint pursuant to CPLR §3211 alone. This is reflected by the decision's second page, albeit with inconsistency. There, an untitled prefatory paragraph of skeletal procedural history states:

> "Defendants moved to dismiss the supplemental complaint in its entirety pursuant to CPLR §3211(a)(7)." (at p. 2).

A bit further down, on the same page under the title heading "Motions with respect to the Supplemental Complaint", the decision states:

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

In other words, defendants did not move to dismiss the supplemental complaint pursuant to CPLR §3212 – nor could they, as CPLR §3212 requires that issue be joined[4] and they had not answered the supplemental complaint.

By ordering that plaintiffs' supplemental complaint be dismissed not only pursuant to CPLR §3211, but §3212, Justice McDonough has *sua sponte*, *sub silentio*, and without notice granted summary judgment to defendants – apparently to give res *judicata* effect to his dismissal of the supplemental complaint:

> "A judgment resulting from the grant of a CPLR 3211 motion is not res judicata of the entire merits of the case (unless the motion was treated as one for summary judgment)…." (underlining added), §276 "Res Judicata Effect of CPLR 3211 Disposition", New York Practice, 4th ed. (2005).[5]

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[4] "Any party may move for summary judgment in any action, after issue has been joined…" (CPLR §3212(a), underlining added); *Historic Albany Foundation v. Michael Breslin, as Albany County Executive*, 282 A.D.2d 981, 983 (3rd Dept. 2001).

[5] See, also, CPLR Annotated, C3211:44 "Treating 3211 Motion as Summary Judgment Motion":

> "Subdivision (c) empowers the court on any CPLR 3211 motion, whether to dismiss a cause of action under subdivision (a) or to dismiss a defense under subdivision (b), to 'treat' the motion as one for summary judgment. The impact of such a determination is that the disposition will as a rule be deemed a disposition on the merits and thus entitled to res judicata treatment. With such an impact, this 'treatment' is not to be lightly indulged." (underlining added).

This is altogether improper. Quite apart from the fact that the record resoundingly establishes plaintiffs' entitlement to summary judgment, *as a matter of law*, Justice McDonough's conversion of defendants' motion to dismiss the supplemental complaint to one for summary judgment for them, pursuant to CPLR §3211(c) – which is seemingly what he has done – required notice, as CPLR §3211(c) itself makes clear:

> "Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment." (underlining added),

with this "adequate notice" required to come from the court, *Mihlovan v. Grozavu*, 72 NY2d 506 (1988); fn. 4 herein; also, CPLR Annotated, C3211:46 "Order Should Clarify That Summary Judgment Treatment is Being Made":

> "…the court can't make this [3211 conversion] treatment on its own motion unless it apprises the parties of its intention, thereby enabling them to submit any proof reflecting on the case that was not submitted on the particular CPLR 3211 motion."

By way of contrast, defendants did move, pursuant to CPLR §3212, for summary judgment on the fourth cause of action of plaintiffs' complaint, as to which they had served an answer. Yet, Justice McDonough's decision conceals this, repeatedly. Thus, the decision's untitled prefatory paragraph does not identify CPLR §3212 in stating:

> "Additionally, defendants moved for summary judgment as to plaintiffs' fourth cause of action." (at p. 2).

Nor does the decision's footnote 3 identify CPLR §3212 in stating:

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

Not even under the section heading "Fourth Cause of Action" (at pp. 4-5), does the decision identify CPLR §3212, even as it recites that defendants "seek summary judgment" (at p. 4), recites the standards governing summary judgment embodied in caselaw, and proclaims "summary judgment dismissing the fourth cause of action is mandated" (at p. 5).

In fact, the only place in the decision where CPLR §3212 is identified is in the erroneous first ordering paragraph dismissing the supplemental complaint.

Going back to the decision's first page, the case caption reflects that the plaintiffs are the Center for Judicial Accountability, Inc. and Elena Sassower, individually and as its director, "acting on their own behalf and on behalf of the People of the State of New York and the Public Interest". The

defendants are Governor Andrew Cuomo, the Temporary Senate President,[6] the Senate, the Assembly Speaker, the Assembly, Attorney General Eric Schneiderman, and Comptroller Thomas DiNapoli, all in their official capacities. Plaintiff Sassower is identified as "Self-Represented". Attorney General Schneiderman is identified as "Attorney for All Defendants", followed by the name of Assistant Attorney General Adrienne Kerwin in parenthesis.

The Decision's Untitled First Paragraph & Section Entitled "Background"

The decision continues, on page two, with the name of the Court: "Roger D. McDonough, J:", beneath which is its untitled paragraph of skeletal procedural history. Consisting of ten sentences, annotated by a one-sentence footnote,[7] it omits the provision of law pursuant to which the lawsuit was brought: State Finance Law Article 7-A (§123 *et seq.*). In other words, it omits that this is a citizen-taxpayer action. Likewise, it omits that plaintiffs seek a declaration that judicial salary increases resulting from the August 29, 2011 report of the Commission on Judicial Compensation are statutorily-violative, fraudulent, and unconstitutional.

That this is a citizen-taxpayer action and that it seeks to void judicial salary increases are also omitted from the balance of the decision – just as Justice McDonough omitted them from his two prior decisions: his October 9, 2014 decision dismissing the first three causes of action of plaintiffs' complaint and his June 24, 2015 decision granting plaintiffs leave to file their supplemental complaint – decisions referred to in the untitled prefatory paragraph, but not their dates.

No fact was emphasized more by plaintiffs, from the outset, than that this is a citizen-taxpayer action. Especially was this so as Justice McDonough's predecessor, in tandem with AAG Kerwin, concealed this in the two weeks he had the case before being elevated to the Appellate Division,

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[6] When this action was commenced on March 28, 2014, the Temporary Senate President was Dean Skelos and the Assembly Speaker was Sheldon Silver. The caption was not amended when they resigned from their leadership positions in May 2015 and February 2015, respectively. These successors, Temporary Senate President John Flanagan and Assembly Speaker Carl Heastie, have operated identically to their predecessors – and this is so-demonstrated by plaintiffs' March 31, 2015 verified supplemental complaint and March 23, 2016 verified second supplemental complaint.

[7] The single-sentence footnote reads:

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

Concealed by this footnote is that AAG Kerwin had expressly not requested oral argument, for which reason, pursuant to 22 NYCRR §202.8(d), Justice McDonough did not have to find that oral argument was "unnecessary". Indeed, his decision gives no reason for denying plaintiffs' request.

Third Department by defendant Governor Cuomo[8]– concealment that AAG Kerwin then continued in tandem with Justice McDonough. There are four key reasons why they concealed it:

First, the citizen-taxpayer statute, in four separate provisions, contemplates the Attorney General's participation as plaintiff or on behalf of plaintiffs (State Finance Law §123-a(3), §123-c(3); §123-d; §123-e(2)). Based thereon, and upon Executive Law §63.1, which predicates the Attorney General's litigation role on the "interest of the state", plaintiffs, from the outset, sought the Attorney General's representation/intervention and his disqualification from representing defendants on conflict of interest grounds arising from Attorney General Schneiderman's facilitating role in the unlawful judicial salary increases at issue in the case – the very basis of his being named a defendant. This includes by their May 16, 2014 cross-motion, which Justice McDonough's October 9, 2014 decision denied[9], and by their September 22, 2015 cross-motion[10], which his instant decision denies. By these denials, each without identifying ANY of the facts and law upon which they were based, Justice McDonough allowed AAG Kerwin to freely engage in fraudulent defense tactics to get the case dismissed. Indeed, not revealed by the decision's sixth ordering paragraph is that its "alternative basis for dismissal" emanates from her advocacy[11]. It reads:

> "**ORDERED** that, as an alternative basis for dismissal, the supplemental complaint must be dismissed as to plaintiff Center for Judicial Accountability, Inc. based on CPLR §321(a) and the relevant caselaw (*see*, Cinderella Holding Corp. v. Calvert Ins. Co., 265 AD2d 444, 444, 2nd Dept. 1999]". (at pp. 8-9, bold in original).

In other words, the decision dismisses the supplemental complaint as to the corporate plaintiff because it had no lawyer – without ever identifying, let alone confronting, the facts and law establishing that that lawyer should have been the Attorney General.

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[8] Justice McDonough's predecessor was Supreme Court Justice Michael Lynch – and his willful disregard, with AAG Kerwin, of the fact that this is a citizen-taxpayer action when plaintiffs commenced the litigation, on March 28, 2014, also by an order to show cause seeking a TRO, is set forth by ¶¶7-25 of plaintiff Sassower's May 16, 2014 affidavit in further support of plaintiffs' order to show cause, in opposition to AAG Kerwin's April 18, 2014 motion to dismiss the complaint, and in support of plaintiffs' May 16, 2014 cross-motion. Justice McDonough's October 9, 2014 decision conceals it all.

[9] *See*, plaintiffs' May 16, 2014 cross-motion (¶¶3 &4); plaintiff Sassower's May 16, 2014 affidavit (¶¶1-36); plaintiffs' May 16, 2014 memorandum of law (pp. 27-29); plaintiffs' June 16, 2014 reply memorandum of law (pp. 11-12); plaintiff Sassower's June 16, 2014 reply affidavit (¶¶1-9) – and Justice McDonough's October 9, 2014 decision (pp. 3-4).

[10] *See*, plaintiffs' September 22, 2015 cross-motion (¶¶4 &5); plaintiffs' September 22, 2015 memorandum of law (pp. 45-48); plaintiff Sassower's September 22, 2015 affidavit (¶8); plaintiffs' November 5, 2015 memorandum of law (pp. 1-3).

[11] See AAG Kerwin's July 28, 2015 dismissal/summary judgment motion (fn. 1) – and plaintiffs' response thereto by their September 22, 2015 memorandum of law (p. 15, fn. 12).

Second, in citizen-taxpayer actions "A temporary restraining order may be granted pending a hearing for a preliminary injunction notwithstanding the requirements of section six thousand three hundred and thirteen of the civil practice law and rules" (State Finance Law §123-e(2)). Here, the decision's first untitled paragraph (at p. 2) refers to Justice McDonough's denial of "temporary injunctive relief" at the oral argument of plaintiffs' "Order to Show Cause seeking various injunctive relief and leave to serve a second supplemental complaint" without revealing that his stated basis, at the oral argument, for denying the TRO, was his assertion that CPLR §6313 prohibited the granting of a TRO, as if CPLR §6313 controlled. Plaintiffs Sassower's April 22, 2016 affidavit[12] – listed by the decision's "Papers Considered" (at p. 10, #11) – recites the pertinent facts as to Justice McDonough's willful disregard of State Finance Law §123-e(2) in denying the TRO – and does so expressly in support of plaintiffs' request for his disqualification for demonstrated actual bias.

Third, a citizen-taxpayer action affords declaratory relief (State Finance Law §123-b). Yet, the decision conceals that plaintiffs are seeking declaratory relief pursuant to State Finance Law Article 7-A – even as it announces (at pp. 6-7) "now that this matter is fully concluded, the Court will issue…declarations", citing not the citizen-taxpayer statute, but CPLR §3001. Nor does it reveal, in referring to Justice McDonough having "Previously…dismissed three of plaintiffs' four causes of action set forth in their original verified complaint" – which is the decision's first sentence (at p. 2) – that such disposition was improper because in a declaratory judgment action the appropriate course is to render declaratory relief, not to dismiss – and so-identified by the fifth, sixth, and seventh causes of action of plaintiffs' supplemental complaint (§§171, 181, 196).

Fourth, a citizen-taxpayer action is "to be promptly determined" and "have a preference over all other causes in all courts" (State Finance Law §123-c(4)). Here, Justice McDonough delayed each of the three decisions and orders he rendered way past the 60-day time-frame for ordinary cases, set by CPLR §2219(a)[13] – and not because time was needed for fidelity to the record or scholarship, as all three are completely perfunctory: substituting bald, conclusory assertions for specifics, because, when compared to the record, each grants AAG Kerwin relief to which she had no lawful entitlement and denies plaintiffs relief to which they were entitled, *as a matter of law*. Thus, the date of Justice McDonough's decision dismissing plaintiffs' first three causes of action and preserving the fourth is October 9, 2014 – nearly four months after AAG Kerwin's dismissal motion that it decided was fully submitted. Justice McDonough's decision granting plaintiffs leave to supplement their verified complaint is June 24, 2015 – nearly two and a half months after plaintiffs' March 31, 2015 motion for that relief was fully submitted. As for the original July 15, 2016 date of the instant decision, it is more than eight months after AAG Kerwin's July 28, 2015 dismissal/summary judgment motion and plaintiffs' September 22, 2015 cross-motion for summary judgment and other relief were fully

[12] Plaintiff Sassower's April 22, 2016 reply affidavit annexes the transcript of the March 23, 2016 oral argument.

[13] The first sentence of CPLR §2219(a) reads: "An order determining a motion relating to a provisional remedy shall be made within twenty days, and an order determining any other motion shall be made within sixty days, after the motion is submitted for decision."

submitted – and nearly three months after plaintiffs' March 23, 2016 order to show cause for leave to serve a second supplemental complaint was fully submitted. This may explain why the decision's untitled first paragraph (at p. 2) contains no dates, using words like "Previously", "Eventually", and "During the pendency". Not until page 10 of the decision is there a date: the August 1, 2016 date of Justice McDonough's amended decision and order, followed by dates for the listed "Papers Considered".

The decision's untitled first paragraph is followed by a one-sentence section entitled "Background" (at p. 2). It states: "Familiarity with the relevant background to this action against the Governor and legislative leaders is presumed." In other words, the decision provides no "relevant background" – and does not identify where "relevant background" might be found. Such is not contained in Justice McDonough's October 9, 2014 or June 24, 2015 decisions. Plaintiffs themselves furnished it by their March 28, 2014 verified complaint, under the title heading: "THE PARTIES & BACKGROUND FACTUAL ALLEGATIONS". Among its "relevant background to this action against the Governor and legislative leaders" is the following at its ¶5:

> a. Plaintiffs' focus on the New York State budget had its genesis in the 2011 Special Commission on Judicial Compensation, established pursuant to Chapter 567 of the Laws of 2010. As the Commission's August 29, 2011 Final Report recommending judicial salary increases of 27% over a three-year period were to have the force of law, absent gubernatorial or legislative action, plaintiffs presented defendants CUOMO, SKELOS, and SILVER with an October 27, 2011 Opposition Report, whose first requested relief was for override of the recommended judicial salary increases. The basis for the override was plaintiffs' showing that the Commission had violated express conditions precedent for the judicial salary recommendations, set forth in Chapter 567 of the Laws of 2010, in addition to being fraudulent and unconstitutional.
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> b. Neither defendants CUOMO, SKELOS, SILVER ever denied or disputed the accuracy of plaintiffs' October 27, 2011 Opposition Report. Nor did defendants SCHNEIDERMAN and DiNAPOLI, to whom plaintiffs filed corruption complaints based thereon. Nor did Chief Administrative Judge Lippman, to whom plaintiffs also furnished the October 27, 2011 Opposition Report. Yet, none took any steps to protect the public purse from judicial salary increases shown to be statutorily violative, fraudulent, and unconstitutional.
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> c. As a result, plaintiffs were burdened with bringing a declaratory judgment action to secure a determination as to the unconstitutionality of Chapter 567 of the Laws of 2010, *as written and as applied*. The lawsuit, entitled [*CJA v. Cuomo, et al*.] was commenced in Bronx County Supreme Court on March 30, 2012 (#302951-2012), accompanied by an order to show cause, with TRO, to prevent disbursement of the monies for the first phase of the judicial salary increase that was to take effect on April 1, 2012.

d. Defendant SCHNEIDERMAN, a named defendant therein, defended all defendants and, in the absence of any legitimate merits defense, engaged in fraudulent advocacy. At his urging, the TRO was denied and the lawsuit [hereinafter '*CJA v. Cuomo I*'] was transferred to Supreme Court/New York County, with no ruling on the preliminary injunction. In the process, plaintiffs' original verified complaint, ALL substantiating exhibits, and the order to show cause for a preliminary injunction, with TRO, went missing.

e. Since the transfer, in September 2012, *CJA v. Cuomo I* has been in limbo, sitting on a shelf in the New York County Clerk's Office because the New York County Clerk – whose salary is tied to judicial salaries – has ignored plaintiffs' complaints for investigation of the record tampering, ignored their requests that he discharge his mandatory duty under Judiciary Law §255 to certify the missing documents, and ignored their requests that he take action against his Chief Deputy Clerk who has barred plaintiff SASSOWER from reviewing the case file under threat that he will have court officers remove her from the courthouse, which he has already done." (plaintiffs' March 28, 2014 verified complaint, at ¶5, underlining, capitalization in the original) [14]

The Threshold Issue of Justice McDonough's Disqualifying Actual Bias, Born of his Financial Interest – Shoved to the Back & Covered-Up

Although judicial disqualification is a threshold issue, the decision puts it at the end (at pp. 7-8). In a single paragraph, appended without a break to its section entitled "Leave to Serve a Second Supplemental Complaint", the decision states:

> "Finally, the Court finds no basis in the record, Judiciary Law, Administrative Code or any relevant statute or case law, for recusal. The Court again notes that the alleged financial conflicts that plaintiffs describe is equally applicable to every Supreme and Acting Supreme Court Justice in the State of New York, rendering recusal on the basis of financial interest a functional impossibility (*see*, Matter of Maron v Silver, 14 NY3d 230, 248-249 [2010])." (at pp. 7-8, underlining added, except beneath *Matter of Maron v. Silver*).

In so-stating, Justice McDonough repeats, largely *verbatim*, the paragraph of his June 24, 2015 decision that denied plaintiffs' request for his disqualification and vacatur of his October 9, 2014 decision:

[14] The index number that New York County assigned to the declaratory judgment action *CJA v. Cuomo I*, following its transfer from Bronx County, is New York Co. #401988-2012. On July 28, 2016, plaintiff Sassower was able to view the file, still on the shelves of the Clerk's Office in Supreme Court/New York County. The original documents that were missing three years ago, identified by ¶5(d), are still missing.

> "Additionally, the Court finds no basis in the record, Judiciary Law, Administrative Code or any relevant statute or case law for recusal. Similarly, no rational basis exists for this Court to vacate its prior [October 9, 2014] Decision and Order. The alleged financial conflict that plaintiffs describe is equally applicable to every Supreme and Acting Supreme Court Justice in the State of New York, rendering recusal on the basis of financial interest a functional impossibility (*see*, Matter of Maron v. Silver, 14 NY3d 230, 248-249 [2010])." (June 24, 2015 decision, at p. 2, underlining added, except beneath *Matter of Maron v. Silver*).

Now, as then, these conclusory assertions are utter frauds. Justice McDonough's decision, like his two prior decisions, materially falsifies the record and, by the record, proves his pervasive actual bias, whose source is reasonably attributable to his actual "financial conflicts".

Common to all three decisions is that they conceal ALL the facts giving rise to the "financial conflicts". For starters, they do not identify that plaintiffs were challenging the judicial salary increases recommended by the August 29, 2011 report of the Commission on Judicial Compensation – and do not identify plaintiffs' asserted proof establishing the statutory violations, fraud, and unconstitutionality of those increases, *to wit*, their October 27, 2011 opposition report and March 30, 2012 verified complaint in their declaratory judgment action *CJA v. Cuomo, et al.*, which plaintiff Sassower handed up to defendants Senate and Assembly on February 6, 2013 in testifying at its "public protection" budget hearing.

Thus, the instant decision conceals the October 27, 2011 opposition report and March 30, 2012 verified complaint in stating:

> "Further, plaintiffs cite the importance of the documentation handed up to the Legislature in February of 2013 in opposition to the Judiciary's budget and the second phase of judicial salary increases." (at p. 3, underlining added).

That "documentation" was not only "cite[d]" by plaintiffs, but furnished by them[15] – and the decision's listing of "Papers Considered" (at pp. 10-11) furthers the concealment of their October 27, 2011 opposition report and March 30, 2012 verified complaint by distorting them as:

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[15] As stated by plaintiffs' September 22, 2015 memorandum of law (at p. 41):

> "With respect to the judicial salary increase – whose third phase was concealed in the judiciary's budget for fiscal year 2014-2015 and Budget Bill #S.6351/A.8551 – the *prima facie* proof that such increase is statutorily-violative, fraudulent and unconstitutional are the documents specified by ¶108 of the second cause of action, *to wit*, plaintiffs' October 27, 2011 Opposition Report to the August 29, 2011 Report of the Commission on Judicial Compensation and the verified complaint in *CJA v. Cuomo I* based thereon. Through litigation fraud and deceit, AAG Kerwin was able to withhold them from the Court and impede plaintiffs' summary judgment entitlement to a declaration based thereon. They are

> "12) Plaintiffs' 2011 Exhibits regarding the Commission of Judicial Compensation;
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> 13) Plaintiffs' 2002 Exhibits regarding motions before the Court of Appeals in a prior proceeding against the Commission on Judicial Conduct before the State of New York;
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> 14) Plaintiffs' Exhibits pertaining to their action (Index #302951-12) heard in Supreme Court, Bronx County" (at p. 10).

Then, too, the decision's sole mention of the Commission on Judicial Compensation is in stating:

> "In reply/further support of their cross-motion, plaintiffs cite an amendment to the Budget Bill which recognizes the unconstitutionality of the Budget Bill. Said amendment pertains to the replacement of the Commission on Judicial Compensation with the Commission on Legislative, Judicial and Executive Compensation. In light of the amendment, plaintiffs question why defendants' motion for dismissal/summary judgment has not been withdrawn." (at p. 4).

There is only one explanation for all this concealment by the decision – and for the even more total concealment by the October 9, 2014 and June 24, 2015 decisions. It enables Justice McDonough to obliterate the existence of an issue that can only be decided in plaintiffs' favor, at a substantial financial loss to him.

As for Justice McDonough's financial interest in the judicial salary increases recommended by the Commission on Judicial Compensation's August 29, 2011 report, plaintiffs particularized it repeatedly.[16] The Commission's August 29, 2011 report raised his yearly salary by nearly $40,000 since March 1, 2012. Effective April 1, 2012, his salary rose from $136,700 to $160,000; effective April 1, 2013, it rose from $160,000 to $168,000; and, effective April 1, 2014 – as a result of the fraudulent denial of the TRO and preliminary injunction sought by plaintiffs' March 28, 2014 order to show cause at the outset of the litigation, which Justice McDonough's October 9, 2014 decision covered up, it rose from $168,000 to $174,000.

Now, with the successor December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation, his salary has been boosted by a further $19,000. This further increase

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> now furnished to the Court, by plaintiffs, in a free-standing file folder, due to their volume." (underlining added).

[16] Plaintiff Sassower's June 6, 2014 reply affidavit (¶¶10-15 – quoted below at fn.18; plaintiff Sassower's March 31, 2015 affidavit (¶¶10-13); plaintiffs' November 5, 2015 reply memorandum of law (p. 4 & fn.1); plaintiff Sassower's April 22, 2016 affidavit (¶6); plaintiffs' April 22, 2016 reply memorandum of law (at p. 3, fn. 2).

became effective April 1, 2016, as a result of Justice McDonough's fraudulent denial of the TRO and preliminary injunction sought by plaintiffs' March 23, 2016 order to show cause. And, it doesn't end there. Based on the December 24, 2015 report, Justice McDonough's now $193,000 annual salary will likely go up next year to reflect a cost-of-living increase and then, as of April 1, 2018, will be upped to $203,000, with a likely further cost-of-living increase the following year.

Thus, Justice McDonough has a HUGE financial interest in not voiding the August 29, 2011 and December 24, 2015 reports. Declarations of their nullity would cause his now $193,000 annual judicial salary to take a nearly $60,000 nosedive and entail a "claw-back" of what he has received since April 1, 2012: approximately $100,000 in salary increases, plus tens of thousands of dollars from salary-based non-salary benefits, such as pensions.

Yet, the decision conceals all this in casting Justice McDonough's "financial conflicts" as "alleged".

That Justice McDonough does not even concede the actuality of the "financial conflicts" only underscores the flagrant dishonesty that permeates his decision and prior ones. Likewise, his deceit that disqualification is a "functional impossibility". It is not. As stated by plaintiff Sassower's April 22, 2016 affidavit in support of Justice McDonough's disqualification – replicating what plaintiffs had previously and repeatedly stated[17], concealed by his prior decisions:

> "A judge can be financially interested, yet nonetheless rise above that interest to discharge his duty. A judge who cannot or will not do that and so-demonstrates this by manifesting his actual bias – must disqualify himself or be disqualified." (April 22, 2016 affidavit, ¶6, underlining in the original).

The Threshold Issue of Assistant Attorney General Kerwin's Litigation Fraud & the Attorney General's Disqualification – Shoved to the Back & Covered-Up

As the record shows, it was AAG Kerwin's brazen and unrestrained litigation fraud that compelled plaintiffs to raise the issue of Justice McDonough's disqualification, time after time.[18] Thus, in

[17] See, fn. 16 and fn. 18.

[18] The first time was in opposing AAG April 18, 2014 motion to dismiss plaintiffs' complaint – and plaintiff Sassower's response was as follows:

> "10. No fair and impartial tribunal would tolerate AAG Kerwin's litigation fraud, upending the most basic legal standards and ethical rules. Yet AAG Kerwin, Attorney General Schneiderman, Comptroller DiNapoli, and their high-ranking staff are seemingly unconcerned about any consequences for their violative conduct. Apparently, they believe the Court will let them get away with anything.
>
> 11. This belief is understandable. The Court has a direct financial interest in this citizen-taxpayer action, challenging, as it does, not only the monies for the Judiciary in the Governor's Budget Bill #S.6351/A.8551, but the third phase of the judicial salary increase by which, on April 1, 2014, this Court's own annual salary rose from $167,000 to $174,000.

opposing AAG Kerwin's July 28, 2014 dismissal/summary judgment motion, plaintiffs' November 5, 2016 reply memorandum of law summed up the situation as follows:

> "Needless to say, the ONLY inference that can be drawn from the fact that AAG Kerwin has continued her litigation misconduct is that she holds to the view that the Court will NOT discharge its duty to ensure the integrity of the judicial process – not the least reason being because it has a financial interest amounting to some $40,000 a year in 'throwing' the case so as not to render the declaration to which plaintiffs are entitled as to the unconstitutionality Chapter 567 of the Laws of 2010, *as written and as applied*, and the judicial salary increases resulting therefrom, embodied in plaintiffs' second and sixth causes of action. [fn.1] That entitlement, uncontested by AAG Kerwin, is set forth at pages 19-25, *infra*.
>
> Suffice to say, more than a century ago, in *Matter of Bolte*, 97 AD 551 (1904), the Appellate Division, First Department stated:
>
> > 'A judicial officer may not be removed for merely making an erroneous decision or ruling, but he may be removed for ***willfully*** making a wrong

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12. Plaintiffs have a summary judgment entitlement to a declaration that the third phase of the judicial salary increase is statutorily-violative, fraudulent, and unconstitutional. This will be evident to the Court upon its ordering defendants to produce the documents I handed up to the Legislature at its February 6, 2013 joint budget hearing on 'public protection' in substantiation of my oral testimony opposing the judicial salary increases recommended by the August 29, 2011 Report of the Special Commission on Judicial Compensation. That is why these documents have not been voluntarily produced by AAG Kerwin in response to plaintiffs' Notice to Furnish Papers to the Court Pursuant to CPLR §2214(c) (Exhibit X-2, p. 3). Indeed, it is why her dismissal motion conceals that plaintiffs' complaint even challenges the third phase of the judicial salary increase – a fraud in and of itself requiring denial of her dismissal motion, *as a matter of law*. (see plaintiffs' May 16, 2014 memorandum of law, pp. 8-9, 10-11, 29).

13. Suffice to say, with the fall of the third phase of the judicial salary increase – the first two phases will also fall – bringing this Court's yearly salary down to $136,700 – a whopping drop of nearly $40,000 a year.

14. Although the 'rule of necessity' holds that where all judges are disqualified, none are disqualified, that does not mean that a judge who is unable to rise above his direct and substantial financial interest is not required to disqualify himself; or that a judge not disqualifying himself is not required to acknowledge his self-interest and make other appropriate disclosure, such as the extent to which he is dependent upon defendants for his continuance on the bench and relevant personal, professional, and political relationships impacting on his fairness and impartiality.

15. This Court can powerfully model fairness and impartiality. All it takes is making disclosure and addressing the fundamental, black-letter, legal and ethical standards, laid out by plaintiffs' May 16, 2014 memorandum of law, that AAG Kerwin and her high-level accomplices would have the Court completely ignore." (plaintiff Sassower's June 6, 2014 reply affidavit, at pp. 5-7, italics and underlining in the original).

> decision or an erroneous ruling, or for a reckless exercise of his judicial functions without regard to the rights of litigants, or for manifesting friendship or favoritism toward one party or his attorney to the prejudice of another…' (at 568, emphasis in the original).
>
> '…Favoritism in the performance of judicial duties constitutes corruption as disastrous in its consequence as if the judicial officer received and was moved by a bribe.' (at 574)." (November 5, 2015 reply memorandum of law, at p. 4).

Yet here, too, as with the threshold issue of Justice McDonough's disqualification, the threshold issues of AAG Kerwin's litigation fraud and Attorney General Schneiderman's disqualification are shoved to the back of the decision – where they are disposed of with brazen lies that do not identify ANY of the particularized facts and law plaintiffs furnished in support. There, under the title heading "Remaining Requested Relief from Plaintiffs' Summary Judgment Motion" (at p. 7), the decision states:

> "The Court notes that plaintiffs' papers are replete with wholly unsubstantiated accusations against the Assistant Attorney General sounding primarily in fraud upon the Court, deceit and making frivolous submissions. In conjunction with the accusations, plaintiffs seek sanctions, costs, penal law punishment, treble damages, referral to disciplinary authorities, disqualification of the Attorney General and an Order directing the Assistant Attorney General to provide certain disclosure.
>
> The Court has reviewed the allegations and finds no basis to impose/award any of the requested relief. Moreover, the Court finds that plaintiffs' request for this Court of vacate its prior Order pursuant to CPLR §5015 wholly without merit." (at p. 7, underlining added).

This is utter fraud – and the decision does not supply a single example of a "wholly unsubstantiated accusation[]" made by plaintiffs' "papers". Nor is there one. ALL of plaintiffs' so-called "accusations" and "allegations" of AAG Kerwin's "fraud", "deceit" and "making frivolous submissions" and of "the disqualification of the Attorney General" are buttressed by specific facts, law, and evidence – so much so as to establish plaintiffs' entitlement to ALL ten branches of their September 22, 2015 cross-motion, *as a matter of law*:

> "(1) pursuant to CPLR §3211(c), giving notice that Attorney General Eric T. Schneiderman's July 28, 2015 motion to dismiss plaintiffs' verified supplemental complaint by Assistant Attorney General Adrienne Kerwin is being converted by the Court to a motion for summary judgment for plaintiffs on their four causes of action therein;
>
> (1) pursuant to CPLR §3212(b), granting plaintiffs summary judgment on their verified complaint's fourth causes of action;

(2) pursuant to this Court's October 9, 2014 decision/order, granting sanctions & other relief against AAG Kerwin and all complicit with her, following determination of the three issues undetermined by the October 9, 2014 decision/order pertaining to plaintiffs' order to show cause with TRO that the Court signed on June 16, 2014, *to wit*, whether AAG Kerwin's 4-page document turnover was (a) a 'flagrant fraud on the Court'; (b) constituted evidence of defendants' violation of Legislative Law §67; and (c) a possible contempt of the TRO;

(4) pursuant to Executive Law §63.1 and State Finance Law Article 7-A, directing Attorney General Schneiderman to identify who in the Attorney General's office has independently evaluated the 'interest of the state' in this citizen-taxpayer action and plaintiffs' entitlement to the Attorney General's representation/intervention;

(5) pursuant to Rule 1.7 of the Rules of Professional Conduct for Attorneys, disqualifying Attorney General Schneiderman for conflict of interest;

(6) pursuant to 22 NYCRR §130-1.1 *et seq.*, imposing maximum costs and $10,000 sanctions against AAG Kerwin and all complicit supervisory lawyers in Attorney General Schneiderman's office by reason of their frivolous and fraudulent July 28, 2015 dismissal/summary judgment motion;

(7) pursuant to Judiciary Law §487(1), assessing penal law penalties against AAG Kerwin and all complicit supervisory lawyers in Attorney General Schneiderman's office, as well as such determination as would afford plaintiffs treble damages against them in a civil action by reason of their frivolous and fraudulent July 28, 2015 dismissal/summary judgment motion;

(8) pursuant to 22 NYCRR §100.3D(2), referring AAG Kerwin and all complicit supervisory lawyers in Attorney General Schneiderman's office to appropriate disciplinary authorities for their knowing and deliberate violations of New York's Rules of Professional Conduct for Attorneys and, specifically, Rule 3.1 'Non-Meritorious Claims and Contentions', Rule 3.3 'Conduct Before A Tribunal'; Rule 8.4 'Misconduct'; and Rule 5.1 'Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers';

(9) pursuant to CPLR §5015(a)(3), vacating the Court's October 9, 2014 decision/order for 'fraud, misrepresentation, [and] other misconduct' of defendants and their counsel;

(10) for such other and further relief as may be just and proper, including $100 motion costs pursuant to CPLR §8202."

Plaintiffs' November 5, 2015 reply memorandum of law states this, explicitly – and, together with their September 23, 2015 memorandum of law, proves it, resoundingly. These two memoranda, 28 pages and 55 pages, respectively, are incorporated by reference by plaintiff Sassower's accompanying affidavits, which swear to their truth. Each demonstrates that AAG Kerwin's motion papers were, "from beginning to end, and in virtually every line", fashioned on fraud and deceit – and that a fair and impartial tribunal had no discretion but to grant plaintiffs ALL branches of their cross-motion, *as a matter of law*.

The starting point is the legal insufficiency of AAG Kerwin's July 28, 2015 dismissal/summary judgment motion – which plaintiffs' September 22, 2015 memorandum of law (at pp. 4-11) shows to be frivolous, *as a matter of law*. This, because it did not remotely meet the legal standards for either dismissal pursuant to CPLR §3211 or summary judgment motions pursuant to §3212– standards it did not explicate in any way. These required AAG Kerwin not to cherry-pick and distort selected allegations of the pleadings, but to set forth ALL the pleadings' allegations which, taken together and accepted as true, failed to state a cause of action, or were conclusively disposed of, *as a matter of law*, by documentary evidence – and which, with regard to her request pursuant to CPLR §3212 for summary judgment on the fourth cause of action of plaintiffs' complaint, required an "affidavit…by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that…the cause of action…has no merit."

Plaintiffs' September 22, 2015 memorandum of law detailed that AAG Kerwin's July 28, 2015 motion had furnished only her own sham, non-probative affirmation, rested on a select handful of allegations of the pleadings, whose content she simplified, distorted, and falsified, and furnished exhibits that did not constitute "documentary evidence" in support of dismissal/summary judgment for defendants, but, rather, supported summary judgment to plaintiffs.

Justice McDonough's decision utilizes the same stratagem as AAG Kerwin had: concealment, distortion, and falsification of the allegations of plaintiffs' causes of action, disregard of fundamental adjudicative standards – and on NO EVIDENCE. In other words, on fraud.

Justice McDonough's Dismissals of Plaintiffs' Causes of Action

The decision precedes its seriatim dismissals of plaintiffs' causes of action with a section entitled "Motions with respect to the Supplemental Complaint" (at pp. 2-4), purporting to summarize the parties' contentions as presented by:

- AAG Kerwin's July 28, 2015 dismissal/summary judgment motion;
- plaintiffs' September 22, 2015 opposition/cross-motion for summary judgment;
- AAG Kerwin's October 23, 2015 reply in further support of her motion;
- plaintiffs' November 5, 2015 reply in further support of their cross-motion.

This section, the lengthiest of the decision's titled sections, actually serves no purpose other than as filler. Apart from not setting forth a single one of plaintiffs' contentions as to the legal insufficiency of AAG Kerwin's dismissal/summary judgment motion, requiring denial of the motion, *as a matter of law*, the decision conceals the material fact that every contention advanced by defendants, usually in the most simplistic, generalized fashion, was challenged by plaintiffs, with factual and legal specifics, and shown to be false and deceitful – and knowingly so. Tellingly, the decision nowhere makes findings as to its summarized recitation in this section, including in dismissing plaintiffs' causes of action by, inferentially, adopting AAG Kerwin's various deceits.

As illustrative, this section cites AAG Kerwin's assertions "In reply/further support of their motion" as contending that:

> "plaintiffs have failed to set forth any facts establishing how Article VII, section 7 or Article III, sections 10 and 16 were violated. Further, defendants maintain that there are no allegations in the supplemental complaint that any of the relevant parties listed in Section 31 of the Legislative Law were precluded from appearing before Legislative committees and/or refused to appear pursuant to any committee request. Finally, defendants maintain that the documentary evidence establishes compliance with Section 54-A of the Legislative Law." (at p. 4)

Not revealed is that AAG Kerwin was responding to plaintiffs' assertions in their September 22, 2015 memorandum in law (at pp. 18, 34, 38-39) that her dismissal motion had to be denied, *as a matter of law*, as it had not denied, but instead concealed, the violations of Article VII, §7, Article III, §16, and Article III, §10 of the New York State Constitution, set forth in the sixth cause of action of their supplemental complaint (¶¶181, 191, 236, PRAYER FOR RELIEF/'WHEREFORE' clause: pp. 39, 40), and the violations of Legislative Law §54-A, set forth in their eighth cause of action (¶¶231-234) – all of which were, therefore, conceded, *as a matter of law*.

Nor does this section include plaintiffs' response to AAG Kerwin's above extracted assertions. This, because plaintiffs' particularized response, spanning 10 pages of their 26-page November 5, 2015 reply memorandum of law (at pp. 9-19), not only thoroughly rebutted them, but reinforced plaintiffs' entitlement to the summary judgment sought by their cross-motion.

The result? Two pages later, without any determination of plaintiffs' fact-specific, law-supported showing, the decision (at p. 6) dismisses plaintiffs' eighth cause of action, utilizing AAG Kerwin's baseless assertions included in this section and, two pages after that (at p. 8), denies plaintiffs' cross-motion for summary judgment in its second ordering paragraph. Suffice to say that nowhere in the body of the decision is there the slightest discussion, let alone findings of fact and conclusions of law, with respect to the basis upon which plaintiffs cross-moved for summary judgment – only a rejection of it, inferentially, immediately before the decision's ordering paragraphs as:

> "Plaintiffs' remaining arguments and requests for relief have been considered and found to be lacking in merit." (at p. 8).

This same section of "Motions with respect to the Supplemental Complaint" also contains two footnotes (at p. 3), each materially false – and known by Justice McDonough to be false. The first, annotating AAG Kerwin's contentions regarding plaintiffs' fourth cause of action, states:

> "As issue has been joined and discovery conducted on the fourth cause of action, defendants maintain that summary judgment is the appropriate vehicle for dismissal as to said cause of action." (fn. 3).[19]

In fact, joinder and discovery were completely sham and worthless, subverted by AAG Kerwin. And Justice McDonough had all the particulars, especially with respect to the fourth cause of action, as plaintiffs had furnished them to him by ¶¶9-24 of plaintiff Sassower's April 15, 2015 reply affidavit in further support of their March 31, 2015 motion for leave to supplement their verified complaint, annexing the substantiating proof as exhibits. Justice McDonough's June 24, 2015 decision had concealed the issue entirely with the boilerplate assertion:

> "Plaintiffs' remaining requests for relief have been considered and found to be lacking in merit." (at p. 2).

This was an utter lie – and the documented particulars set forth by the aforesaid ¶¶9-24 of plaintiff Sassower's April 15, 2015 affidavit are the proof.

As for the second footnote of this section (at p. 3), annotating the paragraph pertaining to plaintiffs' "opposition/support", the decision states:

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

This is another lie – and proving it are the first two branches of plaintiffs' September 22, 2015 cross-motion, which read:

> "(1) pursuant to CPLR §3211(c), giving notice that Attorney General Eric T. Schneiderman's July 28, 2015 motion to dismiss plaintiffs' verified supplemental

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[19] In fact, AAG Kerwin had relegated her explanation of the "appropriate vehicle" to a footnote of her July 28, 2015 memorandum of law (at p. 11, fn. 5), which without referencing joinder or discovery, merely stated:

> "While plaintiffs' eighth cause of action must be considered using a motion to dismiss standard, see CPLR 3211, the court should apply a summary judgment standard as to defendants' motion relating to plaintiffs' fourth cause of action. See CPLR 3212."

complaint by Assistant Attorney General Adrienne Kerwin is being converted by the Court to a motion for summary judgment for plaintiffs on their four causes of action therein;

(2) pursuant to CPLR §3212(b), granting plaintiffs summary judgment on their verified complaint's fourth cause[] of action".

These establish that plaintiffs were NOT seeking conversion with respect to summary judgment relief that they were simultaneously cross-moving for directly – which is the basis upon which Justice McDonough found the conversion relief "unnecessary". Rather, they were seeking conversion ONLY with respect to the four causes of action of their supplemental complaint, pursuant to CPLR §3211(c). This had nothing to do with the fourth cause of action of their complaint, as to which plaintiffs were entitled to – and did – cross-move for summary judgment, directly, pursuant to CPLR §3212(b). Consequently, the decision's express basis for denying plaintiffs' conversion request is a fraud.

1. The Decision's Summary Judgment Dismissal of the Fourth Cause of Action of Plaintiffs' Verified Complaint, Pursuant to CPLR §3212

Under its heading "Fourth Cause of Action" (at pp. 4-5), the decision recites the standard for summary judgment:

> "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any genuine material issues of fact from the case. The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegard v. New York Univ. Med. Center, 64 NY2d 851 [1985]).
>
> Once such a showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof, in admissible form, to establish the existence of material issues of fact which require a trial (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue. Averments merely stating conclusions are insufficient (Bethlehem Steel Corp. v. Solow, 51 NY2d 870 [1980]; Capelin Assoc. v. Globe Mfg. Corp., 34 NY2d 338 [1974]).
>
> Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v. Cornell University, 162 AD2d 922, 923 [3rd Dept. 1990]). The focus is upon issue finding, not issue resolving, and all inferences and evidence must be viewed in a light most favorable to the party opposing the motion for summary judgment (*see*, B.S. Industrial Contractors, Inc. v. Town of Wells, 173 AD2d 1053 [3rd Dept. 1991])."

As pointed out by plaintiffs' September 22, 2015 memorandum of law (at p. 8), AAG Kerwin's July 28, 2015 motion had not identified "the rudimentary standards governing dismissal and summary judgement motions – reflective of her knowledge that she had not remotely met the standard for either."

Here, the ONLY reason the decision recites the standard is to make it appear that Justice McDonough is adjudicating in conformity therewith. This is fraud, as are Justice McDonough's two surrounding paragraphs: the one preceding and the one following. These read:

> "The Court previously determined that plaintiffs' had adequately stated a fourth cause of action as to defendants' purported violation of Legislative Law §32-a regarding public hearings for New York's Budget. The Court specifically noted that defendants' submissions did not include any documentary evidence establishing a defense to said cause of action. Defendants have now provided the Court with such documentary evidence. Accordingly, they seek summary judgment.
> …
> The Court finds that the relevant, documentary evidence fully demonstrates that defendants complied with Legislative Law §32-a. In response to defendants' prima facie showing of entitlement to summary judgment, plaintiffs failed to raise any triable issue of fact. Accordingly, summary judgment dismissing the fourth cause of action is mandated." (at pp. 4-5, underlining added).

This is the entirety of what the decision says under the heading "Fourth Cause of Action" – and its fraud begins with its assertion as to of what "the Court previously determined". That determination, by the Court's October 9, 2014 decision, had stated with respect to the fourth cause of action:

> "Plaintiffs' complaint adequately sets forth a viable cause of action alleging, *inter alia*, that defendants violated Legislative Law 32-a regarding public hearings for New York's Budget. …" (October 9, 2014 decision, at p. 6, italics in the original).

In other words – and by the words "*inter alia*" – the Court's October 9, 2014 decision recognized that the fourth cause of action involved more than violation of Legislative Law §32-a. Indeed, the plethora of violations it involved were listed by the complaint's proposed declaratory judgment relating to the fourth cause of action:

> "A. that Budget Bill #6351/A.8551 is a wrongful expenditure, misappropriation, illegal and unconstitutional because nothing lawful or constitutional can emerge from a legislative process that violates its own statutory & rule safeguards, *inter alia*, Legislative Law §32-a (public hearings); Senate Rule VIII, §7, Senate Rule VII, §1, and Assembly Rule III, §1(f) (fiscal notes and introducer's memoranda); Senate Rule VII, §4 ('Title and body of bill'); Assembly Rule III, 1, 8) 'Contents'; 'Revision and engrossing'; Senate Rule VIII, §§3, 4, 5; Assembly Rule IV (committee meetings, hearings, reports, votes); Senate Rule VII, 9 (resolutions); New York Constitution,

> Article III, §10 '…The doors of each house shall be kept open…'; Public Officers Law, Article VI 'The legislature therefore declares that government is the public's business...'; Senate Rule XI, §1 'The doors of the Senate shall be kept open'; Assembly Rule II, §1 'A daily stenographic record of the proceedings of the House shall be made and copies thereof shall be available to the public', etc." (verified complaint, at p. 45, underlining in the original).

Consequently, even if the unspecified "documentary evidence" referred-to by the Court's instant decision actually established defendant Legislature's compliance with Legislative Law §32-a – which it does not –it could not support summary judgment on plaintiffs' fourth cause of action whose other violations of statutory, rule, and constitutional provisions are not just unaddressed by the decision, but concealed.

Plaintiffs' September 22, 2015 memorandum of law pointed out (at pp. 7-8) that the predicate for AAG Kerwin's motion for summary judgment pursuant to CPLR §3212 on plaintiffs' fourth cause of action was having answered the complaint, but that defendants' answer, which she signed and verified, was so sham that she had NOT cited it in support of summary judgment on the fourth cause of action – and had furnished "NO documentary evidence to substantiate its denials, nor affidavit from anyone with 'knowledge or information…to admit or deny'" what, by the answer, she had professed to have no knowledge or information to...admit or deny". This would not have been new to the Court, as the particulars had been provided to it previously by ¶¶ 9-24 of plaintiff Sassower's April 15, 2015 reply affidavit in further support of plaintiffs' March 31, 2015 motion for leave to file their supplemental complaint – and AAG Kerwin did not then or thereafter deny or dispute the accuracy of that presentation in any respect.

As for AAG Kerwin's supposed "documentary evidence" establishing "defendants' prima facie showing of entitlement to summary judgment" on plaintiffs' fourth cause of action, the decision does not specify what it is – and for good reason. It does NOT exist. AAG Kerwin furnished NO evidence establishing that defendants had not violated Legislative Law §32-a in the respects specified by plaintiffs' fourth cause of action, all concealed by Justice McDonough's decision. Nor did she refute plaintiffs' evidentiary presentation that they had. This is particularized at pages 26-31, 34 of plaintiffs' September 22, 2015 memorandum of law – with pages 39-42 further detailing plaintiffs' entitlement to summary judgment in their favor on their fourth cause of action.

None of this was denied or disputed by AAG Kerwin's October 23, 2015 reply/opposition – and plaintiffs' November 5, 2015 reply memorandum of law highlighted this (at pp. 1, 5), demonstrating that entitlement to summary judgment was wholly plaintiffs'.

2. The Decision's Dismissals of the Four Causes of Action of Plaintiffs' Verified Supplemental Complaint, Pursuant to CPLR §3211

The decision's dismissal of the four causes of action of plaintiffs' verified supplemental complaint, pursuant to CPLR §3211, is without reciting the standard for motions thereunder.

Plaintiffs' September 22, 2015 memorandum of law (at p. 9) recited the standard, quoting from the Court of Appeals decision in *Leon v. Martinez*, 84 NY2d 83, 88 (1994):

> "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481, 484; *Rovello v Orofino Realty Co*., 40 NY2d 633, 634). Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., *Heaney v Purdy*, 29 NY2d 157). In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, *supra*, at 635) and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one''(*Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co*., *supra*, at 636)."

Plaintiffs stated that such controlling standard,

> "recited in an abundance of Third Department cases[fn9] – made it frivolous, *as a matter of law*, for AAG Kerwin to have made a dismissal motion under CPLR §§3211(a)(7) and (a)(1) unless she could identify ALL the accepted-as-true allegations of the verified supplemental complaint which, taken together, fail to state a cause of action; and ALL the allegations which, stating a cause of action, are conclusively disposed of, *as a matter of law*, by documentary evidence. AAG Kerwin's dismissal motion does neither. Her affirmation does not cite any of the paragraphs of either the complaint or supplemental complaint. As for her memorandum of law, its citations to the complaint and verified complaint[fn4] either

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"fn9 Among these, *Moulton v. New York*, 114 A.D.3d 115 (3rd Dept. 2013); *Kosmider v. Garcia*, 111 A.D.3d 1134 (3rd Dept. 2013); *Delaware County v. Leatherstocking Healthcare*, 110 A.D.3d 1211 (3rd Dept. 2013); *Nelson v. Lattner Enterprises*, 108 A.D.3d 970 (3rd Dept. 2013); *McBride v. Springsteen-El*, 106 A.D.3d 1402 (3rd Dept. 2013).

Mason v. First Central National Life Insurance Inc., 86 A.D.3d 854, 855 (3rd Dept. 2010); *Erie Insurance Group v. National Grange Mutual Insurance Co.*, 63 A.D.3d 1412 (3rd Dept. 2009); *Weston v. Cornell University*, 56 A.D.3d 1074 (3rd Dept. 2008); *Ozdemir v. Caithness Corporation*, 285 A.D.2d 961, 963 (3rd Dept. 2001)."

> materially simplify, distort, or falsify the content of the cited paragraphs or do not reveal their content at all." (Plaintiffs' September 22, 2015 memorandum of law, at p. 9, capitalization and italics in the original).

Identically, Justice McDonough's dismissals of the fifth, sixth, seventh, and eighth causes of action of plaintiffs' verified supplemental complaint – each by single paragraphs – rest on materially simplifying, distorting and falsifying the content of those four causes of action – and on NO EVIDENCE.

In dismissing plaintiffs' fifth, sixth, and seventh causes of action, the decision essentially replicates its single paragraph dismissals of the first, second, and third causes of action plaintiffs' verified complaint – a fact it does not reveal.

Thus, under the heading "Fifth Cause of Action", (at p. 5), the decision states:

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

The near identical single paragraph of Justice McDonough's October 9, 2014 decision dismissing plaintiffs' first cause of action was as follows:

> "Plaintiff's first cause of action alleges that the Budget is unconstitutional because it was not adequately certified and does not contain itemized estimates of the financial needs of the legislature. The itemization challenge clearly must be dismissed as it is nonjusticiable (*see*, Urban Justice Center v. Pataki, 38 AD3d 20, 30 [1st Dept. 2006]. As to the certification issue, the Court finds that the documentary evidence submitted by defendants conclusively demonstrates that defendants have complied with the letter and spirit of the constitutional requirement for certification (*see generally*, Matter of Schneider v. Rockefeller, 31 NY2d 420, 434 [1972]). Accordingly, the first cause of action must be dismissed." (at p. 5).

Under the heading "Sixth Cause of Action" (at pp. 5-6), the decision states:

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

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

The near identical single paragraph of Justice McDonough's October 9, 2014 decision dismissing plaintiffs' second cause of action was as follows:

> "Plaintiffs' second cause of action principally alleges that the Senate and Assembly are unable to comprehend the Judiciary's proposed budget for 2014-2015 because the cumulative dollar amount and percentage increase over the prior year's budget is not capable of being discerned. The Court finds that the documentary evidence submitted by defendants clearly and conclusively establishes a defense to this cause of action. Said information is readily discernible throughout the Judiciary's proposed budget. Accordingly, the second cause of action must be dismissed. Additionally, this cause of action would also appear to fall under the type of itemization argument already found to be nonjusticiable." (at p. 5).

Under the heading "Seventh Cause of Action" (at p. 6), the decision states:

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

The materially identical single paragraph of Justice McDonough's October 9, 2014 decision dismissing plaintiffs' third cause of action was as follows:

> "Plaintiffs' third cause of action alleges that the Legislative Budget transmitted to the Governor by Senator Skelos and Speaker Silver contained no reappropriations. They further contend that the Governor's budget contains nineteen pages of reappropriations. Accordingly, they contend that the reappropriations constitute revisions in violation of New York's Constitution. The Court finds that the documentary evidence submitted by defendants clearly and conclusively establishes a defense to this cause of action. Said submissions clearly establish that the 'reappropriations' at issue do not constitute executive revisions to the proposed Budget. Accordingly, the third cause of action must be dismissed." (at p. 6).

Yet, the fifth, sixth, and seventh causes of action of plaintiffs' verified supplemental complaint (¶¶194-202) were NOT identical to the first, second, and third causes of action of their verified complaint (¶¶76-112), such that they could be identically dismissed. Rather, each of the subsequent three causes of action consisted, in the main, of analyses demonstrating that Justice McDonough's dismissals of the first, second, and third causes of action, by his October 9, 2014 decision, were legally insupportable and factually baseless. This was the "gist" of each and "principally alleged" – and plaintiffs' September 22, 2015 memorandum of law (at pp. 1, 14-23) highlighted this because AAG Kerwin had fraudulently purported that the fifth, sixth, and seventh causes of action were identical to the first, second, and third causes of action and should be dismissed for the same reasons. Rather than confronting AAG Kerwin's fraud and the accuracy of plaintiffs' analyses, uncontested by her, the decision simply repeats the fraud Justice McDonough had committed in dismissing the first three causes of action. This includes NOT identifying the supposed "documentary evidence" furnished by AAG Kerwin that "clearly and conclusively" established defenses to the fifth, sixth, and seventh causes of action – because she had NO such evidence.[20] Rather, what she furnished

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[20] As to the fifth cause of action (¶¶169-178), the "documentary evidence" that AAG Kerwin furnished – replicating what she had furnished for dismissal of the plaintiffs' first cause of action – consisted of the one-sentence December 1, 2014 letter signed by defendants Skelos and Silver to defendant Cuomo, transmitting the 16-page legislative budget for fiscal year 2015-2016.

These "conclusively demonstrate[d]" precisely what ¶¶131-138, of plaintiffs' supplemental complaint alleged, *to wit*, the letter did not claim to be transmitting "itemized estimates of the financial needs of the legislature" or that same had been "certified by the presiding officer of each house"; and its transmitted 16-page budget contained no certification, nor even a reference to "itemized estimates" of the Legislature's "financial needs" or to Article VII, §1 of the New York State Constitution. Nor was certification even possible, *inter alia*, because the transmitted budget was missing the Legislature's "General State Charges" and because its figures were a palpable contrivance of leadership, being dollar identical to those of the previous four years.

As to the sixth cause of action (¶¶179-193), the "documentary evidence" that AAG Kerwin furnished – replicating what she had furnished for dismissal of the plaintiffs' second cause of action – consisted of only one part of the Judiciary's December 1, 2014 two-part budget: that of operating expenses, with its attached "single budget bill". This "clearly and conclusively" established precisely what ¶¶139-144, 169-170 of plaintiffs' verified supplemental complaint alleged, *to wit*, the 'single budget bill" was seemingly uncertified and did not tally the judiciary's appropriations and reappropriations, thereby concealing the discrepancy of tens of millions of dollars between the "single budget bill" that contained reappropriations and the Judiciary's two-part budget presentation, which did not. As for the judiciary reappropriations, AAG Kerwin concealed the issue entirely, including the violations of Article VII, 7, Article III, 16, and State Finance Law alleged by plaintiffs sixth cause of action, and their use for illegitimate, slush-fund purposes – as for instance, to hide the funding of the statutorily-violative, fraudulent, and unconstitutional judicial salary increases.

As to the seventh cause of action (¶¶194-202), the "documentary evidence" that AAG Kerwin furnished -- replicating what she had furnished for dismissal of plaintiffs' third cause of action – consisted of defendant Cuomo's legislative/judiciary budget bill #S.2001/A.3001, introduced on January 21, 2015. It "clearly and conclusively" established precisely what ¶¶145, 149-150 of plaintiffs' verified supplemental complaint alleged, *to wit*, it concealed 22 pages of reappropriations for the legislature, in an out-of-sequence section in the back of the bill, which did not appear to be suitable for reappropriation and which had not been part of the Legislature's budget request.

established plaintiffs' entitlement to summary judgment on those causes of action.

Justice McDonough's dismissals of plaintiffs' fifth, sixth, and seventh causes of action cannot be justified, factually or legally, and are frauds in the same respects as those causes of action particularize pertaining to his dismissals of their first, second, and third causes of action by his October 9, 2014 decision. The further specifics set forth at pages 1, 14-23 of plaintiffs' September 22, 2015 memorandum of law and pages 2, 6 of their November 5, 2015 reply memorandum of law establish this, resoundingly.

Under the heading "Eighth Cause of Action" (p. 6), the decision states:

> "The eighth cause of action principally relates to defendants' purported violations of Legislative Law §32-a regarding public hearings for New York's Budget. The Court finds that the documentary evidence submitted by defendants clearly and conclusively establishes a defense to this portion of the cause of action. To the extent other claims were raised in this cause of action, the Court concludes: (1) that plaintiffs have failed to set forth any facts in the supplemental complaint as to how Article VII, section 7 or Article III, sections 10 and 16 were violated; (2) that there are no allegations in the supplemental complaint that any of the relevant parties listed in Section 31 of the Legislative Law were precluded from appearing before Legislative committees and/or refused to appear pursuant to any committee request; and (3) that the documentary evidence establishes compliance with Section 54-A of the Legislative Law. Accordingly, dismissal of this cause of action is warranted pursuant to CPLR §3211(a)(1) and (7)." (p. 6, underlining added).

This single paragraph misrepresents and conceals what plaintiffs' eighth cause of action (¶¶203-236) "principally relates to". Of its 33 paragraphs only six pertain to Legislative Law §32. As to these six paragraphs (¶¶206-207, 217-220), the decision identifies nothing about the violation of Legislative Law §32 they particularize – reflective of Justice McDonough's knowledge that AAG Kerwin furnished NO "documentary evidence that "establishes a defense" to them, let alone "clearly and conclusively".[21]

Nor did AAG Kerwin provide any documentary evidence establishing "compliance with Section 54-A of the Legislative Law", other than in respects not relevant to the violations of Legislative Law §54-A alleged by the eighth cause of action, but not disclosed by the decision. And establishing this "clearly and conclusively" is plaintiffs' November 5, 2015 memorandum of law (at pp. 17-19).

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[21] As to the eighth cause of action (¶¶203-236), the "documentary evidence" that AAG Kerwin furnished was defendant Legislature's press release and schedule for its public budget hearings for fiscal year 2015-2016, its agenda/witness list for its February 26, 2015 "public protection" budget hearing, and the transcript of the February 26, 2015 "public protection" budget hearing. These "clearly and conclusively" establish[ed] that she had no rebuttal to ¶¶151-162, 206-207, 217-220 of plaintiffs' supplemental complaint.

As for the decision's assertion "To the extent other claims were raised in this cause of action", the implication that there might be some question as to whether "other claims were raised" is a further fraud. The eighth cause of action rests on violations of a multitude of constitutional, statutory, and rule provisions. However, NOT among them are Article VII, §7 and Article III, §16 of the New York State Constitution and Legislative Law §31, cited by the decision as if they are. Indeed, as pointed out by plaintiffs' November 5, 2015 reply memorandum of law (at pp. 7, 9), the supplemental complaint never alleged any violation of Legislative Law §31, contrary to AAG Kerwin's falsehood on the subject. As for the Article VII, §7 and Article III, §16 constitutional violations, contrary to the decision, these have nothing to do with plaintiffs' eighth cause of action – and AAG Kerwin never purported that they did. Rather, they pertain to the judiciary's reappropriations and are part of plaintiffs' sixth cause of action. Plaintiffs' November 5, 2015 reply memorandum of law (at pp. 10-13) makes this clear, as likewise that AAG Kerwin has no defense to them.

As for the violations of constitutional, statutory and rule provisions alleged by plaintiffs' eighth cause of action that the decision does not identify, let alone address, in dismissing it, they are:

- Senate Rules VIII, §7, VII, §1, Assembly Rules III, §1(f), §2(a) (fiscal notes, fiscal impact statements, and introducer's memoranda);

- Senate Rule VII, §4; Assembly Rule III, §§1, 2, 8 (bills);

- Senate Rules VIII, §§3, 4, 5; Assembly Rule IV (committee meetings, hearings, reports, votes);

- Senate Rule VII, §9 (resolutions);

- Legislative Law §54-a ("Scheduling of legislative consideration of budget bills");

- Senate/Assembly Joint Rule III, §§1, 2 ("Budget Consideration Schedule"; "Joint Budget Conference Committee");

- New York Constitution, Article III, §10; Public Officers Law, Article VI; Senate Rule XI, §1; Assembly Rule II, §1 (public access).

These, too, are particularized by plaintiffs' September 22, 2015 memorandum of law (pp. 26-31, 34, 38) – and the state of the record with respect to them, entitling plaintiffs to summary judgment, is highlighted by plaintiffs' November 5, 2015 reply memorandum of law (at p. 7), totally ignored by the decision.

The Decision's Section Entitled "Declaratory Relief"

Having dismissed plaintiffs' five causes of action without revealing their allegations, including that plaintiffs sought declaratory judgments as to each, the decision continues (at pp. 6-7) with a five-sentence paragraph reading:

> "The Court notes that no issues of fact have been raised herein. Rather, the matters are purely questions of law and statutory interpretation. As such, in the context of a motion to dismiss, the Court may render a determination and declare the rights of the parties (Spilka v. Town of Inlet, 8 AD3d 812, 813 [3rd Dept. 2004]). Now that this matter is fully concluded, the Court will issue said declarations below in compliance with CPLR §3001 (*See*, Stonegate Family Holdings, Inc. v. Revolutionary Trails."

This paragraph is multitudinously fraudulent. To the extent that "no issues of fact have been raised", it is because the documentary evidence, both as furnished by plaintiffs and as furnished by AAG Kerwin, substantiates the causes of action of plaintiffs' complaint and supplemental complaint, entitling plaintiffs to summary judgment. That is why the decision conceals ALL the specifics of plaintiffs' allegations, as likewise, ALL specifics of defendants' "documentary evidence" upon which, in whole or in part, it is dismissing plaintiffs' five causes of action.[22]

The decision's assertion that "no issues of fact have been raised" and that "the matters are purely questions of law and statutory interpretation" is its pretext for issuing declaratory judgments "in compliance with CPLR §3001"[23]. In so doing, it does not reveal that plaintiffs have brought a declaratory judgment action, or that they have done so pursuant to State Finance Law Article 7-A. Indeed, the decision goes out of its way to conceal that plaintiff have brought a declaratory judgment actions, as may be seen from its materially abridged paraphrase of *Spilka* to remove its reference to "a declaratory judgment action".

The relevant language from *Spilka* that Justice McDonough materially expurgates is as follows:

> "Where no question of fact is raised but only a question of law or statutory interpretation is presented on a motion to dismiss a declaratory judgment action, the court may render a determination and declare the rights of the parties (*see*

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[22] *Cf.*, *Kurylov v Icahn School of Medicine at Mount Sinai*, 139 A.D.3d 451 (1st Dept. 2016) ("the questions raised about whether plaintiff has any evidence…are not solely ones of law or statutory interpretation.").

[23] CPLR §3001, entitled "Declaratory judgment", states, in pertinent part:

> "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

> *Washington County Sewer Dist. No. 2 v White, 177 A.D.2d 204, 206, 581 N.Y.S.2d 485 [1992]; see also Hopkinson v Redwing Constr. Co., 301 A.D.2d 837, 837-838, 754 N.Y.S.2d 86 [2003]*)." (underlining added).

Then, too, the decision omits any paraphrase or quote of the next two sentences from *Spilka* – the first of which is:

> "This Court may convert a motion to dismiss to a motion for summary judgment (*see* CPLR 3211 [c]), and the notice of such conversion is excepted where only questions of law are raised, they have been fully briefed by the parties and such treatment is requested by one party (*see Historic Albany Found. v Breslin, 282 A.D.2d 981, 983-984, 724 N.Y.S.2d 113 [2001], lv dismissed 97 N.Y.2d 636, 760 N.E.2d 1284, 735 N.Y.S.2d 489 [2001]; Four Seasons Hotels v Vinnik, 127 A.D.2d 310, 320, 515 N.Y.S.2d 1 [1987]*)."

Quite possibly, the reason the decision purports that "no issues of fact have been raised" is to confer on defendants a summary judgment dismissal of plaintiffs' supplemental complaint, without revealing that this is what it is doing. Is this the explanation for the erroneous first ordering paragraph (at p. 8) dismissing the supplemental complaint "pursuant to CPLR §3212", which is summary judgment?

As for the further sentence in *Spilka*:

> "If defendant prevails on any point, the proper determination would be a declaration in its favor rather than dismissal of the complaint (*see Bresky v Ace INA Holdings, 287 A.D.2d 912, 913, 731 N.Y.S.2d 791 [2001]*).",

as well as its referred-to citation to the Third Department decision in *Bresky*, which states:

> "since plaintiff sought a declaratory judgment in this action, the proper remedy should have been a declaration in favor of defendant rather than the dismissal of the complaint (*see, Maurizzio v Lumbermens Mut. Cas. Co., 73 NY2d 951, 954*)",

such underscores precisely what plaintiffs had identified in the record before Justice McDonough, prior to his October 9, 2014 decision dismissing their first, second, and third causes of action[24] and, thereafter, by their fifth, sixth, and seventh causes of action (¶¶171-172; 181, 196), *to wit*, that

[24] See plaintiffs' May 16, 2014 memorandum of law in opposition to AAG Kerwin's April 18, 2014 dismissal motion and in support of plaintiffs' cross-motion for summary judgment and other relief, pp. 7-8.

dismissals are "not appropriate" in declaratory judgment actions, but, rather declarations in defendants' favor.[25]

As for the decision's assertion that it will issue declarations "Now that this matter is fully concluded", such presumably is to explain away what plaintiffs' fifth, sixth, and seventh causes of action had pointed out (¶¶171-172; 181, 196): Justice McDonough's failure to have rendered declarations in his October 9, 2014 decision, which had instead, improperly, dismissed plaintiffs' first, second, and third causes of action. Justice McDonough's cited case, *Stonegate Family Holdings, Inc. v. Revolutionary Trails* – whose caption he gives, but no legal citation, 73 A.D.3d 1257 (3rd Dept. 2001) – is not to the contrary.

The Decision's Section Entitled "Leave to Serve a Second Supplemental Complaint"

Justice McDonough's dismissal of plaintiffs' five causes of action – based on NO evidence and on perfunctory legal grounds shown to be inapplicable by the very causes of action he dismisses – is the predicate for its denying "leave to serve a second supplemental complaint" (at p. 7). The decision states:

> "The Court has considered the parties' respective arguments as to the issue of plaintiffs' request for leave to serve a second supplemental complaint. Plaintiffs' second supplemental complaint asserts eight new causes of action. The Court denies leave to serve a second supplemental complaint as to causes of action 9-12, based on the Court's dismissal of plaintiffs' original eight causes of action. Under these circumstances, the Court finds that causes of action 9-12 are 'patently devoid of merit' (Lucido v. Mancuso, 49 AD3d 220, 229 [2nd Dept. 2008]). As to causes of action 13-16, the Court finds that the allegations therein arise out of materially different facts and legal theories as opposed to the original four causes of action and the additional four causes of action set forth in the supplemental complaint. Accordingly, the Court finds that defendants have adequately established the prejudice that would flow from allowing a second supplemental complaint setting forth entirely new facts, theories and causes of action several years after service of the original complaint (*see generally*, Brunetti v Musallam, 59 AD3d 220, 223 [1st Dept. 2009])." (at p. 7).

This is utterly fraudulent – proven by plaintiffs' "respective arguments" which the decision does not reveal, let alone determine with findings of fact and conclusions of law. These "arguments" are set forth at ¶¶2-8 of plaintiff Sassower's March 23, 2016 affidavit in support of plaintiffs' order to show cause for leave to file the second supplemental complaint – and by plaintiff Sassower's April 22,

[25] Matthew Bender & Co, "ANALYSIS of CPLR 3001, New York Civil Practice: CPLR P 3001.18 (David Ferstendig); also, *Washington County Sewer Dist. No. 2 et al. v. White, et al*., 177 A.D.2d 204 (3rd Dept 1992).

2016 reply affidavit and plaintiffs' April 22, 2016 reply memorandum of law, each in further support of their leave to file.

Suffice to say that the merit of plaintiffs' ninth, tenth, eleventh, and twelfth causes of action of their verified second supplemental complaint (¶¶301-384) is obvious from their content, supported by fact, evidence, and law. These four causes of action pertain to fiscal year 2016-2017 and the decision does not contest that they parallel the four causes of action of plaintiffs' verified complaint pertaining to fiscal year 2014-2015 (¶¶ 76-126) and the four causes of action of plaintiffs' verified supplemental complaint pertaining to fiscal year 2015-2016 (¶¶169-236). As the record establishes that plaintiffs were entitled to summary judgment as to each of those eight causes of action, so it establishes that their ninth, tenth, eleventh, and twelfth causes of action are not only meritorious, but entitle them to summary judgment, as well.

As for plaintiffs' thirteenth, fourteenth, fifteenth, and sixteenth causes of action (¶¶385-470), the decision's bald pretense that "the allegations therein arise out of materially different facts and legal theories" is a repetition of AAG Kerwin's fraudulent opposition papers, exposed by pages 11-14 of plaintiffs' April 22, 2016 memorandum of law. And even more completely than AAG Kerwin had, the decision conceals the ENTIRE content of the thirteenth, fourteenth, fifteenth, and sixteenth causes of action, as likewise the relevant content of plaintiffs' second, fourth, sixth, and eighth causes of action (¶¶108, ¶113-126, ¶¶190, ¶¶203-236).

Plaintiffs' thirteenth, fourteenth, and fifteenth causes of action (¶¶385-457) particularize the unconstitutionality, *as written and as applied*, of Chapter 60, Part E of the Laws of 2015, establishing the Commission on Legislative, Judicial and Executive Compensation – and parallel the unconstitutionality, *as written and as applied*, of the materially identical statute, Chapter 567 of the Laws of 2010, establishing the predecessor Commission on Judicial Compensation – encompassed by plaintiffs' second and sixth causes of action (and, indirectly, by their fourth and eighth causes of action), proven by their October 27, 2011 opposition report and by their March 30, 2012 verified complaint in their declaratory judgment action based thereon.

As for plaintiffs' sixteenth cause of action (¶¶458-470), pertaining to the unconstitutionality of three-men-in-a-room budget-dealing, *as unwritten and as applied*, it only elaborates upon, with specifics, what their fourth and eighth causes of action set forth (¶¶113-126, 203-236). The final two paragraph of the eighth cause of action of their supplemental complaint reflect this, stating:

> "235. Of course, identically to last year, the real action is taking place behind closed doors by 'three men in a room' deal-making by defendant CUOMO, defendant SKELOS, and defendant HEASTIE – expanded to a fourth man by defendant KLEIN.
>
> 236. Plaintiffs repeat the last paragraph of their verified complaint, ¶126, altering it only to substitute defendant HEASTIE's name for defendant SILVER:

> '…one need only examine the Constitutional, statutory, and Senate and Assembly rule provisions relating to openness – such as Article III, §10 of New York's Constitution '…The doors of each house shall be kept open…' ; Public Officers Law, Article VI 'The legislature therefore declares that government is the public's business...'; Senate Rule XI, §1 'The doors of the Senate shall be kept open'; Assembly Rule II, §1 'A daily stenographic record of the proceedings of the House shall be made and copies thereof shall be available to the public' – to see that government by behind-closed-doors deal-making, such as employed by defendants CUOMO, SKELOS, HEASTIE, SENATE, and ASSEMBLY, is an utter anathema and unconstitutional – and that a citizen-taxpayer action could successfully be brought against the whole of the Executive budget.'"

All of the foregoing is set forth, with greatest particularity, by plaintiffs' April 22, 2016 reply memorandum of law in further support of their March 23, 2016 order to show cause. The decision neither identifies nor addresses ANY of its specification of fact and law – for the obvious reason that it establishes plaintiffs' entitlement for leave to file their verified second supplemental complaint, overwhelmingly and *as a matter of law*.

It is under this final section heading "Leave to Serve a Second Supplemental Complaint" (at pp. 7-8) that the decision stashes its single paragraph pertaining to recusal, notwithstanding the issue of Justice McDonough's disqualification was raised by plaintiffs not only with respect to their March 23, 2016 second supplemental complaint, but with respect to their September 22, 2015 cross-motion for summary judgment and other relief, by their November 5, 2015 reply memorandum of law (at p. 4).

The decision then leaves a gap of a few lines before adding:

> "Plaintiffs' remaining arguments and requests for relief have been considered and found to be lacking in merit. In light of the Court's dismissal of the supplemental complaint and denial for leave to serve a second supplemental complaint, the Court also concludes that injunctive relief is unwarranted here." (at p. 8).

Here, too, Justice McDonough furnishes no specificity to support his bald assertions. He does not identify what "Plaintiffs' remaining arguments and requests for relief" might be or why they have been "found to be lacking in merit". Nothing in the record supports this – and, certainly, if Justice McDonough actually "considered" such "remaining arguments and requests for relief" – as was his duty – he could have readily specified what he was talking about.

As for "injunctive relief [being] unwarranted here", this, too, is not only false, but fraudulent. Injunctive relief was compelled, *as a matter of law*, because the record establishes that plaintiffs were entitled to summary judgment on their causes of action – and plaintiffs' April 22, 2016 reply memorandum of law, which, pursuant to Justice McDonough's footnote 5, his decision does not list among its "Papers Considered", lays out the state of the record concisely.

The decision's Concluding Clause "Based upon the foregoing, it is hereby…"

Beneath the clause "Based upon the foregoing, it is hereby" (at p. 8), the decision sets forth six ordering paragraphs and six declaratory paragraphs.

1. The Six Ordering Paragraphs (at pp. 8-9)

As hereinabove set forth (at pp. 4-6, *supra*), the amended decision and order corrects two of the six ordering paragraphs of Justice McDonough's initial July 15, 2016 decision, but leaves intact an additional error – this, in the first ordering paragraph – so as to fraudulently dismiss plaintiffs' verified supplemental complaint, not only pursuant to CPLR §3211, but §3212.

There is no ordering paragraph pertaining to the fourth cause of action of plaintiffs' verified complaint – and none granting defendants summary judgment pursuant to CPLR §3212, the provision under which AAG Kerwin moved with respect to it.

For that matter, there is no ordering paragraph granting defendants' motion to dismiss plaintiffs' verified supplemental complaint pursuant to CPLR §§3211(a)(1), (a)(2), and (a)(7).

2. The Six Declaratory Paragraphs (at p. 9)

The decision's six declaratory paragraphs are, *on their face*, overbroad and deficient – and, when compared to the record, fraudulent. In boiler-plate fashion, each identically states, without the slightest specificity, that the Legislative and Judiciary budgets for fiscal years 2014-2015 and 2015-2016, as likewise the Legislative/Judiciary budget bills for those years, are:

> "not: (1) a wrongful expenditure; (2) a misappropriation; (3) illegal; or (4) unconstitutional".

At minimum, these declarations were required to identify the cherry-picked grounds upon which the instant decision and the October 9, 2014 decision dismissed the causes of action on which the declarations rest. Indeed, the declarations are so generic that Justice McDonough is able to avail himself of six to dispose of the eight causes of action of plaintiffs' complaint and supplemental complaint: combining the substantively different third and fourth causes of action of the complaint into a single declaration, as likewise the substantively different eleventh and twelfth causes of action of the supplemental complaint into a single declaration.

CPLR §3017(b), entitled "Declaratory judgment", states:

> "In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested…" (underlining added).

The obvious reason for this requirement is so that a court's declaration can be responsive thereto.

Plaintiffs complied with their obligation pursuant to CPLR §3017(b). Their verified complaint (pp. 44-45) and their supplemental complaint (pp 39-40), by their "PRAYER FOR RELIEF/WHEREFORE" clauses, specify the respects in which the Legislative budget, the Judiciary budget, and the combined Legislative/Judiciary budget bills were each "a wrongful expenditure, misappropriation, illegal, and unconstitutional."

Thus, for example, the requested declarations for the sixth cause of action:

> "that the Judiciary's proposed budget for fiscal year 2015-2016, embodied in Budget Bill #S.2001/A.3001, is a wrongful expenditure, misappropriation, illegal and unconstitutional because the Judiciary budget is so incomprehensible that the Governor, Budget Director, and Legislature cannot agree on its cumulative cost and percentage increase; that its reappropriations are not certified, including as to their suitability for that purpose, and violate Article VII, §7 and Article III, §16 of the New York State Constitution and State Finance Law §25, and that both by its reappropriations and appropriations it creates a 'slush fund', concealing relevant costs, including of the three-phase judicial salary increase, now fully implemented despite its statutory violations, fraudulence, and unconstitutionality, demonstrated by plaintiffs' October 27, 2011 Opposition Report to the Commission on Judicial Compensation's August 29, 2011 Report recommending the three-phase judicial salary increase" (verified supplemental complaint, "WHEREFORE", pp. 39-40).

This provided Justice McDonough with the declaration that he could have readily adapted to state the negative. However, doing so would have exposed that his simplistic dismissal of the sixth cause of action – and identically simplistic dismissal of the second cause of action – concealed essentially ALL of plaintiffs' particularized grounds of misappropriation, unlawfulness, and unconstitutionality, rested on NO EVIDENCE, and flew in the face of a record establishing plaintiffs' entitlement, *as a matter of law*, to all their requested declarations.

Here, as with every other aspect of the decision, the best proof of Justice McDonough's fraud are plaintiffs' memoranda of law – omitted by the decision's recitation of "Papers Considered" (at pp. 10-11).