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

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

Plaintiffs,

-v-

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

Defendants.

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Index #160941/2013

Reply Affidavit in Further Support of the Proposed Intervening Plaintiff's Motion for Reargument/Renewal, Vacatur & Other Relief

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

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the *pro se* proposed intervening plaintiff in this declaratory judgment action, acting on my own behalf and on behalf of the People of the State of New York. This affidavit is submitted in reply to the opposition submissions to my June 17, 2014 motion for reargument/renewal, vacatur and other relief, filed by attorneys representing and purporting to represent the parties.

2. Additionally, this affidavit is submitted in further support of the motion. Specifically, it furnishes facts and evidence in further support of the motion's second branch: vacating the April

24, 2014 stipulation of discontinuance (Exhibit 13-c(1))[1] for "fraud, misrepresentation, or other misconduct of an adverse party", pursuant to CPLR §5015(a)(3), inasmuch as none of plaintiffs' three counsel were authorized to discontinue this taxpayer-paid declaratory judgment action, which they were never even authorized to commence.

3. That plaintiffs' three counsel commenced and prosecuted this action, at a cost to this State's taxpayers of hundreds of thousands of dollars – and then sought, by a discontinuance, to rob the taxpayers of the return on their financial investment by depriving them of the declaratory judgment that is due them – reinforces this Court's duty to impose "terms and conditions" for discontinuance, pursuant to CPLR §3217, along the lines of what I proposed at the April 28, 2014 oral argument (Exhibit 14, pp. 29-31). Such proposed "terms and conditions" should now be modified to afford the Senate and Assembly the opportunity to pass resolutions authorizing their inclusion as co-plaintiffs with me in securing judicial declarations, on behalf of the People of the State of New York, on the three causes of action in my verified complaint in which they are interested, over and beyond declarations on the causes of action of their own complaint.

4. This affidavit is also submitted in further support of the motion's first branch, as it furnishes additional facts and evidence, in support of reargument, that this litigation is not moot – and that it falls within recognized exceptions to the doctrine of mootness – and in support of renewal, as it furnishes additional facts and evidence of this Court's *actual* bias, mandating disclosure by the Court in the absence of its disqualification.

5. My accompanying memorandum of law establishes that counsel's opposition is not only frivolous, but "fraud on the court", as that term is defined. I incorporate it by reference, swearing to its truth. The showing made therein and by this affidavit reinforces the motion's third

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[1] Exhibits 8-17 are annexed to my June 17, 2014 affidavit in support of reargument/renewal/vacatur.

branch, for referral of the parties and their counsel to disciplinary and criminal authorities, pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, as well as emendation of the motion's fourth branch "for such other and further relief as may be just and proper" to specifically include imposition of sanctions and costs against the parties and their attorneys, pursuant to §130-1.1 *et seq.*, and a determination affording treble damages, pursuant to Judiciary Law §487, which I hereby request.

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

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* * *

The Evidence that this Declaratory Judgment Action Belongs to the Taxpayers Who Paid for It – Not the Senate and Assembly Who Did Not Authorize It and Whose Counsel Could Not Represent Any of the Plaintiffs, Including in Stipulating a Discontinuance

7. ¶¶10-11 of my June 17, 2014 affidavit in support of my reargument/renewal/vacatur motion and pages 4-5 of its incorporated analysis of the Court's April 30, 2014 decision (Exhibit 17) directly challenge the identity of the parties and their counsel – including as grounds for vacatur of the stipulation of discontinuance pursuant to CPLR §5015(a)(3). This is entirely concealed by opposing counsel's submissions, which offer no response, let alone evidence. Tellingly, Assistant Solicitor General Vale's affirmation refers to "Senators Dean G. Skelos and Jeffrey D. Klein and

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Exhibits 1-7 are annexed to my April 23, 2014 affidavit in support of my order to show cause. My April 23,

Speaker Sheldon Silver" as acting "purportedly on behalf of the Senate, Assembly, and all legislators" (at ¶5, underlining added) – reflective of her knowledge that these purported plaintiffs' counsel have NOT established their entitlement.

8. In the context of the Court's April 30, 2014 decision (Exhibit 8-b) asserting that "Counsel for all the parties have signed a Stipulation of Discontinuance", my analysis presented the pertinent facts and law, including by quoting from ¶¶3-4 of my April 23, 2014 affidavit in support of my order to show cause to intervene. Contained therein was a citation to the New York Court of Appeals decision in *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001), that the Assembly Speaker has no authority to litigate on behalf of the Assembly, absent an Assembly resolution. The annotating footnote 4 was to my FOIL/records requests to the Secretary of the Senate and the Assembly Records Access Officer – and their responses. That exchange of correspondence was Exhibits 1-7 to my April 23, 2014 affidavit.

9. Exhibit 1 was my December 16, 2013 letter, requesting:

> "all publicly accessible documents pertaining to the retention of the law firms Kirkland & Ellis, LLP (Michael J. Garcia, Esq.); Kasowitz, Benson, Torres & Friedman, LLP (Marc E. Kasowitz, Esq.); and Loeb & Loeb, LLP (Jay K. Musoff, Esq.) and any other law firms or attorneys for purposes of legal representation and litigation against the Commission to Investigate Public Corruption [and]
> ...any resolutions passed by the Senate and Assembly with respect thereto."

10. The Secretary of the Senate's response, by a December 23, 2013 e-mail (Exhibit 2), was that the requested items "are not in the possession of the Senate. Fully executed contracts do not exist at this time." Almost three months later, by a March 13, 2014 e-mail (Exhibit 4), he repeated: "no fully executed contracts exist at this writing".

2014 proposed verified complaint annexes Exhibits A-W.

11. By contrast, the Assembly Records Access Officer responded by a December 23, 2013 letter (Exhibit 5), stating:

> "Attached please find the Justification for Contract between the New York State Assembly and Kasowitz, Benson, Torres & Friedman, LLP.
>
> Additionally, please note, there are no resolutions passed by the Assembly and Senate with respect thereto."

On March 18, 2014, she responded by a further letter (Exhibit 7), stating:

> "Enclosed please find a letter amendment to the contract previously provided to you, which is the only subsequent document responsive to your request.
>
> Additionally, as was true at the time of the Assembly's prior response, there are no resolutions passed by the Assembly and Senate with respect thereto."

12. This was the evidentiary record that the Court had before it on April 28, 2014, at the oral argument of my order to show cause for a stay, at which neither Mr. Garcia nor anyone from his law firm, Kirkland and Ellis, LLP, appeared for their purported clients, the Senate and Dean Skelos as member and Temporary Senate President, and when Mr. Kasowitz also did not appear, but, rather, Jennifer Recine, Esq. of his law firm, who stated her appearance as "on behalf of Sheldon Silver in his individual capacity and as member of the leadership of the Assembly" (Exhibit 14, p. 3) —in other words, not on behalf of the Assembly.

13. I pointed this out to the Court, stating:

[Exhibit 14, pp. 6-7]

> "At the outset, I must make reference to the fact that not all counsel is here represented. We have missing counsel for the Senate…
>
> …missing is Kirkland & Ellis who represents Temporary Senate President Skelos and purportedly the New York State Senate. Mr. Musoff of the firm Loeb & Loeb has an appearance only for Jeffrey Klein as Temporary Senate President, not purporting to represent anyone but Jeffrey Klein.

So there is missing any appearance by the firm of Kirkland & Ellis, and I think notice can be taken that that is a large law firm that could have sent a representative other than Mr. Garcia if he was actually engaged, but I do additionally wish to point out and perhaps it would be significant to have the court reporter read back the entry of appearance by Ms. Recine of the firm Kasowitz, Benson, Torres & Friedman because she, to my recollection, did not purport to be representing the Assembly but only Speaker Silver in his capacity as – she said Assembly Speaker Silver in that capacity and the leadership.

And there is a fundamental issue. You asked their position and they identified that they oppose the intervention. And there is a threshold question, with all due respect, as to whether or not they are properly representing the parties that are before the Court, whether there are conflict of interest issues."

[Exhibit 14, p. 16]

"...there is a question as to whether or not the Senate and Assembly ever had representation. And parenthetically, Your Honor, this is where we get back to the disqualification and conflict of interest with counsel, because when you ask their positions, they're paid – this litigation, both its prosecution and defense was paid from tax dollars so that there could be a determination of the serious constitutional separation of powers issues.

Does the Legislature have an ongoing interest in the determination of that issue so that never again does this Governor or any other Governor do a thing like what was done by Governor Cuomo?"

[Exhibit 14, pp. 23-24]

"...you still don't have any representation of the Senate and Assembly, so I don't know how you can discontinue an action which has in the caption Senate and Assembly and they are not represented by counsel."

Pertinent portions of this exchange were quoted by my analysis (Exhibit 17, p. 5).

14. Consequently, it was incumbent upon Messrs. Garcia, Kasowitz, and Musoff, in opposing my reargument/renewal/vacatur motion, to have come forward with evidence establishing that the Senate and Assembly are parties represented by them in this declaratory judgment action or, if not, that they can properly represent – at taxpayer expense – the individual plaintiffs, Skelos, Silver, and Klein. <u>This they have not done.</u>

15. Subsequent FOIL/records requests have revealed that counsel for the so-called plaintiffs had no authorization to bring this declaratory judgment action. The evidentiary proof is as follows:

16. The "Justification for Contract" with the Kasowitz firm (Exhibit 18-a) that the Assembly Records Access Officer transmitted by her December 23, 2013 letter to me (Exhibit 5) states, in pertinent part:

> "The Assembly has asked the firm of Kasowitz, Benson Torres Friedman LLP to serve as special counsel advising the Assembly in formulating or amending legislation or policies related to campaign finance, the electoral process, lobbying, conflicts of interest and ethics of public officers, intended to restore the public trust and increase accountability in state government. As special counsel, Kasowitz, Benson Torres Friedman LLP will also advise the Assembly in matters related to the separation of powers and legislative privileges and immunities and provide counsel if litigation arises related to these issues, assist in managing compliance and responding to requests for information in connection with Executive inquiries." (underlining added).

17. Its annexed contract with the Kasowitz firm, #C111945, was signed by Mr. Kasowitz on August 19, 2013 and signed by Assembly Administrative Counsel Amy Metcalfe on August 22, 2013 (Exhibit 18-b). It was "approved as to form" by the Attorney General's Principal Attorney in the "Contract Approval Unit", Lorraine Remo, on September 25, 2013, and, thereafter, approved by the Comptroller's Director of Contracts Charlotte Breeyear on October 10, 2013. The contract limited compensation for legal services to $50,000 and stated, in its paragraph D:

> "The retained attorney or law firm will represent the New York State Assembly in judicial litigation related to the services to be provided under this agreement only when such services are specifically requested by the Assembly and approved by the Attorney General. Such approval must be requested separately for each matter to be litigated and must be received prior to the commencement of services." (underlining added).

18. In other words, the contract, expressly, did NOT authorize this declaratory judgment action – or any other litigation – but required, for each, a specific request by the Assembly, approved by the Attorney General, and "received prior to the commencement of services." No such documents were furnished by the Assembly Records Access Officer on December 23, 2013 (Exhibit 5), notwithstanding this declaratory judgment action had been filed more than a month earlier, on November 22, 2013, and there was then pending an action by plaintiffs to quash the subpoenas and at least six motions to intervene in other proceedings involving the subpoenas.

19. Three separate paragraphs of the Assembly contract with the Kasowitz firm (Exhibit 18-b) reflect the approvals of both the Attorney General and Comptroller necessary for the contract to take effect and be modified:

Paragraph S:

> "This agreement will not take effect until approved, in writing, hereon by the Offices of the Attorney General and State Comptroller of the State of New York." (underlining added).

Paragraph J:

> "The Assembly may, at any time, by written notice, make changes in or additions to work or services within the general scope of this contract upon the approval of the Office of the Attorney General and the Office of the State Comptroller. ..." (underlining added).

Paragraph O:

> "No waiver or modification of this Agreement or of any covenant, condition, or limitation herein contained shall be valid unless in writing, executed by the parties hereto, and approved by the Offices of the Attorney General and Comptroller of the State of New York ..." (underlining added).

20. The contract also included – as its Appendix A – a "Standard Clauses for New York State Contracts" whose §3 entitled "Comptroller's Approval", states:

"In accordance with Section 112 of the State Finance Law[2]...if this contract exceeds $50,000...or if this is an amendment for any amount to a contract which, as so amended, exceeds such statutory amount...it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office..." (underlining added).

21. As for the "letter amendment" to the Kasowitz contract (Exhibit 19), which the Assembly Records Access Officer supplied on March 18, 2014 as the "only subsequent document responsive to [my] request" (Exhibit 7), it was dated November 27, 2013 and signed by Assembly Administrative Counsel Metcalfe and Mr. Kasowitz. It amended the $50,000 contract to $350,000, but did not state the reason therefor. Absent was any mention of, let alone request for, litigation services – which, pursuant to the contract, were required to be specific requests for each matter being litigated.

22. Consequently, on July 1, 2014, I made FOIL requests to the Records Access Officers of the Attorney General and Comptroller (Exhibits 20-a, 21-a) for records pertaining to their approvals of contracts with the Kasowitz firm. Each FOIL request also sought records pertaining to the Attorney General's and Comptroller's approvals of contracts for Kirkland & Ellis and Loeb & Loeb, whose legal services were presumably pursuant to comparable contracts.

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[2] In pertinent part, State Finance Law §112 reads:

2.(a) Before any contract made for or by any state agency, department, board, officer, commission, or institution...shall be executed or become effective, whenever such contract exceeds fifty thousand dollars in amount...it shall first be approved by the comptroller and filed in his or her office... The comptroller shall make a final written determination with respect to approval of such contract within ninety days of the submission of such contract to his or her office unless the comptroller shall notify, in writing, the state agency, department, board, officer, commission, or institution, prior to the expiration of the ninety day period, and for good cause, of the need for an extension of not more than fifteen days, or a reasonable period of time agreed to by such state agency, department, board, officer, commission, or institution and provided, further, that such written determination or extension shall be made part of the procurement record pursuant to paragraph f of subdivision one of section one hundred sixty-three of this chapter.

(b) Whenever any liability of any nature shall be incurred by or for any state department, board, officer, commission, or institution, notice that such liability has been incurred shall be immediately given in writing to the state comptroller."

23. By a July 24, 2014 letter (Exhibit 21-c), the Comptroller's Records Access Officer furnished 86 pages of documents, all relating to Assembly contract #C111945 with the Kasowitz firm.[3] Among these, a January 23, 2014 e-mail from the Attorney General's Deputy State Counsel, Meg Levine, to the Comptroller's Counsel, Nancy Groenwegen, stating:

> "the Office of the Attorney General waives its contractual right to review amendments to the Assembly's contract with Kasowitz Benson (C111945), and recuses itself from any further review of the Kasowitz Benson contract due to the litigation pending in connection with the Moreland Commission." (Exhibit 21-f).

24. There was also a February 20, 2014 letter from the Comptroller's Director of Contracts Breeyear to Assembly Administrative Counsel Metcalfe, instructing that revision of the contract was required:

> "...as the Attorney General (AG) has waived its contractual right to review amendments to Contract C111945, and has recused itself from any further review of the contract due to litigation pending in connection with the Moreland Act 'Commission to Investigate Public Corruption,' this contract must be amended to revise the various clauses that mention the AG to reflect the fact that their approval is no longer required. Any further amendments submitted to increase the contract cap must also revise the contractual language relative to the AG's need for approval. (Exhibit 21-g, underlining added).

Nevertheless, NONE of the 86 pages produced by the Comptroller on July 24, 2014 included any revised contract reflecting that the Attorney General approval was "no longer required".

25. The Comptroller's February 20, 2014 letter to Assembly Administrative Counsel (Exhibit 21-g) also recommended that "the next amendment, here applicable" (underlining added) incorporate "Outside Counsel Contract Guidelines", which it enclosed. Among its provisions, §IIG expressly stating:

> "If covered by Executive Law Section 63(1), the Agreement shall not be effective without the written approval of the Office of the Attorney General. If covered by

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[3] All 86 pages are incorporated herein by reference. As the Court has denied me permission to e-file, they are posted on CJA's webpage for this motion, accessible here: http://www.judgewatch.org/web-pages/searching-nys/commission-to-investigate-public-corruption/holding-to-account/6-17-14-reargument.htm .

> State Finance Law Section 112, the Agreement shall not be effective without the written approval of the Office of the Attorney General and the Office of the State Comptroller Bureau of Contracts." (underlining added).

26. As for my FOIL request for contracts for legal services between the Senate and Kirkland & Ellis and the Senate and Loeb & Loeb, the Comptroller's July 24, 2014 letter expressly stated:

> "this office does not have any contracts relating to legal services for the Senate with Kirland (sic) & Ellis LLP nor Loeb & Loeb, LLP" (Exhibit 21-c).

27. By letter dated August 6, 2014, the Attorney General's Records Access Officer responded to my July 1, 2014 FOIL request to him by enclosing 18 pages.[4] These consisted of the $50,000 Assembly contract #111945 with the Kasowitz firm, a September 3, 2013 letter from Assembly Administrative Counsel Metcalf to the Attorney General's Principal Attorney in the "Contract Approval Unit", Lorraine Remo, and a September 18, 2013 letters from Assembly Administrative Counsel Metcalf to Deputy Attorney General Levine (Exhibits 20-d, 20-e). The Attorney General's Records Access Office furnished no documents relating to contracts between the Senate and Kirkland & Ellis and Loeb & Loeb, though that was not made explicit in his letter (Exhibit 20-c), as it had in the Comptroller's. Nor did any of these 18 pages include a single record pertaining to the November 27, 2013 letter-amendment increasing compensation to the Kasowitz firm by $300,000, produced by the Comptroller. Thus, the Attorney General's 18 pages did not include the December 4, 2013 letter of Assembly Administrative Counsel Metcalfe to the Attorney General's "Contract Approval Unit" Principal Attorney Remo (Exhibit 21-g) transmitting that amendment and requesting that the Attorney General "approve as to form and transmit to the Office

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[4] All 18 pages are incorporated herein by reference. As the Court has denied me permission to e-file, they are posted on CJA's webpage for this motion, accessible here: http://www.judgewatch.org/web-pages/searching-nys/commission-to-investigate-public-corruption/holding-to-account/6-17-14-reargument.htm.

of the State Comptroller for their approval". Nor did it include the January 23, 2014 e-mail from the Attorney General's Deputy State Counsel Levine to the Comptroller's Counsel Groenwegen (Exhibit 21-h) reiterating an oral conversation between them as to the Attorney General's recusal from review of the Kasowitz contract.

28. NONE of the documents furnished by the Comptroller and Attorney General pertaining to Assembly contract #C111945 with the Kasowitz firm indicated any Assembly request for services for "judicial litigation", "requested separately for each matter to be litigated" and "received prior to the commencement of services" – as the contract expressly required.

29. On July 30, 2014, I again wrote the Secretary of the Senate (Exhibit 22-a), furnishing him with a FOIL request for:

> "(1) copies of all billings and invoices from Kirkland & Ellis, LLP for services rendered to the Senate and/or Temporary Senate President Dean Skelos for legal representation and/or litigation against the Commission to Investigate Public Corruption – and records reflecting all payments made to Kirkland & Ellis;
>
> (2) copies of all billings and invoices from Loeb & Loeb, LLP for services rendered to Temporary Senate President Jeffrey Klein for legal representation and/or litigation against the Commission to Investigate Public Corruption – and records reflecting all payments made to Loeb & Loeb;
>
> (3) all contracts – whether or not 'fully-executed' – between the Senate and Kirkland & Ellis, LLP retaining it for legal representation and litigation against the Commission to Investigate Public Corruption;
>
> (4) all contracts – whether or not 'fully-executed' – between the Senate and Loeb & Loeb, LLP retaining it, on behalf of Temporary Senate President Klein, for legal representation and litigation against the Commission to Investigate Public Corruption;
>
> (5) any resolutions passed by the Senate authorizing legal representation and/or litigation against the Commission to Investigate Public Corruption, including by outside counsel."

30. The Secretary of the Senate responded that the requested records "are not subject to disclosure pursuant to Senate rules" (Exhibit 22-c). Upon my requesting clarification that this meant "ALL the records requested by my July 30, 2014 letter, he responded: "no documents/records requested are required to be subject to disclosure per Senate Rules." (Exhibits 22-d, 22-e).

31. I now believe that the meaning of the Secretary of the Senate's December 23, 2013 FOIL response "Fully executed contracts do not exist at this time" (Exhibit 2) and of his March 13, 2014 FOIL response "no fully executed contracts exist at this writing" (Exhibit 4) is that either such contracts as were made with Kirkland & Ellis and Loeb & Loeb as special counsel had not been submitted for approval to the Attorney General and Comptroller – or, if submitted, were not approved. I also believe they could not have been approved because the Legislature had no reason to retain more than a single special counsel inasmuch as the positions of the Senate and Assembly are perfectly aligned, with the consequence that the Kasowitz firm could represent both chambers without conflict of interest. So, too, the same special counsel as was representing Temporary Senate President Skelos – Kirkland & Ellis – could, without conflict, represent Temporary Senate President Klein, without need of a further counsel, Loeb & Loeb.

32. Quite possibly, the Senate has a practice of inserting in the very body of its contracts retaining special counsel the "Justification for Contract". Thus, for example, the Senate's April 1, 2008 contract with the law firm Lewis & Fiore, Esqs. for representation in the judicial compensation lawsuit brought by then Chief Judge Judith Kaye (Exhibit 23). It asserted, at its very outset, as if in resolution form, "WHEREAS, the Senate in defense of said action has different legal positions, defenses and arguments than the Assembly and the Governor" – and it annexed, as its Appendix B, the proposal of Lewis & Fiore, Esqs. (Exhibit 23-b), expressly stating:

> "The Senate has an objective separate from the other defendants. Unlike the Assembly and the Governor, the Senate in the closing days of last year's session

passed a bill providing for exactly what the suit seeks to compel. To that end, our interest and our position in this litigation is in conflict with the Assembly which failed to adopt the Senate bill, and the Governor who, of course, was not then the Governor and had no power to act institutionally without the Assembly passing the pay raise bill." (at p. 3, underlining added).

33. At bar – and as reflected by ¶¶10-11 of my June 17, 2014 affidavit and pages 4-5 of its incorporated analysis (Exhibit 17) – there is conflict of interest. However, it is not between the Senate and Assembly, but between Skelos, Klein, and Silver, on the one hand, and the Senate and Assembly, on the other – and involves the very gravamen of the declaratory judgment action, namely, the facts giving rise to the establishment of the Commission and the Legislature's function and prerogatives, here impinged not only by the Governor, as purported by plaintiff's complaint, but by Skelos, Klein, and Silver, in collusion with him, as demonstrated by my April 23, 2014 order to show cause (moving affidavit: ¶¶3-4, 21-31) and verified complaint: ¶¶45-48, 106-111).

The Further Evidence that this Declaratory Judgment Action is Not Moot and Falls Within Recognized Exceptions to Mootness

34. As particularized by my accompanying memorandum of law, counsel do not address, indeed they conceal, the focally-presented evidence as to why this declaratory judgment action is not moot – evidence also concealed by the Court's decision (Exhibit 8-b):

(1) the Governor's still-live Executive Order #106 that established the Commission, which he has not withdrawn; and

(2) the Commission's living legacy: its December 2, 2013 preliminary report, on which the public is being led to detrimentally rely.

35. That the Commission is not legally disbanded because the Governor did not rescind Executive Order #106 was remarked upon by Governor Cuomo's challenger in the democratic primary, Zephyr Teachout, a Fordham Law School professor with an expertise in public corruption. On July 28, 2014, she wrote a letter to Attorney General Schneiderman, with copies to the Commission's Co-Chairs and Members, stating:

"The Governor has publicly announced to the press that he has 'disbanded' the Moreland Commission, but there is no executive order countermanding Executive Order 106. Therefore the Commission to Investigate Public Corruption has not been disbanded.

Unless an executive order is subject to mandatory renewal, the order continues in force until suspended.

The absence of a countermanding executive order leaves the original Executive Order legally alive..." (Exhibit 24-a, underlining added).[5]

36. As for the December 2, 2013 preliminary report, by which the Commission lives on, it is continually put forward as the basis for legislative action – as if it were a legitimate report of a legitimate body, rather than, as my April 23, 2014 order to show cause demonstrates[6], materially false and misleading. Thus, on July 28, 2014, Commission Co-Chair Fitzpatrick released a letter describing the preliminary report as "a template for any legislative body serious about ethical reform; a report that serves as a roadmap for any prosecutorial agency serious about rooting out public corruption..." (Exhibit 25-a). Three weeks later, on August 20, 2014, four Commission members, including Commission Co-Chair Rice signed onto a letter to every major candidate for the State

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[5] I contacted Professor Teachout about this letter (Exhibit 24-b), asking her if she would furnish me the legal authority on which she relied so that I might provide it to the Court. I also asked her whether she had received any answer to her letter from the Attorney General and Commissioners – and whether she had reviewed the record of this declaratory judgment action, which I had brought to her attention at the outset of her gubernatorial campaign so that she might champion the cause of honest government on behalf of ALL New Yorkers. I received no response.

Suffice to say, Professor Teachout has multitudinous ties to the same "good government" groups that had the inside-track with the Commission, born of a shared view that public campaign financing is the panacea for ending public corruption. As such, she was perfectly content with the unconstitutionality of Executive Order #106, *as written and as applied* – indeed, with rank corruption and disregard of conflict of interest rules – so long as their result was a recommendation of public campaign financing from the Commission. Notably, Professor Teachout not only testified before the Commission at its September 17, 2013 public hearing in support of public campaign financing and, presumably, was present when I testified that the Commission was corrupt and violating conflict of interest rules, but, thereafter, herself experienced, first-hand, the Commission's disregard for conflict of interest when its staff contacted her, a partisan of public campaign financing, to write its preliminary report.

[6] *See* ¶¶58-68 of my April 23, 2014 affidavit under the title heading "The December 2, 2013 Preliminary Report Manifests the Commission's Actual Bias and Self-Interest, Vitiating its Reliability and Endangering the Public in Material Respects".

Legislature[7] which, describing the preliminary report as "devastating", urged enactment of its recommendations of public campaign finance reforms (Exhibit 25-c).

37. As for exceptions to mootness, the Court may take judicial notice that throughout these many months there has been a mountain of news reporting, editorializing, and commentary about the Governor's creating and shuttering of the Commission and the lawfulness of his interference in its operations – demonstrative that the constitutional and legal questions presented by this declaratory judgment action are squarely within two recognized exceptions to mootness, recited by the analysis (Exhibit 17, p. 10) – without contradiction from counsel:

> "(3) the case involves a novel issue[n3] or significant or important questions not previously passed upon;[n4] and
> (4) the case involves a matter of widespread public interest or importance[fn5] or of ongoing public interest.[n6]"

The Further Evidence of this Court's Demonstrated Actual Bias in this Declaratory Judgment Action

38. No fair and impartial tribunal could fail to take steps to ensure that the record of the proceedings before it was preserved, as the law requires it to be. This Court, however, has had no such concern – including for purposes of properly adjudicating this reargument/renewal/vacatur for fraud motion.

39. Following the Court's April 30, 2014 decision, my entire April 23, 2014 order to show cause, which I had submitted to the Court in hard-copy, went missing, with no uploading of it onto the electronic docket. Making this worse was the fact that I could not myself upload the order to show cause on the e-docket because, at the April 28, 2014 oral argument, the Court had, without reason, denied my request for authorization so that I could e-file (Exhibit 14, pp. 34-35). Thereafter, upon my spending substantial time and energy to get the Clerk's Office to upload to the e-docket, the

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[7] "*Lost in the controversy – Moreland's critical recommendations: Civic leaders call on candidates to*

pdfs of the order to show cause that I furnished it, and labelling all the many component parts so that, when uploaded, each piece could be easily-located and accessed, Clerk's Office personnel nonetheless uploaded the pdfs in a mishmash, unusable fashion, also omitting such pertinent pieces as the order to show cause itself, my affidavit requesting authorization to e-file, and such key exhibits to my motion papers as my April 15, 2013 corruption complaint to U.S. Attorney Preet Bharara, which had been my Exhibit B-2.

40. I presented these facts to the Court by a June 24, 2014 letter entitled "(1) Safeguarding the Integrity & Usability of the Record; (2) Renewed Request for Authorization for E-Filing" (Exhibit 26). The letter began:

> "This is to request that the Court take steps to secure an investigation of the whereabouts of the hard-filed original of my April 23, 2014 order to show cause to intervene to oppose mootness and for summary judgment in the above-entitled declaratory judgment action – such being necessary for the Court's proper determination of my June 17, 2014 motion for reargument/renewal, vacatur and other relief, returnable on July 8, 2014.
>
> At present, this hard-filed original of my order to show cause and supporting papers is missing – and the posting of my copy of the supporting papers on the Unified Court System's e-docket by Clerk Office personnel is a deficient, unusable mishmash. As I can do a far better job than the Clerk's Office in posting my own court submissions – and I am certainly willing to take the Court System's 'Free Online Training' – I also renew the request made by my order to show cause that the Court authorize my e-filing herein."

The letter concluded four pages later, as follows:

> "Your endorsement of an investigation into the whereabouts of my original hard-filed April 23, 2014 order to show cause and for rectification of the deficient e-docketing of the pdfs of my order to show cause that I had furnished will go far to achieving results. Certainly, if you will now, as I request, authorize my e-filing, you can spare Clerk Office staff the burden of having to post record documents that, demonstrably, I can better post myself."

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embrace campaign finance reform", Legislative Gazette, August 25, 2014 (Exhibit 25-d).

41. The Court's response to this letter – which no fair and impartial tribunal could ignore – was to do just that.

42. Nor was the Court's non-response to my June 24, 2014 letter accidental. Two and a half months later – with the hard original of my April 23, 2014 order to show cause still missing, with the e-docket still posting an unusable mishmash of my pdfs of that motion, and with only the two-page notice of motion posted for my June 17, 2014 reargument/renewal/vacatur motion, not the affidavit or exhibits, the Court demonstrated the same disregard for the integrity of the record, for my time, energy, and money, and for its ability to properly determine this motion. I was then seeking an unopposed adjournment of the return date, then calendared for September 5, 2014, so as to enable the Clerk's Office to correct the e-docket. Such is reflected by my September 3, 2014 and September 4, 2014 letters to the Court (Exhibits 29-a, 29-c), the latter stating:

> "...I respectfully request that the court advise whether I must make a time-consuming, costly trip from Westchester to appear at the calendar call, tomorrow, to request an adjournment that is unopposed by counsel – especially when the record herein shows that counsel in this declaratory judgment action and in the other related litigations repeatedly secured the Court's so-ordering of stipulations for adjournments, without the necessity of any court appearance."

43. The Court simply ignored the letter, imposing upon me the completely unnecessary burden of appearing at the calendar call, where it was confirmed that it was for the Court, not the clerk in the motions part, to have granted the adjournment – which is what I stated in my September 4, 2014 letter (Exhibit 29-c), without response from the Court.

44. It would not surprise me if the unstated reason why the Court did not sign my proposed order for the adjournment of the return date was its inclusion of the paragraph:

> "The Clerk's Office is directed to appropriately e-docket the *pro se* intervening plaintiff's June 17, 2014 motion and her underlying April 23, 2014 order to show cause – and, as to the latter, to verify the whereabouts of the original."

ELENA RUTH SASSOWER

Sworn to before me this
26th day of September 2014

Notary Public

TABLE OF EXHIBITS

Exhibit 21-e: September 3, 2013 letter from Assembly Administrative Counsel Amy Metcalfe to Comptroller's Chief Auditor William Hughes

Exhibit 21-f: December 3, 2013 Assembly Contract Approval Request Form

Exhibit 21-g: December 4, 2013 letter from Assembly Administrative Counsel Amy Metcalfe to Attorney General's Principal Attorney/"Contract Approval Unit", Lorraine Remo

Exhibit 21-h: January 23, 2013 e-mail from Deputy Attorney General Meg Levine to Nancy Groenwegen, Counsel to Comptroller, with copy to Lorraine Remo

Exhibit 21-i: February 20, 2014 letter from Charlotte Breeyear, Director of Contracts/Office of the State Comptroller to Assembly Administrative Counsel Amy Metcalfe, with enclosed "Outside Counsel Contract Guidelines"

Exhibit 21-j: February 20, 2014 approval by Charlotte Breeyear of Amendment #1

Exhibit 22-a: Proposed Intervening Plaintiff's July 30, 2014 FOIL/records request to Secretary of Senate

Exhibit 22-b: Proposed Intervening Plaintiff's August 22, 2014 e-mail to Secretary of Senate

Exhibit 22-c: Secretary of Senate's August 22, 2014 e-mail response with August 6, 2014 response

Exhibit 22-d: Proposed Intervening Plaintiff's August 22, 2014 e-mail to Secretary of Senate

Exhibit 22-e: Secretary of Senate's August 22, 2014 e-mail response

Exhibit 23-a: May 1, 2008 Senate Contract #C150014 with Lewis & Fiore, Esqs.

Exhibit 23-b: April 24, 2008 proposal of Lewis & Fiore, Esqs.

Exhibit 24-a: Democratic Primary Gubernatorial Candidate Teachout July 28, 2014 letter to Attorney General Schneiderman, with copies to Commission Co-Chairs and Members

Exhibit 24-b: Proposed Intervening Plaintiff's e-mail to Zephyr Teachout

Exhibit 25-a: July 28, 2014 statement of Commission Co-Chair William J. Fitzpatrick

Exhibit 25-b: "*Fitzpatrick defends Moreland, Cuomo*", Albany Times Union/Capitol Confidential, July 28, 2014 (Casey Seiler)

Exhibit 25-c: August 20, 2014 letter signed by Commission Co-Chair Kathleen Rice & Commissioners David Soares, Peter Zimroth, Lance Liebman

Exhibit 25-d: "*Lost in the controversy – Moreland's critical recommendations: Civic leaders call on candidates to embrace campaign finance reform*", Legislative Gazette, August 25, 2014 (James Gormley)

Exhibit 26: Proposed Intervening Plaintiff's June 24, 2014 letter to Justice Schlesinger

Exhibit 27-a: Proposed Intervening Plaintiff's June 27, 2014 letter to Justice Schlesinger, with Kasowitz' June 26, 2014 e-mail

Exhibit 27-b: Justice Schlesinger's July 7, 2014 signed order

Exhibit 28-a: Proposed Intervening Plaintiff's July 24, 2014 letter to counsel

Exhibit 28-b: Proposed Intervening Plaintiff's July 25, 2014 letter to Justice Schlesinger's court clerk

Exhibit 29-a: Proposed Intervening Plaintiff's September 3, 2014 letter to Justice Schlesinger

Exhibit 29-b: Proposed Intervening Plaintiff's September 4, 2014 e-mail to Rose Ann Magaldi/ Principal Law Clerk to Justice Schlesinger

Exhibit 29-c: Proposed Intervening Plaintiff's September 4, 2014 letter to Justice Schlesinger

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

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

Index #160941/2013

Plaintiffs,

-v-

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

Defendants.

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PROPOSED INTERVENING PLAINTIFF'S AFFIDAVIT IN REPLY & IN FURTHER SUPPORT OF MOTION FOR REARGUMENT/RENEWAL, VACATUR & OTHER RELIEF

ELENA RUTH SASSOWER, Proposed Intervening Plaintiff, *Pro Se*, individually and as Director of the Center for Judicial Accountability, Inc., and on behalf of the People of the State of New York & the Public Interest

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