SUPREME COURT OF STATE OF NEW YORK ALBANY COUNTY

CENTER FOR JUDICIAL ACCOUNTABILITY, INC.

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

Plaintiffs,

Index #1788-14

-against-

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York, DEAN SKELOS in his official capacity as Temporary Senate President, THE NEW YORK STATE SENATE, SHELDON SILVER, in his official capacity as Assembly Speaker, THE NEW YORK STATE ASSEMBLY, ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, and THOMAS DiNAPOLI, in his official capacity as Comptroller of the State of New York,

Defendants.	
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PLAINTIFFS' REPLY MEMORANDUM OF LAW

in Further Support of Plaintiffs' Cross-Motion for Summary Judgment & Other Relief

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

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that the legislative budget was not even within the announced jurisdiction of the "public protection" conference subcommittee.

Consequently, plaintiffs are entitled to a declaration that the legislative/judiciary budget bills for fiscal years 2014-2015 and 2015-2016 violate Legislative Law§54-a.

AAG Kerwin Does Not Contest Plaintiffs' Entitlement to Declarations that the Judicial Salary Increases Recommended by the August 29, 2011 Report of the Commission on Judicial Compensation, Embedded in the Judiciary's Proposed Budgets and Legislative/Judiciary Budget Bills, are Fraudulent, Statutorily-Violative, and Unconstitutional – & that Chapter 567 of the Laws of 2010 – Now Materially Replicated in Chapter 60 of the Laws of 2015 – was Unconstitutional, as Written & as Applied

Plaintiffs' second and sixth causes of action (¶108, PRAYER FOR RELIEF/WHEREFORE clause, at p. 44; ¶¶179-181, 190, PRAYER FOR RELIEF/WHEREFORE clause, at p. 39) challenge the lawfulness of the judicial salary increases embedded in the Judiciary's proposed budgets for fiscal years 2014-2015 and 2015-2016 and the legislative/judiciary budget bills embodying them.

As set forth at ¶5 of plaintiffs' complaint, these salary increases were recommended by the August 29, 2011 Report of the Commission on Judicial Compensation, established by Chapter 567 of the Laws of 2010. Plaintiffs demonstrated the fraudulence, statutory violations and unconstitutionality of that Report by their October 27, 2011 Opposition Report. The very first page of its Introduction called for repeal of the commission statute – Chapter 567 of the Laws of 2010 – as "deleterious to the public and unconstitutional, *as written and as applied.*^{fn2}", stating, by its annotating footnote 2:

"As to whether, without constitutional amendment, the legislative and executive branches can, by statute, delegate judicial compensation to an appointed commission, whose recommendations do not require affirmative legislative and executive action to become law, such will be separately presented." (underlining in the original).

Plaintiffs then "separately presented" that issue by their March 30, 2012 verified complaint in their declaratory judgment action *CJA v. Cuomo I*, whose second cause of action, entitled "Chapter

567 of the Laws of 2010 is Unconstitutional, As Written", included the following subsection:

"B. Chapter 567 of the Laws of 2010 Unconstitutionally Delegates Legislative Power Without Essential Safeguarding Provisions & Guidance

- 145. Such case law as *Mary McKinney, et al. v. Commissioner of the New York State Department of Health, et al.*, 15 Misc.3d 743; 836 N.Y.S.2d 794 (Supreme Court/Bronx Co. 2007), affirmed by the Appellate Division, First Department, 41 A.D.3d 252 (2007), appeal dismissed, 9 N.Y.3d 891 (2007), appeal denied, 9 N.Y.3d 815 (N.Y., Nov. 27, 2007); motion granted 9 N.Y.3d 986 (N.Y., Nov. 27, 2007), reflects further grounds upon which Chapter 567 of the Laws of 2010 is unconstitutional, *as written*.
- 146. Article III, §1 of the New York State Constitution vests the legislative power in the Senate and Assembly. There is no provision in the Constitution for delegating decision-making power over judicial salaries to an appointed commission, let alone to an appointed commission whose recommendations are self-executing so as to become law automatically without affirmative legislative or executive action by the People's elected representatives.
- 147. Such delegation, moreover, could only be constitutional if the appointed commissioners were of a sufficient number and diversity, and untainted by an agenda or other bias and interest.
- 148. At bar, Chapter 567 of the Laws of 2010 provides for only seven commissioners and of these, only two are appointed by the Legislature. This is an insufficient number to reflect the diversity of either the Legislature or the State.
- 149. Nor does the statute specify neutrality as a criteria for appointment and having two commissioners appointed by the chief judge assures that at least two of the seven commissioners will have been appointed to achieve the judiciary's agenda of pay raises.
- 150. As the judiciary would otherwise have no deliberative role in determining judicial pay raises legislatively and the chief judge is directly interested in the determination, the chief judge's participation as an appointing authority is, at very least, a constitutional infirmity.
- 151. Nor could such delegation be constitutional unless the statute defined the constitutional considerations relevant to the Commission's evaluation of judicial compensation levels.
- 152. Chapter 567 of the Laws of 2010 is not sufficiently-defined and provides insufficient guidance to the Commission as to the 'appropriate

factors' for it to consider. The statute requires the Commission to 'take into account all appropriate factors, including but not limited to' six listed factors. These six listed factors are all economic and financial – and are completely untethered to any consideration as to whether the judges whose salaries are being evaluated are discharging their constitutional duty to render fair and impartial justice and afford the People their due process and equal protection rights under Article I.

- 153. It is unconstitutional to raise the salaries of judges who should be removed from the bench for corruption or incompetence and who, by reason thereof, are not earning their current salaries. Consequently, a prerequisite to any pay raise recommendation must be a determination that safeguarding appellate, administrative, disciplinary and removal provisions of Article VI are functioning.
- 154. The absence of such explicit factor to guide the Commission renders the statute unconstitutional, *as written*."

Seven months ago, Chapter 567 of the Laws of 2010 was repealed – and how it happened is described by Plaintiffs' September 22, 2015 memorandum of law:

"In the behind-closed doors, 'three-men-in-a-room' budget negotiations for fiscal year 2015-2016, defendants Cuomo, Skelos and Heastie amended budget bills which, at the 11th hour, were introduced and passed by the Legislature in rubber-stamp fashion. Among these was Budget Bill #S.4610-A/A.6721-A and its amendments included repeal of Chapter 567 of the Laws of 2010, so as to replace the Commission on Judicial Compensation, with a Commission on Legislative, Judicial, and Executive Compensation.

The amendment – Part E of Budget Bill #S.4610-A/A.6721-A – largely replicates the provisions of Chapter 567 of the Laws of 2010. *As written*, it suffers from the same constitutional infirmities as were directly challenged by the verified complaint in *CJA v. Cuomo I* [Second Cause of Action: ¶¶140-154] – and which are indirectly challenged by the verified complaint herein…" (at p. 48).

Among the provisions that Part E of Budget Bill #S.4610-A/A.6721-A replicates is "the force of law" power given to commission recommendations, absent affirmative legislative action – the unconstitutionality of which was the subject of plaintiffs' second cause of action in *CJA v. Cuomo I.*

On June 3, 2015, a handful of Assembly members introduced Assembly Bill #07997, whose

purpose, expressly stated by its sponsors' memo, is to:

"...eliminate the provisions in the 2015 budget that stated that the salary determinations of the special commission on compensation could become effective automatically 'with the force of law,' and could 'supersede' any inconsistent provisions of the Judiciary Law, Executive Law, and Legislative Law, without any further legislative action." (Exhibit 22-b to plaintiff Sassower's accompanying reply affidavit).

According to the memo, "this budget bill language violates several fundamental provisions of the New York State Constitution". The memo then furnishes seven specifics – five of which identically apply to Chapter 567 of the Laws of 2010:

- "b. Article III, Section 1 of the New York State Constitution states that the legislative power 'shall be vested in the Senate and Assembly.' A non-elected commission cannot be delegated legislative power to enact recommendations 'with the force of law' that can 'supercede' inconsistent provisions of law.
- d. Article III, Section 13 of the New York State Constitution states that 'no law shall be enacted except by a bill,' yet the salary commission was given the power to enact salary recommendations 'with the force of law' without any legislative bill approving of such salaries being considered by the legislature.
- e. Article III, Section 14 of the New York State Constitution states that no bill shall be passed 'or become law' except by the vote of a majority of the members elected to each branch of the legislature. The budget bill, however, stated that the recommendations of the salary commission would 'have the force of law' without any vote whatsoever by the legislators. Such a provision deprives the members of the legislature of their Constitutional right to vote on every bill prior to its enactment into law.
- f. Article IV, Section 7 of the New York State Constitution gives the Governor the authority to veto any bill, but there is no corresponding ability of the Governor to veto any recommendations of the salary commission before such recommendations would become effective.
- g. Article VII, Section 6 of the New York State Constitution states in relevant part that '(n)o provision shall be embraced in any appropriation bill unless it relates specifically to some particular appropriation in the bill,' yet there was no appropriation in the budget bill relating to the salary commission. Thus, this legislation was improperly submitted and considered by the legislature as an unconstitutional rider to a budget bill."

As recounted by plaintiff Sassower's accompanying affidavit, she alerted AAG Kerwin to

Assembly Bill #07997and its relevance to plaintiffs' challenge herein to the judicial salary increases. Yet, AAG Kerwin has not come forward with any response. For that matter, she has not come forward with any response to plaintiffs' October 27, 2011 Opposition Report and to the four causes of action of their March 30, 2012 verified complaint in *CJA v. Cuomo*, *I*⁴ – copies of which plaintiffs' furnished the Court by their September 22, 2015 opposition/cross-motion, including for purposes of establishing their entitlement to their cross-motion's third branch pertaining to AAG Kerwin's fraud and violations with respect to their June 16, 2014 order to show cause with TRO, which required the legislative defendants to preserve those very documents and turn them over to the Court.⁵

It must be noted that from April to September 2013, plaintiffs repeatedly apprised defendants Legislators and Governor of the background history of "the force of law" provision of Chapter 567 of the Laws of 2010, directly challenged by their *CJA v. Cuomo I* second cause of action (¶¶145-154). The context was plaintiffs' efforts to prevent enactment of legislation establishing "a special commission on compensation for state employees designated managerial or confidential", A.246/S.2953, containing an identical "force of law" provision. Their April 20, 2013 memo furnished, repeatedly, to all Legislators and to the Governor⁶ stated:

These are: "As and for A First Cause of Action: Evisceration of Separation of Powers: Collusion of the Three Government Branches against the People" (¶¶128-139); "As and for a Second Cause of Action: Chapter 567 of the Laws of 2010 is Unconstitutional, As Written" (¶¶140-154); "As and for a Third Cause of Action: Chapter 567 of the Laws of 2010 is Unconstitutional, as Applied" (¶¶155-166); "As and for a Fourth Cause of Action: "The Commission's Judicial Pay Raise Recommendations are Statutorily-Violative" (¶¶167-172).

See pp. 42-44 of plaintiffs' September 22, 2015 memorandum of law: "Plaintiffs' Entitlement to Sanctions and Other Relief against AAG Kerwin & Those Complications in her Fraud and Contempt of the Order to Show Cause, with TRO, Signed by the Court on June 16, 2014".

Plaintiffs' correspondence to the Legislators and Governor pertaining to the managerial/confidential employees compensation commission is posted on CJA's website, www.judgewatch.org, on a webpage entitled

"The express basis of ¶¶145-154 of the verified complaint's second cause of action, appearing beneath the title heading 'Chapter 567 of the Laws of 2010 Unconstitutionally Delegates Legislative Power Without Safeguarding Provisions and Guidance', is the 2007 decision of Bronx Supreme Court Justice Mary Ann Brigantti-Hughes in Mary McKinney, et al. v. Commissioner of the New York State Department of Health, et al., 15 Misc.3d 743 (2007). At issue in McKinney was a statute which allowed recommendations of a special commission to become law, without affirmative legislative action. Judge Brigantti-Hughes upheld the statute – Chapter 63 (Part E) of the Laws of 2005 – only because it contained safeguarding provisions. Such safeguarding provisions, however, are absent from Chapter 567 of the Laws of 2010 and from A.246/S.2953 – each also allowing commission recommendations to become law, without affirmative legislative action.

That Chapter 63 (Part E) of the Laws of 2005 should have been stricken as unconstitutional may be seen from the *amicus curiae* brief that the New York City Bar Association filed with the Court of Appeals, in support of the motion of the McKinney plaintiffs for leave to appeal. The *amicus* brief described the statute delegating legislative power to a commission, without requiring the legislature to affirmatively vote on its recommendations before they would become law, as:

'a process of lawmaking never before seen in the State of New York' (at p. 24);

a 'novel form of legislation...in direct conflict with representative democracy [that] cannot stand constitutional scrutiny (at p. 24)';

a 'gross violation of the State Constitution's separation-of-powers and...the centuries-old constitutional mandate that the Legislature, and no other entity, make New York State's laws' (at p. 25);

'most unusual [in its]...self-executing mechanism by which recommendations formulated by an unelected commission automatically become law...without any legislative action' (at p. 28);

unlike 'any other known law' (at p. 29);

'a dangerous precedent' (at p. 11) that

'will set the stage for the arbitrary handling of public resources under the guise of future temporary commissions that are not subject to any public scrutiny or accountability (at p. 36).

[&]quot;Fighting Off the Progeny of the Judicial Compensation Statute – & Securing a Functioning Legislative Process", accessible from the left sidebar panel "Judicial Compensation-State-NY".

Indeed, Appellate Division, Fourth Department Justice Eugene Fahey deemed the statute unconstitutional, violating due process, the presentment clause, and separation of powers, in his dissenting opinion in *St. Joseph Hospital, et al. v. Novello*, 43 A.D.3d 139 (2007) – another case challenging Chapter 63 (Part E) of the Laws of 2005, which came up to the Court of Appeals in the same period as *McKinney*.

The Court of Appeals' response to these two important cases, simultaneously before it, was in keeping with its corrupt, politicized conduct chronicled by the CJA v. Cuomo verified complaint. It dismissed both the McKinney and St. Joseph Hospital appeals of right, 'sua sponte', on its standard boilerplate, 'no substantial constitutional question is directly involved', thereafter denying leave to appeal without reasons.

These were not the only challenges generated by Chapter 63 (Part E) of the Laws of 2005. There are five others identified by the New York City Bar Association's May 2007 report 'Supporting Legislative Rules Reform: The Fundamentals' (at pp. 9-10), whose discussion of the statute was in the context of describing it as the product of New York's dysfunctional Legislature, whose rules vest disproportionate power in the leadership, leaving committees, which should be the locus for developing legislation and discharging oversight responsibilities, as nothing more than shells. ^{fn} "(Exhibit 23 to plaintiff Sassower's accompanying affidavit, underlining in the original).

As the record before this Court is devoid of even an assertion by AAG Kerwin that the judicial salary raises recommended by the Commission on Judicial Compensation complied with the statutory prerequisites of Chapter 567 of the Laws of 2010 and does not contest the accuracy of plaintiffs' October 27, 2011 Opposition Report and the four causes of action of the March 30, 2012 verified complaint in *CJA v Cuomo I*, plaintiffs are entitled to a two-fold declaration by the Court, based on the massive documentary evidence before it, that the judicial pay raises are statutorily-violative, fraudulent, and unconstitutional and that Chapter 567 of the Laws of 2010 – now materially replicated in Chapter 60 of the Laws of 2015 – was unconstitutional, *as written and as applied*.

CJA's website contains a webpage relating to the litigation challenges to Chapter 63 (Part E) of the Laws of 2005, which posts the City Bar's amicus brief in McKinney v. NYS Dept. of Health and Justice Fahey's dissenting opinion in St. Joseph Hospital v. Novello. The direct link is here:

CONCLUSION

The record herein requires the granting of all ten branches of plaintiffs' cross-motion, as a matter of law, and denial of AAG Kerwin's dismissal/summary judgment motion, as a matter of law, in all respects.

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

the Public Interest

November 5, 2015