

CENTER for JUDICIAL ACCOUNTABILITY, INC.\*

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Elena Ruth Sassower, Director

By Fax: 518-285-6192 (6 pages):

March 24, 2016

TO: Acting Supreme Court Justice Roger McDonough

FROM: Elena Ruth Sassower, plaintiff *pro se*, individually &  
on behalf of the People of the State of New York and the public interest

RE: **PLAINTIFFS' EMERGENCY ORDER TO SHOW CAUSE:**  
Request for reconsideration of the Court's denial of the TRO and for an immediate hearing on the preliminary injunction, and, if denied, for the Court's disqualification for demonstrated actual bias and interest:  
**Citizen-Taxpayer Action:** *Center for Judicial Accountability v. Cuomo*, #1788-14

This follows up my phone conversation with your law clerk, Steven Connolly, at approximately 9:15 this morning, to request that the Court reconsider its denial of plaintiffs' TRO at yesterday's oral argument of plaintiffs' emergency order to show cause and that it hold an immediate hearing on plaintiffs' requested preliminary injunction – *to wit*, tomorrow.

As I recollect, the Court's stated basis for denying the TRO was its assertion that a TRO is not available to enjoin public officers from statutory duties – for which it cited no law. I believe the law to which the Court was referring is CPLR §6313(a), which reads, in pertinent part:

“If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time. No temporary restraining order may be granted... against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties.”

In response, I pointed out that this is a citizen-taxpayer action under State Finance Law Article 7-A [§§123 *et seq.*] and I cited to, and read from, State Finance Law §123-e(2), which expressly excepts

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\* **Center for Judicial Accountability, Inc. (CJA)** is a national, non-partisan, non-profit citizens' organization, working to ensure that the processes of judicial selection and discipline are effective and meaningful.

CPLR §6313 from applicability:

“The court, at the commencement of an action pursuant to this article, or at any time subsequent thereto and prior to entry of judgment, upon application by the plaintiff or the attorney general on behalf of the people of the state, may grant a preliminary injunction and impose such terms and conditions as may be necessary to restrain the defendant if he or she threatens to commit or is committing an act or acts which, if committed or continued during the pendency of the action, would be detrimental to the public interest. A temporary restraining order may be granted pending a hearing for a preliminary injunction notwithstanding the requirements of section six thousand three hundred thirteen of the civil practice law and rules, where it appears that immediate and irreparable injury, loss, or damage will result unless the defendant is restrained before a hearing can be had.” (underlining added).

As I recollect, the Court not only did not respond to this, but countenanced Assistant Attorney General James McGowen’s bald suggestion that plaintiffs’ action was not properly a citizen taxpayer action.

In an effort to overcome the Court’s continued assertion that a TRO was not available for enjoining public officers from “statutory duties”, I pointed out that no “statutory duties” of any public officers were involved in enjoining the “force of law” judicial salary increase recommendations of the Commission on Legislative, Judicial and Executive Compensation, as these would be taking effect automatically on April 1<sup>st</sup>. To my recollection, the Court offered no explanation as to why a TRO is not available to enjoin the judicial salary increases, in which the Court has a \$19,000 financial interest in fiscal year 2016-2017.

The Court stated, several times, in response to my presentation, that the sole issue the Court was addressing was the TRO and that this did not involve the underlying “merits”, unlike the hearing on the preliminary injunction, which would. However, the Court did not then schedule the hearing on the preliminary injunction for tomorrow, so as to be timely for the granting of a preliminary injunction with respect to the fourth and fifth branches of plaintiffs’ emergency order to show cause. Nor did it schedule the hearing on the preliminary injunction for early next week so that the “merits” could be addressed before April 1<sup>st</sup> and the passage of the budget.

As I stated, the Court already has before it a full briefing of virtually all the facts and law as to the constitutional, statutory, and rule violations particularized by plaintiffs’ second supplemental verified complaint pertaining to fiscal year 2016-2017 – as these are the same constitutional, statutory, and rule violations as have been litigated for the past two years *via* plaintiffs’ verified complaint pertaining to fiscal year 2014-2015 and *via* plaintiffs’ supplemental complaint pertaining to fiscal year 2015-2016. The record before the Court establishes plaintiffs’ summary judgment entitlement – and, indeed, my cross-motion for summary judgment has been pending before the Court, *sub judice*, for 4-1/2 months, notwithstanding the directive of State Finance Law 123-c(4) that a citizen-taxpayer action “shall be promptly determined” and “shall have preference over all other causes in all courts”.

Moreover, it would seem that the Court is not intending on holding an actual hearing on the preliminary injunction on April 22<sup>nd</sup> – especially as it wrote on the emergency order to show cause “PERSONAL APPEARANCES ARE NOT NECESSARY.” (capitalization and underlining in the original).

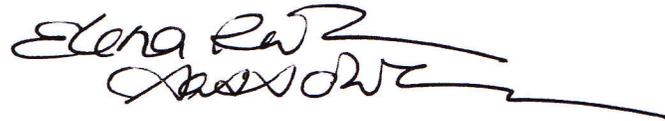
Before calling chambers this morning, I telephoned the court stenographer to order the transcript of yesterday’s proceeding. I then telephoned Assistant Attorney General James McGowan, as well as Assistant Attorney General Adrienne Kerwin, also present yesterday. I requested each of them to get back to me as soon as possible so that I might speak with them about what had transpired yesterday, before speaking with the Court. It is now more than five hours later and I have received no return call from them.

As I stated yesterday, this Court has a substantial financial interest in this citizen taxpayer action, inasmuch as it challenges the judicial salary increases of which the Court has been the beneficiary, boosting its salary by almost \$40,000 a year. Contrary to the Court’s June 24, 2015 decision – the same decision as granted plaintiffs’ March 31, 2015 motion for leave to file their supplemental complaint – “just because “every Supreme and Acting Supreme Court Justice in the State of New York” has an “equally applicable” “financial conflict”, does not make “recusal on the basis of financial interest a functional impossibility”. 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 actual bias – must disqualify himself or be disqualified.

The Court asked me yesterday whether I was reiterating my request that it disqualify itself. Let there be no doubt that based on the record before the Court and its conduct at yesterday’s proceeding – I am.

Based on the record before the Court, in the absence of its granting of the TRO and/or its scheduling a hearing on the preliminary injunction for either tomorrow or Monday, March 28<sup>th</sup>, I seek an appealable order so that the Appellate Division, Third Department can determine plaintiffs’ entitlement to the Court’s disqualification for demonstrated actual bias and interest – and to the TRO and preliminary injunction requested by their emergency order to show cause.

Thank you.

A handwritten signature in black ink, appearing to read "Elena R. W. Kerwin". The signature is written in a cursive, somewhat stylized font with a long horizontal flourish extending to the right.

Enclosure: signed Emergency Order to Show Cause

cc: Assistant Attorney General Adrienne Kerwin  
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