SUPREME COURT OF STATE OF NEW YORK
ALBANY COUNTY

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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' 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

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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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April 22, 2016

TABLE OF CONTENTS

Introduction

This memorandum of law is submitted in reply to Assistant Attorney General Adrienne Kerwin's opposition to plaintiffs' March 23, 2016 order to show cause for leave to file their verified second supplemental complaint and for a preliminary injunction.

As with all her past advocacy, AAG Kerwin has again demonstrated that defendants have no legitimate defense and that the Attorney General's duty, pursuant to Executive Law §63.1 and State Finance Law §123 *et seq.*, is to be representing plaintiffs. As hereinafter shown, AAG Kerwin's April 8, 2016 affirmation and memorandum of law are not just frivolous, but frauds upon the Court, fashioned, from beginning to end and in virtually every line, on knowingly false and misleading factual assertions, material omissions, and law that is either inapplicable, misstated, or both. This is unacceptable from any lawyer. That it is perpetrated on behalf of the state's highest law enforcement officer to subvert the statutory safeguard for protecting taxpayer monies provided by State Finance Law Article 7-A (§123 *et seq.*) requires severest action. Consequently, this Court's duty is to exercise all the powers the law furnishes it for safeguarding the integrity of the judicial process – beginning with a direction to Attorney General Schneiderman that he identify who in his office has independently evaluated the "interest of the state" and plaintiffs' entitlement to his representation/intervention in this citizen-taxpayer action, as the statute contemplates. Had this been done at the inception of the case two years ago – as the record before the Court mandated at that time – the case would have ended, two years ago, with declarations, in plaintiffs' favor, on all four causes of action of their March 28, 2014 verified complaint pertaining to the budget for fiscal year 2014-2015. The repetition of identical constitutional, statutory, and rule violations for fiscal years 2015-2016 and 2016-2017 would have all been avoided – and the necessity of plaintiffs' March 31, 2015 verified supplemental complaint and now March 23, 2016 verified second supplemental complaint.

Materially omitted by AAG Kerwin's April 8, 2016 opposition to plaintiffs' March 23, 2016 order to show cause is that since the first week of November 2015, there has been pending before this Court, *sub judice*, not just her July 28, 2015 motion for summary judgment on the fourth cause of action of plaintiffs' verified complaint and for dismissal of the fifth, sixth, seventh, and eighth causes of action of plaintiffs' verified supplemental complaint – which is all that her affirmation (¶8) and memorandum of law (p. 1) reveal – but plaintiffs' September 22, 2015 cross-motion for summary judgment on all five of those causes of action.

It is plaintiffs' cross-motion entitlement to summary judgment on their fourth, fifth, sixth, seventh, and eighth causes of action – *with its summary judgment implications for all eight causes of action of plaintiffs' verified second supplemental complaint* – that entitles them to the granting of their March 23, 2016 order to show cause, both for leave to file their verified second supplemental complaint and for the injunctive relief that remains available. Yet, AAG Kerwin not only conceals this, but her memorandum of law (pp. 3, 4, 7 at fn.1) explicitly and implicitly makes it appear that the Court's determination of her dismissal/summary judgment motion will be judgment for defendants. This is unabashed fraud, as the ONLY judgment that the record can support, consistent with the facts and law, is for plaintiffs.

Because this Court has not decided AAG Kerwin's dismissal/summary judgment motion and plaintiffs' cross-motion for summary judgment – as was its obligation to have done months ago, with findings of fact and conclusions of law – AAG Kerwin is able to reprise all her past misconduct and spurious, fraudulent claims in opposing plaintiffs' March 23, 2016 order to show cause.

As plaintiffs have stated again and again, including at the outset of each of their two memoranda of law in support of their *sub judice* cross-motion for summary judgment,[1] the fundamental legal principle is as follows:

> 'when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party.' Corpus Juris Secondum, Vol 31A, 166 (1996 ed., p. 339);
>
> 'It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood or other fraud in the preparation and presentation of his cause...and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and that from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.' II John Henry Wigmore, Evidence §278 at 133 (1979)."

Plainly, AAG Kerwin would not now be replicating and reprising all her past fraud had she believed the Court to be a fair and impartial tribunal that would not only draw the proper inferences from her misconduct, but sanction her and her conspiring superiors, consistent with 22 NYCRR §130-1.1 *et seq*., Judiciary Law §487, and the Court's mandatory disciplinary responsibilities under §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct. Her unabashed instant fraud demonstrates she has no such belief[2] – reinforcing the Court's duty to disqualify itself, already established by the record herein.

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[1] *See* plaintiffs' September 22, 2015 memorandum of law in opposition to AAG Kerwin's dismissal/summary judgment motion and in support of plaintiffs' cross-motion for summary judgment and other relief (at pp. 3-4) and plaintiffs' November 5, 2015 reply memorandum of law in further support of their cross-motion (at p. 2).

[2] Plaintiffs have repeatedly stated that the ONLY inference that can be drawn from AAG Kerwin's litigation fraud is that she believes that the Court will not discharge its duty to ensure the integrity of the judicial process – not the least reason because of its financial interest in the judicial salary increases. Plaintiffs' *sub judice* November 5, 2015 reply memorandum of law in further support of their cross-motion, set this forth, in its "Introduction" (at p. 4), and concluded as follows:

> "Suffice to say, more than a century ago, *in Matter of Bolte*, 97 AD 551 (1904), the Appellate

AAG Kerwin's Opposing Affirmation is Legally-Insufficient and Fraudulent

Once again, AAG Kerwin has presented the Court with an affirmation that is legally-insufficient,[3] serving no purpose, but to deceive. Its skeletal procedural history (¶¶2-8) not only omits plaintiffs' September 22, 2015 cross-motion for summary judgment and other relief, but the

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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 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, bold in original, underlining added).
>
> '…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, underlining added)."

[3] As plaintiffs previously stated, including in their September 22, 2015 memorandum of law in support of their *sub judice* cross-motion (at pp. 4-5):

> "Although AAG Kerwin's affirmation expressly states that it is 'under penalty of perjury pursuant to CPLR 2106', it is not affirmed 'to be true', as CPLR §2106 requires:
>
> > 'The statement of an attorney…when subscribed and affirmed by him to be true under penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.'
>
> According to treatise authority:
>
> > 'While attorneys always have a professional duty to state the truth in papers, the affirmation under this rule gives attorneys adequate warning of prosecution for perjury for a false statement.', McKinneys Consolidated Laws of New York Annotated, 7B, p. 817 (1997), Commentary by Vincent C. Alexander.
>
> Tellingly, AAG Kerwin's affirmation does not set forth the basis upon which it is made – whether personal knowledge, familiarity with the facts, papers, and proceedings, or upon information and belief. It is, therefore, completely non-probative, *as a matter of law*.
>
> More than 110 years ago, it was already stated:
>
> > 'It has too long been the rule to need the citation to authority, that such averments in an affidavit have not [sic] probative force. The court has a right to know whether the affiant had any reason to believe that which he alleges in his affidavit." *Fox v. Peacock*, 97 A.D. 500, 501 (1904).'"

most recent procedural event germane to plaintiffs' March 23, 2016 order to show cause – the oral argument on March 23, 2016 on plaintiffs' requested TRO, the Court's disposition thereof, and its basis.[4] For that matter, she omits the basis upon which the Court's June 24, 2015 decision granted plaintiffs' March 31, 2015 motion for leave to file their verified supplemental complaint, thereby concealing that the Court's reasoning for granting leave is "even more applicable now" with respect to their verified second supplemental complaint.

That the Court's June 24, 2015 decision granting leave is "even more applicable now" is recited at ¶¶6-7 of plaintiff Sassower's March 23, 2016 affidavit in support of the order to show cause:

> "6. Last year, when AAG Kerwin also refused to stipulate to plaintiffs' filing of their supplemental complaint, this Court stated as follows in its June 24, 2015 decision granting plaintiffs' motion for leave:
>
> > 'The Court finds that plaintiffs are entitled to supplement their verified complaint. Defendants have not made an adequate showing that the new causes of action are 'palpably insufficient' or 'patently devoid of merit' (Lucido v. Mancuso, 49 AD3d 220, 229 [2nd Dept. 2008]). The Court's finding does not, of course, insulate the causes of action from a subsequent challenge to their merits via a CPLR §§3211 and/or 3212 motion.' (Exhibit B).
>
> 7. I read this paragraph to Ms. Kerwin on March 11th, stating that the Court's reasoning is even more applicable now, as she had no basis for the CPLR §§3211/3212 motion she thereafter made, the fraudulence of which plaintiffs demonstrated by their cross-motion for summary judgment in their favor, which is *sub judice* before the Court." (underlining added).

AAG Kerwin's affirmation does not deny or dispute this – and concedes its truth by concealing ¶¶6-7 and plaintiffs' cross-motion for summary judgment.

The law is clear that "failing to respond to a fact attested to in the moving papers…will be deemed to admit it", Siegel, New York Practice, 281 (4th ed. 2005, p. 464), citing *Kuehne v. Nagel,*

Inc. v. Baiden, 36 N.Y.2d 539 (1975), itself citing Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. "If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it".

Likewise AAG Kerwin's affirmation conceals and does not deny or dispute ¶¶4-5 of plaintiff Sassower's March 23, 2016 affidavit which had stated:

> "4. It would be wasteful to bring a separate citizen taxpayer action when the facts and law are identical – and when any such separate citizen taxpayer action would doubtless be assigned to the Court as a related proceeding.
>
> 5. Assistant Attorney General Adrienne Kerwin did not deny this when, on March 11, 2016, she refused to consent to my request for a stipulation pursuant to CPLR §3025(b) so as to obviate my having to proceed by motion (Exhibit A)."

Instead of responding to plaintiff Sassower's affidavit, which is what AAG Kerwin's affirmation should properly have done, especially where, as with ¶¶4-7, the paragraphs are not only dispositive but relate to her, her affirmation responds to none of it. Instead it contains nothing but the identical conclusory, irrelevant, and false factual assertions and innuendos as her memorandum of law. The only difference is that she appends exhibits.[5]

And even her exhibits are deceitful. Apart from the fact that her first five exhibits are superfluous as they are all already before the Court[6], inclusion of her so-called verified answer to

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[4] See exhibits annexed to plaintiff Sassower's accompanying reply affidavit.

[5] As illustrative, AAG Kerwin's ¶¶2-8 are, essentially *verbatim*, the content of the "Preliminary Statement" of her memorandum of law (pp. 1-2). Her notable falsehoods include: (1) her description (at ¶3) that plaintiffs' March 28, 2014 verified complaint "challenge[s] the negotiation of the 2014-2015 Legislative and Judiciary budgets – the falsity of which is verifiable from the copy of the March 28, 2014 verified complaint she annexes as her Exhibit A; and (2) her description (at ¶5) of the Court's October 9, 2014 decision and order as having "dismissed plaintiffs' First, Second and Third Causes of Action as failing to state a claim" – the falsity of which is verifiable from the copy of the October 9, 2014 decision she annexes as her Exhibit B. Also materially false, her ¶¶10, 15, 16 – as reflected in the discussion, *infra*.

[6] Four of these exhibits AAG Kerwin annexed to her *sub judice* July 28, 2014 affirmation in support of her dismissal/summary judgment motion: (1) plaintiffs' March 28, 2014 summons with verified complaint (w/o exhibits) (here her Exhibit A); (2) the Court's October 9, 2014 decision & order (here her Exhibit B); plaintiffs' March 31, 2015 verified supplemental complaint (w/o exhibits) (here her Exhibit C); and her

plaintiffs' verified complaint is sham and perjurious – so-highlighted by plaintiffs' *sub judice* September 22, 2015 memorandum of law in support of their cross-motion for summary judgment (at pp. 7-8, including its fn. 7).[7] As for AAG Kerwin's last three exhibits,[8] their sole purpose is to mislead the Court that defendants did not violate Legislative Law §32-a for fiscal year 2016-2017 and are entitled to dismissal of plaintiffs' twelfth cause of action. Yet, contrary to AAG Kerwin's ¶12, these exhibits do not support defendants' entitlement to summary judgment on the twelfth cause of action, whose recited violations go far beyond Legislative Law §32-a. Rather, these three final exhibits support summary judgment to plaintiffs for all the reasons detailed at pages 26-28 of plaintiffs' *sub judice* September 22, 2015 memorandum of law in response to the comparable exhibits that AAG Kerwin had annexed to her July 28, 2015 affirmation for dismissal/summary judgment of plaintiffs' fourth and eighth causes of action.

AAG Kerwin's Opposing Memorandum of Law is Fraudulent

AAG Kerwin's memorandum of law (pp. 1-2) begins with a redundant "Preliminary Statement" that essentially repeats, *verbatim*, the skeletal, materially-incomplete and false procedural history of her accompanying affirmation (¶¶2-8).

This is followed by her three-point argument (pp. 2-12). The first two points (pp. 2-4) pertain to the first branch of plaintiffs' March 23, 2016 order to show cause – leave to supplement pursuant

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November 6, 2014 letter with her verified answer to plaintiffs' verified complaint (here her Exhibit D). As for AAG Kerwin's Exhibit E: the Court's June 24, 2015 decision & order, it is Exhibit B to plaintiff Sassower's March 23, 2016 affidavit in support of plaintiffs' order to show cause.

[7] The sham and perjurious nature of AAG Kerwin's so-called verified answer was also the subject of ¶¶12-14 of plaintiff Sassower's April 14, 2015 reply affidavit in further support of their March 31, 2015 motion for leave to file their supplemental complaint.

[8] These are AAG Kerwin's Exhibit F: the Senate's January 12, 2016 announcement: "Legislature Announces Joint Budget Hearing Schedule"; her Exhibit G: the Legislature's witness list for its February 4, 2016 joint budget hearing on "public protection"; and her Exhibit H: the transcript of the Legislature's February 4, 2016 joint budget hearing on "public protection"

to CPLR §3025(b). However, neither point includes the text of CPLR §3025(b) – nor its pertinent mandatory language "Leave shall be freely given upon such terms as may be just…"

The third point (pp. 5-12) pertains to the injunctive relief sought by the second, third, fourth, and fifth branches of plaintiffs' order to show cause. Because this is a citizen-taxpayer action, the governing statutory provision is State Finance Law §123-e(2), allowing for a preliminary injunction upon "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." Indeed, at the March 23, 2016 oral argument of the TRO, plaintiff quoted State Finance Law §123-e(2)[9].

Nevertheless, as throughout this litigation, AAG Kerwin conceals that this is a citizen-taxpayer action – and the governing statute for injunctive relief that applies by reason thereof.

AAG Kerwin's Fraudulent Point I:
"Plaintiffs' Efforts to Supplement the Complaint with the Proposed Ninth, Tenth, Eleventh and Twelfth Causes of Action Would be Futile"

AAG Kerwin's Point I (pp. 2-3) is based on the inapplicable legal proposition – regurgitated from her unsuccessful opposition to plaintiffs' March 31, 2015 motion for leave to file their verified supplemental complaint[10] – that:

> "When a party seeks to amend or supplement a pleading that would be dismissed on a motion to dismiss, any effort to amend or supplement would be futile. Under such circumstances, a motion for leave to amend o[r] supplement a pleading should be denied." (at p. 2).

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9 See plaintiff Sassower's accompanying reply affidavit: Exhibit C, pp. 8-9.

10 See Point I of AAG Kerwin's April 9, 2015 memorandum of law in opposition to plaintiffs' March 31, 2015 motion for leave to file their supplemental complaint.

According to AAG Kerwin's Point I:

> "In this case, the court has already determined that the allegations in plaintiffs' proposed Ninth, Tenth and Eleventh Causes of Action are legally insufficient to state a claim, since they are identical to plaintiffs' First, Second and Third Causes of Action already dismissed by the court... Since these claims would be dismissed in the same way that the First, Second, and Third Causes of Action in the original complaint were dismissed, plaintiffs' motion for leave to supplement the complaint with these claims should be denied." (at p. 3).[11]

This is utterly fraudulent. **Plaintiffs' ninth, tenth, and eleventh causes of action** are not identical to the first, second, and third causes of action of plaintiffs' complaint. The ninth, tenth and eleventh causes of action (¶¶301-316, ¶¶317-331, ¶¶332-335) each begin by repeating, realleging, and reiterating the span of predecessor paragraphs that include the fifth, sixth, and seventh causes of action of plaintiffs' verified supplemental complaint. As examination of the fifth, sixth, and seventh causes of action readily reveal, they are, almost entirely, analyses of why the Court's dismissals of the first, second, and third causes of action, by its October 9, 2014 decision, are indefensible factually and legally and do not bar plaintiffs' fifth, sixth, and seventh causes of action.

That these analyses are dispositive may be seen from the fact that AAG Kerwin has never denied or disputed their accuracy in any respect. Instead, she has concealed their existence, fraudulently purporting that plaintiffs' fifth, sixth, and seventh causes of action are identical to the first, second, and third causes of action, when they were not – and that the Court's dismissals of the first, second, and third causes of action, by its October 9, 2014 decision, were for failing to state a claim, when they were founded on unspecified "evidence", which, in fact, does not exist. She made these misrepresentations when she opposed plaintiffs' March 31, 2015 motion to supplement the

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[11] *Cf.* ¶11 of AAG Kerwin's affirmation:

> "Plaintiffs' proposed Ninth, Tenth and Eleventh Causes of Action would be dismissed, just as Plaintiffs' First, Second and Third Causes of Action were, and therefore plaintiffs' application to supplement the complaint with these claims should be denied as futile."

complaint – to which plaintiffs objected by their April 15, 2015 reply affidavit (¶¶2-7). And she did this again when she made her July 28, 2015 motion to dismiss the supplemental complaint – to which plaintiffs' objected by their September 22, 2015 memorandum of law in support of their cross-motion for summary judgment (pp. 1, 16-17).

Plaintiffs' *sub judice* September 22, 2015 cross-motion for summary judgment as to the fifth, sixth, and seventh causes of action, demonstrating that the Court's October 9, 2014 dismissal of the first, second, and third causes of action is no bar to the fifth, sixth, and seventh causes of action – without contest by AAG Kerwin – also establishes that it is no bar to plaintiffs' ninth, tenth, and eleventh causes of action.

Moreover, ¶¶320-331 of **plaintiffs' tenth cause of action** *expressly* identifies and details an additional challenge to the Judiciary's proposed budget for fiscal year 2016-2017 and the Legislative/Judiciary budget bill based thereon relating to "the constitutionality and lawfulness of the interchange provision appearing at §2 of the Judiciary's 'single budget bill' – and replicated, *verbatim*, in §2 of defendant CUOMO's Legislative/Judiciary Budget Bill #S.6401/A.9001", with such challenge being both *as written* and *as applied*. This is simply disregarded by AAG Kerwin, who does not deny or dispute its factual and legal showing in any respect.

As for **plaintiffs' twelfth cause of action**, AAG Kerwin states:

> "...the court now has pending before it a full record that supports the dismissal of plaintiffs' Fourth and Eighth Causes of Action. See Kerwin aff. at ¶8. In connection with that record, defendants established that Legislative Law §32-a was not violated, which was the only claim that survived defendants' motion to dismiss the original complaint. The court has now before it irrefutable proof that the requirements of Legislative Law §32-a were not violated in 2014 and 2015. Submitted herewith are copies of (1) the 2016-2017 press release and schedule of budget hearings; (2) the agenda for the February 4, 2016 Public Protection hearing; and (3) the transcript from the February 4, 2016 Public Protection hearing. See Kerwin aff. at Exhs. F, G & H. Since these documents establish that Legislative Law §32-a was not violated in 2016,

permitting plaintiffs to add their Twelfth Cause of Action would be futile." (at p. 3).[12]

This is an even more brazen fraud. There is NO evidence before the Court to support dismissal of plaintiffs' fourth and eighth causes of action. Rather, as highlighted by plaintiffs' *sub judice* September 22, 2015 memorandum of law in support of their cross-motion (at pp. 26-35, 38-42) and reinforced by their November 5, 2015 reply memorandum of law, the only evidence before the Court pertaining to 2014 and 2015 supports summary judgment to plaintiffs on the panoply of constitutional, statutory, and rule violations specified by the fourth and eighth causes of action – Legislative Law §32-a among them. Indeed, AAG Kerwin's furnishing to the Court of the identical evidence for 2016 pertaining to supposed compliance with Legislative Law §32-a is an utter deceit for all the reasons specified by pages 26-28 of plaintiffs' September 22, 2015 memorandum of law in support of their cross-motion: it does not show that the Legislature held any budget hearing at which the public could be heard with respect to the Legislature's own budget – or at which any member of the public was heard in opposition to the judiciary budget or in opposition to the judicial salary increases. It certainly does not show any effort by the Legislature to permit plaintiff Sassower to testify, or explain why her timely and repeated requests to testify went unheeded, or refute plaintiffs' assertion that the reason she was not permitted to testify was because the Legislature knew her proposed testimony to be dispositive of unlawfulness, unconstitutionality, and fraud.

AAG Kerwin's Fraudulent Point II:
"Plaintiffs Should Not be Granted Leave to Supplement the Complaint with the Proposed Thirteenth, Fourteenth, Fifteenth and Sixteenth Causes of Action"

AAG Kerwin's Point II (p. 4) is also based on the inapplicable legal proposition – also regurgitated from her unsuccessful opposition to plaintiffs' March 31, 2015 motion for leave to file their verified supplemental complaint.[13] According to AAG Kerwin, these causes of action:

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12 *Cf.* ¶12 of AAG Kerwin's affirmation.

> "arise[] out of materially different facts than those contained in plaintiff's original complaint and first supplemental complaint" and
>
> "are completely different from, and unrelated to, those contained in the original and first supplemental complaint" (at p. 4).

This is outright fraud – and reflecting this is her description of the thirteenth, fourteenth, fifteenth, and sixteenth causes of action as relating to:

> "(1) The constitutionality of Chapter 60, Part E, of the Laws of 2015; (2) the actions of the Commission on Legislative, Judicial and Executive Compensation; and (3) the alleged 'three-men-in-a-room budget dealing' of the Governor, Temporary Senate President, and Assembly Speaker" (at p. 4),

without revealing that the verified complaint and the verified supplemental complaint:

> (1) each challenge the constitutionality of Chapter 567 of the Laws of 2010 – the statute that was materially identical to Chapter 60, Part E of the Laws of 2015, which repealed it;
>
> (2) each challenge the "actions" of the Commission on Judicial Compensation – the same "actions" as the Commission on Legislative, Judicial and Executive Compensation would, thereafter, replicate; and
>
> (3) each challenge the behind-closed-doors deal-making that was eviscerating and substituting for any constitutional and legitimate legislative process – and from which, on March 31, 2015, Chapter 60, Part E, of the Laws of 2015 emerged.

Indeed, to craft her fraudulent argument she reduces plaintiffs' verified complaint and verified supplemental complaint to a combined single sentence, describing them as:

> "related only to the procedures surrounding the submission of the Legislative and Judicial Budgets, and their inclusion in the proposed 2014-2015 and 2015-2016 executive budgets" (at p. 4).

Whatever the precise meaning of this vague description is, it intentionally conceals the nexus between the second supplemental complaint and the complaint and supplemental complaint.

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[13] AAG Kerwin's Point II of her April 9, 2015 memorandum of law in opposition to plaintiffs' March 31, 2015 motion for leave to file their supplemental complaint.

AAG Kerwin's Point II ends with further fraud – materially replicating her opposition to plaintiffs' March 31, 2015 motion for leave to file their verified supplemental complaint – stating:

> "Dispositive motions on all of the plaintiffs' existing claims have been pending before the court since November 2015. To permit the plaintiffs to essentially piggy-back a new, unrelated case onto one that was originally commenced in March 2014, and is awaiting a decision on dispositive motions, would necessarily prejudice defendants." (at p. 4).

Her inference is that the "dispositive motions on all of the plaintiffs' existing claims" is her motion for summary judgment on the fourth cause of action of plaintiffs' complaint and for dismissal of the fifth, sixth, seventh, and eighth causes of action of plaintiffs' supplemental complaint – because both her affirmation and memorandum of law conceal plaintiffs' responding cross-motion. Yet, it is plaintiffs' cross-motion that is dispositive – both of plaintiffs' entitlement to declarations in their favor on their "existing claims", as well as of the Court's duty to vacate its indefensible dismissals of plaintiffs' first, second, and third causes of action.

Moreover, because the causes of action in the second supplemental complaint materially replicate the allegations and causes of action in the complaint and supplemental complaint, the Court's granting of leave to plaintiffs to file their second supplemental complaint will not "prejudice defendants". Rather, it will spare defendants the burden of a separate and redundant litigation by enabling the Court to expeditiously grant summary judgment to plaintiffs on the largely identical causes of action of their second supplemental complaint.

The record already contains a full briefing of virtually <u>all</u> the constitutional provisions, statutes, and legislative rules whose violations are the subject of the eight causes of action of plaintiffs' verified second supplemental complaint. Consequently, plaintiffs are ready to move for summary judgment on those causes of action – and, as stated at ¶3 of plaintiff Sassower's

accompanying affidavit, will do so promptly upon the Court's granting of their order to show cause for leave to file the verified second supplemental complaint.

AAG Kerwin's Fraudulent Point III:
"Plaintiffs' Application for Preliminary Injunctive Relief Should be Denied in its Entirety"

AAG Kerwin's Point III (pp. 5-12) is also based on inapplicable law and flagrant falsification of the facts. Once again, as she has throughout this litigation, AAG Kerwin conceals that this is a citizen-taxpayer action under State Finance Law Article 7-A, §123 *et seq.* – and that its§123-e(2) expressly provides for the granting of a preliminary injunction and TRO:

> "2. 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).

Not one of AAG Kerwin's cited cases pertains to the granting or denial of a preliminary injunction or TRO in a citizen-taxpayer action – and she makes no claim that in a citizen-taxpayer action a preliminary injunction is a "drastic remedy" and "extraordinary relief", requiring a three-fold showing:

> "by clear and convincing evidence, that: (1) there exists a likelihood of ultimate success on the merits of the underlying action; (2) the movant will suffer irreparable injury absent the granting of the preliminary injunction; and (3) a balancing of the equities favors the moving party." (at p. 5).

She then unequivocally asserts (at p. 5) that plaintiffs "have failed to submit any evidence" establishing any of these three requirements. According to AAG Kerwin:

> In support of their order to show cause, the plaintiffs submitted only their proposed second supplemental complaint with thirty exhibits, and a twelve paragraph affidavit

> of plaintiff Elena Ruth Sassower with two exhibits. The exhibits attached to plaintiff Sassower's affidavit are (1) an email between plaintiff Sassower and defense counsel relating to the second supplemental complaint and (2) this court's June 24, 2015 and October 9, 2014 decisions. This alleged 'evidentiary proof' is entirely insufficient to satisfy plaintiffs' substantial burden of demonstrating their entitlement by clear and convincing evidence" (at pp. 5-6).[14]

She does not here specify what is "entirely insufficient". Nor does she proceed sequentially through the four branches of injunctive relief of plaintiffs' order to show cause. Rather she skips to the third of the four injunctive branches, which she quotes in full (at p. 6):

> "(4) enjoining defendants Senate and Assembly's General Budget Conference Committee and its subcommittees from proceeding further in resolving differences between eight of their respective budget bills:
>
> (i) State Operations: Budget Bill #S.6400-B/A.9000-B;
> (ii) Aid to Localities: Budget Bill #S.6403-B/A.9003-B;
> (iii) Capital Projects: Budget Bill #S.6404-B/A.9004-B;
> (iv) Public Protection and General Government: Budget Bill #S.6405-B/A.9005-B;
> (v) Education, Labor and Family Assistance: Budget Bill #S.6406-B/A.9006-B;
> (vi) Health and Mental Hygiene: Budget Bill #S.6407-B/A.9007-B;
> (vii) Transportation, Economic Development & Environmental Conservation: Budget Bill #S.6408-B/A.9008-B; and
> (viii) Revenue: Budget Bill #S.6409-B/A.9009-B,
>
> absent an evidentiary showing at to how the amendments giving rise to the differences could have been passed on dates the Legislature was not in session (March 11/12, 2016), who introduced the amendments, where and when they were introduced, and the debate and votes thereon, if any".

According to her, this preliminary injunctive relief is "unrelated to [plaintiffs'] proposed underlying claims", which she specifies (at p. 6) as "plaintiffs' proposed Causes of Action Twelve through Sixteen". This is false – and plaintiffs' twelfth cause of action, entitled "Nothing Lawful or Constitutional Can Emerge from a Legislative Process that Violates its Own Statutory & Rule

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[14] *Cf.* ¶14 of AAG Kerwin's affirmation.

Safeguards – and the Constitution", could not be clearer in particularizing the related underlying facts:

> "354. Upon information and belief, defendants SENATE and ASSEMBLY have also dispensed with any committee deliberations and any committee votes on any of defendant CUOMO's executive budget. These are his four other appropriation budget bills:
>
> (1) State Operations (#S.6400/A.9000);
> (2) Debt Service (#S.6402/A.9002);
> (3) Aid to Localities (#S.6403/A.9003);
> (4) Capital Projects (#S.6404/A.9004);
>
> and his five proposed 'Article VII bills':
>
> (1) Public Protection and General Government (S.6405/A.9005);
> (2) Education, Labor and Family Assistance (S.6406/A.9006);
> (3) Health and Mental Hygiene (S.6407/A.9007);
> (4) Transportation, Economic Development and Environmental Conservation (S.6408/A.9008);
> (5) Revenue (S.6409/A.9009).
>
> 355. Upon information and belief, defendants SENATE and ASSEMBLY have also dispensed with any deliberations and any votes on the Senate and Assembly floor with respect to any of these ten budget bills, including the Legislative/Judiciary Budget Bill #S6401/A.9001.
>
> 356. With the exception of Legislative/Judiciary Budget Bill #S6401/A.9001 and the Debt Service Budget Bill #S.6402/A.9002, the other eight budget bills have each been amended, twice (Exhibits 30-a, 30-b).
>
> 357. The first set of amendments was apparently defendant CUOMO's 30-day amendments when all eight budget bills were amended on the same day, February 16, 2016 – and in a fashion producing no differences in the Senate and Assembly versions of the same budget bills.
>
> 358. The second set of amendments also took place in unison. On March 11, 2016, the eight Assembly budget bills were amended. The next day, March 12, 2016, the corresponding eight Senate budget bills were amended. Yet by whom these amendments were introduced, where, why, and by what vote they were approved is a mystery – especially as neither the Senate nor Assembly were in session on those two days, which were a Friday and a Saturday (Exhibit 30-c). According to Assembly webpages for each of the eight Senate bills and each of the eight Assembly bills: 'There are no votes for this bill in this legislative session' and 'memo not available'.

> As such, these amendments appear to be non-amendments, as they are utterly fraudulent."

Consequently, AAG Kerwin's pretense that "plaintiffs are not entitled to any of the requested relief that is not related to their underlying claims" – for which she cites CPLR §6301 and gives, as her only example, the above-quoted fourth branch of plaintiffs' March 23, 2016 order to show cause – is false and inapplicable.

Tellingly, notwithstanding AAG Kerwin's Point III pertains to denying plaintiffs' preliminary injunctive relief "in its entirety", she does not comparably quote from the three other branches of injunctive relief sought by plaintiffs' order to show cause. Rather, the balance of her Point III contains only a snippet of quote (at p. 7) – with no identification of the branch of plaintiffs' order to show cause to which it relates.

AAG Kerwin's Fraudulent Subsection "Likelihood of Success on the Merits"

The snippet of quote from plaintiff's order to show cause, included in the first paragraph of this subsection (at pp. 7-12), reads as follows:

> "To the extent that plaintiffs seek to enjoin the defendants and/or committees/subcommittees of the Legislature from 'proceeding on' or 'enacting' any bill, such relief is unavailable as moot since the 2016-2017 state budget has been enacted. New York Public Interest Group, Inc. v. Regan, 91 AD2d 774, 775 (3d Dept 1982)(since the challenge appropriation bills were enacted with the budget, plaintiffs/claims were moot). Accordingly since the plaintiffs seek preliminary injunctive relief related to moot claims, their application for relief should be denied."[15] (at p. 7).

This is deceitful. Obviously injunctive relief that has been overtaken by subsequent events can no longer be granted. Yet, AAG Kerwin does not specify which portions of plaintiffs' order to show cause fall into that category, other than the above-quoted fourth branch. She does not, for example, quote or identify the fifth branch, where the injunctive relief is also mooted:

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15 *Cf.* ¶16 of AAG Kerwin's affirmation.

> "enjoining defendants Governor Cuomo, Temporary Senate President Flanagan, and Assembly Speaker Heastie from engaging in their behind-closed-doors, three-men-in-a-room budget deal-making with respect to Judiciary/Legislative Budget Bill #S.6401/A.9001 and the whole of the Executive Budget; or, alternatively, requiring that such budget negotiations be publicly conducted".

More importantly, she conceals that the second and third branches seek injunctive relief that is not completely mooted. As for the second branch:

> "enjoining defendants from enacting Legislative/Judiciary Budget Bill #S.6401/A.9001 and/or disbursing monies pursuant thereto; or, alternatively: (i) as to the legislative portion, enjoining enactment of its §1 appropriations and §4 reappropriations (pp. 1-9; 25-48) **and disbursement of monies therefrom**; and; (ii) as to the judiciary portion, enjoining enactment of its §3 reappropriations (pp. 22-24) **and disbursement of monies therefrom, particularly for purposes of funding "the force of law" judicial salary increases recommended by the December 24, 2015 Report of the Commission on Legislative, Judicial and Executive Compensation for fiscal year 2016-2017"** (underlining in the original, bold added),

disbursement of monies from the enacted bill can still be enjoined. As for the third branch:

> "enjoining defendants from enacting any bill appropriating monies to fund "the force of law" judicial salary increases recommended by the December 24, 2015 Report of the Commission on Legislative, Judicial and Executive Compensation – **or otherwise disbursing monies for such purpose**". (bold added),

the entirety of this injunctive relief remains available. No bill has been enacted to fund the judicial salary increases – yet the monies to pay for the increases are being covertly disbursed.

A. AAG Kerwin Conceals that Injunctive Relief Requested by the Second and Third Branches of Plaintiffs' Order to Show Cause Remains Available – and Falsifies Plaintiffs' Thirteenth, Fourteenth, and Fifteenth Causes of Action Establishing their Entitlement Thereto

AAG Kerwin nowhere identifies that the thirteenth, fourteenth, and fifteenth causes of action seek the nullification/voiding of the judicial salary recommendations – though this is expressly stated in the title of each. These titles, also appearing in the second supplemental complaint's table of contents (pp. 4-5), read:

"AS AND FOR A THIRTEENTH CAUSE OF ACTION
Chapter 60, Part E, of the Laws of 2015 is Unconstitutional, *As Written* – and **the Commission's Judicial Salary Increase Recommendations are Null & Void by Reason Thereof**";

"AS AND FOR A FOURTEENTH CAUSE OF ACTION
Chapter 60, Part E, of the Laws of 2015 is Unconstitutional, *As Applied* – & **the Commission's Judicial Salary Increase Recommendations are Null & Void by Reason Thereof**";

"AS AND FOR A FIFTEENTH CAUSE OF ACTION
The Commission's Violations of Express Statutory Requirements of Chapter 60, Part E, of the Laws of 2015 Renders its **Judicial Salary Increase Recommendations Null and Void**". (underlining and italics in the original, bold added).

The entirety of AAG Kerwin's response to **plaintiffs' thirteenth and fourteenth causes of action** is two paragraphs. The first furnishes the legal standard applicable to constitutionality. It reads:

"...plaintiff's proposed Thirteenth and Fourteenth Causes of Action allege that Chapter 60, Part E of the Laws of 2015 is unconstitutional both as written and as applied. See Plaintiff's Proposed Second Supplemental Complaint at ¶¶385-452. Where, as here, a plaintiff asserts that a statute is unconstitutional, courts are mindful that enactments of the Legislature – a coequal branch of government – may not casually be set aside by the Judiciary. The statutes in issue enjoy a strong presumption of constitutionality, grounded in part on 'an awareness of the respect due the legislative branch.' Dunlea v. Anderson, 66 NY2d 265, 267 (1985). On the merits, a plaintiff bears the heavy burden of establishing the statute's unconstitutionality 'beyond a reasonable doubt.' Matter of E.S. v. P.D., 8 NY3d 150, 158 (2007)." (at p. 7).

The second paragraph then baldly declares:

"Plaintiffs' submissions in support of their application for a preliminary injunction are wholly devoid of evidence sufficient to support a finding that Chapter 60, Part E of the Laws of 2015 is unconstitutional beyond a reasonable doubt. As has been true throughout the pendency of this case, plaintiffs have submitted, almost exclusively, only copies of letters or communications from plaintiffs to state officials. See Plaintiffs' Proposed Second Supplemental Complaint at Exhs. 37-54. Despite their apparent belief to the contrary, plaintiffs own documents do not constitute 'evidence' sufficient to establish the alleged unconstitutionality of an enacted statute. As a result, plaintiffs have failed to establish that they are likely to succeed on the merits of proposed causes of action Thirteen and Fourteen.[fn2]" (at pp. 7-8)

This is utterly fraudulent – as the most cursory examination of the thirteenth and fourteenth causes of action makes obvious and as AAG Kerwin well knows in not revealing ANY of their allegations nor specifying in what respects plaintiffs' exhibits are insufficient in establishing unconstitutionality.

Indeed, **plaintiffs' thirteenth cause of action – the unconstitutionality of Chapter 60, Part E, of the Laws of 2015, *as written* (¶¶385-423)** – has NOTHING to do with ANY "copies of letters or communications from plaintiffs to state officials" – NONE of which are either referred-to or furnished by the allegations of the cause of action. Rather, the thirteenth cause of action rests, exclusively:

> (1) on the text of the statute;
>
> (2) on the budget bill by which it was introduced, amended, and enacted: Budget Bill #S.4610/A.6721;
>
> (3) on the sponsors' memo to #A.7997, the bill to amend the statute, introduced by five Assembly members, citing five different provisions of the New York State Constitution, violated by the statute's "force of law" provision: Article III, §1; Article III, §13; Article III, §14; Article IV, §7; Article III, §6;
>
> (4) the dissenting opinion of then Appellate Division, Fourth Department Justice Eugene Fahey in *St. Joseph Hospital v. Novello*, 43 A.D.3d 139 (2007);
>
> (5) the New York City Bar Association's *amicus curiae* brief to the Court of Appeals in *McKinney v. Commissioner of the NYS Dept. of Health,* 15 Misc. 3d 743 (Bronx County), aff'd., 41 AD3d 252 (1st Dep't.), appeal dismissed, 9 NY3d 891 (2007);
>
> (6) the Supreme Court decision of Bronx County Supreme Court Justice Mary Brigantte-Hughes in *McKinney v. Commissioner*, 15 Misc. 3d 74 (2007);
>
> (7) Article XIII, §7 of the New York State Constitution and the November 23, 2009 brief of the Governor, Senate and Assembly in *Maron v. Silver*, 14 NY3d 230 (2010);
>
> (8) Article VII, §6, Article VII, §2 of the New York State Constitution;
>
> (9) the Appellate Division, Third Department decision in *Winner v. Cuomo*, 176 AD2d 60, 63 (3rd Dept. 1992);
>
> (10) the Court of Appeals decision in *Pataki v. Assembly* 4 NY3d 75 (2004);

(11) the video of the Senate Finance Committee's March 31, 2015 meeting;

(12) the law review article "*Albany's Dysfunction Denies Due Process*", 30 Pace Law Review 965 (2010);

Thus, apart from her deceit, AAG Kerwin has NO response to the thirteenth cause of action as to the unconstitutionality of Chapter 60, Part E, of the Laws of 2015, *as written* – entitling plaintiffs to the granting of a preliminary injunction to enjoin defendants from disbursing monies for the judicial salary increases and from enacting any bill providing for such funding.

As for **plaintiffs' fourteenth cause of action (¶¶424-552), the unconstitutionality of Chapter 60, Part E, of the Laws of 2015, *as applied***, here, too, AAG Kerwin has NO response to its particularized allegations and the evidence referred-to and furnished in support – the accuracy of which she does not contest.

AAG Kerwin's annotating footnote 2 (at p. 8) continues her fraud. Notwithstanding plaintiffs' overwhelming evidentiary presentation in support of their thirteenth and fourteenth causes of action, none of it confronted, let alone controverted by her, she begins:

> "Notwithstanding plaintiffs' failure to submit any evidence that they are likely to succeed on the merits of proposed causes of action Thirteen and Fourteen" (underlining added).

She then purports that those two causes of action "would fail as a matter of law", based on *McKinney v. Commissioner of NY State Department of Health*, 15 Misc. 3d 743 (Bronx County), aff'd., 41 AD3d 252 (1st Dep't.), appeal dismissed, 9 NY3d 891 (2007). This is yet a further fraud – as she has neither denied nor disputed, but instead concealed, that plaintiffs' thirteenth cause of action contains a subsection B (¶¶394-402) based on *McKinney,* the entirety of which she has not confronted, including its first two paragraphs reading:

> "394. By contrast to *McKinney*, where the Supreme Court upheld the statute because of the safeguarding provisions it contained, such safeguards are here absent.

395. Unlike the statute in *McKinney*, Chapter 60, Part E, of the Laws of 2015 does not provide for a commission of sufficient size and diversity, nor furnish the commission with sufficient guidance as to standards and factors governing its determinations..."

As for plaintiffs' fifteenth cause of action (¶¶453-457), the Commission's violations of *express* statutory requirements, AAG Kerwin dispatches it with a single paragraph:

> "Plaintiff's proposed Fifteenth Cause of Action alleges that the Commission on Legislative, Judicial and Executive Compensation violated the statutory requirements of Chapter 60, Part E, of the Laws of 2015. See Plaintiffs' Proposed Second Supplemental Complaint at ¶¶453-457. In support of this proposed cause of action, plaintiffs attached Exhibits 39 and 40 to their proposed second supplemental complaint. Again, these exhibits are documents authored by the plaintiffs, which are insufficient 'evidence' to support a cause of action. Additionally, the text of the proposed second supplemental complaint also fails to include any factual allegations to support a cause of action that the Commission on Legislative, Judicial and Executive Compensation – which is not a party in this action – violated Chapter 60, Part E, of the Laws of 2015. Accordingly, plaintiffs are unable to establish by clear and convincing evidence that they are likely to succeed on the merits of their Fifteenth proposed cause of action, and their application for preliminary injunction should therefore be denied." (at p. 8)

Again, this is utter fraud. AAG Kerwin has not denied, disputed, or even identified a single one of the seven statutory violations particularized by the fifteenth causes of action (¶¶454, 456) – nor specified in what respects Exhibits 39 and 40 "authored by the plaintiffs" are "insufficient 'evidence' to support a cause of action". These two exhibits are, respectively, plaintiffs' January 15, 2016 letter to Temporary Senate President Flanagan and Assembly Speaker Heastie (Exhibit 39) and its enclosed 12-page "Statement of Particulars in Further Support of Legislative Override of the 'Force of Law' Judicial Salary Increase Recommendations, Repeal of the Commission Statute, Etc." (Exhibit 40) – and their recitation of statutory violations, uncontested by her, is corroborated by comparison of the text of the statute with the Commission's December 24, 2015 Report, the videos and transcripts of the Commission's meetings and hearing, and the submissions the Commission received, posted on its website.

As for AAG Kerwin's assertion (at p. 8) that the "text" of the second supplemental complaint fails to include any factual allegations to support a cause of action that the Commission violated the statute, she does not specify why ¶¶ 274-276, 283-287, 289-300 are not sufficient for that purpose, quite apart from the sufficiency of ¶¶453-457 of plaintiffs' fifteenth cause of action – and AAG Kerwin furnishes no law for her false innuendos with respect thereto or with respect to the Commission not being a party.

B. AAG Kerwin Conceals that Plaintiffs' Sixteenth Cause of Action is Not Mooted Just Because the Preliminary Injunction Sought by the Fifth Branch of their Order to Show Cause is Moot

With respect to plaintiffs' sixteenth cause of action, "Three-Men-in-a-Room, Budget Deal-Making is Unconstitutional, *As Unwritten* and *As Applied*", AAG Kerwin asserts:

> "Plaintiffs' claims concerning the manner in which the budget was being negotiated are moot, since budget negotiations ended with the enactment of the 2016-2017 state budget." (at p. 9).

This is false. What is moot is the preliminary injunction sought by the fifth branch of plaintiffs' order to show cause – not the underlying claim as to the unconstitutionality of three-men in a room budget deal-making. There are yet eleven months left on its unconstitutional, larcenous result: the enacted executive budget for fiscal year 2016-2017, against which a citizen-taxpayer would lie for a declaration that it was unconstitutionally and unlawfully procured and that its disbursement of state funds is unconstitutional and illegal. Moreover, the recognized exceptions to mootness are all here present: (1) likelihood of repetition; (2) a phenomenon typically evading review; (3) involves a novel issue or significant or important questions not previously passed upon; (4) involves a matter of widespread public interest or importance or of ongoing public interest; *Winner v. Cuomo*, 176 A.D.2d 60 (3rd Dept. 1992); *Schulz v. Silver*, 212 A.D.2d 293 (3rd Dept. 1995); 43 New York Jurisprudence §25 "Exceptions to mootness doctrine".

That AAG Kerwin pretends that the sixteenth cause of action is moot reflects that she has no answer, whatever, to its showing that three-men-in-a-room, budget deal-making is unconstitutional, either *as unwritten* or *as applied.* Indeed, she confronts virtually none of the allegations of the sixteenth cause of action.

Thus, AAG Kerwin:

> (1) does not deny or dispute that "Neither the Constitution, nor statute, nor Senate and Assembly rules authorize the Governor, Temporary Senate President, and Assembly Speaker to huddle together for budget negotiations and the amending of budget bills", asserted by plaintiffs' ¶461;
>
> (2) does not show how three-men-in-a-room "budget negotiations and the amending of budget bills" can remotely be reconciled with the constitutional scheme set forth at Article VII, §§3, 4, analyzed by plaintiffs' ¶460.

As such, plaintiffs' ¶¶462, 463 are correct. The Court of Appeals decision in *King v. Cuomo*, 81 N.Y.2d 247 (1993), controls – as its basis for declaring bicameral recall unconstitutional was because such practice was not provided for by the New York State Constitution and was held to unbalance the constitutional design, the situation at bar.

AAG Kerwin conceals the entirety of the Court of Appeals' reasoning in *King v. Cuomo*. Likewise she conceals that plaintiffs have asserted (¶464) that the unconstitutionality of three-men-in-a-room budget deal-making is *a fortiori* to the unconstitutionality of bicameral recall – and why: in *King*, there were Senate and Assembly rules governing the recall practice, whereas, at bar, there are no Senate and Assembly rules governing three-men-in-a-room budget deal-making which, moreover, takes place behind-closed-doors and is universally decried as contrary to good government.

She also conceals plaintiffs' ¶¶465, 466 furnishing further legal authority, *Campaign for Fiscal Equity, Inc. v. Marino*, 87 N.Y.2d 235 (1995), and the law review article "*The Anti-*

Corruption Principle", Cornell Law Review, Vol 94: 341-413, each reinforcing the unconstitutionality of three-men-in-a-room, budget deal-making.

The culmination of all this concealment is AAG Kerwin's quoting, in full, Article VII, §§3, 4 of the New York State Constitution, followed by her bald declaration:

> "Despite plaintiffs' imaginations to the contrary, nothing in either of these constitutional provisions prohibits the Governor and leaders of the Legislature from meeting to discuss any aspect of the budget. In light of plaintiffs' failure to provide any legal authority to support such a position, plaintiffs have failed to establish any likelihood of success on the merits of their proposed Sixteenth Cause of Action by clear and convincing evidence." (underlining added).

In other words, in the complete absence of any showing by her as to how three-men-in-a-room "budget negotiations and amending of budget bills" – all taking place out of public view – is consistent with the text of Article VII, §§3, 4, she reduces the complained-against constitutional violations to "meeting to discuss any aspect of the budget". Indeed, her sparse argument pertaining to plaintiffs' sixteenth cause of action multiply purports that plaintiffs' challenge is to the Governor, Temporary Senate President and Assembly Speaker "meeting" together or to negotiating, without identifying that this includes the amending of bills.

Additionally, it would appear that because AAG Kerwin cannot address the unconstitutionality of three-men-in-a-room, budget deal-making *as applied* (¶¶467-470), she relegates such frivolous, fraudulent responses as she has to her footnotes 3, 4, and 5. Thus, in the absence of any answer to the behind-closed-doors aspect of three-men-in-a-room budget deal-making, violating Article III, §10 of the New York State Constitution, "The doors of each house shall be kept open", and Senate and Assembly Rules consistent therewith : Senate Rule XI, §1; Assembly Rule II, §1; and Public Officers Law, Article VI, set forth by ¶468, AAG Kerwin purports, in footnote 3 (at p. 9), that "if, *arguendo*" the sixteenth cause of action is deemed to allege a violation of the Open Meetings Law, it would fail to allege a claim *as a matter of law*. In other words, she has

not responded to the violations actually alleged.

Her footnote 4 (at p. 10) would appear to be a further response to violation of Senate and Assembly rules pertaining to openness, as well as to the amending of bills, stating:

> "To the extent that the plaintiffs, again, allege that the Legislature violated its own rules, defendants again state that, as this court has already held, such a claim is not reviewable by the court. Heimbach v. State, 59 NY2d 891, 893 (1983), app. dismissed 464 US 956 (1983)(determining whether a legislative roll call was incorrectly registered is a legislative matter beyond judicial review); Urban Justice Ctr. v. Pataki, 38 AD3d 20, 27 (1st Dept 2006), lv. denied 8 NY3d 958 (2007) (not the provence of the courts to direct the Legislature on how to do its work particularly where the internal practices of the Legislature are involved)."

This is utterly fraudulent. This Court has issued two decisions, both of which AAG Kerwin annexes to her April 8, 2016 affirmation, neither holding that the Legislature's violation of its own rules is "not reviewable by the court". Moreover, as plaintiffs have repeatedly asserted – including in their September 22, 2015 memorandum of law in support of their cross-motion (at p. 25), *sub judice* before the Court – *Heimbach* does not stand for the proposition, that AAG Kerwin would have the Court adopt, that the Legislature, being constitutionally enabled to make its own rules, is thereupon free to violate the rules it has made. And making this further clear is *Seymour v. Cuomo*, 180 A.D.2d 215, 217 (1992) – the case that at the Court of Appeals is *King v. Cuomo*, wherein the Appellate Division, Third Department stated:

> "The rules established by the Senate and Assembly to govern the proceedings in each house (NY Const, art 3, §9) are the functional equivalent of a statute."

Just as the Legislature is not free to violate statutes – and AAG Kerwin makes no argument that it is – so, too, is the Legislature not free to violate its own functionally-equivalent rules.

Nor does *Urban Justice Center v. Pataki* apply, as the plaintiffs there were challenging Senate and Assembly rules. Here, plaintiffs are seeking to enforce Senate and Assembly rules being violated by the Senate and Assembly.

As for AAG Kerwin's footnote 5 (at p. 11) that:

> "Plaintiffs' claims in their, *inter alia*, Twelfth and Sixteenth Causes of Action, and any information related thereto, would also be barred by the Speech or Debate Clause of the New York State Constitution. See N.Y. Const. Art. III, §1"

Plaintiffs have already refuted the availability of a speech or debate clause defense in their *sub judice* September 22, 2015 memorandum of law in support of their cross-motion for summary judgment (at pp. 31- 34) – and such is here applicable. Moreover, inasmuch as the Governor is not covered by the speech or debate clause, it is not available as to him.

AAG Kerwin's Fraudulent Subsection "Irreparable Harm"

Apart from AAG Kerwin's failure to even claim that in a citizen-taxpayer action, pursuant to State Finance Law §123 *et seq.*, "irreparable harm" is a criteria for a preliminary injunction, she makes no claim that the massive taxpayer monies being disbursed in the absence of the preliminary injunction sought by plaintiffs' order to show cause can be recovered upon the Court's ultimate judgement in plaintiffs' favor – the ONLY determination the record will support. Most specifically, she makes no claim that the judicial salary increases being disbursed to the judges since April 1, 2016, pursuant to the recommendations of the Commission on Legislative, Judicial and Executive Compensation – and the monetary non-salary benefits based thereon – will be returned by them to the public treasury, let alone with a return of the judicial salary increases the judges received, since April 1, 2012, pursuant to the recommendations of the Commission on Judicial Compensation – and the monetary non-salary benefits they received based thereon. As such, plaintiffs have met the standard for a preliminary injunction under State Finance Law §123-e(2), *to wit*, "acts which, if committed or continued during the pendency of the action, would be detrimental to the public interest."

AAG Kerwin's Fraudulent Subsection "Balancing of the Equities"

The foregoing establishes the fraud of AAG Kerwin's pretense (at p. 12) that "equitable considerations weigh in favor of denying plaintiffs' request for preliminary injunctive relief". Based on the overwhelming record before the Court, not only are the equities all in plaintiffs' favor, but their entitlement to summary judgment.

CONCLUSION

Upon the Court's discharging its constitutional function of making findings of fact and conclusions of law with respect to plaintiffs' showing herein, including as to the ten branches of plaintiffs' *sub judice* September 22, 2015 cross-motion for summary judgment and other relief, the Court's duty will be, *as a matter of law*, to grant plaintiffs leave to file their verified second supplemental complaint, to grant them the preliminary injunctive relief that remains available, and to take all appropriate steps to safeguard the integrity of the judicial process and the statutory remedy afforded by State Finance Law, Article 7-A, beginning with a direction to Attorney General Schneiderman that he identify who in his office has independently evaluated the "interest of the state" and plaintiffs' entitlement to his representation/intervention in this citizen-taxpayer action.

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

April 22, 2016