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' REPLY MEMORANDUM OF LAW

in Further Support of Cross-Motion
& Order to Show Cause for Preliminary Injunction

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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REPLY MEMORANDUM OF LAW

Introduction

This memorandum of law is submitted in reply to the Attorney General's May 30, 2014 opposition to plaintiffs' May 16, 2014 cross-motion – and in further support of plaintiffs' cross-motion and March 28, 2014 order to show cause for a preliminary injunction.

The Attorney General's opposition, consisting of a paltry 12-paragraph affirmation and 3-1/3-page memorandum of law, both by Assistant Attorney General Adrienne Kerwin, is no less a "fraud on the court" than was the Attorney General's April 18, 2014 dismissal motion, also by AAG Kerwin, whose pervasive fraud and deceit were particularized by plaintiffs' May 16, 2014 opposing memorandum of law and the basis for their cross-motion. As stated on the very first page of plaintiffs' May 16, 2014 memorandum of law – and equally appropriate for the first page of this memorandum of law – the Attorney General's fraudulent litigation conduct:

> "would be unacceptable if perpetrated by an ordinary lawyer. That it is perpetrated by this 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 by this Court."

The statutory and rule provisions invoked by the fifth, sixth, and seventh branches of plaintiffs' cross motion – 22 NYCRR §130-1.1, *et seq.*, Judiciary Law §487(1), and 22 NYCRR§100.3(D)(2) – provide the Court with the means and obligation to protect itself and plaintiffs from falsehood and fraud. Such falsehood and fraud reinforce plaintiffs' entitlement to their other cross-motion branches. As also stated at the outset of their May 16, 2014 memorandum of law:

"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)."

Plaintiffs' other cross-motion branches are:

(1) pursuant to CPLR §3211(c), giving notice that Attorney General Eric T. Schneiderman's motion to dismiss plaintiffs' verified complaint by Assistant Attorney General Adrienne Kerwin is being converted by the Court to a motion for summary judgment for plaintiffs on their four causes of action, with a so-ordering of plaintiffs' March 26, 2014 Notice to Furnish Papers to the Court pursuant to CPLR §2214(c) in conjunction therewith;

(2) pursuant to CPLR §3132, granting leave to plaintiffs to serve interrogatories upon defendants – *to wit*, plaintiffs' "Questions for Temporary Senate President Skelos and Assembly Speaker Silver" and "Questions for Chief Administrative Judge Prudenti", annexed to their verified complaint as Exhibit M-2 and Exhibit K-2, respectively;

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

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

...

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

As 22 NYCRR §130-1.2 enables the Court to impose $10,000 sanctions for each "single occurrence of frivolous conduct", plaintiffs now expressly seek, as part of their cross-motion's eighth branch of "other and further relief", imposition of additional maximum $10,000 sanctions against AAG Kerwin and her collusive superiors in the office of the Attorney General and Comptroller, with an additional award of maximum costs to plaintiffs, as well as further treble damages under Judiciary Law §487(1), based on AAG Kerwin's unabated frivolous and fraudulent conduct, as hereinafter demonstrated.

AAG Kerwin's misconduct has continued with full knowledge of the definition of "fraud on the court", set forth at page 1 of plaintiffs' May 16, 2014 memorandum of law. That definition, uncontested by her and incontestable, bears repeating:

> "A lawyer's or party's misconduct in a judicial proceeding so serious that it undermines or is intended to undermine the integrity of the proceeding.", Black's Law Dictionary (7th ed. 1999);
>
> "Fraud on the court involves wilful conduct that is deceitful and obstructionist, which injects misrepresentations and false information into the judicial process 'so serious that it undermines . . . the integrity of the proceeding' (*Baba-Ali v State*, 19 NY3d 627, 634, 975 N.E.2d 475, 951 N.Y.S.2d 94 [2012] [citation and quotations omitted]). It strikes a discordant chord and threatens the integrity of the legal system as a whole, constituting 'a wrong against the institutions set up to protect and safeguard the public' (*Hazel-Atlas Glass Co. v. Hartford-Empite*, 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 [1944]; *see also Koschak v Gates Const. Corp.*, 225 AD2d 315, 316, 639 N.Y.S.2d 10 [1st Dept 1996]['The paramount concern of this Court is the preservation of the integrity of the judicial process']).", *CDR Creances S.A.S. v Cohen, et al.*, 2014 N.Y. LEXIS 1002; 2014 NY Slip Op 3294 (Court of Appeals; May 8, 2014).

AAG Kerwin's Dismissal Motion Must Be Denied, *As a Matter of Law*, as Pages 1-24 of Plaintiffs' May 16, 2014 Memorandum of Law are Uncontested & Dispositive

It is frivolous *per se* – and a fraud on this Court – for AAG Kerwin to purport that the Court can grant her dismissal motion where she has not denied or disputed ANY of the facts, law, or legal argument establishing its fraudulence and legal insufficiency, particularized by the first 24 pages of plaintiffs' May 16, 2014 memorandum of law, all of which she conceals. Indeed, so brazen is AAG Kerwin's fraud that she would have the Court believe that these 24 pages do not even exist. Thus the "Preliminary Statement" of her May 30, 2014 memorandum of law states:

> "Instead of making any kind of legal argument in response to those made by the defendants in support of their motion to dismiss, plaintiff has cross-moved for various types of relief..." (p. 1, underlining added).

Having purported that plaintiffs have not made "any kind of legal argument", AAG Kerwin does not address plaintiffs' 24-page fact-based, law-supported argument – which is entirely uncontested. Instead, the totality of what she has to say in further support of her dismissal motion is the single paragraph under Point III of her May 30, 2014 memorandum of law. Entitled "Defendants' Motion to Dismiss Should be Granted", it feigns:

> "Despite spending pages on insulting defense counsel and the Attorney General, the plaintiff has failed to articulate how the on-point case-law relied upon by the defendants in their motion to dismiss is not dispositive."

This is utter fraud, as AAG Kerwin well knows in failing to confront pages 13-24 of plaintiffs' May 16, 2014 memorandum, resoundingly demonstrating the worthlessness of her paltry case-law, even as to the cherry-picked and distorted allegations of the complaint that her dismissal motion reveals.

Plaintiffs' Entitlement to the Granting of the First Branch of their Cross-Motion, *As a Matter of Law*

It is frivolous *per se* – and a fraud on this Court – for AAG Kerwin to oppose the first branch of plaintiffs' cross-motion, pursuant to CPLR §3211(c), for conversion of her dismissal motion to one for summary judgment for plaintiffs and, in conjunction therewith, a so-ordering of their Notice to Furnish Papers to the Court Pursuant to CPLR §2214(c) (Exhibit X-2), where she has not denied or disputed ANY of the facts, law, and legal argument establishing plaintiffs' entitlement to this first branch, set forth at pages 24-26 of their May 16, 2014 memorandum of law.

In fact, AAG Kerwin does not craft an opposition argument. Notwithstanding the title she gives to Point I of her May 30, 2014 memorandum of law, "Plaintiffs' Request that Defendants' Motion to Dismiss by Converted to a Motion for Summary Judgment Should be Denied" (pp. 1-2), her argument is actually not against conversion, but to "pre-answer discovery and the production of documents". As to this, she claims:

> "Since, as argued in defendants' moving papers, the complaint fails to state a cause of action as a matter of law, no extrinsic evidence is necessary to dispose of this case." (p. 2, underlining added).

Such is wholly nonsensical. Apart from the fact that CPLR §3211(c) expressly states:

> "Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment" (underlining added),

AAG Kerwin's dismissal motion was not solely based on failure to state a cause of action, pursuant to CPLR §3211(a)(7), but documentary evidence, pursuant to CPLR §3211(a)(1) – and the fraudulence of each of these grounds is particularized by pages 1-24 of plaintiffs' May 16, 2014 memorandum of law, without rebuttal by her.

AAG Kerwin's only other argument in her Point I are two seemingly contradictory sentences. The first states:

> "In the event, arguendo, the courts (sic) finds that the complaint states a claim on its face, the defendants have no objection to proceeding directly to summary judgment without discovery if the plaintiff is so inclined." (p. 2).

Obviously, plaintiffs are not inclined to proceed to summary judgment without discovery – as evident from their cross-motion requests for a so-ordering of their Notice to Furnish Papers to the Court Pursuant to CPLR §2214(c) – and for leave of Court to serve interrogatories pursuant to CPLR §3132. Notably, AAG Kerwin does not identify the mechanics of her proposed "proceeding directly to summary judgment without discovery". The only path to summary judgment – other than conversion of her pre-answer dismissal motion pursuant to CPLR §3211(c) – is for defendants to answer the complaint so that a summary judgment motion could be made pursuant to §3212, but defendants have not answered the complaint.

AAG Kerwin's second sentence states:

> "However, to the extent that the court grants plaintiffs' request to convert defendants' motion to one for summary judgment, defendants respectfully request that the defendants be provided the opportunity to offer extrinsic evidence in support of such a motion." (p. 2).

Clearly, plaintiffs also request "to offer extrinsic evidence" – and to the fullest extent possible – for which they seek the Court's so-ordering of their Notice to Furnish Papers to the Court Pursuant to CPLR §2214(c).

AAG Kerwin's Point I does not identify plaintiffs' CPLR §2214(c) Notice (Exhibit X-2). Only in her affirmation does she directly address it – at ¶3 – presumably because she has no law to put in a memorandum of law to support her flimsy argument that "any relief sought by plaintiffs in connection with their 'Notice to Furnish Documents to the Court' should be denied." In so-stating, she omits that plaintiffs' Notice is "Pursuant to CPLR §2214(c)" – and that such CPLR provision expressly states:

> "...Where such papers are in the possession of an adverse party, they shall be produced by him at the hearing on notice served with the motion papers..."

She does not deny that all the requested papers – to the extent they exist – are in defendants' possession. Instead, she purports: "...to the extent that such documents exist, they are publicly available either online or through the relevant public relations offices of the Assembly or Senate" – providing no law for her implied proposition that this would negate defendants' obligation pursuant to CPLR §2214(c) to provide the requested originals to the court or certified copies thereof. Such would not facilitate either the speedy determination that State Finance Law §123-c(4) contemplates for citizen-taxpayer actions or that is requisite for determining the order to show cause for a stay with TRO that are the "motion papers" for which the Notice was originally served.

No less honest is her assertion: "Further, defendants submitted some of these public documents in connection with their motion to dismiss" – especially as the minimal, deceitful nature of such production was pointed out by pages 5-6 of plaintiffs' May 16, 2014 memorandum of law, without rebuttal by her.

That litigating parties are expected to cooperate in making disclosure is reflected by CPLR §3102: "Method of obtaining disclosure", whose subdivision (b) states:

> "Stipulation or notice normal method. Unless otherwise provided by the civil practice law and rules or by the court, disclosure shall be obtained by stipulation or on notice without leave of the court..."

Subdivision (f) entitled "Action to which state is party" is particularly relevant:

> "In an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person."

In the absence of any law to support her opposition to the Court's so-ordering of plaintiffs' CPLR §2214(c) Notice – a so-ordering necessitated by her failure to voluntarily furnish the requested

documents, be they originals or certified copies – AAG Kerwin's ¶3 rests on factual falsehood, purporting:

> "plaintiffs have failed to identify any document exclusively in the possession of the defendants, or that are at all relevant to the complaint" (underlining added).

Again, she furnishes no law that the requested documents must be "exclusively" in defendants' possession" – and, plainly, original records, such as requested in the first instance by plaintiffs' §2214(c) Notice, are in defendants' exclusive possession. As for her claim that plaintiffs have "failed to identify any document…at all relevant to the complaint", it is utter deceit:

- Plaintiffs repeatedly stated that the requested documents substantiated their complaint – and the relevance of each requested document is obvious from the complaint's four causes of action (¶¶76-126) and the declaratory relief of its "WHEREFORE" clause (pp. 44-45), whose very existence she conceals; and

- AAG Kerwin fails to identify a single requested document whose relevance to the complaint she questions.

Moreover, page 26 of their May 16, 2014 memorandum of law supported this cross-motion relief by specifying the relevance of an original document request, *to wit*,

> "the documents handed up by Plaintiff ELENA RUTH SASSOWER at the Legislature's February 6, 2013 joint budget hearing on 'public protection' in substantiation of her oral testimony on that date in opposition to the Judiciary's proposed budget and the judicial salary increases recommended by the August 29, 2011 Report of the Special Commission on Judicial Compensation.[fn.1]"

expressly stating that production of these is:

> "dispositive of plaintiffs' entitlement to the voiding of the third phase of the judicial salary increase, embedded in Budget Bill #S.6351/A.8551, as it primarily consists of the verified complaint in *CJA v. Cuomo I*, whose most important exhibit is CJA's October 27, 2011 Opposition Report." (underlining in the original).

AAG Kerwin does not deny or dispute that the requested production of these original records would establish plaintiffs' entitlement to summary judgment, *as a matter of law*. And her knowledge

that defendants have no defense to such dispositive evidence is reinforced by her dismissal motion, which fraudulently conceals that plaintiffs' complaint seeks the voiding of the third phase of the judicial salary increase – a concealment in and of itself requiring denial of her dismissal motion, *as a matter of law* (see plaintiffs' May 16, 2014 memorandum of law, pp. 8-9, 10-11, 29).

Consequently, AAG Kerwin's opposition to plaintiffs' first cross-motion branch is completely unsupported, in fact or law.

Plaintiffs' Entitlement to the Granting of the Second Branch of Their Cross-Motion, *As a Matter of Law*

It is frivolous *per se* – and a fraud on this Court – for AAG Kerwin to oppose the second branch of plaintiffs' cross-motion for leave to serve interrogatories pursuant to CPLR §3132, particularized at page 26 of their May 16, 2014 memorandum of law, where the sole basis of her opposition is a factual deceit.

AAG Kerwin's opposition is supported by no law – and not even placed in her memorandum of law, but at ¶4 of her affirmation, where she states:

> "no information that could arguably be provided through answers to the questions that plaintiff proposes…– even if they were proper and not subject to many objections – would be sufficient to remedy the legal inadequacy of plaintiffs' claims, as discussed in defendants' moving papers."

This is altogether fraudulent – and, tellingly, AAG Kerwin does not identify anything about the questions, does not furnish a single one that might be improper and subject to objections, and does not explain why defendants' answers would not be "sufficient to remedy" the supposed "legal inadequacy of plaintiffs' claims" or what specific "legal inadequacy" she is talking about. As AAG Kerwin well knows by concealing the entire content of plaintiffs' proposed interrogatories (Exhibits K-1, M-1), the questions it presents are devastating – and defendants' answers will substantiate the document-based allegations of plaintiffs' complaint. As for her knowledge that the complaint suffers

from no "legal inadequacy", this is evidenced from her failure to contest pages 1-24 of plaintiffs' May 16, 2014 memorandum of law, establishing no "legal inadequacy".[1]

As for the law, which AAG Kerwin does not furnish, it is evident from the CPLR provisions relating to interrogatories that plaintiffs' proposed interrogatories are perfectly proper and that defendants' responses would require them to produce and/or afford access to documents encompassed by plaintiffs' Notice to Furnish Papers to the Court Pursuant to CPLR §2214(c) (Exhibit X-2). Thus, CPLR §3131 entitled "Scope of interrogatories" states:

> "Interrogatories may relate to any matters embraced in the disclosure requirement of section 3101 and the answers may be used to the same extent as the depositions of a party. Interrogatories may require copies of such papers, documents or photographs as are relevant to the answers required, unless opportunity for this examination and copying be afforded."

The referred-to CPLR §3101 opens as follows:

> "There shall be full disclosure of all matter material and necessary in the prosecution and defense of an action, regardless of the burden of proof..." (subdivision (a)).

Moreover, any objections by defendants to specific questions are not a basis for denying the plaintiff the right to serve interrogatories. Thus, CPLR §3133, entitled "Service of answers or objections to interrogatories", states:

> "(a) Service of an answer or objection. Within twenty days after service of interrogatories, the party upon whom they are served shall serve upon each of the parties a copy of the answer to each interrogatory, except one to which the party objects, in which event the reasons for the objection shall be stated with reasonably particularity."

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[1] With respect to plaintiffs' proposed interrogatories, plaintiffs seek leave to serve them "upon defendants", not, as AAG Kerwin's ¶4 incorrectly states, "upon Temporary Senate President Skelos, Assembly Speaker Sheldon Silver and Chief Administrative Judge Gail Prudenti". Chief Administrative Judge Prudenti is not a named defendant. To the extent defendants cannot answer the questions originally intended for her, plaintiffs are perfectly willing to furnish a subpoena to her or Chief Judge Lippman as non-parties.

Consequently, AAG Kerwin's opposition to plaintiffs' second cross-motion branch is completely unsupported, in fact or law.

Plaintiffs' Entitlement to the Granting of the Third Branch of Their Cross-Motion, *As a Matter of Law*

It is frivolous *per se* – and a fraud on this Court – for AAG Kerwin to oppose the third branch of plaintiffs' cross-motion, pursuant to Executive Law §63.1 and State Finance Law Article 7-A, for a court order compelling the Attorney General to identify who, in his office, has independently evaluated "the interest of the state" and plaintiffs' entitlement to his representation/intervention when she has not denied or disputed ANY of the facts, law, or legal argument presented by pages 27-28 of plaintiffs' May 16, 2014 memorandum of law in support thereof. Here, too, AAG Kerwin places her minimal opposition not in her memorandum of law, but in her affirmation, whose ¶¶5-6 obscure the third branch issues by jumbling it with opposition to the fourth branch.

That AAG Kerwin's ¶¶5-6 reinforce plaintiffs' entitlement to the cross-motion's third branch is clear from her failure to even assert that anyone at the Attorney General's office independently evaluated "the interest of the state" pursuant to Executive Law §63.1 or plaintiffs' entitlement to the Attorney General's intervention/representation, as contemplated by State Finance Law Article 7-A. That no independent evaluation has been done is clear from pages 1-24 of plaintiffs' May 16, 2014 memorandum of law, establishing what any independent evaluation would have determined: that there is no legitimate defense to the complaint – and that the Attorney General's obligation is to represent plaintiffs and/or intervene on their behalf.

Consequently, AAG Kerwin's opposition to plaintiffs' third cross-motion branch is completely unsupported, in fact or law.

Plaintiffs' Entitlement to the Granting of the Fourth Branch of Their Cross-Motion, *As a Matter of Law*

It is frivolous *per se* – and a fraud on this Court – for AAG Kerwin to oppose the fourth branch of plaintiffs' cross-motion, pursuant to Rule 1.7 of the Rules of Professional Conduct, to disqualify the Attorney General for conflict of interest, where she does not deny or dispute ANY of the facts, law, or legal argument particularized at pages 28-29 of plaintiffs' May 16, 2014 memorandum of law in support of this branch. Indeed, even in quoting from page 29 in ¶5 of her affirmation that the Attorney General

> "'is unable to represent the People and the public interest herein because doing so would require him to confront the statutorily-violative, fraudulent, and unconstitutional judicial salary increase that he was duty-bound to stop years ago, but instead corruptly enabled, including [by] his litigation fraud…' See id. at p. 29",

she does not deny its factual truth.

Instead, AAG Kerwin rests her opposition on falsely asserting in her ¶6:

> "…there is no law to support plaintiffs' claims that the Attorney General has a conflict of interest…"

That this is unabashed fraud, is clear from plaintiffs' notice of cross-motion, which expressly invokes Rule 1.7 of the Rules of Professional Conduct in seeking the Attorney General's disqualification for conflict of interest. Indeed, pages 28-29 of plaintiffs' May 16, 2014 memorandum of law pertaining to this branch not only quotes Rule 1.7, but, additionally, *Greene v. Greene*, 47 NY2d 447, 451 (1979), in support of plaintiffs' assertion that the Attorney General suffers from disqualifying self-interest with respect to the judicial salary increase issue – the truth of which AAG Kerwin does not deny.

Consequently, AAG Kerwin's opposition to plaintiffs' fourth cross-motion branch is completely unsupported, in fact or law.

Plaintiffs' Entitlement to the Granting of the Fifth, Sixth, and Seventh Branches of Their Cross-Motion, *As a Matter of Law*

It is frivolous *per se* – and a fraud on this Court – for AAG Kerwin to oppose the fifth, sixth, and seventh branch of plaintiffs' cross-motion:

- for maximum costs and sanctions against her and all complicit supervisory lawyers in the office of the Attorney General and Comptroller, pursuant to 22 NYCRR §130-1.1 *et seq*.

- for assessment of penal law punishment against her and all complicit supervisory lawyers in the offices of the Attorney General and Comptroller, as well as such determination as would afford plaintiffs treble damages against them in a civil action, for pursuant to Judiciary Law §486(1);

- for referral of AAG Kerwin and all complicit supervisory lawyers in the offices of the Attorney General and Comptroller to appropriate disciplinary authorities, pursuant to 22 NYCRR §100.3D(2), for their wilful and deliberate violations of New York's Rules of Professional Conduct

when she does not deny or dispute ANY of the facts, law, and legal argument presented at pages 1-24 of plaintiffs' May 16, 2014 memorandum of law as to the fraudulence and legal insufficiency of her dismissal motion, all fully documented – nor ANY of the facts, law, and legal argument presented at pages 30-34 in support of these three cross-motion branches.

22 NYCRR §130-1.1(c) states:

> "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues…whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

At bar, plaintiff Sassower repeatedly "brought to the attention" of AAG Kerwin and supervising attorneys in the Attorney General's office – and in the Comptroller's office – the lack of legal and factual basis of her dismissal motion and their duty to withdraw it, only to rebuffed again, and again, and again, necessitating plaintiffs' May 16, 2014 opposition/cross-motion. In face of its devastating particulars – none refuted by AAG Kerwin – she has continued, undeterred – indeed,

adding to her fraudulent conduct by the succession of outrageous lies that fill ¶¶7-11 of her affirmation and at the outset of her memorandum of law, purporting, in completely conclusory fashion, that her dismissal motion is "both legally-sound and undeniably an appropriate response to the complaint" (¶8); that the basis of plaintiffs' sanctions requests is "the fact that **defense counsel filed a motion to dismiss** plaintiff's complaint" (¶8, bold in original); that plaintiffs have "a complete misunderstanding of the law, litigation and the power of the court", with their "apparent objection" being to "defense counsel's writing style and method of advocacy" (¶7); that plaintiffs' allegations are "baseless and defamatory" and "do not justify or support any kind of sanctions against defense counsel" (¶10); that "If anything, plaintiffs…should be sanctioned" because their "papers are replete with false, libelous and scandalous allegations about defense counsel and the Office of the Attorney General" (¶7); that plaintiffs engaged in "unethical, inappropriate and harassing antics…before and after the commencement of this action" (¶9), including reaching out to "the represented defendant NYS Office of the State Comptroller" (¶11), "making allegations of attorney fraud and misconduct and other outlandish and unsupported accusations" (May 30, 2014 memorandum of law, p. 1).

The only truth in any of this is that plaintiff Sassower reported AAG Kerwin's "attorney fraud and misconduct", all with particularizing facts and law, to higher-ups in the Attorney General's office and in the Comptroller's office so that they could take appropriate steps, consistent with their constitutional, statutory, legal, and ethical responsibilities, including pursuant to Rule 5.1of the Rules of Professional Conduct. Characteristically, and including with respect to her suggestion that "sanctions are appropriate" against plaintiffs (¶¶11, 7), AAG Kerwin offers no law to support the facts she does not have.

Consequently, AAG Kerwin's opposition to plaintiffs' fifth, sixth, and seventh cross-motion branches is completely unsupported, in fact or law.

Plaintiffs' Entitlement to a Preliminary Injunction, *As a Matter of Law*

It is frivolous *per se* – and a fraud on this Court – for AAG Kerwin to pretend, as she does in Point II of her memorandum of law, entitled "To the Extent the Order to Show Cause was Intended to Seek a Preliminary Injunction, Such an Application Should be Denied" (pp. 2-3), that there is some question as to whether plaintiffs' March 28, 2014 order to show cause seeks a preliminary injunction, in addition to a TRO. The evidence is as follows:

- the face of the order to show cause makes obvious that it is not limited to a TRO[2];
- Plaintiff's March 26, 2014 Notice to Furnish Papers to the Court Pursuant to CPLR §2214(c), opened with the words:

> PLEASE TAKE NOTICE that...upon the hearing of plaintiffs' Order to Show Cause for a Preliminary Injunction, with TRO, in the above-entitled citizen-taxpayer action (State Finance Law, Article 7-A: §123, *et seq.*), you are required, pursuant to CPLR §2214(c), to produce the original or copies of:" (underlining added).

and closed with the words:

> "PLEASE ADDITIONALLY TAKE NOTICE that your failure to make such production – and to certify same as originals or true and correct copies – may result in the summary granting of the relief sought by plaintiffs' Order to Show Cause for Preliminary Injunction, with TRO, as well as sanctions against you." (underlining added).

- Justice Lynch had no difficulty in discerning that the order to show cause was not limited to a TRO (Exhibit Y, p. 18, lns. 18-23; p. 19, lns. 2-3; p. 20, lns. 9-10);

Likewise frivolous *per se* – and a fraud on this Court – is AAG Kerwin's assertion that the preliminary injunction should be denied "based on the complete lack of merit of any of plaintiffs' claims, as articulated by defendants' motion to dismiss" (p. 2). It is her dismissal motion that

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[2] Plaintiffs' March 28, 2014 order to show cause is Exhibit B to AAG Kerwin's affidavit in support of

completely lacks merit, as she well knows in not contesting ANY of the facts, law, or legal argument, particularized by pages 1-24 of plaintiffs' May 16, 2014 memorandum of law.

As for her further sentence that plaintiffs have "utterly failed to offer any evidence that they would suffer irreparable harm if the budget is enacted during the pendency of this matter" (p. 3, underlining added), this is nonsense. Thanks to AAG Kerwin's fraudulent opposition to the TRO on March 28, 2014, the budget was enacted. The only question now is whether defendant Comptroller should be enjoined from:

> "disbursing monies for Budget Bill #S.6351/A.8551, or, at least, the entirety of the Legislative portion, both its appropriations and reappropriations (pp. 1-9; 27-46); and, with respect to the Judiciary portion, the unitemized funding for the unidentified third phase of the judicial salary increase and the reappropriations (at pp. 24-26) pending determination of plaintiffs' Verified Complaint to declare same unconstitutional and unlawful." (order to show cause, pp. 1-2, underlining in original).

Also false is AAG Kerwin's pretense that plaintiffs have incorrectly stated that their "application for a 'stay' was unopposed" – by which plaintiffs meant their application for a preliminary injunction. To advance her deceit that it was opposed, she purports that the March 28, 2014 oral argument on plaintiffs' order to show cause was "for preliminary injunctive relief", rather than, as it was, for a TRO, following which she falsely makes it appear that she is paraphrasing from pages 15-16 of the transcript. The reason AAG Kerwin does not quote from those pages is that they reveal that her opposition was to the TRO. Her words were as follows:

> "I'm unaware of any provision of the State Finance Law that trumps CPLR 6313-A...
>
> ...I don't know of any statutory provision that allows for [a] TRO here.
>
> Notwithstanding, very briefly, there is nothing here to support any kind of likelihood on the merits, because there is no justiciable controversy in here. And the only evidence that's contained in here are letters, mostly I should say, are letters from the plaintiff.

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her dismissal motion.

So even on an actual, you know, a regular old TRO standard, it wouldn't fly here anyway.

So for those reasons we ask that the TRO be denied." (Exhibit Y, pp. 15-16, underlining added).

She then falsely asserts "plaintiff failed to address the elements of a preliminary injunction[fn1] at all" – referencing the March 28, 2014 transcript for that proposition. In fact, examination of the transcript shows that plaintiff Sassower gave ample evidence that the elements for the granting of a preliminary injunction were satisfied, so-reflecting this by her assertions:

> "...And what I'm saying is that *prima facie*, the plaintiffs here have furnished you evidence of the violations, the constitutional and other violations with respect to this budget. (Exhibit Y, pp. 9-10);
>
> "So then the state is free to disburse the monies where there is a *prima facie* showing of unconstitutionality?" (Exhibit Y, p. 20).

Tellingly, AAG Kerwin relegates to a footnote what she purports to be the elements for the granting of a preliminary injunction, reflective of her knowledge of their inapplicability. Indeed, her cited case, *Nobu Next door, LLC v. Fine Art Housing, Inc.*, 4 N.Y.3d 839, 840 (2005) – which she introduces by an inferential "see"[3] – is not a citizen-taxpayer action under State Finance Law Article 7-A – and she makes no claim that a citizen-taxpayer action, whose purpose is to safeguard taxpayer dollars, is identically governed by the same weighing of those elements as a regular case.

That different standards govern injunctive relief in citizen-taxpayer actions under State Finance Law Article 7-A is clear from that Article 7-A, whose §123-e, "Relief by the court", states in its subsection 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

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[3] According to The Blue Book: A Uniform System of Citation (Harvard Law Review Association, 17th edition, 2000), "see" before a legal citation means that there is "an inferential step between the authority cited and the proposition it supports". In other words, "the proposition is not directly stated by the cited authority" (at pp. 22-23).

> 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).

In other words, in a citizen-taxpayer action, the statute identifies the standard for the granting of a preliminary injunction, upon "a hearing", which is a lower standard than for a TRO. All that is statutorily required is a showing of acts "detrimental to the public interest".

As citizen-taxpayer actions are founded on preserving taxpayer monies, the acts "detrimental to the public interest", can only be acts of unconstitutional, illegal dissipation of those monies. The record before the Court is not only one of "probable cause" with respect to such dissipation, but one entitling plaintiffs to summary judgment.

Indeed, the record shows that the reason plaintiffs served AAG Kerwin with their March 26, 2014 Notice to Furnish Papers to the Court Pursuant to CPLR §2214(c), requiring production of originals or certified copies:

> "upon the hearing of plaintiffs' Order to Show Cause for a Preliminary Injunction, with TRO" (Exhibit X-2),

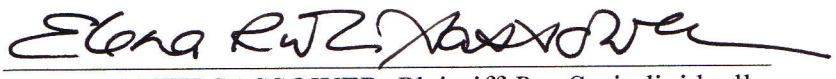
was, explicitly, because:

> "the issues of unconstitutionality and unlawfulness of the Legislature's proposed budget, the Judiciary's proposed budget, and Budget Bill #S.6351/A.8551 are matters of documentary proof, evident from the face of those documents and from legislative records thereon" (Exhibit Z-4, underlining in the original);
>
> "proven, *prima facie* – and sufficient for summary judgment – by the documents requested by plaintiffs' March 26th Notice to Furnish Papers to the Court Pursuant to CPLR §2214(c)". (Exhibit Z-5, underlining added.)

Consequently, AAG Kerwin's belated opposition to plaintiffs' March 28, 2014 order to show cause for a preliminary injunction is completely unsupported, in fact or law – with its bad-faith reinforced by her continued withholding from the Court of the requested original and certified copies of papers in defendants' possession.

Conclusion

AAG Kerwin's dismissal motion must be denied, *as a matter of law*, plaintiffs' cross-motion granted, in its entirety, and a preliminary injunction granted to plaintiffs, with such terms as may be necessary, upon the hearing of their March 28, 2014 order to show cause to enjoin the Comptroller from making unconstitutional and unlawful disbursements, pursuant to State Finance Law Article 7-A.



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