Appellant Sassower's July 24, 2018 moving affidavit in support of OSC

action (Exhibit D-1) [R.1120-1122] – the same four causes of action as were before Justice Lynch – and which, *on their face*, establish a *prima facie* entitlement to summary judgment, as I so-stated at the oral argument and in my correspondence thereafter.

10. By May 16, 2014, the case was before Judge McDonough. As for Justice Lynch, he was already sitting on this Court – as, undisclosed by him in denying the TRO six weeks earlier, was that he was awaiting appointment to the Court by Governor Cuomo, the first-named defendant in the predecessor citizen-taxpayer action. Governor Cuomo appointed Justice Lynch to this Court on or about April 15, 2014 – which surely he would not have done if, two weeks earlier, Justice Lynch had granted the TRO (Exhibit A-1), directed AAG Kerwin to immediately comply with appellants' March 26, 2014 Notice to Furnish the Court with Papers Pursuant to CPLR §2214(c) (Exhibit B), and scheduled a comparably immediate hearing on the preliminary injunction. This was Justice Lynch's duty to have done, based on the facts and law before him – and which, had he done, would have ended the case, in short order, with the granting of the declarations sought by the March 28, 2014 verified complaint [R.269-270].

Threshold Integrity Issues Pertaining to the Attorney General: Plaintiffs' Entitlement to its Representation/Intervention & its Disqualification as Defense Counsel on Conflict of Interest Grounds

11. Appellants are without counsel – and, pursuant to Executive Law §63.1, which predicates the attorney general's litigation posture on "the interest of the state", and State Finance Law §123, which contemplates the attorney general's affirmative role in citizen-taxpayer actions as plaintiff – we are entitled to his representation or intervention on our behalf because Judge Hartman's appealed-from November 28, 2017 decision and judgment [R.31-41] is indefensible, the product of fraud and collusion between her and the attorney general's office in which she worked for 30 years, concealing what is evident from the face of each of appellants' verified pleadings –

Ex E-1

beginning with the March 28, 2014 verified complaint that was before Justice Lynch [R.226-272] – *to wit*, that there is NO "merits" defense to our causes of action, each *prima facie* as to a mountain of constitutional, statutory, and rule violations.

12. By letter, dated May 16, 2018 (Exhibit I (eye) -1)[6], I gave NOTICE to Attorney General Schneiderman's successor, Barbara D. Underwood, that Judge Hartman's November 28, 2017 decision and judgment [R.31-41] was indefensible—and furnished, in substantiation, appellants' January 10, 2018 notice of appeal [R.1] with its pre-calendar statement [R.3] and "legal autopsy"/analysis of the November 28, 2017 decision and judgment [R.9-30] from which that fact could be verified, *readily*. In pertinent part, the letter stated:

> "The accuracy of this 'legal autopsy'/analysis is your duty to verify – since, pursuant to Executive Law §63.1, you have NO defense to the appealed-from decision and judgment, which, *as a matter of law*, must be voided. Only this is consistent with the 'interests of the state' – and your obligations pursuant to State Finance Law §123 *et seq.* and such other provisions as Executive Law §63-c and State Finance Law §187 *et seq.* ('New York False Claims Act').
>
> Consequently, your duty is to obviate the appeal entirely by moving to vacate the November 28, 2017 decision and judgment and the underlying decisions on which it rests, including pursuant to CPLR §5015(a)(3) 'fraud, misrepresentation, or other misconduct of an adverse party'; or, alternatively, to represent CJA on the appeal and perfect and prosecute it on behalf of the People of the State of New York and the public interest that CJA has heretofore been representing. (Exhibit I-1, at pp. 4-5, capitalization, italics, and underlining in the original.)

13. I received no response from Attorney General Underwood, nor from anyone on her behalf – including her high-ranking supervisory/managerial attorneys to whom I also sent the May 16, 2018 NOTICE. Consequently, on May 30, 2018, I sent her a further letter (Exhibit J-1)[7],

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[6] The substantiating enclosures – excepting appellants' January 10, 2018 notice of appeal herein [R.1-41] – are herewith furnished as Free-Standing Exhibit I (eye).

[7] The substantiating enclosures are herewith furnished as Free-Standing Exhibit J.

inquiring whether her failure to respond was the consequence of her conflicts of interests – thereupon particularizing a succession of conflicts impinging on her judgment.

14. Again, in the absence of any response, I sent a follow-up: a June 6, 2018 e-mail (Exhibit K), requesting a response by June 13th. Then, in the absence of any response again, I sent a June 14, 2018 e-mail (Exhibit L) that I would be moving forward with perfecting the appeal and asking who, in the office, would be handling it. Even as to this, there was no response – and on June 18, 2018, I independently ascertained that it was Assistant Solicitor General Frederick Brodie (Exhibit M).

15. Eight days later, after responses from Assistant Solicitor General Brodie reflecting that the attorney general's office would be continuing, on appeal to this Court, the same disregard of its professional and ethical obligations as in Supreme Court, I sent him a June 26, 2018 e-mail (Exhibit N-2), with copies to Attorney General Underwood and her high-ranking supervisory/managerial attorneys, stating:

> "As I have still received NO response from Attorney General Underwood – or any of her high-level supervisory/managerial attorneys – to my May 16th NOTICE, May 30th letter, and June 6th and June 14th e-mails, I am cc'ing them on this e-mail, with an express request that they IMMEDIATELY advise as to who is evaluating the 'interest of the state' on this appeal – and, consistent therewith, plaintiffs' entitlement to the Attorney General's representation/intervention, pursuant to Executive Law §63.1 and State Finance Law §123 *et seq.*, including *via* appointment of independent/outside counsel. Needless to say, such will be a threshold issue at the [upcoming] argument of the order to show cause – and if Attorney General Underwood is not personally present to address it – and the state of the record – I will request the Court to command her appearance and response." (capitalization and underlining in the original).

16. Again, there was no response from Attorney General Underwood or any of her supervisory/managerial attorneys. Nor, for that matter, did Assistant Solicitor General Brodie answer my question as to "who is evaluating the 'interest of the state' on this appeal" in responding, by a June 27, 2018 e-mail (Exhibit N-3):

> "I do not believe Executive Law 63(1) or State Finance Law 123 *et seq.* entitles you to a formal determination by the attorney general of the 'interests of the state' or the appointment of an independent counsel. Executive Law 63(1) provides, in part, that '[n]o action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality **of the state,** without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant.' (Emphasis added.) Because you and CJA are not a part 'of the state,' the provision does not appear to apply to you. State Finance Law 123 *et seq.* authorizes citizen-taxpayer suits under certain circumstances, and I understand you have proceeded under that section. State Finance Law 123-c(3) requires that citizen-taxpayer complaints be served on the attorney general, but does not appear to require the attorney general to make a formal determination. If you have contrary authority, please bring it to my attention." (bold in original).

17. Such response is a deceit, as to both Executive Law §63.1 and State Finance Law §123 *et seq.* As to Executive Law §63.1, which is two sentences long, Assistant Solicitor General Brodie omits its first sentence because – as is clear therefrom – I and CJA do not have to be "a part 'of the state'" in order to be entitled to representation by the Attorney General, whose duty, enunciated by that first sentence, is to:

> "Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state, but this section shall not apply to any of the military department bureaus or military offices of the state." (underlining added).

As for State Finance Law §123, *et seq.*, Assistant Solicitor General Brodie does not quote the single provision to which he refers: §123-c(3), which reads:

> "Where the plaintiff in such action is a person other than the attorney general, a copy of the summons and complaint shall be served upon the attorney general".

In other words, in this section, as likewise in §123-a(3), §123-d, §123-e(2), it is expected that the attorney general will himself bring the citizen-taxpayer action. Certainly, the requirement that a

plaintiff serve the attorney general with a copy of the summons and complaint would be meaningless if the attorney general did not then have to make a "formal determination" as to it and other statutes that furnish the attorney general with ample means for safeguarding public monies, such as Executive Law §63-c and State Finance Law §187 *et seq.* ("New York False Claims Act"). And who in the attorney general's office makes the determination, "formal" or otherwise? Did such person determine that in this citizen-taxpayer action, as well as in the previous one, the attorney general should not "prosecute", but, instead, "defend"? How could this be in "the interest of the state", when defending cannot be done except by litigation fraud because there is NO legitimate defense.

18. On July 6, 2018, as I was finalizing the reproduced record on appeal, I e-mailed Assistant Solicitor General Brodie, cc'ing Attorney General Underwood and her highest supervisory/managerial attorneys, and stating:

> "as would have been obvious to you three weeks ago, at the outset of your review of the draft brief that I had furnished Attorney General Underwood and her highest-ranking supervisory and managerial attorneys on June 14th – essentially unchanged by the finalized July 4th brief I furnished you yesterday – the state has NO FACTUAL OR LEGAL BASIS for opposing the appeal. Your duty, weeks ago, was to have so-advised Attorney General Underwood, her executive supervisory/managerial staff, and your immediate supervisor, Assistant Solicitor General Paladino, so that prompt steps could have been taken, consistent with Executive Law 63.1 ('The attorney-general shall – Prosecute and defend all actions and proceedings in which the state is interested…in order to protect the interest of the state….') and State Finance Law, Article 7-A (§§123-b; 123-a, 123-c(3), 123-d) – and NOT, as you did, burden me with the huge effort and expense of perfecting the appeal. It remains your duty to advise them of what, certainly, by now, you well know: that there is NO DEFENSE to this appeal, that any opposition is frivolous, *as a matter of law*, and that each and every day that passes brings with it a further larceny of taxpayer dollars – with the judicial and district attorney salary increases themselves stealing tens, if not hundreds, of thousands of dollars daily." (Exhibit O-1, capitalization, underlining, and italics in the original).

19. Assistant Solicitor General Brodie's response, also on July 6, 2018 (Exhibit O-2), was to refer me back to his June 27, 2018 e-mail, with the words: "I previously responded to your argument that you are entitled to some sort of formal determination by the Attorney General on the

merits of your appeal. See item 10 of my email of June 27, 2018 at 10:36 a.m." This followed his assertion: "I will review your brief when it is served on me" – thereby making even more explicit what had already been apparent over the weeks of my interaction with him, namely, that he was not evaluating "the interest of the state".

20. In reply, I e-mailed that I would "respond further…by my affidavit in support of the order to show cause, with preliminary injunction with TRO, which I will e-mail you as soon as it is fully drafted so that you can have maximum time to review it before the anticipated…oral argument." (Exhibit O-3).

21. Suffice to note that throughout the course of this citizen-taxpayer action before Judge Hartman, as likewise throughout the course of its predecessor before Judge McDonough, appellants sought court orders 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 the representation/intervention of the Attorney General" (Exhibit D-1) [R.1120-1122]. From our first May 16, 2014 memorandum of law, we briefed this threshold issue and the related threshold conflict-of-interest issue [R.1152-1154] – and then repeated them, essentially identically, in all our subsequent memoranda of law[8] because neither then nor thereafter was it ever addressed by Judge McDonough or Judge Hartman – or, in any significant way, if at all, by AAG Kerwin or AAG Helena Lynch, the two assistant attorneys general who signed papers, or AAG James McGowen, who showed up in court with AAG Kerwin on March 28, 2014 before Justice Lynch [Exhibit A-2], to oppose appellants' order to show cause with TRO [Exhibit A-1] and, thereafter, again with AAG

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[8] *See* R.517-520 (appellants' September 30, 2016 reply memorandum of law); R.980-982 (appellants' May 15, 2017 reply memorandum of law); R.1334 (appellants' August 25, 2017 reply memorandum of law).

Kerwin, on March 23, 2016, to oppose another order to show cause with TRO (Exhibit F-1), which he argued (Exhibit F-2).

22. By way of postscript, the record before Judge Hartman includes my September 28, 2016 FOIL request to the attorney general's records access officer for:

> "the Attorney General's guidelines, policies, and procedures for determining the 'interest of the state', pursuant to Executive Law §63.1, and its duty to represent plaintiffs and/or intervene on their behalf in citizen-taxpayer actions, pursuant to State Finance Law Article 7-A" [R.590].

The December 15, 2016 response, from the attorney general's records appeals officer – which I also furnished to Judge Hartman – was "after a diligent search, the OAG located no responsive records." [R.604].

23. I received a similar response to the FOIL request embodied by my May 30, 2018 letter to Attorney General Underwood (Exhibit J-1), which had concluded, as follows:

> "For the benefit of all concerned, I invoke FOIL [Public Officers Law, Article VI] and, by copy of this letter to your records access officer, request:
>
> (1) written protocols, policies, and/or guidelines of the attorney general's office governing the conflicts of interest afflicting you – and procedures for securing independent/outside counsel, as well as a special prosecutor;
>
> (2) records of how the attorney general's office has implemented Executive Law §63.11, conferring upon you the duty to 'Receive complaints concerning violations of section seventy-four of the public officers law' – including the make-up of your 'advisory committee on ethical standards'; and instances where, based on its 'findings and recommendations', the attorney general has brought 'a civil action...for the recovery of moneys...received or expended by an officer';
>
> (3) records establishing when, if ever, any committee of the Legislature has held an oversight hearing of the operations of the attorney general's office with respect to its constitutional and statutory function, discharge of its duties, and its budget."

The July 5, 2018 answer I received was that "the Office of the Attorney General has conducted a diligent search and has located no records that respond to your request". (Exhibit J-4).

Appellants' Statutory Entitlement to a Preference, both for their Appeal and the Preliminary Injunction

24. It is to prevent "illegal or unconstitutional disbursement of state funds" that State Finance Law §123-c(4) commands:

> "An action under the provisions of this article shall be heard upon such notice to such officer or employee as the court, justice or judge shall direct, and shall be promptly determined. The action shall have preference over all other causes in all courts."

and that §123-e(2) provides:

> "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."

25. This Court's Rules of Practice, Part 800, currently in effect, make no mention of citizen-taxpayer actions, nor special provision for their appellate review, including with respect to their mandated statutory preference "over all other causes in all courts", notwithstanding the importance of State Finance Law Article 7-A – and the fact that actions brought thereunder challenging state disbursements and encompassing injunctive relief would, in the main, if not exclusively, be brought in the Third Department. Likewise, there is no mention of, nor provision for, citizen-taxpayer actions in this Court's Rules of Practice, Part 850, that will take effect on September