

SUPREME COURT OF STATE OF NEW YORK
ALBANY COUNTY

----- X
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 #5122-16
-against-

ANDREW M. CUOMO, in his official capacity as Governor
of the State of New York, JOHN J. FLANAGAN in his official
capacity as Temporary Senate President, THE NEW YORK
STATE SENATE, CARL E. HEASTIE, 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, THOMAS P. DiNAPOLI,
in his official capacity as Comptroller of the State of New York,
and JANET M. DiFIORE, in her official capacity as Chief Judge of the
State of New York and chief judicial officer of the Unified Court System,

Defendants.
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PLAINTIFFS' MEMORANDUM OF LAW
in Further Support of Plaintiffs' Order to Show Cause for a Preliminary Injunction,
in Reply/Opposition to Defendants' Cross-Motion, & for Other Relief

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

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INTRODUCTION

This memorandum of law is submitted in reply to defendants' opposition to plaintiffs' September 2, 2016 order to show cause for a preliminary injunction, which Assistant Attorney General Adrienne Kerwin, who identifies herself as "of counsel" to defendant Attorney General Eric Schneiderman, has placed within her September 15, 2016 cross-motion to dismiss plaintiffs' September 2, 2016 verified complaint pursuant to CPLR §§3211(a)(7) and (8). It is also submitted in opposition to that dismissal cross-motion – and, in conjunction therewith, in support of the relief mandated by the record, including notice by the Court that it is treating AAG Kerwin's dismissal cross-motion as a motion for summary judgment in plaintiffs' favor, pursuant to CPLR §3211(c).

As with all her advocacy in the predecessor citizen-taxpayer action, *CJA et al. v. Cuomo et al.* (Albany Co. #1788-14), AAG Kerwin has again demonstrated that defendants have no legitimate defense and that the Attorney General's duty, pursuant to State Finance Law §123 *et seq.* and Executive Law §63.1, is to be representing plaintiffs.¹ As hereinafter shown, her opposition/cross-motion is not just frivolous, but a "fraud upon the court",² fashioned, from beginning to end and in

¹ Because Assistant Attorney General Kerwin September 15, 2016 cross-motion identically repeats the litigation fraud she committed in the predecessor citizen-taxpayer action, this memorandum of law substantially replicates the responsive presentations made by plaintiffs' memoranda of law therein dated May 16, 2014, June 16, 2014, September 22, 2015, November 5, 2015, and April 22, 2016.

² "Fraud on the court" is defined by Black's Law Dictionary (7th ed. 1999) as:

"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."

See, also *CDR Creances S.A.S. v Cohen, et al.*, 23 N.Y.3d 307 (2014):

"Fraud on the court involves willful 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-Empire*, 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675

virtually every line, on knowingly false and misleading factual assertions, material omissions, and on 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 threshold direction to defendant Attorney General Schneiderman that he identify who in his office has independently evaluated the “interest of the state”, pursuant to Executive Law §63.1, plaintiffs’ entitlement to his representation/intervention in this citizen-taxpayer action, as State Finance Law Article 7-A contemplates – and his own conflicts of interest, precluding his representation of his fellow defendants. This is especially essential as defendant Schneiderman has a direct, financial interest in the sixth, seventh, and eighth causes of action to strike down the budget statute that established the Commission on Legislative, Judicial and Executive Compensation that is presently poised to make substantial “force of law” recommendations to increase his salary. Had this been done in the predecessor citizen-taxpayer action – as plaintiffs’ repeatedly requested of Justice McDonough based on the record before him – the predecessor action would have ended with declarations in plaintiffs’ favor on all their causes of action.

The record in the predecessor citizen-taxpayer action is comprehensively summarized by plaintiffs’ 36-page, single-spaced analysis of Justice McDonough’s August 1, 2016 amended decision and order therein – annexed to their September 2, 2016 verified complaint as Exhibit G.³

[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’)].”

³ Exhibits A-K hereinafter referred to are all annexed to plaintiffs’ September 2, 2016 verified complaint herein.

The analysis establishes plaintiffs' entitlement to summary judgment on the eight causes of action of their predecessor citizen-taxpayer action and leave to file their verified second supplemental complaint so as to thereafter promptly obtain summary judgment on its additional eight causes of action. That AAG Kerwin does not deny or dispute the accuracy of the analysis in any respect makes her cross-motion to dismiss plaintiffs' instant complaint and opposition to their order to show cause for a preliminary injunction frivolous, *as a matter of law*.

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".

Not only does AAG Kerwin's opposition/cross-motion make no reference to plaintiffs' analysis of Justice McDonough's August 1, 2016 decision, but her only references to Exhibit G are without identifying what Exhibit G is. Those references, in her memorandum of law, are in a besmirching paragraph which reads:

"plaintiffs lack the ability to differentiate between actual and admissible evidence that supports legally-cognizant arguments, and their own baseless thoughts and opinions. In refusing to accept legal rulings, the plaintiffs resort to making disparaging comments and claims about the court, see e.g. Complaint at ¶24, ¶25, **Exh. G**, the parties, see e.g. id at ¶14(b), and defense counsel. See e.g. id. at **Exh. G**. It is within this context that the complaint herein must be analyzed and, ultimately, dismissed in its entirety." (at p. 4, bold added).

Such is a brazen fraud on this Court. Exhibit G is not about "baseless thoughts and opinions". Rather, as the most cursory examination of it reveals, it is about "actual and admissible evidence that supports legally-cognizant arguments", concealed and falsified by Justice McDonough, in tandem with AAG Kerwin, to utterly corrupt the judicial process in the predecessor citizen-taxpayer action

by judicial decisions “so totally devoid of evidentiary support as to render [them] unconstitutional under the Due Process Clause” of the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Tellingly, AAG Kerwin furnishes not a single example from Exhibit G to support her false characterizations in that paragraph or elsewhere in her cross-motion.

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 Secundum, 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, if AAG Kerwin believed that this Court was a fair and impartial tribunal that would draw the proper inferences from her instant litigation misconduct and 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, she would not be engaging in litigation misconduct. As in the predecessor citizen-taxpayer action, her unabashed fraud demonstrates that she has no such belief—reinforcing this Court’s even more threshold duty to confront, by appropriate disclosure, the factors contributing to AAG Kerwin’s audacious conduct, replicating, in every material respect, precisely what she did in the predecessor citizen-taxpayer action, chronicled by plaintiffs’ Exhibit G. This includes:

- concealing that this is a citizen-taxpayer action;
- concealing that judicial salary increases are challenged herein;
- concealing the controlling standard governing dismissal motions.

Apart from this Court's \$60,000-a-year judicial salary interest, plus the additional thousands of dollars in salary-based, non-salary benefits challenged by this citizen-taxpayer action, are the Court's professional and personal relationships that led to its being appointed to the bench by defendant Governor Cuomo and confirmed by defendant Senate, last year, after 30 years of employment in the Attorney General's office, including as an assistant solicitor general to defendant Attorney General Schneiderman and, before that, as an assistant solicitor general to then-Attorney General defendant Cuomo.⁴

Based on plaintiffs' showing herein and by plaintiff Sassower's accompanying affidavit, the duty of any fair and impartial tribunal is to not only grant the preliminary injunction sought by their September 2, 2016 order to show cause, indeed, to grant the TRO that a self-interested Justice McDonough wrongfully struck, but, upon denying AAG Kerwin's dismissal cross-motion, to give notice to the parties that the Court is treating it as a motion for summary judgment for plaintiffs, pursuant to CPLR §3211(c)⁵. This, moreover, is the only disposition consistent with the expedition that State Finance Law §123-c(4) expressly mandates for citizen-taxpayer actions:

⁴ Plaintiffs' September 23, 2016 FOIL request to defendants Governor and Senate, seeking relevant documents is Exhibit L to plaintiff Sassower's accompanying affidavit. The video of the Senate Judiciary Committee's May 5, 2015 confirmation hearing is <https://www.nysenate.gov/calendar/meetings/judiciary/may-05-2015/judiciary-meeting> and the video of the May 5, 2015 Senate floor proceedings and vote is: <https://www.nysenate.gov/calendar/sessions/may-05-2015/senate-session-05-05-15>. They are also both posted on CJA's webpage for these responsive papers, accessible, with the rest of the record, from CJA's homepage, www.judgewatch.org, via the prominent link: "CJA's Citizen-Taxpayer Actions to End NYS' Corrupt Budget 'Process' & Unconstitutional 'Three Men in a Room' Governance".

⁵ CPLR §3211(c) entitled "Evidence permitted; immediate trial; motion treated as one for summary judgment" states:

“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.”

As with the Court’s discharge of its mandatory responsibilities of disqualification/disclosure, pursuant to §§100.3E and F of the Chief Administrator’s Rules Governing Judicial Conduct and its mandatory disciplinary responsibilities under §100.3D(2), such does not require any formal motion by plaintiffs.

**AAG Kerwin’s Deficient & Fraudulent Cross-Motion –
Starting with her Non-Probative, Deceitful Affirmation**

AAG Kerwin’s cross-motion consists of her September 15, 2016 notice of cross-motion, her affirmation, and a memorandum of law. The relief she seeks is dismissal of plaintiffs’ September 2, 2016 verified complaint pursuant to CPLR §3211(a)(7) (failure to state a cause of action) and CPLR §3211(a)(8) (lack of personal jurisdiction) and denial of plaintiffs September 2, 2016 order to show cause for a preliminary injunction.

Although AAG Kerwin’s affirmation expressly states (at p. 1) 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.”, McKinney’s Consolidated Laws of New York Annotated, 7B, p. 817 (1997), Commentary by Vincent C. Alexander.

“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. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.”

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*.⁶

In fact, AAG Kerwin has personal knowledge of the record of the predecessor citizen-taxpayer action, having been “of counsel” defense counsel throughout. As such, the duty she owed the Court, by her affirmation, was to confront the specifics of plaintiffs’ 36-page, single-spaced Exhibit G chronicling the course of that proceeding – including the fraudulence of Justice McDonough’s dismissals of the four causes of action of plaintiffs’ March 28, 2014 verified complaint therein and the four causes of action of their March 31, 2015 verified supplemental complaint therein, accomplished by trashing the fundamental, black-letter standards governing dismissal/summary judgment motions pursuant to CPLR §§3211(a)(7) and (a)(1). As stated by Exhibit G, “concealment, distortion, and falsification of the allegations of plaintiffs’ causes of action, disregard of fundamental adjudicative standards – and on NO EVIDENCE. In other words, on fraud.” (at p. 18, capitalization in original, underlining added).

Yet, her affirmation does not even mention plaintiffs’ Exhibit G, let alone confront its fact-specific, record-based showing. Instead, under the title heading “Prior Related Proceedings” (pp. 3-5: ¶¶8-15), she offers up a skeletal two-page, double-spaced recitation whose material fraud is exposed by Exhibit G, in addition to the very face of the documents to which she refers. As illustrative:

⁶ 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).

- her ¶9 simplifies each of the four causes of action of plaintiffs’ March 28, 2014 verified complaint to single allegations, which they are not (Exhibit B: ¶¶76-98, ¶¶99-108, ¶¶109-112, ¶¶113-126 – and as their corresponding requested declarations plainly reveal (Exhibit B: WHEREFORE: pp. 44-45);
- her ¶10 purports that Justice McDonough’s October 9, 2014 decision dismissed the first three causes of action of the verified complaint as “not justiciable” – without revealing that the decision also dismissed them on unspecified evidence – and further purports, as to the fourth cause of action, that the decision preserved it “as to whether the defendants violated Legislative Law 32-a”, when it was not so-limited (Exhibit E: pp. 5-6);
- her ¶12 simplifies each of the four causes of action of plaintiffs’ March 31, 2015 verified supplemental complaint to the identical single allegations she had falsely purported with respect to plaintiffs’ verified complaint, not revealing that the first three causes of action of the verified supplemental complaint were largely analyses showing that Justice McDonough’s dismissals of the first three causes of action of plaintiffs’ verified complaint by his October 9, 2014 decision were legally and factually insupportable – including because the unspecified evidence upon which he rested the dismissals does not exist (Exhibit C: ¶¶169-178, ¶¶179-193, ¶¶194-202, ¶¶203-236; WHEREFORE: pp. 39-40);
- her ¶13, whose footnote 5 purports that plaintiffs cross-moved for “summary judgment and other baseless relief”, concealing that among this other relief was sanctions against her for litigation fraud, including misrepresenting the causes of action of plaintiffs’ verified complaint and verified supplemental complaint, and for disqualification of Attorney General Schneiderman from representing his co-defendants – as to which, along with summary judgment, plaintiffs’ entitlement was *as matter of law* and so-demonstrated by their September 22, 2015 cross-motion;
- her ¶15, which entirely conceals the basis upon which Justice McDonough’s August 1, 2016 decision (Exhibit D) “granted defendants’ motions and denied plaintiffs’ motions” – the very subject of plaintiffs’ 36-page, single-spaced Exhibit G.

Likewise skeletal, conclusory and materially false is AAG Kerwin’s half-page description of

“The Present Complaint” (p. 5: ¶¶16-19). Thus:

- her ¶16 purports that the first, second, third, and fourth causes of action of plaintiffs’ September 2, 2016 verified complaint allege “the exact same claims that have already been rejected...in connection with the 2014-15 and 2015-16 budgets” – without revealing that those four causes of action each allege (¶¶24-27; ¶¶35-38; ¶¶41-44; ¶¶49-52), and by their incorporated Exhibit G demonstrate (at pp. 24-29, 21-23), the fraudulence of Justice McDonough’s dismissals of plaintiffs’ corresponding predecessor causes of action;

- her ¶17 purports that four of “the remaining five causes of action” of plaintiffs’ September 2, 2016 verified complaint are “contained in plaintiffs’ proposed second supplemental complaint in the prior case”⁷—concealing that Justice McDonough’s August 1, 2016 decision did not adjudicate them in denying plaintiffs leave to serve their March 23, 2016 verified second supplemental complaint (Exhibit D: p. 7).

AAG Kerwin concludes her affirmation with a section entitled “Plaintiffs’ Application for Preliminary Injunctive Relief” (pp. 5-6: ¶¶20-22). It begins by materially falsifying the relief sought by plaintiffs’ September 2, 2016 order to show cause, whose ¶¶4, 5 could not have been clearer as to the circumstances of their request for Justice McDonough’s disqualification and vacatur of his August 1, 2016 decision and order. As those circumstances are no longer applicable by reason of this Court’s assignment to the case, AAG Kerwin’s opposition to vacatur of the August 1, 2016 decision and her deference to this Court as to whether Justice McDonough should be disqualified from assignment to this case is a deceit.

Suffice to say, however, that AAG Kerwin’s assertion that “The defendants are aware of no legitimate basis requiring the disqualification of Justice McDonough in this proceeding” (¶21, underlining added) – which she compounds in her memorandum of law by proclaiming:

“Plaintiffs’ allegations in their order to show cause that (1) Judge McDonough should be disqualified from presiding over this proceeding because he has ‘demonstrated actual bias,’ and (2) Judge McDonough’s August 1, 2016 [decision] should be vacated are so wholly without merit and are not supported by any proof whatsoever” (p. 12, fn. 8, underlining added)

are utter frauds on this Court, where she has not in any respect denied or disputed plaintiffs’ showing of his pervasive actual bias, born of his huge financial interest, demonstrated resoundingly by their 36-page, single-spaced Exhibit G.

⁷ AAG Kerwin’s numbers are off. There are six remaining causes of action – five of which were

AAG Kerwin's Deficient & Fraudulent Memorandum of Law

AAG Kerwin's supporting memorandum of law is 15 pages, divided into four sections: a two-paragraph "Preliminary Statement" (p. 1); a two-page section entitled "Prior Proceedings" (pp. 1-3); a 14-page section entitled "Argument" (pp. 3-15) whose three Points are prefaced by an untitled prefatory paragraph (p. 3), and a one-sentence "Conclusion" (p. 15). As AAG Kerwin has not incorporated her memorandum of law into her affirmation, swearing to its truth, the factual assertions in the memorandum are unsworn.

Completely absent from AAG Kerwin's memorandum of law is any identification of the controlling standard governing CPLR §3211(a)(7) dismissal motions for failure to state a cause of action – reflective of her knowledge that she has not remotely met it.

Plaintiffs' Exhibit G (at p. 24) furnished that standard, which neither Justice McDonough nor AAG Kerwin had identified in the predecessor citizen-taxpayer action, because each had flagrantly violated it:

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481, 484; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634). Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., *Heaney v Purdy*, 29 NY2d 157). In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, *supra*, at 635) and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, *supra*, at 636)." *Leon v. Martinez*, 84 NY2d 83, 88 (1994).

embodied by plaintiffs' March 23, 2016 verified second supplemental complaint in the predecessor citizen-taxpayer action.

The unambiguous standard:

“We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory”,

from the Court of Appeals decision in *Leon v. Martinez* is reflected by the Appellate Division, Third Department in *State United Teachers ex rel Magee v. State of New York*, 140 A.D.3d 90, 95 (2016) – a decision cited by Justice McDonough at the September 2, 2016 oral argument of plaintiffs’ order to show cause for a preliminary injunction with TRO (Exhibit O, p. 12).⁸ Such “facts as alleged in the complaint” are ALL alleged facts. As the Appellate Division, Third Department stated in *Haire v. Bonelli*, 57 A.D.3d 1354, 1355 (3rd Dept. 2008):

“When courts consider a motion under CPLR 3211, pleadings are afforded a liberal construction, with all alleged facts accepted as true (see *Leon v Martinez*, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972 [1994]). The court may consider affidavits submitted to remedy any defects in the complaint in determining whether plaintiff has a cause of action, per CPLR 3211 (a) (7), not whether he has stated one (see *id.* at 88).” (underlining added).

The Court of Appeals termed this “the well known principle”, stating, in *Barr v. Wackman*, 36 N.Y.2d 371, 375 (1975):

“We note at the outset the well known principle that on a motion to dismiss for failure to state a cause of action every fact alleged must be assumed to be true and the complaint liberally construed in plaintiff’s favor (see, e.g., *Sage v Culver*, 147 NY 241, 245; see, also, *Papilsky v Berndt*, 59 FRD 95, 97, app dsmd 503 F2d 554).” (underlining added).

Such “well known principle”⁹ – the controlling standard – made it frivolous for AAG Kerwin to cross-move to dismiss plaintiffs’ verified complaint herein for failure to state a cause of action unless

⁸ Exhibit O, the transcript of the September 2, 2016 oral argument, is annexed to plaintiff Sassower’s accompanying affidavit, which continues the sequence of exhibits begun by plaintiffs’ September 2, 2016 verified complaint.

⁹ *Sage v. Culver*, 147 NY 241, 245, cited by the Court of Appeals as reflecting the “well known principle”, is an 1895 case wherein the Court of Appeals stated:

she could identify ALL the accepted-as-true allegations of plaintiffs' pleading which, taken together, failed to state a cause of action. Yet here, as previously, AAG Kerwin crafts her dismissal cross-motion on concealing the allegations establishing plaintiffs' causes of action.

Additionally, because this is a citizen-taxpayer action under State Finance Law Article 7-A [§123 *et seq.*] – a fact AAG Kerwin completely conceals here, just as she and Justice McDonough had in the predecessor citizen-taxpayer action – she needed to furnish law relating to that statutory safeguard against “wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property” (§123-b) – including that the dismissal she seeks and her opposition to preliminary injunctive relief is consistent therewith.

Yet, as in the prior citizen-taxpayer action, AAG Kerwin has NOT furnished the law pertaining to citizen-taxpayer actions pursuant to State Finance Law Article 7-A. In and of itself, this requires denial of her dismissal cross-motion, *as a matter of law*, as she has neither asserted nor shown that plaintiffs have not established their entitlement to declaratory relief under the very legal authority pursuant to which they have brought their action.¹⁰

Moreover, once again, AAG Kerwin conceals that because this citizen-taxpayer action seeks declaratory judgments, it cannot be “dismissed” – as her cross-motion requests. Rather, declarations

“When a complaint is met by a demurrer on the ground of insufficiency, the question always is whether, assuming every fact alleged to be true, enough has been well stated to constitute any cause of action whatever. The complaint will be deemed to be sufficient whenever the requisite allegations can be fairly gathered from all the averments, though the statement of them may be argumentative and the pleading deficient in logical order and in technical language. The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. (*Zabriskie v. Smith*, 13 N. Y. 330; *Marie v. Garrison*, 83 id. 14, 23; *Sanders v. Soutter*, 126 id. 193.)”

¹⁰ Cf., *New York State Association of Small City School Districts v. State of New York*, 42 A.D.3d 648, 651 (2007):

“...A viable cause of action against the State under the Education Article...
...To state a cause of action under the Education Article...”

must issue, *Seymour v. Cuomo*, 180 A.D.2d 215, 217-218 (1992); *Donovan v. Cuomo*, 126 A.D.2d 305, 310 (3rd Dept. 1987). As stated in New York Practice, David D. Siegel, (5th ed. 2011):

“If a plaintiff in an ordinary action loses on the merits, the result is a dismissal of the complaint. In a declaratory action, ‘the court should make a declaration, even though the plaintiff is not entitled to the declaration he seeks’.^{fn1} A mere dismissal is not appropriate.^{fn2} The court must determine the rights of the parties to the dispute involved and, if the defendant prevails, the declaration should simply go the defendant’s way.^{fn3} If the defendant should move to ‘dismiss’ the complaint for failure to state a cause of action, under CPLR 3211(a)(7), the motion in the declaratory context should be taken as a motion for a declaration in the defendant’s favor and treated accordingly.”

The foregoing deficient, sanctionable advocacy by AAG Kerwin in the predecessor citizen-taxpayer action was highlighted by plaintiffs’ Exhibit G (at pp. 9, 18, 30-32). It is all blithely repeated by her.

Below are some further highlights of the AAG Kerwin’s legally-insufficient and fraudulent memorandum of law – replicating her essentially identical misconduct in the predecessor citizen-taxpayer action.

AAG Kerwin’s section entitled “Preliminary Statement” (at p. 1)

The first section of AAG Kerwin’s memorandum of law is her “Preliminary Statement” – and it is noteworthy only because it identifies that plaintiffs’ September 2, 2016 order to show cause sought a temporary restraining order, in addition to a preliminary injunction – and that Justice McDonough, in signing the order to show cause, “denied the application for a temporary restraining order”. Yet neither here, nor elsewhere in her memorandum of law, or in her affirmation, is there any elucidation of the grounds upon which Justice McDonough struck the TRO, or AAG Kerwin’s advocacy that enabled it.

As reflected by the September 2, 2016 transcript, notwithstanding plaintiff Sassower quoted, in full, State Finance Law §123-e(2) to establish that CPLR§ 6313 did not bar a TRO (Exhibit O, at pp. 4-5), Justice McDonough and AAG Kerwin each purported (Exhibit O, pp. 12, 9-10) – without explanation – that a TRO was not available and – without addressing what plaintiff Sassower stated as to why plaintiffs were entitled to a TRO – resorted to bald, conclusory claims, whose falsity is evident from plaintiffs’ verified complaint supporting the order to show cause. Plaintiff Sassower’s accompanying affidavit excerpts the graphic particulars of their fraud.

AAG Kerwin’s section entitled “Prior Proceedings” (at pp. 1-3)

This second section of AAG Kerwin’s memorandum of law essentially repeats, *verbatim*, the skeletal, materially incomplete, misleading and false recitation appearing at ¶¶8-15 of her affirmation. The most significant difference is its false assertion that plaintiffs’ supplemental complaint added “identical causes of action relating to the 2015-16 Legislative and Judiciary budgets” (at p. 2, underlining added).

To the contrary – and as highlighted by plaintiffs’ Exhibit G (at p. 27) – the fifth, sixth, and seventh causes of action of plaintiffs’ verified supplemental complaint (Exhibit C: ¶¶169-178, ¶¶179-193; ¶¶194-202) were each, primarily, a demonstration that Justice McDonough’s dismissals of the corresponding first, second, and third causes of action of plaintiffs’ verified complaint (Exhibit B: ¶¶76-98; ¶¶99-108; ¶¶109-112), by his October 9, 2014 decision (Exhibit E), were each legally and factually insupportable.

AAG Kerwin's section entitled "Argument" (at pp. 3-15)

This third section of AAG Kerwin's memorandum of law, which contains a three-point "Argument", begins with an untitled paragraph. Its first sentence is the sum total of AAG Kerwin's argument as to why the Court should dismiss the first four causes of action of plaintiffs' verified complaint herein.

**AAG Kerwin's Fraudulent and Untitled Single-Sentence Argument
for Dismissal of Plaintiffs' First, Second, Third and Fourth Causes of Action**

Without reciting a single allegation of plaintiffs' first cause of action (¶¶23-33 & incorporated ¶¶301-316), or of their second cause of action (¶¶34-39 & incorporated ¶¶317-331), or of their third cause of action (¶¶40-47 & incorporated 332-335), or of their fourth cause of action (¶¶48-53 & incorporated 336-384) – in flagrant violation of the black-letter standard for dismissal motions pursuant to CPLR §3211(a)(7) – AAG Kerwin disposes of the first four causes of action of plaintiffs' verified complaint by the following single sentence:

“For the reasons that plaintiffs' claims were dismissed in two prior decisions of this court in the prior proceeding, plaintiffs' First, Second, Third and Fourth Causes of Action should be dismissed here. See Complaint at Exhs. D, E.” (at p. 3).

This is utter fraud by AAG Kerwin. The “two prior decisions...in the prior proceeding” are Justice McDonough's August 1, 2016 decision and his October 9, 2014 decision (Exhibits D & E) – and their fraudulent dismissals of the causes of action of plaintiffs' verified complaint and verified supplemental complaint are alleged and particularized by plaintiffs' Exhibit G – with plaintiffs' first, second, third, and fourth causes of action herein each expressly resting on Exhibit G by their ¶¶24-27; ¶¶35-38; ¶¶41-44; and ¶¶49-52, respectively. These allegations are presumed true on a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action – and AAG Kerwin has neither identified them, nor presented the slightest rebuttal to them, nor invoked CPLR §3211(a)(1) “documentary evidence” so as to demonstrate their untruth.

Moreover, “the reasons plaintiffs’ claims were dismissed” by the August 1, 2016 and October 9, 2014 decisions include supposed “documentary evidence” germane to fiscal years 2014-2015 and 2015-2016. Yet, she has not cross-moved to dismiss plaintiffs’ first, second, third, and fourth causes of action of their instant complaint based on “documentary evidence” for this fiscal year.

Finally, in falsely purporting that the first four causes of action of the instant complaint should be dismissed for “the reasons” the prior “claims” were dismissed, she conceals that the second cause of action (§§34-39) contained allegations pertaining to the unconstitutionality and unlawfulness of the interchange/transfer provisions (incorporated §§320-331) – paragraphs without counterpart in either the verified complaint or verified supplemental complaint in the prior action.

As for AAG Kerwin’s three-point “Argument”, it is as follows:

AAG Kerwin’s Fraudulent Point I
“Defendants’ Cross-Motion to Dismiss the Complaint
Should be Granted in its Entirety” (pp. 4-11)

Two prefatory paragraphs appear beneath this heading, both completely conclusory and false.

The first reads:

“Plaintiffs have commenced a frivolous and baseless action using a complaint that is virtually incomprehensible in form and content. By continuously referencing a proposed second amended complaint from the prior proceeding (for which leave to file was rejected by the court, and which never served as the operative pleading) and other irrelevant documents, the plaintiffs have made it nearly impossible to discern ‘just what they are claiming in this case. The complaint completely fails to succinctly and clearly articulate any factual or legal claims and, instead, leaves it to the court and to the defendants to decipher whether the complaint contains any non-frivolous claims.’” (at p. 4).

No reading of plaintiffs’ verified complaint could support the view that it is “frivolous and baseless” – or that there is anything “nearly impossible to discern” about its claims. AAG Kerwin furnishes no example of text that is either indecipherable or frivolous – and there is none.

Her second prefatory paragraph (at p. 4), also completely conclusory and false, is the one quoted above (at p.3, *supra*), referencing plaintiffs' Exhibit G, without disputing the accuracy of its content in any respect.

Two sections, A and B, then follow:

“A. Plaintiffs Have Failed to Obtain Personal Jurisdiction Over Governor Andrew M. Cuomo, Temporary Senate President John J. Flanagan, The New York State Senate, and Chief Judge Janet M. DiFiore” (at pp. 4-5)

The title and content of this section are frivolous and fraudulent.

AAG Kerwin purports:

“Upon information and belief, service was attempted on Governor Andrew M. Cuomo, Temporary Senate President John J. Flanagan, the New York State Senate and Chief Judge Janet M. DiFiore on September 2, 2016 by plaintiff Elena Sassower, herself.” (p. 5, underlining added).

This is false. Plaintiff Sassower did not “attempt” service. She effected service – and secured from representatives authorized to accept service signed acknowledgements on behalf of defendants Governor Cuomo and Chief Judge DiFiore and, with respect to defendants Temporary Senate President Flanagan and the Senate, the card of their counsel (Exhibit S). Surely AAG Kerwin learned this from her public officer clients.

Also false is AAG Kerwin’s legal argument based thereon. She asserts that because CPLR ¶2103(a) designates that service is to be made by “any person **not a party**...”, therefore “any attempt by [plaintiff Sassower] to serve any defendants in this case...failed to properly obtain jurisdiction over said defendants” – and “should be dismissed pursuant to CPLR 3211(a)(8)” (p. 5). In fact, in the absence of prejudice, service of a pleading by a party is not grounds for dismissal in the Third Department – and the 2014 Appellate Division, Third Department decision in *Conti v. Clyne*, 120 A.D.3d 884, 886, could not be clearer:

“this Court has consistently held that it ‘is a mere irregularity which does not vitiate

service’ (*Matter of Schodack Concerned Citizens v Town Bd. of Schodack*, 148 AD2d 130, 133, 544 NYS2d 49 [1989], *lv denied* 75 NY2d 701, 551 NE2d 106, 551 NYS2d 905 [1989]; see *Matter of Sullivan v Albany County Bd. of Elections*, 77 AD2d 959, 959, 431 NYS2d 855 [1980]). We perceive no reason to depart from our precedent, particularly in light of the Court of Appeals’ holding that CPLR 2001, as amended in 2007, permits a court to overlook technical defects in the manner of service that do not prejudice the person or persons being served (see *Ruffin v Lion Corp.*, 15 NY3d 578, 582, 940 NE2d 909, 915 NYS2d 204 [2010]).”

And just this year, in *Neroni v. Follender*, 137 A.D.3d 1336, 1337 (2016), the Appellate Division,

Third Department again reiterated this “consistently-held” policy, citing *Conti v. Clyne*, that:

“Although CPLR 2103 (a) requires service to be made by a person who is not a party to the action, a violation of this provision ‘is a mere irregularity which does not vitiate service’ where, as here, no resulting prejudice is shown (*Matter of Conti v Clyne*, 120 AD3d 884, 886, 991 N.Y.S.2d 663 [2014] [internal quotation marks and citations omitted], *lv denied* 23 NY3d 908, 992 N.Y.S.2d 798, 16 N.E.3d 1278 [2014]; see CPLR 2001).”

Surely, this is the reason that AAG Kerwin furnishes no case law.

Suffice to say that AAG Kerwin makes no claim of any prejudice to her clients – and there is none by the service that plaintiff Sassower effected on their authorized representatives immediately upon the conclusion of the September 2, 2016 oral argument, as recounted by her accompanying affidavit.

“B. The Complaint Fails to Allege Facts Sufficient to State a Claim as to Plaintiff’s Fifth, Sixth, Seventh, Eighth, Ninth or Tenth Causes of Action” (at pp. 5-11)

In this section are three further subsections for dismissal of the causes of action of plaintiffs’ complaint, excepting the first four:

**AAG Kerwin’s Fraudulent “Argument”
for Dismissal of Plaintiffs’ Fifth and Ninth Causes of Action (pp. 5-9)**

In a first subsection of her Point I-B, AAG Kerwin argues for the dismissal of plaintiffs’ fifth and ninth causes of action.

As for AAG Kerwin’s argument (at p. 6) for dismissing plaintiffs’ fifth cause of action (¶¶54-58 & incorporated ¶¶362-383 & ¶¶458-470), she asserts that since its ¶56 alleges that the fifth cause of action is “laid out” by the twelfth cause of action of plaintiffs’ verified second supplemental complaint, it should be dismissed “For the reasons that plaintiffs’ Twelfth Cause of Action were dismissed in the prior proceeding”. However, the twelfth cause of action was NOT dismissed in the prior proceeding. Rather, Justice McDonough’s August 1, 2016 decision denied plaintiffs’ leave to file their verified second supplemental complaint containing the twelfth cause of action (Exhibit D: p. 7). Nor does Justice McDonough’s dismissals of plaintiffs’ fourth and eighth causes of action in the prior citizen-taxpayer action, by his August 1, 2016 decision, have any applicability – as his August 1, 2016 decision did not adjudicate the violations of Article VII, §§4, 5, 6 of the New York State Constitution summarized by ¶57 of the fifth cause of action in this proceeding relating to:

- the failure of the Senate and Assembly, by their committees and by their full chambers, to amend and pass the Governor’s appropriation bills and to reconcile them so that they might “become law immediately without further action by the governor”, as mandated by Article VII, §4 of the New York State Constitution;
- the so-called “one-house budget proposals”, emerging from closed-door political conferences of the Senate and Assembly majority party/coalitions;
- the proceedings of the Senate and Assembly Joint Budget Conference Committee and its subcommittees, conducted by staff, behind-closed-doors, based on the “one-house budget proposals”;
- the behind-closed-doors, three-men-in-a-room budget deal-making by the Governor, Temporary Senate President, and Assembly Speaker.”

Consequently, AAG Kerwin’s first argument for dismissing the fifth cause of action completely fails.

Also unavailing is AAG Kerwin’s second argument for dismissing the fifth cause of action. She asserts that since plaintiffs’ fifth cause of action is also based on the allegations of the sixteenth cause of action of their second supplemental complaint in the prior proceeding – which is the ninth

cause of action herein – it should be dismissed for the same reasons as the ninth cause of action. However, the ninth cause of action is limited to a single issue: the unconstitutionality, *as unwritten and as applied*, of “the behind-closed-doors, three-men-in-a-room budget deal-making by the Governor, Temporary Senate President, and Assembly Speaker”. Consequently, even were there any legitimacy to AAG Kerwin’s arguments with respect to plaintiffs’ ninth cause of action, it would not dispose of the broader fifth cause of action, whose particulars are set forth by the incorporated ¶¶362-383, identified at ¶56.

As for AAG Kerwin’s arguments (at pp. 7-9) for dismissal of plaintiffs’ ninth cause of action (¶¶81-84 & incorporated ¶¶458-470), they are essentially a *verbatim* repeat of what she had set forth at pages 9-11 of her April 8, 2016 memorandum of law in opposition to plaintiffs’ March 23, 2016 order to show cause in the prior proceeding for leave to file their verified second supplemental complaint. AAG Kerwin does not reveal this – or plaintiffs’ rebuttal by pages 23-27 of their April 22, 2016 reply memorandum of law, unaddressed by Justice McDonough. As plaintiffs’ presentation there is dispositive of her regurgitated arguments here, it is set forth below with the minimal changes corresponding to AAG Kerwin’s changes.

“AAG Kerwin asserts:

‘Any claims as to how the 2016-17 budget was negotiated are moot, since the budget was subsequently enacted...’ (at p. 7).

This is false. The enactment of the budget on or about April 1, 2016 does not change the fact that there are yet six months left to fiscal year 2016-2017 against which a citizen-taxpayer lies for declarations that it was unconstitutionally and unlawfully procured, that its disbursement of state funds is unconstitutional and illegal, and for such injunctive relief as is appropriate to the circumstances. 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 ninth 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 ninth 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 at plaintiffs’ incorporated ¶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’ incorporated ¶460.

As such, plaintiffs’ incorporated ¶¶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 (at incorporated ¶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’ incorporated ¶¶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’ imagings 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.
Therefore, plaintiffs' Ninth Cause of Action should be dismissed.'
(at p. 9, 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' ninth 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* (incorporated ¶¶467-470), she relegates such frivolous, fraudulent responses as she has to her footnotes 4, 5, and 6. 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 incorporated ¶468, AAG Kerwin purports, in footnote 5 (at p. 7), that 'if, *arguendo*, the court reads plaintiffs' Fifth or Ninth Cause of Action as alleging a violation of the Open Meetings Law, the complaint fails to allege such a claim as a matter of law.' In other words, she has not responded to the violations actually alleged.

Her footnote 4 (at p. 6) 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 complaint alleges that the Legislature violated its own internal rules, such claims are not justiciable. 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 province of the courts to direct the Legislature on how to do its work particularly where the internal practices of the Legislature are involved); Matter of Gottlieb v. Duryea, 38 A.D.2d 634, 635 (1971), aff'd 30 N.Y.2d 807 (1972), cert. denied 409 U.S. 1008 (1972); see People ex rel Burby v. Howland, 155 N.Y. 270, 282 (1898); Smith v. Espada, Index No. 4912-09 (Sup. Ct., Albany Co. June 16, 2009).'

This is utterly fraudulent. Neither *Heimbach* nor any of the other cited cases 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 6 (at p. 9) that:

‘Plaintiffs’ claims in their, *inter alia*, Fourth, Fifth and Ninth 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, §11’,

plaintiffs have already refuted the availability of a speech or debate clause defense in the prior proceeding – without contest by AAG Kerwin and with no ruling by Justice McDonough. 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.”

Plaintiffs’ referred-to uncontested refutation of the speech or debate clause in the prior proceeding was set forth at pages 31-34 of their September 22, 2015 memorandum of law in opposition to AAG Kerwin’s July 28, 2015 dismissal/summary judgment motion and in support of plaintiffs’ September 23, 2015 cross-motion for summary judgment and other relief. In view of its dispositive nature, it is hereinbelow set forth, *verbatim*. The text preceding it detailed that among the allegations of plaintiffs’ verified complaint and verified supplemental complaint that AAG Kerwin’s motion had concealed were that defendants Senate and Assembly were rigging their budget hearings to prevent opposition testimony “dispositive of unconstitutionality, illegality, and fraud being collusively committed by the Legislature, Judiciary, and Executive branches with respect to the

budget”. It was in this context that plaintiffs’ memorandum stated:

“The only explanation for this concealment is that doing otherwise would foreclose a Speech or Debate Clause defense. Indeed, in the Court of Appeals’ decision in *People v. Ohrenstein*, 77 N.Y.2d 38 (1990), whose page 54 AAG Kerwin twice-cites, the Court stated:

‘Historically the Speech or Debate Clause serves to preserve the integrity of the Legislature by preventing other branches of government from interfering with legislators in the performance of their duties. But no matter how far the immunity may extend under the State Constitution, it cannot be said that it was intended to provide a sanctuary for legislators who would defraud the State...’.

And the dissent of Judge Simons, though not on this ground, is also relevant, stating:

‘Legislators are trustees of the public treasury. They may appropriate and spend State funds to the extent authorized, but if they do so to benefit themselves or others personally, they commit a crime.’ (at 64).

Having materially simplified and falsified plaintiffs’ fourth and eighth causes of action with respect to Legislative Law §32-a, AAG Kerwin asserts (at p. 15):

‘who is selected to testify orally at legislative hearings, and why such people are, or are not, chosen, are not issues that may be judicially reviewed’.

For this proposition she cites the Appellate Division, First Department’s 2009 decision in one of the judicial compensation case brought by state judges, *Larabee v. Governor of the State of New York*, 65 A.D.3d 74, 87-92, purporting that it holds that ‘Speech or Debate Clause applies to all legitimate legislative activity, which includes all acts of the Legislature other than political matters’.

This is false. In *Larabee*, the First Department stated:

‘...defendants assert absolute immunity by operation of the Speech or Debate Clause of NY Constitution, article III, §11. They argue that by virtue of the Speech or Debate Clause, a court is not empowered to inquire into the Legislature’s reasons for adopting or not adopting particular measures which thus remain beyond judicial review....

...Individual statements of legislators or legislative acts may be protected from litigation, but it does not automatically follow that the manner in which legislative decisions are made is similarly protected; otherwise, the fundamental purpose of judicial review, to

determine the constitutionality of governmental acts, would be eviscerated...

...As noted by Professor Tribe, 'to the extent that legislative and nonlegislative actions are entangled in practice, the privileged status of legislative action does not preclude its judicial review,' which may still be accomplished without formally requiring individual legislators 'to answer personally for legislative acts' (Tribe, *American Constitutional Law* §5-20, at 1019). Courts are empowered to determine the constitutional boundaries of each branch of government (*Pataki v New York State Assembly*, 4 NY3d 75, 96, 824 NE2d 898, 791 NYS2d 458 [2004]) and whether an action is within the purview of legitimate legislative activity (*Straniero*, 218 AD2d at 85).

We find that legislative immunity is unavailable to shield defendants from plaintiffs' separation of powers claim. Since no member of the Legislature has been named a defendant in his or her individual capacity, we need not be concerned with the historical and entirely appropriate concern that a legislator might be harmed by the prospect of civil or even criminal liability as a consequence of his or her unfettered discharge of legislative duties.

To the extent that the Speech or Debate Clause bars inquiry into the motivations underlying legislative decisions and communications, those concerns are academic, considering that the record is replete with information, including public statements by legislative leaders, explaining why judicial salary increases were abandoned at the eleventh hour (*Straniero*, 218 AD2d at 83; *Hutchinson*, 443 US at 131-132)... We need only look to the outward manifestation...'.

Needless to say, in so-holding, the First Department not only had before it the argument of the plaintiff judges, who argued against a Speech or Debate Clause defense, but of *amici* such as then Court of Appeals Chief Judge Judith Kaye and the Unified Court System Court, whose brief included the following:

'The Chief Judge's and Judiciary's salary-inadequacy claim under the separation-of-powers doctrine, as well as the Compensation Clause claims in this case and in *Kaye v. Silver*, do not depend on legislative motives. Those claims do not even arguably challenge why legislators have failed to do what they should have done; they straightforwardly allege that legislative and executive actions and inactions themselves violate the State Constitution. That, of course, is exactly the sort of straightforward 'judicial review of legislative acts' that unquestionably '[l]egislative immunity does not...bar.' Powell, 395 U.S. at 503. As the Supreme Court said in *Kilbourn v. Thompson*:

‘Especially it is competent and proper for this court to consider whether [the legislature’s] proceedings are in conformity with the Constitution and laws because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.’

103 U.S. at 199, quoted in *Powell*, 395 U.S. at 506.” (October 23, 2008 brief, at p. 39).

At bar, no legislators are named in their individual capacities in this declaratory judgment action, challenging the constitutionality and lawfulness of the Legislature’s acts with respect to the budget. Nor is any inquiry of underlying motivations needed. ‘[T]he outward manifestation’, as detailed by plaintiffs’ complaint and supplemental complaint, is sufficient for determining the violation and subversion of Legislative Law §32-a. Plaintiffs’ challenge does not require an inquiry into ‘legislative motives’, but ‘straightforwardly’ alleges that what defendant Senate and Assembly did violated and subverted Legislative Law §32-a – and amply buttresses this with evidentiary proof.

Having misrepresented the First Department decision in *Larabee*, AAG [Kerwin] then conceals the Court of Appeals’ decision in *Maron v. Silver*, 14 NY3d 230 (2010), which, with briefing from Chief Judge Kaye, the Office of Court Administration, and other judicial plaintiffs, not only upheld the First Department’s determination in *Larabee*, but additionally stated:

‘The Speech or Debate Clause applies to only ‘members’ and to ‘any speech or debate in either house.’ Nowhere does the Clause state that such immunity applies to either house of the Legislature as a whole, and therefore, it does not apply to the Assembly or the Senate. ...’ (at 257).”

AAG Kerwin conceals the foregoing law-supported, fact-specific refutation of her previous iteration of her argument, to which she has furnished no response. It is dispositive of the frivolous and deceitful nature of what she has here put forward because she has NO legitimate grounds upon which to premise dismissal of plaintiffs’ ninth cause of action for failure to state a cause of action.

**2. AAG Kerwin’s Fraudulent “Argument”
for Dismissal of Plaintiffs’ Sixth, Seventh & Eighth Causes of Action (pp. 9-10)**

In the second subsection of her Point I-B, AAG Kerwin devotes five sentences to the sixth, seventh, and eighth causes of action of plaintiffs’ verified complaint (¶¶59-68 & incorporated ¶¶385-423; ¶¶69-76 & incorporated ¶¶424-452; ¶¶77-80 & incorporated ¶¶453-457). Instead of identifying their allegations – as required in moving to dismiss pursuant to CPLR §3211(a)(7) – she states only that these three causes of action “allege that Chapter 60, Part E of the Laws of 2015 is unconstitutional both as written and as applied” and that “Specifically, plaintiffs’ Sixth and Seventh Causes of Action challenge the legitimacy of the Commission on Legislative, Judicial, and Executive Compensation”, falsely implying that the eighth cause of action does not. Not a single detail is furnished – reflective of her knowledge that revealing them would make it impossible to contrive a defense. Indeed, because the subheadings of the sixth and seventh causes of action disclose the damning violations – any one of which would suffice for obtaining the preliminary injunction/TRO relief sought by plaintiffs’ September 2, 2016 order to show cause – her argument conceals them, as likewise the consequence of the violations which the causes of action identify by their titles, *to wit*, “the Commission’s Judicial Salary Increase Recommendations are Null & Void by Reason Thereof”.

Thus, for the sixth cause of action entitled “Chapter 60, Part E, of the Laws of 2015 is Unconstitutional, As Written – & the Commission’s Judicial Salary Increase Recommendations are Null & Void by Reason Thereof” (at pp. 24-26), the subheadings AAG Kerwin conceals, together with the entirety of their content, are the following:

- A. Chapter 60, Part E, of the Laws of 2015 Unconstitutionally Delegates Legislative Power by Giving the Commission’s Judicial Salary Recommendations “the Force of Law” (at p. 24);
- B. Chapter 60, Part E, of the Laws of 2015 Unconstitutionally Delegates Legislative Power Without Safeguarding Provisions (at p. 24);

- C. Chapter 60, Part E, of the Law of 2015 Violates Article XIII, §7 of the New York State Constitution (at p. 25);
- D. Chapter 60, Part E, of the Law of 2015 Violates Article VII, §6 of the New York State Constitution – and, Additionally, Article VII, §§2 and 3 (at p. 25);
- E. Chapter 60, Part E, of the Laws of 2015 is Unconstitutional because Budget Bill #4610-A/A.6721-A was Procured Fraudulently and Without Legislative Due Process (at p. 26).

For the seventh cause of action entitled “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” (at pp. 26-28), the subheadings that AAG Kerwin conceals, together with the entirety of their content, are the following:

- A. *As Applied*, a Commission Comprised of Members who are Actually Biased and Interested and that Conceals and Does Not Determine the Disqualification/Disclosure Issues Before it is Unconstitutional (at p. 27);
- B. *As Applied*, a Commission that Conceals and Does Not Determine Whether Systemic Judicial Corruption is an “Appropriate Factor” is Unconstitutional (at p. 27);
- C. *As Applied*, a Commission that Conceals and Does Not Determine the Fraud before It – Including the Complete Absence of ANY Evidence that Judicial Compensation and Non-Salary Benefits are Inadequate – is Unconstitutional (at p. 27);
- D. *As Applied*, a Commission that Suppresses and Disregards Citizen Input and Opposition is Unconstitutional (at p. 28).

As for the eighth cause of action entitled “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” (at p. 28), which has no subheadings, AAG Kerwin conceals that it involves violations of “express statutory requirements” – and the entirety of what they are.

It is without identifying a single allegation of the approximately 80 allegations of these three causes of action – in flagrant violation of the controlling standard for dismissal pursuant to CPLR §3211(a)(7) – that AAG Kerwin rests the entirety of her argument for dismissing them on two judicial decisions. This is what she says:

“...the legitimacy of a commission such as the Commission on Legislative, Judicial, and Executive Compensation – which replaced the Commission on Judicial Compensation – and was modeled on the Berger Commission (Commission on Health Care Facilities in the 21st century) – was upheld in McKinney v. Commissioner of New York State Department of Health, 15 Misc. 3d 743 (Bronx County), aff’d, 41 A.D.3d 252 (1st Dep’t), appeal dismissed, 9 N.Y.3d 891 (2007).

In addition, the Supreme Court, Nassau County, recently dismissed a challenge to the present Commission on Legislative, Judicial and Executive Compensation. See, Coll v. NYS Commission on Legislative; Judicial and Executive Compensation; NYS Legislature; NYS Governor, Index No. 2598-2016 (Nassau County September 1, 2016) (copy attached).

Accordingly, plaintiffs’ Sixth, Seventh and Eighth Causes of Action should be dismissed.”

This is utter fraud. The *McKinney* case – and the Bronx Supreme Court decision therein – substantiate plaintiffs’ sixth cause of action as to the unconstitutionality of Chapter 60, Part E, of the Laws of 2015, *as written* – and such is alleged, explicitly, by subsections A and B of plaintiffs’ sixth cause of action. These make plain that: (1) the Commission on Legislative, Judicial and Executive Compensation, like the Commission on Judicial Compensation before it, was NOT “modeled” after the Berger Commission as it does not include the safeguarding provisions of the Berger Commission; and (2) the unidentified “legitimacy” of the Berger Commission that *McKinney* upheld was the “force of law” effect of its recommendations – and only because of the safeguarding provisions, here absent.¹¹

¹¹ AAG Kerwin’s above-quoted assertions as to the Commission on Legislative, Judicial, and Executive Compensation, Commission on Judicial Compensation and *McKinney* are repeated, *verbatim*, from her April 8, 2016 memorandum of law (at p. 8, fn. 2) – notwithstanding rebutted by plaintiffs’ April 22, 2016 reply memorandum of law (at pp. 21-22).

Thus, subsection A of plaintiffs' sixth cause of action states, in pertinent part:

"390. In *St. Joseph Hospital, et al. v. Novello, et al.*, 43 A.D.3d 139 (2007), a case challenging a statute that gave 'force of law' effect to a special commission's recommendations – Chapter 63, Part E, of the Laws of 2005 – then Appellate Division, Fourth Department Justice Eugene Fahey, writing in dissent, deemed the statute unconstitutional, violating the presentment clause and separation of powers:

'It is apparent that the Legislation inverts the usual procedure utilized for the passage of a bill. According to the usual procedure, a bill is presented to the Governor for his or her signature or veto after passage by the Senate and the Assembly. Should the Governor sign the bill, it becomes law; should the bill be vetoed, the veto may be overridden by a two-thirds vote of the Legislature. Here, the Legislation creates a process that allows the recommendations of the Commission to become law without ever being presented to the Governor after the action of the Legislature.' *Id.*, 152.

391. Justice Fahey's dissent was cited by the New York City Bar Association's *amicus curiae* brief to the Court of Appeals in a different case challenging the same statute, *Mary McKinney, et al. v. Commissioner of the New York State Department of Health, et al.*, 15 Misc.3d 743 (S.Ct. Bronx 2006), *affm'd* 41 A.D.3d 252 (1st Dept. 2007), appeal dismissed, 9 N.Y.3d 891 (2007), appeal denied, 9 N.Y.3d 815; motion granted, 9 N.Y.3d 986. It characterized "the force of law" provision as:

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

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

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

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

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

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

‘will set the stage for the arbitrary handling of public resources under the guise of future temporary commissions that are not subject to any public scrutiny or accountability (at p. 36).^{fn6}

Subsection B of plaintiffs’ sixth cause of action states, in pertinent part:

“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 AAG Kerwin’s reliance on the Nassau County Supreme Court decision in *Coll v. NYS Commission on Legislative, Judicial and Executive Compensation; NYS Legislature; NYS Governor*, which she purports “recently dismissed a challenge to the present Commission on Legislative, Judicial and Executive Compensation” (at p. 10, underlining added) – implying, by the word “present”, that the challenge was to the commission statute, *as applied* – and as to which she annexes the paltry three-sentence decision purporting that the action was “to declare that the Commission on Legislative, Judicial and (sic) Compensation acted in an unconstitutional manner”, this is false. Indeed, had AAG Kerwin furnished any details of the challenge in that case – which, considering the defense was handled by the Attorney General’s office, she readily could have done – it would have been evident that the case had nothing to do with the Commission on Legislative, Judicial and Executive Compensation “act[ing] in an unconstitutional manner”. Rather, and as may be seen from the complaint therein (Exhibit P), it challenged the commission statute, *as written* – and, in particular, the “force of law” power that the statute confers on commission salary recommendations.

In short, except for two judicial decisions which substantiate the first two subsections of plaintiffs’ sixth cause of action, AAG Kerwin has NO DEFENSE whatever to plaintiffs’ sixth, seventh, and eighth causes of action, ALL of whose allegations she conceals.

3. AAG Kerwin's Fraudulent "Argument"
for Dismissal of Plaintiffs' Tenth Cause of Action (pp. 10-11)

In a third subsection of her Point I-B, AAG Kerwin's argues for dismissal of plaintiffs' tenth cause of action (§§85-110). Once again, in violation of the controlling standard for dismissal motions pursuant to CPLR §3211(a)(7), she cherry-picks the few allegations she discloses, concealing entirely or misrepresenting those for which she cannot fashion any argument. Falling in the latter category, her concealment of the content of §§109-100 as to whether the budget of Criminal Justice Services, embodied in Aid to Localities Budget Bill #S.6403-d/A.9003-d, is certified – including by the certificate mandated by section 1, paragraph d of the bill:

“No moneys appropriated by this chapter shall be available for payment until a certificate of approval has been issued by the director of the budget, who shall file such certificate with the department of audit and control, the chairperson of the senate finance committee and the chairperson of the assembly ways and committee.” (Exhibit H: at p. 2).

By the express language of this provision, at the very outset of Aid to Localities Budget Bill #S.6403-d/A.9003-d, the absence of the budget director's “certificate of approval” renders the state's disbursements of monies pursuant thereto unlawful – and this would include the district attorney salary reimbursement and incentives, challenged by the tenth cause of action. Nothing could be clearer than that §§109-100 not only state a cause of action, but required AAG Kerwin to produce the certificate, if she was going to avoid a summary judgment determination for plaintiffs. Meanwhile, as reflected by the responses that plaintiffs have received to their September 1, 2016 FOIL request for the “certificate of approval” (Exhibit K), defendant Senate has advised that “after a search, there are no documents/records responsive to your request” (Exhibit Q-1) and defendant Assembly has similarly advised: “the Assembly, including the Ways and Means Committee, has no records responsive to these requests” (Exhibits Q-2).

Obviously, if the director of the budget's "certificate of approval" exists, AAG Kerwin should have readily been able to furnish it, as it is in the possession, custody, and control of her clients. However, her cross-motion to dismiss does not invoke CPLR §3211(a)(1), a defense founded on "documentary evidence", and she has supplied no "certificate of approval" from the budget director, let alone one filed with the defendant Comptroller or defendants Senate and Assembly, despite plaintiffs' September 1, 2016 FOIL request (Exhibit K) giving her a head-start in procuring these documents.

Nor has she procured the other "documentary evidence" that would be requisite for rebutting other allegations of plaintiffs' tenth cause of action that also plainly state a cause of action – and as to which she also had a head-start, *via* plaintiffs' July 11, 2016 and July 13, 2016 FOIL requests (Exhibits I-1, J-1).

Indeed, if, as ¶94 alleges and demonstrates, defendant Comptroller has no documents responsive to plaintiffs' July 11, 2016 FOIL requests concerning his compliance with County Law §700.11(c) in calculating "the amount of state aid payable to each county" pursuant to County Law §§700.11(a) and (b), plaintiffs here, too, not only have a cause of action, but summary judgment.

Likewise, plaintiffs have summary judgment as to ¶95, where, notwithstanding that this year's appropriations for district attorney salary reimbursement in Aid to Localities Budget Bill #S.6403-d/A.9003-d – and in of the past two fiscal years – rest on a "plan prepared by the commissioner of criminal justice services and approved by the director of the budget", such plan, requested by plaintiffs' July 13, 2016 FOIL request, either does not exist or cannot be readily disclosed

That AAG Kerwin conceals the content and context of ¶¶94-95, relegating reference to them to her footnote 7 in purporting:

“To the extent that plaintiffs are dissatisfied with responses they received to FOIL requests, see Complaint at ¶¶94, 95, such must be challenged in an Article 78 proceeding.” (at p. 11),

is completely fraudulent. ¶¶94-95 are not about plaintiffs being “dissatisfied”, but about whether they have a summary judgment entitlement to the declarations they seek, absent production of documents responsive to their FOIL requests that neither AAG Kerwin – nor the recipients of the FOIL requests – have provided.

Also fraudulent is the sentence that AAG Kerwin’s footnote 7 annotates, reading:

“Therefore, when S.6403-d/A.9003-d was enacted into law as Chapter 53 of the Laws of 2016, the provisions contained in that Chapter which provided for disbursement of funds to reimburse counties of District Attorney salaries superseded anything to the contrary contained in any other law.”

Tellingly, AAG Kerwin furnishes NO LAW for the proposition that *via* a budget appropriations provision defendants can not only “supersed[e] anything to the contrary contained in any other law”, but then violate that superseding budget appropriation provision, as, for instance, by not having or executing the required “plan prepared by the commissioner of criminal justice services and approved by the director of the budget” – or not making the plan publicly available. Consequently, plaintiffs have stated a cause of action as to ¶¶92-93 – paragraphs AAG Kerwin does not cite and whose content she only generally reveals, devoid of specifics.

Indeed, it is only with respect to plaintiffs’ showing that, “*as written*, there is NO item in Aid to Localities Budget Bill #S.6403-d/A.9003-d authorizing disbursements of state money to the counties for district attorney salaries for this fiscal year – not \$4,212,000 or any other sum” (at ¶91, capitalization & underlining in the original), that AAG Kerwin offers any law, a single 1904 case for the proposition “inadvertent inclusion of wrong fraction in legislation did not invalidate the statute.” She then states:

“To permit such an immaterial error to invalidate enacted budget legislation would result in a loss of expected money that counties relied upon, contrary to the clear intent of the Legislature and the Governor.” (at p. 10).

Apart from not furnishing any sworn statements from defendants Governor Cuomo, Senate, and Assembly as to their “clear intent”, which she easily could have done, she has failed to disclose that the 62 counties of New York State and their collective organization, the New York State Association of Counties (NYSAC), are apparently not troubled by “a loss of expected money”, as none of the counties, nor NYSAC, have chosen to intervene, despite having been furnished with a September 7, 2016 notice from plaintiffs of their right to intervene by reason of their “interest that will be affected” (Exhibit R). Such notice was e-mailed to AAG Kerwin on September 8, 2016 (Exhibit M-1).

Needless to say, even were the Court to rule that the incorrect fiscal year does not invalidate the district attorney salary appropriation for this fiscal year, the reach of such ruling would not extend beyond ¶¶90-91 and would not support dismissal of the balance of the tenth cause of action, virtually all concealed by AAG Kerwin.

AAG Kerwin’s Fraudulent Point II
“All Claims Brought by Plaintiff Center for Judicial Accountability, Inc.
Must Be Dismissed” (at pp. 11-12)

AAG Kerwin’s Point II is virtually a *verbatim* repeat of Point I (p. 4) of her April 18, 2014 memorandum of law in support of her motion to dismiss plaintiffs’ verified complaint in the predecessor citizen-taxpayer action, which, when she thereafter moved to dismiss plaintiffs’ verified supplemental complaint, she regurgitated, essentially *verbatim*, in the first footnote of her July 28, 2015 memorandum of law. She identifies neither of these facts. Plaintiffs’ response, first by their May 16, 2014 memorandum of law (at pp. 13-14) and then quoted, in full, by their September 22, 2015 memorandum of law (at fn. 12), is no less germane now, than then. Here it is, with only the slightest changes necessitated by AAG Kerwin’s own:

“AAG Kerwin’s Point III (pp. 11-12), entitled ‘All Claims Brought by Plaintiff Center for Judicial Accountability, Inc. Must be Dismissed’, is founded on falsehood and material omission. AAG Kerwin’s assertion that ‘The complaint alleges that plaintiff CJA appears through its Director, plaintiff Sassower’ is false, as she knows in supplying no annotating reference to the complaint. It is also a shameful, altogether improper objection, in view of plaintiff Sassower’s repeated assertion and request for the Attorney General’s representation and intervention for plaintiffs pursuant to Executive Law §63.1, to which there has been no response – as AAG Kerwin also knows in concealing such material fact. Certainly, it is reasonable to infer that among the reasons AAG Kerwin conceals that this action is a citizen-taxpayer action pursuant to State Finance Law Article 7-A is because its provisions plainly contemplate that the Attorney General will involve himself as plaintiff or on behalf of plaintiffs to ensure a merits determination of wrongful, illegal, and unconstitutional expenditures of taxpayer monies.

Certainly, too, AAG Kerwin well knows that no purpose would be served by dismissal of ‘any claims alleged in the complaint on behalf of plaintiff CJA’. Perfectly evident from the complaint is that there are no claims alleged that would not continue by plaintiff Sassower, who, like CJA, is additionally acting ‘on behalf of the People of the State of New York & the Public Interest’, in the absence of the participation of the Attorney General and Comptroller, whose duty it is to safeguard public monies. *Cf., Cass v. New York*, 88 A.D.2d 305, 308 (3rd Dept. 1982) [dismissal of action against the state as being ‘a result of little practical consequence since the two State officers [Comptroller and Chief Administrator of the Courts] remain as parties defendant’].”

AAG Kerwin’s Fraudulent Point III:
“Plaintiffs’ Application for Preliminary Injunctive Relief
Should be Denied in its Entirety” (at pp. 12-15)

AAG Kerwin’s Point III (pp. 12-15) materially repeats, *verbatim*, Point III (pp. 5-12) of her April 9, 2016 memorandum of law in opposition to plaintiffs’ March 23, 2016 order to show cause for a preliminary injunction/TRO with respect to their verified second supplemental complaint in the predecessor citizen-taxpayer action, which they sought leave to file. AAG Kerwin also does not reveal this – or respond to plaintiffs’ rebuttal by their April 22, 2016 reply memorandum of law (at pp. 14-28), demonstrating it to rest on “inapplicable law and flagrant falsification of the facts” (p. 14, underlining in the original).

Plaintiff Sassower’s accompanying affidavit demonstrates that at the September 2, 2016 oral argument of plaintiffs’ order to show cause for a preliminary injunction with TRO, neither AAG

Kerwin nor Justice McDonough addressed ANY of the specifics that plaintiff Sassower presented as entitling plaintiffs to a TRO. Now, by her written opposition, AAG Kerwin continues to ignore these same specifics – further compelling the granting to plaintiffs of the TRO to which they were entitled on September 2, 2016.

Needless to say, AAG Kerwin has had more than six months – since March 23, 2016, when plaintiffs furnished her with their verified second supplemental complaint in the predecessor citizen-taxpayer action (Exhibit B)– to fashion a defense to the specifics that plaintiff Sassower outlined at the September 2, 2016 argument (Exhibit O: pp. 7-8), *to wit*, that Chapter 60, Part E of the Laws of 2016, establishing the Commission on Legislative, Judicial and Executive Compensation, was a non-appropriation rider to the budget, in violation of Article VII, §6 of the New York State Constitution; was untimely, in violation of Article VII, §§2-3 of the New York State Constitution; and was advanced by fraud, as verifiable from the video of the Senate Finance Committee’s March 31, 2015 vote on #S.4610-a/A.6721-a. Yet, despite all the legal and investigative resources at her command, she has concealed the allegations and presented NO defense, whatever. The result is that Chapter 60, Part E, of the Laws of 2015 must fall for all the reasons particularized by plaintiffs’ sixth cause of action, sections D and E (¶¶67-68 and incorporated ¶¶407-423) – and with it the judicial salary increases for this fiscal year, whose nearly \$30-million funding, is concealed in Legislative/Judiciary Budget Bill #S.6401-a/A.9001-a. As stated by plaintiff Sassower at the September 2, 2016 argument:

“The money – the huge amount of taxpayer money is being funneled somewhere from the judiciary budget from the re-appropriations and the now second cause of action here reviews the serious and substantial issue with respect to the re-appropriations. Firstly, there is a question whether the re-appropriations of the judiciary were certified. Then there is a problem as to whether or not those re-appropriations actually are proper re-appropriations. And one of the issues is that there is a transfer provision and it appears that through the transfer interchange provision that is part of the re-appropriation section, as well as the appropriation

section, the money for the judicial salary increases is somewhere being funneled out from the re-appropriations. It's completely unidentified." (Exhibit O, p. 9, lns. 8-22).

This hidden funneling of the monies is embodied in plaintiffs' second cause of action – and its ¶39 reads in pertinent part:

“...the Judiciary is funding the 2016 phase of the judicial salary increase recommended by the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation from its §3 reappropriations, *via* its §2 interchange provision. Such reinforces the unconstitutionality of the interchange provision and the reappropriations, detailed at ¶¶320-331 [of plaintiffs' March 23, 2016 verified second supplemental complaint] – key features of the Judiciary's slush-fund budget.”

Here, too, AAG Kerwin has had a full six months to confront the constitutional issues laid out by incorporated ¶¶320-331. Yet she has NOT responded – including to its ¶¶320 assertion that plaintiffs' challenge to the constitutionality and lawfulness of the interchange/transfer provision, *as written and as applied*, is “additional[]” – meaning with NO parallel in the second cause of action of plaintiffs' March 28, 2014 complaint (Exhibit B: ¶¶99-108) or in the sixth cause of action of their March 31, 2015 supplemental complaint (Exhibit C: ¶¶179-193) in the predecessor citizen-taxpayer action. In other words, she cannot rely on Justice McDonough's fraudulent October 9, 2014 and August 1, 2016 decisions as having determined the issue of the interchange/transfer provision. Nor does she, instead simply concealing this further challenge to which she has NO defense. Moreover, as clear from each of those decisions (Exhibits E and D), Justice McDonough's dismissals of plaintiffs' second and sixth causes of action in the predecessor citizen-taxpayer action were without identifying or addressing any of their allegations as to the unconstitutionality and unlawfulness of the Judiciary's reappropriations, including whether they were certified.

AAG Kerwin's Fraudulent Subsection "Likelihood of Success on the Merits"
(at pp. 13-14)

AAG Kerwin begins this subsection with a footnote – her footnote 9 – that:

“Since a ‘preliminary injunction may not issue where the underlying action is dismissed...’ County of Orange v MTA, 71 Misc2d 691, 693 (Sup Ct. Orange Co. 1971), plaintiffs are not entitled to preliminary injunction relief since defendants’ cross-motion to dismiss the complaint should be granted.” (at pp. 13-14).

Such proposition of law has no application, at bar, as AAG Kerwin’s dismissal cross-motion must be denied, *as a matter of law*, for its flagrant violation of the black-letter standard governing dismissal pursuant to CPLR §3211(a)(7). As hereinabove demonstrated, her cross-motion conceals the allegations of each of the ten causes of action – allegations not only stating a cause of action, but entitling plaintiffs to summary judgment, as verifiable from the incorporated record of the prior citizen-taxpayer action.

She then purports that:

“To the extent that plaintiffs seek to enjoin the defendants from taking action on a ‘proposed budget’ for fiscal year 2016-2017, see First and Second Causes of Action, such relief is unavailable as moot since the 2016-2017 state budget has been enacted. New York Public Interest Group, Inc. v. Regan, [91 A.D.2d 774, at 775 (3d Dept 1982)]. Accordingly since the plaintiffs seek preliminary injunctive relief related to moot claims, their application for relief should be denied.”

This is utterly false. Plaintiffs’ order to show cause does not seek “to enjoin the defendants from taking action on a ‘proposed budget’”. Rather, it seeks to enjoin disbursement of public monies pursuant to the enacted Legislative/Judiciary Budget Bill #S.6401-a/A.9001-a and the enacted Aid to Localities Budget Bill #S.6403-d/A.9003-d. There is nothing moot about that relief – and AAG Kerwin makes no claim that the disbursement of monies pursuant to those enacted bills is not on-going and capable of being enjoined.

She then purports:

“For the reasons discussed above, plaintiffs cannot establish a likelihood that they will succeed on the merits of any of their claims, and they have failed to present the court with any admissible evidence to support such a finding....

Plaintiffs’ submissions in support of their application for a preliminary injunction are wholly devoid of evidence sufficient to support a finding of unconstitutionality beyond a reasonable doubt, or any statutory violation....”

Again, utter fraud. As herein demonstrated, AAG Kerwin’s “reasons discussed above” are sham and deceitful, concealing all but a fraction of the verified complaint’s allegations – and offering up “arguments” that only underscore plaintiffs’ entitlement to injunctive relief because they establish that defendants have NO defense, at all, to ANY of plaintiffs ten causes of action.

AAG Kerwin’s Fraudulent Subsection “Irreparable Harm” (at p. 15)

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 approximately \$27.5 millions of dollars in judicial salary increases being disbursed to the judges since April 1, 2016, pursuant to the Commission on Legislative, Judicial and Executive Compensation’s December 24, 2015 report – and the monetary non-salary benefits based thereon – *via* the Judiciary reappropriations in Legislative/Judiciary Budget Bill #S.6401-a/A.9001-a – will be returned by them to the public treasury, let alone with a return of the approximately \$150 millions of dollars in judicial salary increases the judges received, since April 1, 2012, pursuant to the Commission on Judicial Compensation’s August 29, 2011 report – and the monetary non-salary benefits they received based thereon. Nor does she claim that the nearly \$4.5 million dollars in district attorney salary reimbursement and financial incentives being disbursed to the counties,

pursuant to appropriation and reappropriation provisions of the Criminal Justice Services' budget in Aid to Localities Budget Bill #S.6403-d/A.9003-d can be recovered. 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" (at p. 15)

The foregoing establishes the fraud of AAG Kerwin's pretense that "equitable considerations weigh in favor of denying plaintiffs' request for preliminary injunctive relief". Based on the record before the Court in this citizen-taxpayer action and the incorporated record in the predecessor citizen-taxpayer action, not only are the equities all in plaintiffs' favor, but they are entitled to the Court's granting of the TRO wrongfully stricken by Justice McDonough in disregard of State Finance Law §123-e(2) and conversion of AAG Kerwin's dismissal cross-motion to a motion for summary judgment for plaintiffs, pursuant to CPLR §3211(c) and in keeping with the expedition mandated by State Finance Law §123-c(4).

PLAINTIFFS' REQUESTED AFFIRMATIVE RELIEF
TO SAFEGUARD THE INTEGRITY OF THESE JUDICIAL PROCEEDINGS

I. The Court's First Threshold Duty:
To Disclose Facts Bearing Upon its Fairness & Impartiality

The bedrock principle for a judge is judicial impartiality. Over 150 years ago, the New York Court of Appeals recognized that ‘the first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality’, *Oakley v. Aspinwall*, 3 N.Y. 547 (1850), quoted in *Scott v. Brooklyn Hospital*, 93 A.D.2d 577, 579 (2nd Dept. 1983). This standard of impartiality, both in appearance and actuality is the hallmark of the Chief Administrator’s Rules Governing Judicial Conduct (Part 100) – which, pursuant to Article VI, §§20 and 28(c) of the New York State Constitution, has constitutional force.

§100.3E pertains to judicial disqualification and states in pertinent part:

“(1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might be reasonably questioned, including but not limited to instances where: (a)(i) the judge has a personal bias or prejudice concerning a party...(d) the judge knows that the judge...(iii) has an interest that could be substantially affected by the proceeding.”

Judiciary Law §14 governs statutory disqualification for interest. In pertinent part, it states:

“A judge shall not sit as such in, or take any part in the decision, of an action, claim, matter, motion or proceeding...in which he is interested...”

It is long-settled that a judge disqualified by statute is without jurisdiction to action and the proceedings before him are void, *Oakley v. Aspinwall*, *supra*, 549, *Wilcox v. Arcanum*, 210 NY 370, 377 (1914), *Casterella v. Casterella*, 65 AD2d 614 (2nd Dept. 1978), 1A Carmody-Wait 2d §3:94. “Recusal, as a matter of due process, is required...where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion”, *People v. Alomar*, 93 N.Y.2d 239 (1999), *Kampfer v. Rase*, 56 A.D.3d 926 (3rd Dept. 2008).

Although recusal on non-statutory grounds is “within the personal conscience of the court”, a judge’s denial of a motion to recuse will be reversed where the alleged “bias or prejudice or unworthy motive” is “shown to affect the result”, *People v. Arthur Brown*, 141 AD2d 657 (2nd Dept. 1988), citing *People v. Moreno*, 70 NY2d 403, 405 (1987); *Matter of Rotwein*, 291 NY 116, 123 (1943); 32 New York Jurisprudence 44, *Janousek v. Janousek*, 108 AD2d 782, 785 (2nd Dept 1985): “The only explanation for the imposition of such a drastic remedy...is that...the court became influenced by a personal bias against defendant.”

A judge who fails to disqualify himself upon a showing that his “unworthy motive” has “affect[ed] the result” and, based thereon, does not vacate such “result” is subject not only to reversal on appeal, but to removal proceedings:

“A single decision or judicial action, correct or not, which is established to have been based on improper motives and not upon a desire to do justice or to properly perform the duties of his office, will justify a removal...”, italics added by Appellate Division, First Department in *Matter of Capshaw*, 258 AD 470, 485 (1st Dept. 1940), quoting from *Matter of Droege*, 129 AD 866 (1st Dept. 1909).

In *Matter of Bolte*, 97 AD 551 (1st Dept. 1904), cited in the August 20, 1998 New York Law Journal column, “*Judicial Independence is Alive and Well*”, by the then administrator and counsel of the New York State Commission on Judicial Conduct, Gerald Stern, the Appellate Division, First Department held:

“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, emphasis in the original).

“...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).

§100.3F of the Chief Administrator’s Rules Governing Judicial Conduct provides that where

a judge's "impartiality might reasonably be questioned" or he has an interest, he may:

"disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation of the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

The Commission on Judicial Conduct's annual reports explicitly instruct:

"All judges are required by the Rules of Judicial Conduct to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned."

According to the Commission in its brief before the New York Court of Appeals in *Matter of Edward J. Kiley*, (July 10, 1989, at p. 20),

"It is cause for discipline for a judge to fail to disclose on the record or offer to disqualify under circumstances where his impartiality might reasonable (sic) be questioned."

Treatise authority holds:

"The judge is ordinarily obliged to disclose to the parties those facts that would be relevant to the parties and their counsel in considering whether to file a disqualification motion", Flamm, Richard E., Judicial Disqualification: Recusal and Disqualification of Judges, p. 578, Little, Brown & Co., 1996.

The facts giving rise to the Court's disclosure obligations are set forth at pages 4-5 herein.

II. The Court's Second Threshold Duty: To Ensure that the Parties are Properly Represented by Counsel

Executive Law §63.1 identifies that the Attorney General's litigation position is contingent on "the interest of the state". It reads as follows:

"The attorney-general shall:

1. 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. No 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." (underlining added).

State Finance Law Article 7-A also contemplates the Attorney General's affirmative role in safeguarding against "wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property" (§123-b) – including as plaintiff:

§123-a defines "person" to include "the attorney general" and he is the only "person" so-specified;

§123-c(3) states "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."

§123-d states that costs and security "shall not apply to any action commenced by the attorney general in the name of and on behalf of the people of the state."

The Attorney General's duty is thus not to provide a knee-jerk defense, but to determine "the interest of the state". Where there is no legitimate defense to a lawsuit, the Attorney General's obligation is not to defend, but to intervene and/or represent the plaintiff so as to uphold "the interest of the state".

Certainly, if the Attorney General had had any legitimate defense to plaintiffs' complaint, AAG Kerwin would not have engaged in the litigation fraud she has by her dismissal cross-motion. Such establishes, *prima facie*, what was already proven in the predecessor citizen-taxpayer action: that the Attorney General has no legitimate defense and his duty is to be representing plaintiffs or intervening on their behalf.

As set forth by plaintiff Sassower's accompanying affidavit, AAG Kerwin has not responded to her requests that she identify who in the Attorney General's office independently evaluated "the interest of the state" and the Attorney General's duty, consistent therewith, to be assisting plaintiffs – here acting as private attorneys general.

That Attorney General Schneiderman is a named defendant, with a direct, financial interest in the sixth, seventh, and eighth causes of action pertaining to the Commission on Legislative, Judicial and Executive Compensation, makes the Court's inquiry of him even more compelled.

In *Greene v. Greene*, 47 NY2d 447, 451 (1979), the Court of Appeals articulated key principles governing attorney disqualification for conflict of interest – the situation at bar where Attorney General Schneiderman, in addition to representing himself, represents his co-defendant public officers:

"It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law (Code of Professional Responsibility, canon 7). For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests (see, e.g., *Cardinale v Golinello*, 43 NY2d 288, 296; *Eisemann v Hazard*, 218 NY 155, 159; Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large.

...where it is the lawyer who possesses personal, business or financial interest at odds with that of his client, these prohibitions apply with equal force (Code of Professional Responsibility, DR 5-101, subd [A]). Viewed from the standpoint of a client, as well as that of society, it would be egregious to permit an attorney to act on behalf of the client in an action where the attorney has a direct interest in the subject matter of the suit. ...the conflict is too substantial, and the possibility of adverse impact upon the client and the adversary system too great, to allow the representation."

The former DR 5-101 is now reflected in Rule 1.7 of New York's Rules of Professional Conduct. Rule 1.7(a)(2) bars a lawyer from representing a client if a "reasonable lawyer" would conclude:

"there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests."¹²

Such "significant risk" is here present, compounded by the fact that Attorney General Schneiderman's preeminent duty of representation is not to his co-defendants who he has heretofore protected, but to the state, to which he has a diametrically-conflicting interest by reason of his salary interest in the compensation issues.

III. The Court's Power under 22 NYCRR §130-1.1(d) to Act "Upon its Own Initiative" and Impose Costs & Sanctions against AAG Kerwin for her Frivolous Cross-Motion

To enable a court to safeguard the integrity of its proceedings, NYCRR §130-1.1(d) explicitly empowers it to act "upon its own initiative, after a reasonable opportunity to be heard" in imposing costs and sanctions against a party or his attorney for "frivolous" conduct in "Every pleading, written motion, or other paper" he has signed.

§130-1.1(c) defines conduct as "frivolous" if:

- "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false."

¹² Such is permitted under Rule 1.7(b) only if, *inter alia*, "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"; and "(4) each affected client gives informed consent, confirmed in writing".

AAG Kerwin's dismissal cross-motion meets the test for frivolousness on all three counts. As hereinabove demonstrated, she has brazenly disregarded the most fundamental legal standards in crafting her dismissal cross-motion. Fashioned on fraud and deceit throughout, it is "completely without merit in law", chocked with "material factual statements that are false", and intended to "delay or prolong the resolution of the litigation or maliciously injure [the plaintiffs herein]", as it has already done.

Such mandates that maximum costs and sanctions be imposed,¹³ especially as AAG Kerwin's "frivolous" conduct replicates, identically, what she did, repeatedly, in the prior citizen-taxpayer action, for which Justice McDonough rewarded her by his decisions.

IV. The Court's Mandatory Disciplinary Responsibilities under §100.3D of the Chief Administrator's Rules Governing Judicial Conduct

Part 100 of the Chief Administrator's Rules Governing Judicial Conduct are designed to ensure the integrity of judicial proceedings. Part 100.3D relates to a judge's "Disciplinary Responsibilities". In mandatory language it states:

"(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action."

New York's Rules of Professional Conduct, promulgated as joint rules of the Appellate Divisions of the Supreme Court, are Part 1200 of Title 22 of New York Codes, Rules and Regulations. Particularly relevant is the Code's definition section, which specifies "fraud" as involving:

"scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another" (1200.1(I)).

¹³ Under §130-1.2, the court is empowered to impose "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct". Pursuant to §130-1.3, "financial sanctions" of up to \$10,000 may additionally be imposed, payable to the Lawyers' Fund for Client Protection.

It also defines “law firm” as including “a government law office”.

Rule 3.1, entitled “Non-Meritorious Claims and Contentions”, states:

“a lawyer shall not...defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous...”. (subsection a).

The definition of “frivolous” is the same as that under 22 NYCRR §130.1.1(c) and includes “knowingly assert[ing] material factual statements that are false” (subsection b(3)).

Rule 3.3, entitled “Conduct Before a Tribunal”, states:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer or use evidence that the lawyer knows to be false. or use evidence that the lawyer knows to be false. If a lawyer...has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal...

Rule 8.4, entitled “Misconduct”, states:

“A lawyer or law firm shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct...
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice.”

Rule 5.1 is entitled “Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers” and states:

“(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b)(1) A lawyer with management responsibilities in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate...

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

- (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or
- (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and
 - (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
 - (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.”

As demonstrated by this memorandum of law and by plaintiff Sassower’s accompanying affidavit, defendants’ dismissal cross-motion, by defendant Attorney General Schneiderman’s “of counsel” AAG Kerwin, is not just “frivolous”, it is fraudulent – and flagrantly violates the Rules of Professional Conduct and, specifically, Rule 3.1, Rule 3.3, and Rule 8.4.

Pursuant to §100.3D(2) of the Chief Administrator’s Rules Governing Judicial Conduct, this requires the Court to “take appropriate action” by referring AAG Kerwin and her culpable superiors in the Attorney General’s office who failed to discharge supervisory responsibilities under Rule 5.1 to disciplinary authorities, consistent with the unequivocal directive of the New York Court of Appeals:

“the courts are charged with the responsibility of insisting that lawyers exercise the highest standards of ethical conduct...Conduct that tends to reflect adversely on the legal profession as a whole and to undermine public confidence in it warrants disciplinary action (*see Matter of Holtzman*, 78 NY2d 184, 191 cert denied, ___ US ___, 112 S.Ct 648; *Matter of Nixon*, 53 AD2d 178, 181-182; *cf.*, *Matter of Mitchell*, 40 NY2d 153, 156).”, *Matter of Rowe*, 80 NY2d 336, 340 (1992).¹⁴

V. Judiciary Law §487 Provides the Court with a Further Means to Protect Itself & Plaintiffs from AAG Kerwin’s Demonstrated Fraud and Deceit

Judiciary Law §487, “Misconduct by attorneys”, states, in pertinent part:

“An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party;

...

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.”

In *Amalfitano v. Rosenberg*, 12 NY3d 8, 14 (2009), the New York Court of Appeals recognized that “the evident intent” of Judiciary Law §487 is “to enforce an attorney’s special obligation to protect the integrity of the court and its truth-seeking function”. As such, AAG Kerwin’s fraudulent cross-motion warrants that the Court utilize Judiciary Law §487, including by referring her to criminal authorities so that she, her colluding attorney superiors, and her consenting

¹⁴ “A court cannot countenance actions, on the part of an attorney, which are unethical and in violation of the attorney’s Canon on Ethics... .A court cannot stand idly by and allow a violation of law or ethics to take place before it.”, *People v. Gelbman*, 568 N.Y.S2d 867, 868 (Just. Ct. 1991).

attorney defendants, can each be prosecuted for her “misdemeanor” and punished under the penal law. Such would not only also be consistent with the Court’s duty to take “appropriate action” under §100.3(D)(2) of the Chief Administrator’s Rules Governing Judicial Conduct, but would serve the beneficial purpose of facilitating plaintiffs’ collection of “treble damages” in a civil action – the importance of which is all the greater as the legislative defendants have not seen fit to create the fund that State Finance Law §123-g identifies was to be established under State Finance Law §123-h to reimburse plaintiffs in meritorious citizen-taxpayer actions for litigation costs and expenses, including attorney fees.¹⁵

CONCLUSION

Upon the Court’s confronting the threshold reasonable questions as to its fairness and impartiality, including by pertinent disclosure of its financial interest and personal and professional relationships, this Court’s duty, pursuant to State Finance Law §123 *et seq.* and Executive Law §63.1 is to make the threshold determination as to who, in defendant Attorney General Schneiderman’s office, has independently evaluated plaintiffs’ entitlement to the Attorney General’s representation/intervention in this citizen-taxpayer action and then:

- (a) to grant plaintiffs the TRO to which their September 2, 2016 order to show cause entitled them and/or to grant them the preliminary injunction to which they are entitled;

¹⁵ State Finance Law §123-g, entitled “Costs and fees”, states:

“1. The court shall have the authority to fix a reasonable sum to reimburse the plaintiff for costs and expenses, including attorney fees in an action wherein judgment was rendered for the plaintiff. Such attorney fees shall only be paid from the fund established under section one hundred twenty-three-h of this article to the extent of money available therein.

2. No intervenors, unless they are necessary parties, shall be awarded attorney fees.”

There is no State Finance Law §123-h.

- (b) to deny AAG Kerwin's September 15, 2016 cross-motion and give notice to the parties, pursuant to CPLR §3211(c), that the Court is treating it as a motion for summary judgment for plaintiffs; and
- (c) to take "appropriate action" against AAG Kerwin, and her conspiring supervisors and the defendants, pursuant to the Court's mandatory disciplinary responsibilities under §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, including by referring them to disciplinary and criminal authorities, imposing sanctions/costs pursuant to 22 NYCRR §130-1.1, and utilizing Judiciary Law §487 so that it achieves its beneficent purpose.



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

September 30, 2016