STATUS REPORT
of the 10th cause of action of plaintiffs' September 2, 2016 verified complaint
Citizen-Taxpayer Action: Center for Judicial Accountability, et al. v. Cuomo, et al.,
Albany Co. #5122-2016[1]

PRESENTED TO WESTCHESTER COUNTY BOARD OF LEGISLATORS ON NOVEMBER 27, 2017 TO FACILITATE THEIR VERIFICATION OF:

PLAINTIFFS' ENTITLEMENT TO SUMMARY JUDGMENT ON THEIR 10th CAUSE OF ACTION (¶¶85-110) TO VOID THE BUDGET ITEM PROVIDING STATE REIMBURSEMENT TO THE COUNTIES FOR DISTRICT ATTORNEY SALARY INCREASES ARISING FROM THE AUGUST 27, 2011 REPORT OF THE COMMISSION ON JUDICIAL COMPENSATION

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#1:
What was defendants' response, by their lawyer, Attorney General Eric Schneiderman, himself a defendant, to plaintiffs' 10th cause of action?

By a September 15, 2016 cross-motion, defendants sought to dismiss plaintiffs' September 2, 2016 verified complaint pursuant to CPLR §3211(a)(7) ["the pleading fails to state a cause of action"] and §3211(a)(8) ["the court has not jurisdiction of the person of the defendant"]. The September 15, 2016 memorandum of law of Assistant Attorney General Adrienne Kerwin, appearing "of counsel", argued (at pp. 10-11), as follows, in support of dismissal of plaintiffs' tenth cause of action:

> "Plaintiffs' Tenth Cause of Action alleges that the disbursement of funds to reimburse counties for District Attorney salaries is not authorized by law and violates statutes and the state and federal constitutions. First, plaintiffs rely on a typographical error in the enacted budget in support of their claim that disbursements made pursuant to budget bill S.6403-d/A.9003-d (which became Chapter 53 of the Laws of 2016) during the 2016-17 fiscal year are not 'authorized.' See Complaint at ¶¶89-91. Chapter 53 of the Laws of 2016 states that '…for state fiscal year 2014-15 the state reimbursement to counties for district attorney salaries shall be equal to the amount received by a county for such purpose in 2013-14…" See Complaint at Exh. H. This is obviously and clearly a drafting error, since the budget for fiscal year 2016-17 would not intentionally contain a provision for payment of monies for the

[1] The September 2, 2016 verified complaint and all the record thereon, as well as the record in CJA's prior citizen-taxpayer action, *Center for Judicial Accountability, et al., v. Cuomo, et al*., (Albany Co. #1788-2014), are posted on CJA's website, www.judgewatch.org, accessible from the prominent homepage link: "CJA's Citizen-Taxpayer Actions to End NYS' Corrupt Budget 'Process' & Unconstitutional 'Three Men in a Room' Governance". The record is also accessible from CJA's webpage "The Larcenous D.A. Salary Increases, The Westchester County Budget – & The Westchester County Board of Legislators", accessible *via* the top panel "Latest News".

2014-15 fiscal year. See e.g. In re City of New York, 95 A.D. 552, 559 (1st Dept 1904) (inadveretent inclusion of wrong fraction in legislation did not invalidate the statute). To permit such an immaterial error to invalidate enacted budget legislation would result in a loss of expected money that cunties relied upon, contrary to the clear intent of the Legislature and the Governor.

Additionally, although the complaint alleges that these disbursements are 'otherwise unlawful and unconstitutional,' see Complaint at Tenth Cause of Action, it fails to identify any constitutional provision that is allegedly violated by the disbursements. See id. Plaintiffs do, however, allege that the disbursements violate County Law ¶700.10 and ¶700.11 and Judiciary Law ¶183-a. See id. However, the complaint itself states that S.6403-d/A.900-d (Chapter 53 of the Laws of 2016) specifically provides that the disbursements are to be made '[n]otwithstanding the provisions of subdivisions 10 and 11 of section 700 of the county law or any other law to the contrary…' See Complaint at ¶89, Exh. H. Therefore, when S.6403-d/A.9003-d was enacted into law as Chapter 53 of the Laws of 2016, the provision contained in that Chapter which provided for disbursement of funds to reimburse counties for District Attorney salaries superseded anything to the contrary contained in any other law.[fn7]"

The annotating footnote 7 read:

"To the extent that plaintiffs are dissatisfied with responses they received to FOIL requests, see Complaint at ¶94, 95, such must be challenged Iin an Article 78 proceeding."

#2:
What was plaintiffs' reply to defendants' cross-motion to dismiss their 10th cause of action?

On September 30, 2016, plaintiffs replied, seeking summary judgment on their ten causes of action. Under the title heading, "AAG Kerwin's Fraudulent 'Argument' for Dismissal of Plaintiffs' Tenth Cause of Action", their reply memorandum stated, as follows (pp. 32-35):

"…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 <u>violate</u> that superseding budget appropriation provision, as, for instance, by <u>not</u> having or executing the required 'plan prepared by the commissioner of criminal justice services and approved by the director of the budget' – or <u>not</u> 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 <u>for this fiscal year</u> – 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."

#3:
What did Judge Denise Hartman do?

By decision dated December 21, 2016, Judge Denise Hartman, without addressing, or even identifying, the threshold integrity issues presented by plaintiffs' September 30, 2016 memorandum of law (at pp. 1-5, 42-53) – as, for instance, her HUGE financial interest in the 6th, 7th, and 8th causes of action to void the judicial salary increases and her relationships with defendants, including Attorney General Eric Schneiderman, for whom she worked, as likewise for former Attorney General, now Governor, Andrew Cuomo, who appointed her to the bench – dismissed nine of plaintiffs' ten causes of action. Her dismissal of the tenth cause of action (¶¶ 85-110), by four sentences (at p. 6), was as follows:

> "The tenth cause of action must also be dismissed. Plaintiff's itemization arguments are non-justiciable (*Pataki*, 4 NY3d at 96; *Urban Justice Ctr.*, 38 AD3d at 30). And the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary. Lastly, the reference to fiscal year 2014-2015 rather than 2016-2017 is a typographical error that does not invalidate the challenged legislation (*see Matter of Morris Bldrs., LP v Empire Zone Designation Bd.*, 95 AD3d 1381, 1383 [3d Dept 2012])."

#4:
What was plaintiffs' response to Judge Hartman's December 21, 2016 decision and what was Judge Hartman's response to their request for "the shortest return date possible" for their February 15, 2017 order to show cause?

On February 15, 2017, plaintiffs responded to Judge Hartman's December 21, 2016 decision by an order to show cause to disqualify her for demonstrated actual bias, born of interest and relationships with the defendants – and to vacate her December 21, 2016 decision, as the manifestation thereof. Annexed, in support, as Exhibit U, was an analysis of the December 21, 2016 decision, demonstrating it to be "a criminal fraud", "falsif[ying] the record in all material respects to grant defendants relief to which they [were] not entitled, *as a matter of law*, and to deny plaintiffs relief to which they [were] entitled, *as a matter of law*" – and asserting (at p. 1) that plaintiffs' September 30, 2016 memorandum of law, whose very existence the decision concealed, was a "paper trail" of the record before Judge Hartman, enabling verification "within minutes" of the decision's fraudulence.

With respect to Judge Hartman's four-sentence dismissal of the tenth cause of action, the analysis quoted it in full, thereupon stating (at p. 18-19):

> "This, too, is fraudulent – as Justice Hartman well knows in not identifying ANY of the allegations of plaintiffs' tenth cause of action, other than that it includes a 'reference to fiscal year 2014-2015'. Thus, Justice Hartman's claim that 'Plaintiff's itemization arguments are non-justiciable' is not only *sua sponte* – having not been advanced by AAG Kerwin – but fictional. Plaintiffs made no itemization arguments and the decision furnishes no detail as to what it is talking about. As for Justice Hartman's claim that 'the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary', her decision furnishes no law for the proposition that an appropriation can lawfully or constitutionally do so – and such contradicts plaintiffs' tenth cause of action that it cannot (¶¶92, 96-104). As for Justice Hartman's claim that 'reference to fiscal year 2014-2015 rather than 2016-2017 is a typographical error that does not invalidate the challenged legislation', such disposes of the least of the several grounds of the cause of action, indeed, only ¶¶ 90-91, leaving the balance, all concealed, not only stating a cause of action, but establishing an entitlement to summary judgment by its three recited FOIL requests – and so identified by plaintiffs' September 30, 2016 memorandum of law (at pp. 32-35)."

Plaintiffs requested (at ¶6) that Judge Hartman fix "the shortest return date possible", stating "No amount of time will enable defendants to refute the analysis, as it is factually and legally accurate, mandating the granting of the disqualification/vacatur relief sought by this order to show cause, *as a matter of law*."

Judge Hartman made plaintiffs' February 15, 2017 order to show cause returnable more than five

weeks later, on March 24, 2017, giving defendants until March 22, 2017 to serve their answering papers on plaintiffs.

#5:
What was defendants' response to plaintiffs' February 15, 2017 order to show cause & its analysis of Judge Hartman's December 21, 2016 decision, annexed as its Exhibit U?

On March 22, 2017, AAG Kerwin served opposition papers, requesting that Judge Hartman deny plaintiffs' February 15, 2017 order to show cause "in all respects". Her March 22, 2017 memorandum of law did not deny or dispute the accuracy of plaintiffs' Exhibit U analysis, instead besmirching and mischaracterizing it (at p. 7) as "consist[ing] of flawed reasoning, unsupportable assertions, and a fundamental misunderstanding of what questions are examined by a court in the context of a motion to dismiss a pleading." Its response to what the Exhibit U analysis detailed about Judge Hartman's dismissal of the tenth cause of action was a single paragraph (at p. 10). Its four sentence read, as follows:

> "Plaintiff fails to present any argument as to why the court purportedly erred by finding her tenth cause of action – regarding appropriations for district attorney salaries – was non-justiciable. The only specific provisions of law that Plaintiff alleges are violated by the appropriations provision are County Law §§700.10 and 700.11, and Judiciary Law ¶183-a. See Compl. ¶¶92(a), 94-102. Plaintiff fails to identify, in the Complaint, or in her motion to reargue, any provision of County Law §§700.10 or 700.11, or Judiciary Law §183-a, that was violated by the 2016-2017 budget bill. And, as set forth in the Complaint, the bill provides for the appropriations '[n]otwithstanding the provisions of subdivisions 10 and 11 of section 700 of the county law or any other law to the contrary.' See Compl. ¶89."

#6:
What was Judge Hartman's response to plaintiffs' notice that AAG Kerwin's March 22, 2017 papers in opposition to their February 15, 2017 order to show cause were "utterly fraudulent"?

On March 24, 2017, the return date of plaintiffs' February 15, 2017 order to show cause, plaintiffs sent a letter to Judge Hartman.[2] Stating that Judge Hartman had given defendants more than a month to respond to the February 15, 2017 order to show cause – and plaintiffs less than two days to reply – Plaintiffs requested a four-day adjournment so as to have the opportunity to reply, in writing, if not orally, in conjunction with oral argument of a further order to show cause that plaintiffs would be bringing. The letter advised that AAG Kerwin's opposition papers were "utterly fraudulent,

[2] Plaintiffs' March 24, 2017 letter is Exhibit 6-a to plaintiff Sassower's May 15, 2017 reply affidavit in further support of their March 29, 2017 order to show cause. Judge Hartman's so-ordered responding letter is Exhibit 6-b.

revealed as such by the most cursory examination of Exhibit U to plaintiffs' February 15th order to show cause" and asked that the letter "be deemed their reply" if the requested adjournment were denied.

By a March 24, 2017 so-ordered letter, Judge Hartman, though granting the adjournment, denied plaintiffs the opportunity to reply at the oral argument of their further order to show cause.

#7:
What was Judge Hartman's decision
on plaintiffs' February 15, 2017 order to show cause
with its substantiating Exhibit U analysis of her December 21, 2016 decision?

Not until May 5, 2017 did Judge Hartman render a 1-1/2 page decision on plaintiffs' February 15, 2017 show cause. Without identifying plaintiffs' Exhibit U analysis of her December 21, 2016 decision, it denied their February 15, 2017 order to show cause "in its entirety". No mention of the indefensibility of her dismissal of plaintiffs' tenth cause of action, detailed by their Exhibit U analysis, without contest as to its accuracy by defendants. Concomitant with the May 5, 2017 decision and order, Judge Hartman issued an amended May 5, 2017 decision & order, which was the December 21, 2016 decision amended to add a CPLR §2219(a) listing of "Papers Considered" – a list identifying plaintiffs' September 30, 2016 memorandum of law.

#8:
What was plaintiffs' response to Judge Hartman's May 5, 2017 decision –
and Judge Hartman's response to plaintiffs' June 12, 2017 order to show cause?

On June 12, 2017, plaintiffs served a (then unsigned) order to show cause for reargument/renewal/ and vacatur of Judge Hartman's May 5, 2017 decision and order and its accompanying May 5, 2017 amended decision and order, based thereon. Plaintiff Sassower's moving affidavit described (at ¶4) the May 5, 2017 decision as:

> "factually and legally insupportable and fraudulent, further demonstrating the actual bias that [Judge Hartman] demonstrated by [her] December 21, 2016 decision that was the basis for plaintiffs' February 15, 2017 order to show cause, whose substantiating proof was plaintiffs' 23-page, single-spaced analysis of the December 21, 2016 decision, annexed as Exhibit U."

Among its particulars, it stated:

> "6. In denying plaintiffs' February 15, 2017 order to show cause, this Court's barely 1-1/2-page May 5, 2017 decision (Exhibit A-2) makes no mention of plaintiffs' Exhibit U analysis, whose accuracy it does not contest. Nor does it

mention or contest the accuracy of plaintiffs' 53-page September 30, 2016 memorandum of law on which the Exhibit U analysis principally relies. Instead, the decision disposes of the February 15, 2017 order to show cause by two short conclusory paragraphs of two sentences and three sentences, respectively, neither identifying a single fact other than that 'Plaintiff correctly points out that the Court['s December 21, 2016 decision] failed to 'recite the papers used on the motion,' as required by CPLR 2219(a)…"

Based thereon, the moving affidavit identified the grounds for reargument:

"7. In keeping with the euphemistic phrasing of CPLR §2221, the grounds for reargument are that the Court 'overlooked or misapprehended' ALL the facts, law, and legal argument presented by plaintiffs' February 15, 2017 order to show cause, other than the violation of CPLR §2219(a) in its December 21, 2016 decision/order. Such facts, law, and legal argument are dispositive of plaintiffs' entitlement to the granting of their February 15, 2017 order to show cause 'in its entirety'…"

To demonstrate that Judge Hartman had also "overlooked" ALL of AAG Kerwin's defense fraud, by her March 22, 2017 opposition papers, plaintiff Sassower's moving affidavit annexed, as its Exhibit E, an analysis of AAG Kerwin's March 22, 2017 opposition, demonstrating its fraudulence throughout. In pertinent part, it stated (at pp. 17-18):

"As for AAG Kerwin's response to plaintiffs' Exhibit U analysis of Judge Hartman's dismissal of their tenth cause of action, she also does not rebut any aspect of its showing as to the fraudulence of that dismissal, which she entirely conceals, including by her twin falsehoods:

> 'Plaintiff fails to present any argument as to why the court purportedly erred by finding her tenth cause of action – regarding appropriations for district attorney salaries – was non-justiciable…Plaintiff fails to identify, in the Complaint, or in her motion to reargue, any provision of County Law §§700.10 or 700.11, or Judiciary Law 183-a, that was violated by the 2016-2017 budget bill…' (at p. 10).

As to these twin falsehoods, plaintiffs' Exhibit U analysis (at p. 19) could not have been more explicit, stating:

> '…Justice Hartman's claim that 'Plaintiff's itemization arguments are non-justiciable' is not only *sua sponte* – having not been advanced by AAG Kerwin – but <u>fictional</u>. Plaintiffs made <u>no</u> itemization arguments and the decision furnishes <u>no</u> detail as to what it is talking

> about. As for Justice Hartman's claim that 'the district attorney salary appropriation plaintiff challenges specifically supersedes any law to the contrary', her decision furnishes no law for the proposition that an appropriation can lawfully or constitutionally do so – and such contradicts plaintiffs' tenth cause of action that it cannot (¶¶92, 96-104)…' (at p. 19, underlining in the original)."

Judge Hartman did not sign the June 12, 2017 order to show cause until June 16, 2017, setting a return date five weeks later, July 28, 2017, with defendants' answering papers to be served on plaintiffs by July 21, 2017.

#9:
What was defendants' response to plaintiffs' June 12, 2017 order to show cause?

On July 21, 2017, AAG Kerwin opposed plaintiffs' June 12, 2017 order to show cause for reargument/renewal/vacatur by a cross-motion. The extent of AAG Kerwin's presentation with respect to the tenth cause of action was under the title heading "Decision and Order dated December 21, 2016 (Amended May 5, 2017)" (at p. 3). It was a single sentence:

> "The tenth cause of action was dismissed as non-justiciable. See id. at p. 6."

The annotating reference was to the December 21, 2016 decision, on which AAG Kerwin entirely rested.

#10:
What was plaintiffs' response to defendants' July 21, 2017 opposition/cross-motion?

On August 25, 2017, plaintiff served their papers in reply to AAG Kerwin's July 21, 2017 opposition to their June 12, 2017 order to show cause, and in opposition to her cross-motion. Their August 25, 2017 memorandum of law demonstrated that AAG Kerwin's July 21, 2017 opposition/cross-motion was fraudulent throughout and that the state of the record before Judge Hartman was that AAG Kerwin had not denied or disputed the accuracy of the two exhibits that are dispositive of plaintiffs' entitlement to reinstatement of their tenth cause of action: plaintiffs' Exhibit U analysis of Judge Hartman's December 21, 2016 decision and plaintiffs' Exhibit E analysis of AAG Kerwin's March 22, 2017 opposition to their February 15, 2017 order to show cause.

#11:

What was defendants' response to plaintiffs' August 21, 2017 reply/opposition papers?

Neither AAG Kerwin, nor any of her superiors in the Attorney General's office, including defendant Attorney General Schneiderman – to whom plaintiffs' furnished notice – responded. This, notwithstanding their entitlement to have submitted reply papers in support of their July 21, 2017 cross-motion.

#12:

What has been Judge Hartman's response to plaintiffs' fully-submitted June 12, 2017 order to show cause and defendants' fully-submitted July 21, 2017 cross-motion?

Plaintiffs' June 12, 2017 order to show cause and defendants' July 21, 2017 cross-motion, both of which were returnable September 1, 2017, more than two months ago, are yet *sub judice* before Judge Hartman.