SUPREME COURT OF STATE OF NEW YORK
ALBANY COUNTY

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CENTER FOR JUDICIAL ACCOUNTABILITY, INC.
and ELENA RUTH SASSOWER, individually and
as Director of the Center for Judicial Accountability, Inc,
acting on their own behalf and on behalf of the People
of the State of New York & the Public Interest,

Plaintiffs,

MOVING AFFIDAVIT

-against-

Index #5122-16
RJI # 01-16-122174

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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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELENA RUTH SASSOWER, being duly sworn deposes and says:

1. I am the unrepresented individual plaintiff in this citizen-taxpayer action brought pursuant to Article 7-A of the State Finance Law (§123 *et seq.*). I am fully-familiar with all the facts, papers, and proceedings heretofore had and submit this affidavit in support of the relief requested by plaintiffs' accompanying order to show cause.

2. Plaintiffs proceed by order to show cause, consistent with State Finance Law §123-c(4) which commands:

> "An action under the provisions of this article shall be heard upon such notice to such officer or employee as the court, justice or judge

> shall direct, and shall be promptly determined. The action shall have preference over all other causes in all courts."

3. The overarching issue presented by plaintiffs' order to show cause is their entitlement to vacatur of the Court's December 21, 2016 decision and order [hereinafter "decision"][1] (Exhibit T-1)[2] because it is legally and factually indefensible and fraudulent – the product of a judge disqualified by actual bias, born of financial interest and long-standing relationships with the named defendants, who made no disclosure, notwithstanding requested to do so, and then corruptly used her office to benefit herself and them. This is demonstrated by plaintiffs' annexed analysis of the decision (Exhibit U), which I wrote and to whose accuracy I swear.

4. Absent the Court's disqualifying itself and vacating its December 21, 2016 decision based on the analysis, plaintiffs will immediately file and perfect an appeal to the Appellate Division, Third Department, likewise based on the analysis. Their "Question Presented" will be as follows:

> "Does appellants' within analysis of the lower court's December 21, 2016 decision/ order require its vacatur/reversal, *as a matter of law* – and the granting of all the affirmative relief sought by appellants' September 30, 2016 memorandum of law, *to wit*,
>
> (1) the lower court's disqualification for financial interest and for apparent bias, now actualized;
>
> (2) an order directing respondent Attorney General Schneiderman to represent appellants and/or for his intervention on their behalf, pursuant to Executive Law §63.1 and State Finance Law Article 7-A – including *via* independent counsel;

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[1] The reargument/renewal relief sought by this motion is timely. AAG Kerwin did not serve the December 21, 2016 decision and order with notice of entry until February 3, 2017, when it was mailed to me (Exhibit T-2). Prior thereto, on January 17, 2017, I had e-mailed AAG Kerwin that her failure to serve and file the notice of entry did not relieve her of the Court's direction, in the December 21, 2016 decision and order, that she had "30 days from the date of this order to answer" the sixth cause of action which the decision had preserved (Exhibit T-3). Her answer to the complaint followed, dated January 20, 2017 (Exhibit T-4) – the 30th day.

[2] Exhibits T-X annexed to this affidavit continue the sequence begun by plaintiffs' September 2, 2016 verified complaint (Exhibits A-K) and my September 30, 2016 affidavit (Exhibits L-S).

(3) an order disqualifying respondent Attorney General Schneiderman from representing his fellow respondents;

(4) an order imposing sanctions and costs upon those in respondent Attorney General Schneiderman's office responsible for the legally-insufficient, fraudulent dismissal cross-motion made on respondents' behalf – and referring them to disciplinary and criminal authorities;

(5) notice, pursuant to CPLR §3211(c), that respondents' cross-motion is being converted to a motion granting summary judgment to appellants on all ten causes of action of their verified complaint;

(6) a preliminary injunction, if not TRO, to appellants based on the record establishing their "likelihood of success on the merits" and "irreparable injury".

5. Pursuant to State Finance Law§123-c(4), this Court's duty, with respect to this order to show cause, is to fix a short return date and then render decision promptly so that if plaintiffs are compelled to file and perfect an appeal, they may do so expeditiously.

6. To facilitate this Court's fixing the shortest return date possible, I have given AAG Kerwin a "head-start" in responding by already e-mailing the analysis, this affidavit, and the unsigned order to show cause to her. My affidavit of service, with its attached e-mail receipt, is annexed (Exhibit V). Suffice to note that a longer return date would not benefit defendants in the slightest. 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*.

7. Indeed, not only does the analysis establish the Court's duty to disqualify itself and vacate its December 21, 2016 decision/order, but its duty to grant reargument. This, because in the euphemistic phrasing of CPLR §2221, the Court has "overlooked or misapprehended" <u>all</u> the facts, law, and legal argument presented by the analysis. Certainly, too, were the Court to fail to grant

reargument so as to rectify the decision's omission of a listing of "papers considered", in violation of CPLR §2219(a), such would underscore that its intent is to thwart plaintiffs' meritorious appellate rights. As stated by the analysis – quoting treatise authority:

> "An order must indicate papers on which the court exercised its discretion so as to subject it to meaningful appellate review. Where it fails to do so, the appeal will be dismissed." (1-3 New York Appellate Practice §3.04 'Appealable Paper', Matthew Bender & Co., citing *In re Dondi*, 63 N.Y.2d 331, 339 (1984) (Exhibit U, at p. 23).

8. As for plaintiffs' entitlement to renewal pursuant to CPLR §2221, the "new facts not offered on the prior motion" – and the "reasonable justification" for not having offered them – are the responses that plaintiffs subsequently received to their two FOIL requests relating to the threshold, integrity issues before the Court – FOIL requests that were Exhibits L and N to my September 30, 2016 affidavit.

9. The first FOIL request, dated September 23, 2016 (Exhibit L), sought "all publicly-available records pertaining to the Court's nomination and May 5, 2015 confirmation to the New York Court of Claims. The responses from defendant Senate and defendant Cuomo are annexed (Exhibits W-1, W-2, and W-3).

10. The resume/curriculum vitae furnished by defendant Cuomo (Exhibit T-3) confirms what the Court was duty-bound to disclose and what plaintiffs' September 30, 2016 memorandum of law (at p. 5) requested the Court to disclose: its 30-year career in the office of the New York State Attorney General, spanning from 1985 to 2015 – in other words, working for defendant Attorney General Schneiderman and, before that, working for then Attorney General, now Governor, defendant Cuomo. Evident from the Court's concealment of this in its decision is that it was unwilling to even claim that it could be fair and impartial as to these defendants and as to the threshold issues before it relating to the Attorney General's office – and, as chronicled by the

analysis (Exhibit U), it was not.

11. Insofar as the Court's resume description of its professional experience in the Attorney General's office describes itself as having:

> "briefed and argued hundreds of appeals in the New York State Appellate Divisions, the New York State Court of Appeals, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court. The subject matter…includes state and federal constitutional law…"

and that it had "supervisory responsibility" over the workproduct of others, the Court clearly does not need the aid of plaintiffs' analysis to know that its December 21, 2016 decision is indefensible, legally and factually, and must be vacated/reversed on appeal, should it now fail to act, consistent with its duty, on this motion.

12. Plaintiffs' second FOIL request, dated September 28, 2016 FOIL (Exhibit N), sought publicly-available records pertaining to AAG Kerwin, as well as the Attorney General's "guidelines, policies, and procedures" relating to conflict of interest, outside counsel, and his duties pursuant to Executive Law §63.1 and State Finance Law Article 7-A – information the Court would likely have been substantially knowledgeable of by virtue of its 30-year tenure in the Attorney General's office – including its eight-year overlap with AAG Kerwin, with whom it may have had professional and personal relationships. The responses from the Attorney General's office are annexed (Exhibits X-1, X-2, X-4).

13. Suffice to say that with regard to plaintiffs' request for

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

the response came back that "after a diligent search, the OAG located no responsive records."

(Exhibit X-4).

14. Finally, there is a further "new fact" properly introduced in support of renewal – defendant Chief Judge DiFiore's so-called "Excellence Initiative", whereby the Judiciary is purportedly striving for "operational and decisional excellence in everything we do". If so, this Court was obviously unaware of same when it rendered its December 21, 2016 decision – as was I, until I read those words in the Judiciary's executive summary to its December 1, 2016 budget request for fiscal year 2017-2018 – words repeated by Chief Administrative Judge Lawrence Marks in testifying before the Legislature on January 31, 2017 in support of the Judiciary's budget, at which I was present, awaiting my turn to testify in opposition.

15. The Court's decision on this motion will be another test of "decisional excellence", nowhere evidenced by its December 21, 2016 decision, nor by the August 1, 2016 decision of Justice McDonough on which it substantially relies.

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Elena Ruth Sassower, Unrepresented Plaintiff

Sworn to before me this
15th day of February 2017

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Notary Public

TABLE OF EXHIBITS