WRITTEN TESTIMONY SUBMITTED ON THE NOMINATION OF MICHAEL GARCIA FOR ASSOCIATE JUDGE OF THE NEW YORK STATE COURT OF APPEALS

New York State Senate
Judiciary Committee

Senator John J. Bonacic, Chairman

Senator Ruth Hassell-Thompson, Ranking Minority Member

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LEGAL momentum

The Women's Legal Defense and Education Fund

February 4, 2016

The Honorable John J. Bonacic
Chair, Senate Standing Committee on Judiciary
The New York State Senate
State Capitol
Albany, NY 12224

Re: Nomination of Michael J. Garcia, Esq. for Associate Judge of the New York State Court of Appeals

Dear Senator Bonacic:

Please communicate my support to the Senate Standing Committee on Judiciary for Governor Andrew Cuomo's nomination of Michael J. Garcia, Esq. for Associate Judge of the New York State Court of Appeals. Michael J. Garcia is an excellent choice.

I became President and CEO of Legal Momentum in April 2014. Before that I served 12 years as New York City Deputy Mayor/Counsel to Michael R. Bloomberg. I was responsible for judicial selection, and also served four years on Governor George Pataki's federal judicial selection committee. When I chaired Mayor Bloomberg's Survivors of Exploitation Working Group, Mr. Garcia, as U.S. Attorney for the Southern District, provided this body with valuable counsel that led to the implementation of a first-of-its-kind citywide series of training sessions at City Family Justice Centers, select New York City Health and Hospitals Corporation hospitals, and the Administration for Children's Services. It was clear he is a brilliant legal mind and dedicated public servant. He has a proven track record of independent thinking and leadership, and has received high honors for his distinguished service.

I believe Michael J. Garcia would be an asset to the New York State Court of Appeals and recommend him to you, without reservation.

Sincerely,

Carol Robles-Román

Proceedings

(No response.)

CHAIR PERSON: That ends --

MS. NOE: I have not said.

CHAIR PERSON: So you have two minutes.

Carol Ann, the director of Health Watch, Public Charging Reports under Judicial Corruption and Enforcement Task Force.

MS. NOE: My name is Carol Ann Noe. The last name is spelled N-O-E.

I had Health Watch, which oversees private organization volunteer and it oversees the safety, health and rights of patients, including the protections under the New York State Human Rights Commission, as well as ADA Title Two Rehab Back 504 in state courts.

I also head -- I'm chief investigator for the Judicial Corruption Enforcement Task Force. This is the first Judicial Corruption Enforcement Task Force of its kind in the City and State of New York and this task force has gone national. We have had assistance from Washington and the federal government to ensure that New York State Supreme Court judges, both in civil and criminal courts, are not violating due process rights, civil rights and constitutional rights, and that they are not engaged in any form of depravation of rights in civil cases.

I'm going to talk firsthand about my experience in

the matrimonial part of New York County, New York County State Supreme, 60 Centre Street. The investigation that we conducted beginning August 2013 through and including November 2015 was done through the Judicial Corruption Enforcement Task Force, which is a private organization of volunteers. We sought help from various federal branches of the federal government to assist us in placing under surveillance key civil judges in New York State matrimonial courts, as well as family courts, as well as the First Department Appellate Division.

I'm going to talk about a particular judge that I had the firsthand experience in dealing with in the matrimonial part. Now, you know, I want to preface that our investigation is simply focused on matrimonial Family Court in New York County, the First Department and the First Department Appellate Division. Our public charging report will be published by a national major news organization and it covers the intensive two and a half year investigation of our findings.

The findings include firsthand accounts of pro se litigants, litigants who are also represented by counsel, counsel itself, as well as sources and whistle blowers who work in the matrimonial part, the family court and First Department Appellate Division.

Access to the courts is not a right. It is a

privilege that only I deem the litigant worthy of.

These statements are repeatedly uttered on the record and in order after order after order in over 128 cases by Justice Ellen Gesmer. Ellen Gesmer in 2016 will be removed off the bench. She will be formerly and officially federally criminally indicted.

The second judge to be removed off the bench of matrimonial part will be Matthew Cooper. The third will be Laura Drager. The fourth is Deborah Kaplan, which I believe has moved onto another area. We have judges in the First Department Appellate Division who will also be removed off the bench in 2016. All of these will be federally, criminally prosecuted as a result of the Judicial Corruption Enforcement Task Force investigation.

Ellen Gesmer began a systematic campaign against 128 litigants and their lawyers to retaliate, seek retributions, seek retaliation and punishment by systematically destroying exhibits and evidence in cases so she would be able to file false instruments. It's called destruction of evidence and filing of false instruments. In my case alone she deprived me of all statutory rights. When the legislature passed a statutory law in 2010, they did so because they did not trust the matrimonial judges would be fair, impartial and unbiased, and they were correct in their session.

Proceedings

So statutory requirements require that you receive counsel fees if you are the non-moneyed spouse. If you are indigent and permanent medical disabilities and permanent medical conditions you are required to receive payment for your medical bills. I was deprived of a trial under Ellen Gesmer where she used my disabilities and my permanent medical conditions against me and she rendered a medical opinion. So Justice Gesmer is also, as far as we know, now a doctor.

There are federal cases filed under seal because of the explosive amount of surveillance evidence that we uncovered under this judge and the other judge in the matrimonial part. Again, this is only First Department. We do not have the resources to go after every single department but at some point that will happen.

To discriminate and retaliate against any litigant under ADA Title Two Act 504 and in violation of the New York State Human Rights Disability Statutes. This is a very, very serious thing.

More importantly, we uncovered a pattern of practice of systemic ongoing retaliation, vengeance, punishment and retribution by these matrimonial judges when any litigant, whether pro se litigants or represented by counsel, files formal complaints against these judges. And the people in charge of investigating these judges on the

state level, the Appellate Division, the administrative court judge, Commission on Judicial Conduct, Attorney General, and District Attorney, all aid and abet and protect these judges from these types of egregious criminal frauds that continue. So when you dispose of litigants' exhibits and their evidence in order to justify false, fraudulent rulings, these are very, very serious charges. And the fact that people's due process rights are ignored -- I am here today under a gag order.

A judgment was entered on my case just recently when no complaint was ever filed in this case, should never had been entered because this particular judge does not want anybody exposing her ongoing patterns of practices. We are exposing them in 128 cases and thankfully we have a branch of the federal government who looked at the evidence and said, You know what? We're going to remove these judges and there's nothing the state can do about it.

Does anybody have any questions? You really should have questions.

CHAIR PERSON: Maybe not right now.

MISS NOE: I'd --

CHAIR PERSON: You had your seven minutes.

MISS NOE: I have two more minutes. I'd like to finish.

CHAIR PERSON: All of you who want to speak out

write to us, write to us. We'll be very happy to hear from you. We have heard this --

MISS NOE: I would just like to say I would like to submit --

CHAIR PERSON: Submit, submit. We'd like to see anything.

MS. REITER: Why don't you stay afterwards and you can discuss it. The person who appeared before this person was rudely interrupted repeatedly by a group of you who were sitting there to the point where this gentleman taking down the testimony was unable to hear. So could we please get real here? There are rules. You have the same amount of time to testify. You're not special. You have the same amount of time that --

MISS NOE: I think I have two more minutes left.

CHAIR PERSON: I will give it to you and that's it.

MISS NOE: Thank you.

I think it's nice for judges to talk about how great each other is, but the bottom line is what are they doing in the court of law? How are they dispensing justice? They are not above the law. They will not be above the law. And these kinds of systemic depravations of due process, constitutional and civil rights, with destruction of evidence, filing false orders, willfully excluding material information and orders in order to justify the frauds that

themselves perpetrated, luckily they were under surveillance so we have a massive amount of evidence and I think the federal government for moving on 2016 on federally criminally indicted and these judges will be removed from a bench, including a substantial amount of judges from the Appellate Division.

Thank you so much for your time.

CHAIR PERSON: Any of the commissioners anything they want to say?

(No response.)

CHAIR PERSON: This public hearing will now be ended and thanks to all of the witnesses and all written submissions that we received. We will review them all and we thank you again for your involvement and your attention.

(Whereupon, the public hearing matter was concluded.)

FEB 5, 2016 –(AMENDED/CORRECTED VERSION REPRINT THIS ONE KEEP DATE OF FEB 5, 2016)

Dear Senator Bonacic, Jessica Cherry, Michael Garcia (Nominee) Chief Justice DiFiore and all Members of NY State Judiciary Committee

Confirmation Hearing Michael Garcia –NYState Court of Appeals

I am the Chief Investigative WD of a volunteer advocacy unit, *" The Judicial Corruption Enforcement Task Force" and* as a Pro-Se litigant who suffers from permanent medical conditions, who is disabled and was left indigent by a corrupted Judge Ellen Gesmer and corrupted court, both I and other advocates, litigants and investigators were told yet again by the NYState Senate Judiciary Committee (Senator Bonacic and Chief Justice DiFiore and others) that we are not entitled to provide oral testimony to the confirmation hearing of Michael Garcia Feb 8, 2016, nor to the prior confirmation hearing of Chief Justice Janet Difiore in Jan 2016

A Public Charging Report will be released in 2016 and published nationally by a Major National News Media Organization against New York State Supreme Court Judges & Others

- The PCR Report highlights an intensive 3 year criminal investigation into over 128 Cases handled by Justice Ellen Gesmer and other New York State Supreme Court Judges in Matrimimonal Courts, Family, Courts, First Dept Appellate Division and Supervisory, Administrative & Chief Court Judges and other Judiciary in New York County.

- The PCR Report highlights an intensive 3 year criminal investigation into members of the *Commission on Judicial Conduct* in failing to investigate, interview and review evidence by protecting the criminal misconduct of New York State Supreme Court Judges at the direction of Chief Justice Lippman, Chief Luis Gonzales and Governor Andrew Cuomo and many more...

- The PCR Report also highlights an intensive 3 year criminal investigation into over NYState Court Reporters, Law Secretaries & Law Clerks for these Judges and other court players who aided and abetted these NYState Supreme Court Judges in altering court & trial transcripts and destroying exhibits, documents and evidence and backdating orders and much more

- The PCR Report also highlights and intensive 3 year criminal investigation into major state and city government high ranking officials and lawyers who aided and abetted the criminal violations of these Judges by failing to protect the public and suppressing thousands of

complaints filed against these judges while engaging in corrupted litigation

- ***"THE JUDICIAL CORRUPTION ENFORCEMENT TASK FORCE"*** **is authorized to take enforcement actions against New York State Supreme Court Judges, the commission on Judicial Conduct and other court players who engaged in an orchestration in concert**

- ***The "FTF"*** **retains exclusive oversight and authority to federally criminally indict these New York State Supreme Court Judges and other court players and government officials listed above**

JUDICIAL CORRUPTION WILL END IN ALL NYSTATE COURTS UNDER THE ENFORCEMENT ACTIONS OF "THE JUDICIAL CORRUPTION ENFORCEMENT TASK FORCE" & "FTF "

JUSTICE ELLEN GESMER OF NY STATE SUPREME COURT – MATRIMONIAL PART- ENFORCEMENT ACTIONS & FEDERAL CRIMINAL INDICTMENTS AS A RESULT OF THE

NOE v NOE LEAD CASE & IN OVER 128 OTHER CASES CRIMINAL VIOLATIONS PERPETRATED BELOW BY JUSTICE GESMER INCLUDE BUT ARE NOT LIMITED TO THE FOLLOWING

- **Destruction of evidence, documents and exhibits to defraud and alter the underlying record**
- **Filing of false Instruments (orders, decisions, judgements and sua sponte orders) in support of the created deliberate underlying frauds Gesmer created**
- **Discrimination and Relation Violations of ADA TITLE II & REBAB ACT 504 using litigants disabilities to deprive them of TRIALS and deprive them of reasonable accommodations**
- **Violations of HIPAA and depriving litigants of medical treatments and destroying medical records and reasonable accommodation disability medical requests**
- **FRAUDS UPON THE COURT AS A JUDICIAL OFFICER OF THE COURT**
- **Retaliation, Retribution, Vengeance and Punishment when litigants and lawyers report this judge to state and federal officials and the media, they are incarcerated as well**
- **Destroying, Altering, Suppressing, Recreating, Falsifying information, Exhibits, Documents and Evidence by deliberately misrepresenting on the Record and in court Transcripts and Trial Transcripts**
- **Destroying, Altering, Suppressing, Recreating, Falsifying Information, Exhibits, Documents and Evidence by deliberately misrepresenting litigants hard copy records, digital records to further support the fraudulent orders and further perpetrate frauds and insure that litigants do not have an accurate record for a meaningful appeal and more**
- **Destroying, Altering, Suppressing, Recreating, Falsifying Orders, Decisions, Judgements by deliberately misrepresenting based on the underlying frauds committed by the court in order to omit facts**
- **Ex-Parte Communications with Appellate Division Judges and Defense Council & other major state government agencies and more**
- **Depriving litigants of their rights to absolute Legal Representation including but not limited to Statutory laws for Council Fees, Medical Bills Payments, Expert Fees, Forensic Accounting, Accounting, Costs & Disbursements owed to the non-monied spouses and so much more**

violations of Statutory laws

- **Depriving litigants of Discovery and Depositions**
- **Depriving litigants of Poor Persons Relief**
- **Failing to sign Orders to Show Causes**
- **Failing to sign Subpoenas**
- **Quashing Subpoenas**
- **Racketeering – Orchestration in Concert**
- **Retaliation, Retribution, Vengeance and Punishment when litigants and lawyers report this judge to state and federal officials and the media, they are incarcerated as well**
- **Failing to enforce Orders by falsify the record and suppressing the evidence and more**
- **Corruptions – Frauds – Conspiracy**
- **Willfully conspiring to deprive litigants of their rights to due process, civil and constitutional rights including deliberately violating all statutory laws and CPLR**
- **Retaliation, Retribution, Vengeance and Punishment when litigants and lawyers report this judge to state and federal officials and the media, they are incarcerated as well**
- **Abuse of Power under Color of Law**
- **Holding litigants in Contempt for 90 to 180 days without a Contempt hearing and without a Lawyer in violation of all statutory laws, civil and constitutional laws**
- **Altering, Recreating, Falsifying & deliberately misrepresenting Evidence on the record and in transcripts**
- **Altering, Recreating, Falsifying, Destroying documents of litigants hard copy record, digital record to further perpetrate frauds and**
- **Issuing GAG orders & Sua Sponte Orders with Ex-Parte Communications without adjudication nor motions before her to cover-up her criminal underlying frauds**
- **Depraved indifference**
- **Extrinsic frauds upon the court as a Judicial officer of the court**
- **Quid Pro Quo & Kick Back Schemes – favors and monies exchanged**
- **So much more charged in the PCR by the JCETF & FTF**

IN ADDITIONAL TO JUDGE ELLEN GESMER...OTHER JUDGES that both ENFORCEMENT ACTIONS & FEDERAL CRIMINAL INDICTMENTS will be taken against ARE AS FOLLOWS

JUDGES in the FIRST DEPT APPELLATE DIVISION ENGAGED IN CORRUPTED JUSTICE BY RIGGING AND THROWING CASES by AIDING & ABETTING GESMER & OTHER JUDGES who are under investigations. All evidence, facts of the record, case law and conclusions of Statutory law ignored –PCR ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

Judge ELLEN GESMER OF NY STATE SUPREME COURT – MATRIMONIAL PART-60 CENTER STREET-NY – PCR ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

Judge MATTHEW COOPER OF NY STATE SUPREME COURT – MATRIMONIAL PART-60 CENTER STREET-NY –JCETF ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

Judge LAURA DRAGER OF NY STATE SUPREME COURT – MATRIMONIAL PART-60 CENTER STREET-NY –

JCETF ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

Judge DEBORAH KAPLAN NY STATE SUPREME COURT –60 CENTER STREET-NY – JCETF ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

Judge Sheri Heitler NY STATE SUPREME COURT - –JCETF ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

Judge Peter Moulton – NY STATE SUPREME COURT –JCETF ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

Former Chief Justice Jonathan Lippman – NY State Supreme Court - (Other Federal Agencies get first crack at the crimes of Jonathan Lippman , then JCETF with FTF to follow)

OTHER JUDGES & OTHER OFFICES of COURT ADMINISTRATION -NYSUCS–OCA-JUDGES & ADMINISTRATORS JCETF ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

COMMISSION on JUDICIAL CONDUCT over 25 people named in both the JCETF enforcement actions and the FTF criminal indictments – Commission will be shut down by the JCETF

MAJOR HIGH RANKING NY STATE GOVERNMENT OFFICIALS & LAWYERS named in both the JCETF enforcement actions and the FTF criminal indictments

AND OTHER PLAYERS IN THE NY COURT SYSTEMS-JCETF ENFORCEMENT ACTIONS & FTF FEDERAL CRIMINAL INDICTMENTS to FOLLOW

The JCETF along with the FTF wishes to thank the hundreds of witnesses that came forward, the hundreds of litigants, the numerous lawyers, the extensive court personnel, the extensive court sources and court whistleblowers for their ongoing cooperation into this (3) year criminal investigation and special thanks goes to the FTF for moving forward with federal criminal indictments

The JCETF can be reached directly via email at - Public Charging Reports <capg@nyc.rr.com>

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permission

Thank you
CAROL NOE
CIWD- JUDICIAL CORRUPTION ENFORCEMENT TASK FORCE
CC: FTF, OAL, DC, HW, PCR –JKW–ESQ

Dear Senator Bonacic and Judiciary Committee Members:

I write this email to endorse and support the current nomination of Michael Garcia to the New York Court of Appeals.

I have known Michael Garcia for many years and believe he would be a tremendous contribution to the law, and the State of New York in a judicial capacity.

Michael and I grew up together in Valley Stream, Long Island, although I am four years older than him. I was with him when he was honored by his Alma Mata Valley Stream Central High School as outstanding Alumni. I know many people who have known him over the years and he is well regarded and respected by all I know who know him.

I have just completed thirty years as Valley Stream Village Justice and I am now currently an Acting Supreme Court Justice in Nassau County Court. I've also recently served as president of the New York State Magistrates Association.

Having known Michael over the years I believe he will have a terrific judicial career and his sharp legal mind will benefit all of us who believe in the fairness of the law and with concern for the public.

I thank you for your consideration and if there are any questions please feel free to contact me at my chambers at 516-493-3545.

Very truly yours,

Robert G. Bogle

February 5, 2016

Mr. James H. Brady
450 West 31st Street
12th Floor
New York, NY 10001
bradyny@gmail.com
201-923-5511

New York State Senate, Judiciary Committee

Re: Confirmation Hearing of Michael Garcia to the Court of Appeals

Dear Mr. Garcia,

I am not necessarily opposed to your nomination, unless you are corrupt. Then I oppose your nomination.

Your background includes being a prosecutor, so it would be impossible for you to honestly claim you do not see that I was, and continue to be, the victim of corruption by the employees and commission members of the State and City of New York.

My claims involve an ongoing robbery and corruption scandal by the state of New York's judicial and law enforcement employees.

These criminals are armed with 1) extreme power, 2) immunity, and 3) a culture of corruption and collusion that virtually assures them they will never be held accountable for their criminal behavior as long as they stick together they can away with blatant criminal activity.

In my particular case, the goal of the state justices, law enforcement agencies, and the Commission on Judicial Conduct members is to make sure it is never investigated why the contract description of my commercial apartment was unlawfully rewritten to void the $100 million dollars worth of air rights that were appurtenant to my unit through the Offering Plan contract.

The rewritings were obviously unlawful since the Justices themselves determined that the contract was "not ambiguous" and the contract was to be enforced "as written"

Instead it was repeatedly rewritten until finally it was rewritten beyond recognition in order to void my rights under the contract for the benefit of powerful New York developers.

The Seventh Paragraph Footnote to the Schedule of Units of the Amended Offering Plan reads:

> "[Seventh Paragraph – New] The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law."

The Appellate Division, First Department's February 11, 2010 decision included a clear and unequivocal conveyance of the utilization of the premise's development rights:

> "that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs."

Justice Kornreich of the Manhattan Supreme Court, Commercial Division, issued a July 15, 2014 decision in which she rewrote both the original contract and the Appellate Division's decision:

> "It has already been adjudged that while the owners of the unit ***may*** have the right to erect additional structures on the roof, that right does not entitle them to use any floor area in doing so (Prior Action, decision and order, Mar 13, 2009 at *2 & *4-*5."

There are three active cases in court on this matter at the time of this writing: *Brady v. Schneiderman*, No. 15 Civ 9141 in Federal District Court, Southern District of Manhattan, before Justice Abrams.

The second case, *Brady v. the Office of the New York Attorney General, Commission on Judicial Conduct, et al.*, Claim No. 126268, in the New York State Court of Claims.

The third case is before the New York Court of Appeals, *James Brady v. 450 West Owners Corp.*, et al, No.157779/2013 and 654226/2013. This suit is against the co-op Board who sold the premise's development rights to Sherwood Equities in violation to the Offering Plan and the Appellate Division's February 11, 2010 decision.

Following please find my Opposition to the Attorney General's Motion to Dismiss in federal court, and my Reply to the Co-op Board, Sherwood Equities, and Chicago Title before the Court of Appeals. These papers show with specificity the nine year ordeal my family and I have suffered at the hands of this state's judicial employees, who have refused to admit the meaning of their own words, and who, contrary to all canons of contract law, have rewritten a contract they ruled unambiguous in order to void my rights for the benefit of real estate developers.

You should be prepared to answer the following questions, as I have been assured that one of the Senators will be asking you about this.

> What does the Seventh Paragraph Footnote means to you?
>
> As a Justice of the Court of Appeals, will you permit the description of apartments to be rewritten, or will you enforce contracts as written?
>
> Do you believe judges who make or permit knowingly false decisions be removed?

I look forward to your response and your implementation of justice in this matter.

Sincerely,

_____/s/_____

James H. Brady

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

James H. Brady,

Plaintiff,

v.

Eric Schneiderman, Attorney General for the State of New York,

Defendant.

X

No. 15 Civ 9141 (RA)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The Attorney General's and his Assistant Attorney General's Memorandum of Law in Support of Motion to Dismiss proves the absolute insanity that I have been subjected to by Eric Schneiderman and his office. As will be shown herein, Attorney General Eric T. Schneiderman and his assistant attorney general Michael A. Berg have absolutely no problem committing perjury, fraud, and aiding and abetting fraud. As will be shown below, Defendants have filled their papers with lies, unfounded assertions, fabrications, and *ad hominen* attacks against Plaintiff, who was a victim of corruption and collusion by the state's judicial employees, and Eric Schneiderman and his office.

It is truly insane that **only** employees and commission members of the state and county of New York argue that the meaning and intent of "the Seventh Paragraph Footnote" to "the Schedule of Units" in the Amended Offering Plan for 450 West 31st Street Owners Corp. does not convey air rights to Plaintiff when (1) no alternative meaning exists, and (2) even the attorneys to the parties to the contract agree, both in the present and past litigation, that the clear intent of the paragraph was to convey air rights to Plaintiff's unit. This fact is proven below.

In the first round of litigation, Stanley Kaufman, the co-op's litigation attorney, stated in "Defendant's Reply Memorandum of Law," April 14, 2008, p.5:

The clear intent was to grant the 12th floor unit owner some latitude in adding **additional space, or structures**, so long as in doing so, the owner did not violate the local building code, **zoning regulations, or other ordinances**.

And further:

The clear and logical meaning of the added footnote number 7 of the Second Amendment was to grant 12th floor owner some latitude ***in adding additional structures***, so long as in doing so, the owner did not endanger anyone else's health or safety or violate the building Code, ***zoning laws or any other laws or ordinances***." (*Ibid.* p. 28).

Similarly, Stanley Kaufman wrote in his "Affirmation in Opposition to Plaintiff's Motion for Reargument":

In the early 1980s, the sponsor's principal, Arthur Green, who at the time occupied the 12th floor, constructed a penthouse addition (an addition what was completely illegal at the time, but legalized years later by the co-op [R 759]). In fact, the Bradys alleged in their Amended Complaint that at a time when the Building had no available development rights, Arthur Green "exercised the rights of the 12th floor to build by constructing a 1,800 square foot penthouse on the roof..." (R67 at par. 23, 24). ***As evidenced by the sponsor's own conduct, paragraph 7 of the Second Amendment was probably designed to give the then owner of the 12th floor (which happened to be the sponsor's principal) the right to build additional space for himself, which he did;*** not to give the owner of the 12th floor unit the benefit of receiving enormously valuable development rights resulting many years later from some then completely unforeseeable future rezoning.

And further, Franklin Snitow, Extell's litigation counsel, stated in his "Affirmation for Defendants Extell Dev. Corp.", et al., March 18, 2008, p. 2 ¶ 3:

The intent is evidenced in the decision of the original owner of the 12th floor unit to build a 1,800 square foot penthouse on the roof. Thus, the intent of the Amendment is clear on its face." (R: 310).

At the March 18, 2014 Oral Arguments, Joseph Augustine, attorney for 450 West Owners Corp., was asked by Justice Kornreich to explain what the Seventh Paragraph Footnote means.

THE COURT: -- which means you're going to have to commit the coop board to tell me: What does Paragraph 7 mean?

MR. AUGUSTINE: It means he has the right to build structures once he submits a plan. And if those structures are permissible by law, such as Department of Buildings, and those plans do not pose a structural risk or any other risk to the building in order to -- for him to service the space that he has there, then the board would be inclined to approve it.
...

THE COURT: But what I'm saying is he does have that right, though, under paragraph 7.

MR. AUGUSTINE: He has - - our understanding he has a right to build structures. That's what it says. No one disagrees. The courts all said the same thing, he has a right to build structures.

The insanity of the corruption of the state of New York judicial employees and commission members is further underscored when they will not even admit the meaning of their own words.

The Appellate Division, First Department's February 11, 2010 decision included a clear and unequivocal conveyance of the utilization of the premise's development rights:

"that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs."
(Exhibit B).

Yet the Attorney General will not admit that these words are a conveyance of air rights when that is the very definition of air rights.

"The rights to develop further the heretofore unused space above a building or other structure." The American Heritage College Dictionary (3rd Ed. 1993) "

"The right to use all or a portion of airspace above real property." Black's Law Dictionary (5th Ed. 1979)"

It is a False Assertion that the Present Motion is Actually an Appeal of State Court Decisions

The opposite is true. Plaintiff is demanding that the Attorney General protect him from having a lower court unlawfully rewrite a higher court decision since the courts of New York State have permitted the unlawful act to take place for the benefit of powerful developers.

As shown herein, a review of Mr. Berg's Memorandum of Law in Support of Motion to Dismiss proves what a fraud Mr. Schneiderman and his Assistant District Attorney are. The crux of Defendants' argument is that Plaintiff's instant motion is actually an appeal of state court decisions, and that this

Court accordingly does not have jurisdiction over the case. Mr. Berg twice refers to Plaintiff as "a state court loser," and not once does he refer to Plaintiff as the victim of a crime and judicial wrongdoing though he saw that a New York State judge rewrote a contract beyond recognition.

Plaintiff was a Supreme Court "winner" until Justice Kornreich rewrote the Seventh Paragraph Footnote contract to void the rights of the Offering Plan and Appellate Division February 11, 2010 decision.

The Seventh Paragraph Footnote to the Schedule of Units of the Amended Offering Plan, which reads as follows:

> "[Seventh Paragraph – New] The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law."
> (Exhibit A).

The Appellate Division, First Department's February 11, 2010 decision included a clear and unequivocal conveyance of the utilization of the premise's development rights:

> "that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs."
> (Exhibit B).

Justice Kornreich issued a July 15, 2014 decision in which she rewrote both the original contract and the Appellate Division's decision:

> "It has already been adjudged that while the owners of the unit ***may*** have the right to erect additional structures on the roof, that right does not entitle them to use any floor area in doing so (Prior Action, decision and order, Mar 13, 2009 at *2 & *4-*5."
> (Exhibit C).

This shows that the Attorney General is lying when he states in his Memorandum of Law that Plaintiff is simply challenging state court decisions and is a "state court loser." It is clear that Justice Kornreich rewrote both the Appellate Division decision and the underlying contract. Plaintiff has a

constitutional right to prosecute the judge who rewrote his contract in order to void the rights under his contract. The Attorney General is a fraud who is more concerned with protecting judges and staying in the good graces of the developers than performing his oath and duty to protect from corruption.

Plaintiff's Constitutional Equal Protection Before the Law is Certainly Being Violated

A review of Mr. Berg's Memorandum of Law proves conclusively that rather than give Plaintiff equal protection before the law, the Attorney General and his office have acted and continue to act as desperate adversaries wildly fighting to avoid having to give Plaintiff equal protection before the law. The motion to dismiss is rife with corruption, with the Attorney General advancing arguments it knows to be false. As stated in Plaintiff's Complaint, the scheme is that the Attorney General is hoping that Plaintiff is never protected from the Justices who repeatedly rewrote his contract and ultimately changed every word in the contract to void the rights given to Plaintiff's New York City apartment.

In their Memorandum of Law, Defendants assert that Plaintiff has suffered no violation of equal protection before the law. "Although Plaintiff labels his claims as a federal equal protection claim, it is essentially a plea for relief in the nature of a writ of mandamus to compel action by a New York State official." (p. 14).

And further Mr. Berg argues: "The Complaint does not allege any of the elements of an equal protection violation. Plaintiff does not claim that he is a member of a protected or suspect class of that the Attorney General intentionally discriminated against him on the basis of membership in such a class. Nor does Plaintiff allege an equal protection claim on a 'class-of-one' or 'selective enforcement' theory.'" (p. 15).

The rights that belonged to Plaintiff were seized. In order to dismiss Plaintiff's claims for damages, the lower court rewrote the higher court decision to void its rights. This is shown in black and white. Yet the Attorney General is making every excuse in the book to not protect Plaintiff's equal protection of the law. Is the Attorney General saying that he treats all similarly situated people this

way? Is the Attorney General saying that he allows judges to rewrite contract voiding their rights for the benefit of the rich and powerful? The Attorney General argues that he has the discretion of deciding who he will protect, but by itself that statement is completely false: he only has that discretion upon an assessment of the evidence. Here, it is undeniable that a contract and higher court decision were rewritten to void their rights, yet the Attorney General continues to insist that nothing unlawful has occurred.

The Attorney General makes blatantly deliberately deceptive statements pertaining to facts

In order for the Court to grant Defendant's motion to dismiss, he would have to provide a file explaining how he arrived at the decision that Plaintiff's rights have not been violated. As no such files exist, he engages in deception and makes false statements: "The New York State Courts squarely and repeatedly rejected Plaintiff's claim, and after he brought successive cases raising essentially the same claim, sanctioned him for engaging in "a near perfect example of frivolous conduct." (NYAG Memo in Support of Motion to Dismiss, p. 5). The Attorney General knows these statements are false yet passes them along to the Court as if they facts.

Plaintiff's contract and the Appellate Division's February 11, 2010 decision were rewritten beyond recognition by a corrupt judge in order to void $100 million worth of air rights, and unwarranted sanctions were imposed, yet the Attorney General, rather than protecting Plaintiff, is advancing the false claims that Plaintiff lost the prior litigation, and that the sanctions levied against him were just. Plaintiff's only goal in the 2007 litigation was to prevent the sale of the premise's development rights after the Co-op failed to obtain a waiver from Brady and his wife, and that goal was achieved.

The transcript of the September 10, 2014 hearing on the OSC shows that Justice Kornreich did not deny that she falsified the prior decision.

THE COURT: So, I have read your papers, and let me say that I stand by my decision. I think my decision is legally required.

The same request, the same legal request, really, was made in another action in front of another judge, and I am bound by that decision. It went all the way up to the Court of Appeals, so I stand by my previous decision.

I am not going to stay enforcement of the sanctions. I believe, I really believe that bringing the action over and over and over again both wastes the court's time, counsel's time, and your time, and it is frivolous. (Transcript p. 4:16-26).

THE COURT: So, I don't believe that there is any reason for me to recuse myself. I don't believe that any decision I made previously was tainted in any way. I believe this case is over at this point, so I am denying your application –

BRADY: It figures.

THE COURT: - for your order to show cause.

BRADY: That figures, your Honor.

THE COURT: Pardon?

BRADY: I said that figures. Of course you would do that. So why don't we address the fact that it's undisputed that you falsified the prior decisions.

THE COURT: That I falsified?

BRADY: You falsified the prior decisions.

THE COURT: Sir, at this point I would admonish you.

BRADY: I'd like it to be on the record, you took out the part, your Honor, that said that "pursuant to paragraph 7, plaintiff has, in addition to the utilization of the roof, the right to construct or extend structures on the roof or above the roof to the extent that may from time to time be permitted under applicable law." This Court took that out of its decision to square it against me.

THE COURT: Sir, you can say whatever you wish to say at this point. You've said it. At this point the record is closed. Your application is denied. Please step back.

BRADY: Thank you, your Honor. More evidence.
(Transcript 5:1-6).

None of the Seven Pages of Case Law and Statutes in Mr. Berg's Index Support the Attorney General's Refusal to Protect Plaintiff's Property and Constitutional Rights to Equal Protection

In their Memorandum of Law, Defendants provide seven (7) pages of authorities and cases to support their actions against Plaintiff. Not one of the dozens of cases cited permit an attorney general to act corrupt and in collusion with judges and New York City billionaire developers when shown that a contract has been rewritten beyond recognition to void its rights for the benefit of the powerful developers. OAG is shown representing Brady's cases as evidence that Brady lost the prior litigation.

In their Preliminary Statement, Defendants state that: "Read in its entirety, the Complaint is merely the latest in a series of challenges by Plaintiff to the outcome and reasoning in the prior state court decisions." (p.1). This statement shows how corrupt Defendants are. Plaintiff's complaint was that he needed protection when it was obvious that a New York State Supreme Court Justice rewrote an Appellate Division decision and an Offering Plan contract in order to void its rights. This is a big deal, and not a mere assertion, and is clearly something that cannot be waved away by the Attorney General through his supposed "discretion."

This Court Absolutely Has Subject Matter Jurisdiction When State Court Justices unlawfully Rewrite or Permit Other Justices to Unlawfully Rewrite Contract Descriptions of New York City Apartments

There are people spending over $100 million on Manhattan apartments because they consider them safe investments. Certainly the public would want to know that the federal court will follow the law pertaining to contracts if, as here, the state courts are discarding following contract law. Defendant's Motion to Dismiss proves the need for the Federal Court's intervention. The motion proves that the Attorney General is going along with the fraud and scheme of permitting state judges to rewrite the contract description of Manhattan apartments to void their rights for the benefit of powerful New York developers. The Attorney General cites the Rooker-Feldman doctrine to argue that Plaintiff must remain in state court – but state court judges are the ones in collusion with the Attorney General

to seize Plaintiff's contractual rights and get away with it by having the Attorney General do nothing about it.

The Attorney General makes the outrageously false statement that he has no standing or authority to investigate corrupt actions of state justices. NYAG provides no law or statute providing such limitation on his authority. He fails to provide any because there isn't any. What happened to Plaintiff smacks of judicial corruption that the Attorney General had an oath and duty to investigate.

Sovereign Immunity Does Not Bar the Present Action

Mr. Berg writes in Defendant's motion to dismiss: "a plaintiff may avoid the Eleventh Amendment bar to suit and proceed against individual state officers...in their official capacities, provided that his complaint (a) alleges an ongoing violation of federal law, and (b) seeks relief properly characterized as prospective," citing *Ex Parte Young*, 209 U.S. 123 (1908). (p. 10).

In the present action, Plaintiff is in fact alleging (and has proven) an ongoing violation of federal law in the form of the equal protection clause of the Constitution. Further, the relief sought is prospective – what else could it be? Only a federal court can rule on Plaintiff's equal protection claim, and only a federal court can provide the relief to enjoin the Attorney General to perform his duty.

This Case Certainly Pertains to Violations of Federal Equal Protection Law

The arguments put forward by Michael Berg and Eric Schneiderman are a disgrace and a fraud. They argue repeatedly that this action is an appeal of state law decisions, when they know this is totally false. As was proven at the March 18, 2014 Oral Arguments, certain words used in the affirmed Appellate Division decision can only be construed as giving the Plaintiff the right to use the premise's development rights, and those are words found in the actual Offering Plan itself. Thus, Plaintiff is not appealing decisions but demanding protection when a lower court rewrote a higher decision to void its rights. The fact that the lower court then sanctioned Plaintiff $400,000 can only be construed as an attempt to destroy Plaintiff and make him too weak to fights back against the people who seized his

property. The Attorney General has certainly proven to being as corrupt as Justice Kornreich, and federal court protection is certainly needed.

New York State contract law is very clear that judges cannot add or remove words from an unambiguous contract. The binding law and authority on contract law in New York State is as follows:

> "When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms." *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 10 [1990]. And "Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." "In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning." *Vermont Teddy Bear v. 538 Madison Realty Co.*, 308 AD2d 33 (2004).

Making a new contract between the parties is precisely what Justice Kornreich did in her July 15, 2014 decision. There is a big difference between judicial error and corruption, as Mr. Berg knows.

Plaintiff Certainly Meets the Criteria for a Writ of Mandamus

In Defendant's memorandum of law, Mr. Berg states that: "Mandamus to compel is an extraordinary remedy, see *Silverman v. Lobal*, 163 AD 2d 62 (1st Dept. 1990), and is available only "to enforce a clear right where a public official has failed to perform a duty enjoined by law." The present case is precisely the fact pattern for which such a writ should be issued. The Attorney General's Office has proved conclusively that they will not perform their duties under the law. Plaintiff has had his real property rights seized by a corrupt judge who issued an unlawful opinion, yet the Attorney General is arguing that they have no right, standing or duty to do anything about it.

Plaintiff Certainly Meets the Criteria for a Mandatory Injunction

"A mandatory preliminary injunction should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief. *Cacchillo v. Insmed*, Inc., 638 F.3d 401 (2nd Cir. 2011)."

The Attorney General argues that it was within his discretion to ignore the crime Plaintiff suffered. The Attorney General has the authority and duty to investigate corruption anywhere in the state. It is specifically his duty to investigate corruption when practiced by state judges.

Article III Standing and Jurisdiction

Contrary to the OAG's assertions, Plaintiff satisfies the criteria for Article III standing. (p. 8). First, Plaintiff did suffer an "injury-in-fact." Plaintiff has been robbed of the use of $100 million worth of development rights stipulated in his Offering Plan contract and in the February 11, 2010 Appellate Division decision. Secondly, Plaintiff's injuries were more than "fairly traceable" to the Attorney General. OAG's actions were actually a *sine qua non* for Plaintiff's injuries: the courts could rely on the Attorney General the judges needed the OAG to go along with the corruption. Thirdly, Plaintiff's claims can be redressed by a favorable decision from this Court.

The rewriting of the Offering Plan contract could only be explained through corruption. The OAG claims that they cannot stand before a state justice and ask why they rewrote a contract and decision in order to void its rights. What statute makes judges gods that do not have to explain anything to anyone, as if being a judge were a license to being corrupt without any accountability.

More Evidence the Attorney General is Aiding and Abetting Fraud in Assuming and Advancing the False Arguments of Justice Kornreich as Truthful Adjudication of the Facts

The Attorney General's Memo of Law quotes from Justice Kornreich's July 15, 2014 decision: "The court found that Plaintiff 'acted in bad faith' in bringing the 2013 actions, 'dragging more than twenty parties into court to litigate matters that have already been determined and claims that lack any substance.'"

The fact that Defendants have quoted these passages as being a true assessment of Plaintiff and what happened in court is deranged. By presenting these statements as true, Defendants OAG are aiding and abetting fraud.

These opposition papers are further proof of perjury, and aiding and abetting fraud on the courts by Defendants. The continued assertions that Plaintiff lost the prior litigation is entirely false. First, a review of the Oral Arguments of March 18, 2014 clearly prove that Plaintiff did not lose the prior litigation. Certain words of the affirmed February 11, 2010 decision can only be construed as giving Plaintiff the right to utilize the premise's permissible development rights to the extent allowed under applicable law. It should not be permissible for Defendants' lawyers to lie to the Court about the history of the prior litigation. The goal of the previous litigation was solely to enjoin the sale of the development rights, which Plaintiff successfully did.

Second, Defendants' attorneys do not hesitate to lie in asserting that all courts, including the Court of Appeals, have ruled that Plaintiff's claims have no merit.

Third, the words used in the First Department's February 11, 2010 decision mean that air rights are conveyed and reserved to the Plaintiff's Unit. As Defendants and their attorneys know, that would mean that a waiver is needed from Plaintiff in order for Defendants 450 West Owners Corp. to lawfully sell or transfer the premise's development rights.

Fourth, *Res judicata* should have prevented a lower court from rewriting the higher court decision, and giving a different interpretation of the Seventh Paragraph Footnote than what was given in the February 11, 2010 decision.

Fifth, OAG is shown advancing Justice Kornreich's false claims made in her July 15, 2014 decision as true. It is untrue that Plaintiff's claim "is a near perfect example of frivolous conduct and warrants defendants' requests for the imposition of sanctions." The rights that were sold by 450 West Owners Corp. were for the difference between what is built and what was permitted under applicable law. This difference is called the premise's unused development rights. It was this difference between what was built and was is permitted that the Appellate Division's decision stated Plaintiff has.

Putting these assertions forward proves Plaintiff's claims that OAG was not intent on performing their duties and protecting Plaintiff from judicial corruption, but rather OAG became a corrupt adversary themselves.

OAG claims that the Court of Appeals denied an appeal of the July 15, 2014 decision, which is untrue. (p. 3). Plaintiff was appealing the Supreme Court's refusal to sign an OSC, which would have made appealing the final decision moot.

Plaintiff Has Certainly Stated a Claim for Relief

This is likely the most outrageous thing the Attorney General states. He has done nothing but give excuses for doing nothing and continuing to do nothing. He is a fraud, and worse wants this Court to go along with the fraud and corruption. The Complaint shows on page 23 how the strategy that arguing Plaintiff had lost completely unraveled on March 18, 2014 at oral arguments, the Attorney General is still going along and arguing that Plaintiff lost the prior litigation.

Collateral Estoppel Certainly Does Not Bar the Present Action

Collateral estoppel does not apply to the present action. Plaintiff, as shown above, did not lose the prior litigation. Besides, the present action is not an appeal from a state court. Further, the claims Plaintiff brings against the Attorney General are novel and have never before been adjudicated.

Conclusion

The Federal Court needs to intervene when, as here, it is shown that the State of New York's top law enforcement agency is turning a blind eye and refusing to investigate when shown proof that state judicial employees repeatedly and unlawfully rewrote Plaintiff's contract and ultimately replaced every word in the original to void the rights in the Offering Plan.

Plaintiff's constitutional right for equal protection before the law was certainly violated by the Attorney General. This Court's decision is of worldwide importance. The people who are spending fortunes on New York City apartments must be assured that the federal courts will protect the rights of individuals and investors fairly, and not allow contracts to be rewritten for the benefit of powerful Manhattan developers.

Scott Kennedy
Notary Public, State of New York
No. 01KE6180990
Qualified in Bronx County
Commission expires January 22, 20

James Brady
Studio 450, 12th Floor
450 West 31st Street
New York, NY 10001
bradyny@gmail.com

EXHIBIT
A

SECOND AMENDMENT TO OFFERING

PLAN TO CONVERT TO COOPERATIVE OWNERSHIP

PREMISES AT:
450 West 31st Street
New York, New York

The following amendments are hereby made in order to clarify and modify certain provisions of the original Offering Plan in the above-titled conversion:

COVER PAGE

[Lines 16-23] NAME AND ADDRESS OF SPONSOR:	31st Street Realty Associates c/o Bachner, Tally & Mantell 850 Third Avenue New York, New York 10022
NAME AND ADDRESS OF SELLING AGENT:	31st Street Realty Associates c/o Bachner, Tally & Mantell New York, New York 10022

INTRODUCTION

[Sixth Paragraph] The Subscription Agreement (hereinafter referred to as "Subscription Agreement," "Purchase Agreement" or "Agreement"), may be found on page 101.

[Thirteenth Paragraph] Sponsor will not sell any units for the following uses:

(1) Medical or drug treatment centers; (2) heavy stamping, pressing or vibrating equipment; (3) storage of explosive or corrosive chemicals; (4) commercial animal breeding; (5) wholesale food processing.

DESCRIPTION OF PROPERTY

[First Paragraph] Fee title to the land and building was acquired on November 30, 1979. The aforesaid land and building were subsequently leased to the Tenant Corporation on May 30, 1980. The building is in an M1-5 manufacturing zone.

[Fourth Paragraph] Upon closing of title with the co-operative corporation, the following contracts will exist and be binding upon the co-operative corporation:

B. Ready Alarm - 11/1/80 - 10/31/81 - Sprinkler Alarm

Footnotes

[First Paragraph] The gross footages set forth herein are approximate and there will be no adjustments in the purchase price if the square footage varies less than 5%. If the actual square footage of the unit is less than the square footage set forth above by more than 5%, then in that event, a proportionate adjustment will be made in the purchase price based upon the percentage difference in the two amounts. The preceding sentence is limited, however, by the Lessor's right to exclude from the unit whatever square footage is necessary for the installation of new water, waste, electrical and ventilation risers.

[Sixth Paragraph - New] The Boiler Room shall, in addition to the square footage set forth herein, include that portion of the existing parking lot for a distance of approximately twenty-five (25) feet extending from the boiler building. The Boiler Room may be extended within such area and appropriate fences erected.

[Seventh Paragraph - New] The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law.

CHANGES IN PRICES, LAYOUT & SIZE OF UNITS

[First Paragraph] In order to meet possible varying demand for number and type of Units, or to meet particular requirements of prospective purchasers, or for any other reasons, the Sponsor reserves the right at any time and from time to time before and after declaring the Plan effective without the consent of the Board of Directors or other tenant-shareholders to: (i) change the layout of the Units; (ii) change the number of Units by subdividing one or more Units into separate units or combining separate Units into one or more Units and (iii) change the size of Units by subdividing or combining Units as aforesaid or by altering the boundary walls of Units or otherwise. If the size of a Unit is changed either as a result of any said subdivision, combination, alteration of boundary walls or otherwise, the number of shares allocated to such Unit may be increased or decreased accordingly. No such reallocation of shares, however, will increase or decrease the total number of shares allocated to all Units in the Building, nor shall any shares be reallocated unless an independent qualified real estate consultant is of the opinion that the aforesaid reasonable relationship is preserved (as determined on the date the change is made). Any reallocation of shares will vary the estimated monthly maintenance charges for the Unit or Units affected thereby from the amounts in the "Schedule of Units"; however, such a change shall not affect the proportion or amount of maintenance charges to be paid by purchasers of Units which are not the subject of such change. Any change in the size,

layout or number Units or in the number . shares allocated thereto may be made without amendment to the Plan; provided, however, that (i) any change in the size or layout of a Unit shall be disclosed to the purchaser thereof by a notice affixed to the inside cover of this Plan, (ii) the Department of Law of the State of New York has received a copy of such notice, and (iii) a copy of such notice shall thereafter be affixed to the inside cover of each Plan presented to any party who had not received a Plan prior to the aforesaid changes.

[Fifth Paragraph] A purchaser will not be excused from purchasing his Unit if the dimensions of his Unit vary from the plans set forth herein by less than five percent and will not have any claim against the Sponsor, except that any diminution in the square footage resulting from the installation of new water, waste, electrical and ventilation risers shall not affect the purchaser's obligation to purchase his Unit. All such work shall be performed by the Tenant-Shareholders Corporation at the expense of the Tenant-Shareholders, which expense shall, in turn, be borne by the Lessees proportionately.

PROCEDURE TO PURCHASE

[First Paragraph] Any person who desires to purchase shares of the Cooperative and the attendant right to a Proprietary Lease will be required to execute a Subscription Agreement in the form that has been appended hereto at page 101. An executed Subscription Agreement would be furnished to the Sponsor together with a check representing the down payment which check would be drawn to the order of Bachner, Tally & Mantell as Escrow Agents for 31st Street Realty Associates.

OPTION TO PURCHASE

Lessee has an option to purchase the land and building for the sum of $1.00 at any time during the term of the Ground Lease.

SUMMARY OF PROPRIETARY LEASE

[Paragraph Four - New] The Proprietary Lease may vary from Tenant to Tenant based upon the use to which the Unit is put.

UNSOLD SHARES

[Third Paragraph] Sponsor shall have the right to change the layout, size and number of Units as provided in the Section entitled "Changes in Prices, Layout & Size of Units" herein.

IDENTITY OF THE PARTIES

[First Paragraph] Sponsor is a partnership formed in the State of New York for the purpose of purchasing the property at 450 West 31st Street, New York, New York, and for the purpose of presenting this offering. The principal assets of the partnership are the fee title to the land and building and ownership of all of the shares of capital stock of the Tenant Corporation.

DOCUMENTS ON FILE

In accordance with Section 353-e(9) of the General Business Law, copies of this Offering Statement-Plan of Cooperative Organization and all exhibits or documents referred to herein shall be available for inspection by prospective purchasers and by any purchaser who shall have purchased securities offered by this Plan or shall have participated in the offering of such securities, at the office of Sponsor's attorneys, Bachner, Tally & Mantell, 850 Third Avenue, New York, New York, and shall remain available for such inspection for a period of six years.

ATTORNEYS FOR SPONSOR

Sponsor has retained the law firm of Bachner, Tally & Mantell, 850 Third Avenue, New York, New York, as counsel. (The law firm of Baskin & Sears, 1350 Avenue of the Americas, New York, New York drafted the By-Laws, the Articles of Incorporation, Subscription Agreement, the Lease, and all other documents relevant to the formation of the Tenant Corporation.) The Tenant Corporation will be represented at closing by Counsel, consequently the Tenant-Corporation should not consider Bachner, Tally & Mantell to be its independent counsel and prospective purchaser should consult with their own counsel on all matters concerning the Tenant-Corporation.

GENERAL

[Fourth Paragraph] This Offering Plan was prepared by the law firm of Baskin & Sears, 1350 Avenue of the Americas, New York, New York, which law firm is no longer counsel to the Sponsor herein. Sponsor has subsequently retained the law firm of Bachner, Tally & Mantell, 850 Third Avenue, New York, New York, as its Counsel.

SUBSCRIPTION AGREEMENT

[Paragraph 3A] Herewith is my check to the order of Bachner, Tally & Mantell as Escrow Agent for 31st Street Realty Associates for the amount of the above stated Down Payment. I agree that, if and after the Plan becomes effective, as herein provided, I will pay the above stated balance of the said Purchase Price within fifteen days after written notice and demand by Escrow Agent, Sponsor or the Tenant Corporation (which notice shall state that the date of closing title has been specified to be not later than 60 days thereafter), such payment to be by personal certified check or official check drawn on a New York bank to the order of 31st Street Realty Associates, and that I will sign the proprietary lease for said Unit promptly upon presentation to me in the form contained in the Plan. The Escrow Agent will give me prompt written notice thereof when the Plan either becomes effective or is abandoned.

[Paragraph 4A] The Sponsor will hold all monies received by it through its agents or employees in trust until actually employed in connection with the consummation of the transaction as provided in Section 352-h of the General Business Law. All such monies will be deposited in a non-interest bearing account with Bank Leumi Trust Company of New York and will be held in the Escrow Account referred to above. The funds so deposited will be disbursed only at the closing and only for the purposes of the consummation of this Plan or returned to me as herein provided.

[Signature Line] Bachner, Tally & Mantell, as Escrow Agent

The Offering Plan for the premises at 450 West 31st Street is effective.

EXHIBIT
B

Brady v 450 W. 31st Owners Corp.

2010 NY Slip Op 01060 [70 AD3d 469]

February 11, 2010

Appellate Division, First Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, March 31, 2010

James Brady et al., Appellants,
v
450 West 31st Owners Corp., Respondent, et al., Defendants.

—[*1] Louis A. Badolato, Roslyn Harbor, for appellants. Kaufman Friedman Plotnicki&Grun, LLP, New York (Stanley M. Kaufman of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered March 26, 2009, to the extent appealed from as limited by the briefs, declaring that defendant 450 West 31st Owners Corp. is the owner of the transferable development rights granted or permitted to the parcel of land on which the cooperatively owned building is located, and that paragraph 7 of the second amendment to the offering plan does not convey or reserve those rights to plaintiffs, and that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs. Appeal from order, same court and Justice,

entered July 7, 2008, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint, unanimously dismissed as academic, without costs.

Paragraph 7 of the second amendment to the offering plan contains no express language giving plaintiffs ownership of or veto power over the building's development rights or air rights (*compare Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 AD3d 407, 408 [2007] ["roof rights reserved for (plaintiff) in the 1986 offering plan"]). It reserves for plaintiffs the right, as [*2]permitted by the relevant laws, to construct or extend structures on the roof that may be built without the use of the building's development rights. Concur—Mazzarelli, J.P., Acosta, Renwick and Freedman, JJ. **[Prior Case History: 2009 NY Slip Op 30599(U).]**

EXHIBIT
C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH Justice PART 54

Index Number : 157779/2013
BRADY, JAMES H
vs
450 W. 31ST STREET OWNERS CORP
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 3/20/14
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 17-32
Answering Affidavits — Exhibits _____ No(s). 60-65
Replying Affidavits _____ No(s). 96, 98

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/15/14

SHIRLEY WERNER KORNREICH J.S.C. , J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☒ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

JAMES BRADY,

Plaintiff,

-against-

450 WEST 31ST STREET OWNERS CORP., DESIREE GREENE, individually and as President of the Board for 450 West 31st Street Owners Corp., JIM FRANCO, individually and as a member of the Board for 450 West 31st Street Owners Corp., KAREN ATTA, individually and as a member of the Board for 450 West 31st Street Owners Corp., PRISCILLA MCGEEHON, individually and as a member of the Board for 450 West 31st Street Owners Corp., BILL SMITH, individually and as a member of the Board for 450 West 31st Street Owners Corp., OWAIN HUGHES, LINDA KRAMER, individually and as a member of the Board for 450 West 31st Street Owner's Corp., CHODOSH REALTY SERVICES INC., JON CHODOSH, STANLEY KAUFMAN, KAUFMAN FRIEDMAN PLOTNICKI & GRUN, LLP, DEIRDRE A. CARSON, GREENBERG TRAURIG, LLP, VINCENT HANLEY and HANLEY & GOBLE,

Defendants.

----------X

Index No.: 157779/2013

DECISION AND ORDER

JAMES BRADY,

Plaintiff,

-against-

JEFFREY KATZ, individually and as CEO and principal owner of Sherwood Equities, Inc., LONG WHARF REAL ESTATE PARTNERS, LLC, CHICAGO TITLE INSURANCE CO., DENNIS W. RUSSO, HERRICK FEINSTEIN LLP, and FRANK MCCOURT, individually and as Chairman and CEO of McCourt Global LP,

Defendants.

----------X

Index No.: 654226/2013

KORNREICH, SHIRLEY WERNER, J.:

Motion sequence numbers 001, 002, 003, 005 and 006 in the action entitled *Brady v 450 West 31st Street Owners Corp., et al.*, index No. 157779/2013 (the Co-op Action) and motion sequence numbers 001, 002, 003, 004 and 006 in the action entitled *Brady v Katz, et al.*, index No. 654226/2013 (the Katz Action) are hereby consolidated for disposition. All the respective defendants in each action move to dismiss (CPLR 3211), and several move for sanctions and for an injunction to enjoin Brady from filing further suits. Plaintiff opposes. Separately, Brady, in the Co-op Action, moves for leave to file a sur-reply, and in the Katz Action, moves to amend the caption and for recusal of this court. For the reasons that follow, Brady's motion to file a sur-reply is granted, his motions to amend the caption and for recusal are denied, both actions are dismissed with prejudice, the requests for sanctions are granted and the requests to enjoin further actions are denied.

I. Background

A. The Extell Transaction

In 2006, plaintiff James Brady purchased the twelfth floor and penthouse unit (the Unit) of the commercial co-op located at 450 West 31st Street in Manhattan (the Building) from Owain Hughes, for use as an event space (Co-op Action Complaint, ¶¶ 33, 49). The deal was brokered by Jon Chodosh of Chodosh Realty Services Inc. (*id.* at ¶ 36). During the same period, also with the involvement of Chodosh and his company, the fee owner of the Building, 450 West 31st Street Owners Corp. (the Co-op), was negotiating the sale of the building's air rights to non-party Extell Development (Extell), which owned an adjoining, vacant lot (*id.* at ¶¶ 36—37). In August 2007, the Co-op and Extell entered into a contract to sell the air rights for approximately

$11.25 million (*id.* at ¶ 61—62). The Co-op was represented by Vincent Hanley of Hanley & Goble LLP and Deirdre Carson of Greenberg Traurig, LLP (*id.* at ¶¶ 41, 51, 57). Desiree Greene was the president of the Co-op board at the time (*id.* at ¶ 62).

B. Prior Action

On November 13, 2007, Brady and his wife commenced an action against the Co-op and Extell, alleging that the Building's development rights belonged to their Unit (complaint, ¶¶ 13—18, *Brady v 450 W. 31st St. Owners Corp.*, Sup Ct, NY County, index No. 603741/07 [the Prior Action]). The Bradys based their claim on language in the second amendment to the 1980 co-op conversion offering plan, stating that "[t]he 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law."

The Bradys claimed that the Co-op and Extell had entered into an agreement "whereby Transferable Development Rights ('TDRs') appurtenant to [their] Unit [would] be combined with lands owned by Defendant Extell so as to constitute one single zoning lot . . . Such a combination is colloquially described as a 'sale of air rights'" (*id.* at ¶¶ 21—22). They sought to enjoin the sale to Extell and asked for declarations that the contract of sale between the Co-op and Extell was void and that the Bradys had "the sole right to the TDRs" (*id.* at ¶¶ 28—37).[1]

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[1] After defendants answered (and the Bradys' motion for a preliminary injunction against the sale was denied), the Bradys served an amended complaint, which, *inter alia*; sought a declaration that "the rights purportedly conveyed by the Contract of Sale belong solely to the 12th Floor . . . and that the [Co-op] cannot without the consent of the owner of the 12th Floor sell or transfer any portion of these rights" (Prior Action, amended complaint, ¶ 79). Of course, the owner of the lot, and, hence, the air rights, was the Co-op, and the Bradys merely owned shares in the Co-op, since they occupied the twelfth floor pursuant to a proprietary lease (*see MacMillan, Inc. v CF Lex Assocs.*, 56 NY2d 386 [1982] [consent of tenant not necessary for zoning lot merger]).

On motions for summary judgment, the court, by decision and order filed July 7, 2008, dismissed the amended complaint. Upon reargument, the court adhered to its prior decision, explicitly rejecting the idea that the Bradys' consent was required to allow the contemplated sale to go forward (Prior Action, decision and order, Mar 13, 2009, at * 2, Friedman, J.). It held that while the offering plan gave the Bradys the right to "build structures on or above the roof" (*id.*), their contention that they were entitled to utilize all of the building's air rights in doing so was "untenable" (*id.* at 3—4). The court held that: 1) the Co-op "is the owner of, and has the right to transfer, the [TDRs] that are granted or permitted pursuant to the Zoning Resolution, to the parcel of land on which the building . . . is located"; 2) the offering plan "does not convey or reserve the TDRs to" the Bradys; and 3) the Bradys have "the right to construct or extend structures upon the roof or above to the same to the extent that may from time to time be permitted under applicable law" (*id.* at 4—5). As the Bradys did not advance any interpretation of the offering plan other than one which would entitle them to use all of the Building's air rights or provide any details as to what, if anything, they actually wanted to construct on the Building's roof, the court held that there was no actual controversy which required a judicial determination of the scope of the Bradys' right to build; it declined to reach the issue, noting that its decision should not be construed as implying that the Bradys had the right to utilize *any* air rights in connection with roof construction (*id.* at 3—5). Judgment was entered on March 26, 2009, and was unanimously affirmed on appeal (*Brady v 450 W. 31st St. Owners Corp.*, 70 AD3d 469 [1st Dept 2010]).[2] Leave to appeal to the Court of Appeals was denied, with costs (15 NY3d 710

[2] Plaintiff's complaint characterizes Justice's Friedman's decision as "internally inconsistent" and the Appellate Division decision as contradictory.

[2010]), as was the Bradys' motion to reargue the denial (16 NY3d 731 [2011]). The Co-op was represented in the Prior Action by Stanley Kaufman of Kaufman Friedman Plotnicki & Grun LLP.

C. Sale of the Air Rights

The transaction between Extell and the Co-op failed to close. In April 2011, the Extell lot was sold to Sherwood 30 Land Group LLC (Sherwood) (Co-op Complaint, ¶ 218). The Co-op began negotiating the sale of the Building's air rights, this time to Sherwood. Initially, the Co-op and Sherwood sought to obtain a waiver from the Bradys regarding the air rights (*id.* at ¶¶ 219, 224; Katz Complaint, ¶¶ 33, 35). However, when Brady refused to sign the waiver as presented (Katz Complaint, ¶¶ 54—56), the Co-op and Sherwood proceeded without his consent. On June 27, 2012, they entered into a Zoning Lot Development and Easement Agreement (ZLDEA) conveying the building's air rights to Sherwood along with most of the Co-op's right to purchase certain additional air rights from the City of New York (Office of the City Register, CRFN 201200027377[4] [the ZLDEA]).[3] The agreement also granted Sherwood a perpetual easement for light, air and view on the airspace more than 40 feet above the penthouse roof (ZLDEA §§ 1.40, 2.21). Sherwood paid approximately $11.5 million for the rights (Co-op Complaint, ¶ 258; Katz Complaint ¶ 107). The ZLDEA was executed by Greene on behalf of the Co-op and by Jeffrey Katz on behalf of Sherwood. It was recorded with the City Register, along with the required title company certificate. Dennis Russo of Herrick Feinstein LLP served as Sherwood's counsel. Chicago Title Insurance Company prepared and filed the certificate.

[3] The Co-op reserved its ability to purchase the right to build an additional 25,000 square feet for commercial purposes (ZLDEA §§ 1.38, 2.1).

A little more than a year later, on August 13, 2013, Sherwood sold its lot, along with its appurtenant air rights and easements, to McCourt Partners for $167 million (Katz complaint, ¶ 98). Frank McCourt is the chairman and CEO of McCourt Global; McCourt Partners is alleged to be a subsidiary of McCourt Global (Katz complaint, ¶¶ 10, 97).

D. Actions by the Co-op

At a shareholders meeting held in June 2009, some months after judgment had been entered in the Prior Action, the Board proposed imposing a $500 to $750 fee for any event held at the Building, as well as requiring security guards to patrol the lobby during events (Co-op Complaint ¶¶ 166—75). The proposed new rules were to give preference to the Building's tenants and their guests over event attendees in the use of the Building's single, rather slow passenger elevator (*id.* at ¶ 170—72). Brady, whose Unit at that time was the only one with a certificate of occupancy allowing it to be used as an event space, successfully opposed the 2009 proposals, and they were not adopted (*id.* at ¶ 175). At a shareholders meeting held in June 2011, it was announced that directors would no longer be elected by cumulative voting (*id.* at ¶ 211).

II. Procedural History

Brady commenced the Co-op Action on August 23, 2013, by filing a summons with notice. A verified complaint was filed on November 23, 2013, in which Brady alleges the following causes of action, numbered here as in the complaint: 1) a declaration that the transfer of rights by the Co-op is unlawful and void *ab initio* as against all of the defendants; 2) a declaration that plaintiff has been partially constructively evicted and is entitled to a full abatement of his maintenance; 3) breach of contract and breach of the covenant of good faith and

fair dealing as against the Co-op and Hughes; 4) tortious interference with contract (the offering plan) against all of the defendants; 5) fraud against the Co-op, the members of its board, Stanley Kaufman and his law firm, who were the Co-op's counsel in the Prior Action, Vincent Hanley and his law firm and Deirdre A. Carson and her law firm, attorneys who represented the Co-op in the Extell deal, and the broker and brokerage firm that brokered both the sale of the Unit to plaintiff and were involved in the Extell deal; 6) negligent misrepresentation against the Co-op; 7) prima facie tort against all of the defendants; 8) gross negligence against all of the defendants due to the Co-op's breach of fiduciary duty to plaintiff by selling the air rights; 9) gross negligence against the Co-op, its board members and its lawyers for reckless disregard of plaintiff's rights; 10) another claim for negligent misrepresentation against the Co-op; 11) slander of title against the Co-op; 12) unjust enrichment against all of the defendants; 13) violation of Section 487 of the Judiciary Law as against the Co-op's attorneys; and again, 14) breach of fiduciary duty and gross negligence against the Co-op and its board members. The causes of action arise from the sale of the air rights, the imposition of the easements and the decision to change the Building's regulations and the corporation's voting method.

Approximately two weeks later, on December 6, 2013, Brady commenced the Katz Action against: Jeffrey Katz, the CEO and a principal of Sherwood; Long Wharf Real Estate Partners, LLC (Long Wharf), Sherwood's partner in the transactions at issue; Chicago Title Insurance Co.; Frank McCourt, individually and as Chairman and CEO of McCourt Global LP, the parent company of the entity which purchased the adjoining lot from Sherwood; and Sherwood's counsel in the Sherwood/McCourt transaction. In the Katz action, Brady alleges the following causes of action, numbered here as in the complaint: 1) tortious interference with

contract against Sherwood, Long Wharf, their attorneys and Chicago Title; 2) unjust enrichment against all of the defendants; 3) aiding and abetting breach of fiduciary duty against Sherwood, Long Wharf, their attorneys and Chicago Title; 4) conspiracy to defraud against all of the defendants; [4] 5) "Frank McCourt was not a bona fide purchaser for value" against Frank McCourt and McCourt Partners; 6) slander of title against all of the defendants; and 7) a declaration that the rights conveyed by the ZLDEA "were the rights held to be appurtenant to [the] 12th Floor and Roof unit."

All defendants now move for dismissal, and Brady moves to file a sur-reply in response to the reply affidavits submitted by the Board in further support of its motion to dismiss the Co-op Complaint. Additionally, Brady moves to amend the Katz Action by adding a number of Sherwood and McCourt-related entities as defendants. Brady is represented by counsel in the Co-op Action, but is *pro se* in the Katz Action. Following oral argument on the motions to dismiss, Brady moved for recusal of this court.

III. Discussion

A. Recusal

A judge may not preside over a matter "to which he is a party, or in which he has been attorney . . . , or in which he is interested, or if he is related by consanguinity or affinity to any party within the sixth degree" (Judiciary Law § 14). "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal" (*People v Moreno*, 70 NY2d 403,

[4] While the fourth cause of action in the Katz Complaint is styled "conspiracy to defraud," New York does not recognize conspiracy as a separate cause of action (*Blanco v Polanco*, 116 AD3d 892, 895—96 [2d Dept 2014]). Accordingly, the court deems the fourth cause of action as one for fraud, asserted against all defendants.

405 [1987]). While disqualification is appropriate where a judge harbors or appears to harbor a personal bias or prejudice against a party (Rules of Chief Admin of Cts [22 NYCRR] § 100.2 [E] [1] [a]), "for any alleged bias and prejudice to be disqualifying 'it must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case'" (*People v Glynn*, 21 NY3d 614, 618 [2013] quoting *Moreno*, 70 NY2d at 407). Brady cites to no ground for recusal other than his belief, after oral argument, that his actions are in danger of dismissal. This is insufficient and smacks of judge shopping. In the exercise of her discretion, the court declines to recuse herself.

B. Sur-Reply

In reply to Brady's opposition to its motion to dismiss the Co-op action, the Co-op submitted, for the first time, an affidavit of Desiree Greene addressing the proposed house rule changes, the change in voting method and the distribution of the proceeds from the Sherwood transaction (Co-op Action, affidavit of Desiree Greene, sworn to on March 26, 2014). Also submitted was an affidavit by a land use attorney opining on the interpretation of certain aspects of the City's Zoning Resolution, as well as a reply brief which was based largely on the record of oral argument, which had been held after Brady's opposition was submitted but prior to the return date on the motion. Moreover, the brief raised arguments concerning the justiciability of the instant actions which should have been raised in the moving papers. Brady's request to submit a sur-reply in response to these new arguments is appropriate and is granted.

C. Dismissal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty*

Corp., 60 NY3d 491 [2009]; *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v Parker*, 179 AD2d 98, 105 (1992)]; *Mazzai v Kyriacou*, 98 AD3d 1088, 1090 [2d Dept 2012]; *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 [1998]). The court may not assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id.* [citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro*, 60 NY3d at 491). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames*, 1 AD3d at 250 [citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)]).

1. Claims Arising out of the ZLDEA and the Prior Action

"Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding on an issue raised in a prior action or proceeding and decided against that party or those in privity" (*Buechel v Bain*, 97 NY2d 295, 303 [2001]). For collateral estoppel to be invoked, "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*id.* at 303—04). In the Prior Action, the court determined that the air rights belonged to the Co-op, not to the Bradys, who occupied their unit under a proprietary lease. The prior court relied on *Macmillan, Inc. v CF Lex Assocs.*, *supra*, 56 NY2d 386, in which the Court of Appeals held that the consent of a tenant occupying 95% of a building's usable area was not needed for the fee owner to sell the parcel's air rights

(Prior Action, decision and order, Mar 13, 2009 at *1, Friedman, J.). It further held that the offering plan did not "convey or reserve" the air rights to the Bradys, that the Co-op was the owner of such rights and had the right to transfer them, and that the Bradys' consent was not necessary to allow for such transfer (*id.*). Thus, to the extent that Brady claims that he was wronged by the transfer of the Co-op's air rights, such claims must be dismissed as a matter of collateral estoppel or *res judicata* (*see O'Brien v City of Syracuse*, 54 NY2d 353 [1981] [where prior lawsuit dismissed, plaintiff "may not bring another action . . . in an attempt to recover damages for the same acts as those on which the first lawsuit was grounded"]).

Brady, however, seeks to distinguish the instant cases from the Prior Action on the ground that the judgment there only declared that the Co-op "is the owner of, and has the right to transfer, the *transferable development rights* ("TDRs")" and that the offering plan "does not convey or reserve *TDRs* to [the Bradys]" (emphasis supplied). According to plaintiff, the term "TDRs" refers exclusively to a transfer of air rights between ***non-contiguous lots***, and, therefore, has no bearing on the transaction at issue here, which shifted the air rights to an adjoining lot.

In so arguing, Brady relies on the Planning Department's online "Zoning Glossary", which states that "[a] transfer of development rights (TDR) allows for the transfer of unused development rights from one zoning lot to another . . . where the transfer could not be accomplished through a zoning lot merger" (Co-op Complaint ¶¶ 143—44, citing New York City Dept. of Planning, Zoning Glossary, http://www.nyc.gov/html/dcp/html/zone/glossary.shtml [accessed Oct 24, 2013]). Even accepting, for the sake of argument, that the statements on the

Planning Department's website have the force of law,[5] this entry merely indicates that there are different *methods* by which air rights can be transferred. One such method is by transfer of air rights between non-contiguous parcels. Another, more common method, is by merging zoning lots (*see, e.g., Hand v Hosp. for Special Surgery*, 34 Misc3d 1212 [A] [Sup Ct. NY County 2012] *aff'd* 107 AD3d 642 [1st Dept 2013]; *Fisher v Bd. of Stds. & Appeals*, 21 Misc3d 1134 [A] [Sup Ct NY County 2008] *aff'd* 71 AD3d 487 [1st Dept 2010]). These variations, however, have nothing to do with the nature of the asset -- to wit, a license under the zoning code to build a certain amount of square footage -- and the question of who owns and controls that asset.

Furthermore, there is no good faith basis for asserting that when the court in the Prior Action issued a ruling concerning who controlled the lot's "transferable development rights", it was actually making a declaration about the propriety of transferring air rights between non-adjoining lots. The proposed air rights sale to Extell, like the consummated sale to Sherwood, involved a zoning lot merger, a fact known both to the court and plaintiff (*see* Prior Action, decision and order, July 2, 2008 at *1, Friedman, J.). In fact, the court in the Prior Action did not refer to a "transfer *of* development rights". Instead, the phrase employed by the court, which Brady finds so confusing, was "transferable development rights." As should be apparent, these two phrases are not the same. Brady's argument is based exclusively on language he found online but which was never actually used by this court.

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[5] They do not (New York City Charter § 200 [zoning rules to be changed only after notice and comment and vote by City Council]). That the Appellate Division once cited to the Planning Department's Zoning Handbook in defining "air rights" in *Matter of Metro. Tr. Auth.*, 86 AD3d 314, 318 (1st Dept 2011) does not transform the Handbook into law. It also should be noted that the Zoning Glossary, which Brady cites, is a different document than the Zoning Handbook.

A review of the papers in the Prior Action reveals that in referring to air rights as "transferable development rights" or "TDRs", the court adopted the phraseology used by the parties, ***including Brady***. For example, in his affidavit submitted in support of his motion for a preliminary injunction, at the commencement of the Prior Action, Brady described the contemplated transaction between Extell and the Co-op as one in which "Transferable Development Rights ("TDRs") appurtenant to Plaintiffs' Unit will be combined with lands owned by Defendant Extell so as to constitute one single zoning lot, as defined in Section 12–10 of the New York City Zoning Resolution" (Prior Action, affidavit of James Brady, sworn to November 13, 2007 ¶ 10). Brady added there that "[s]uch a combination is colloquially described as a 'sale of air rights'" (*id.*). Similarly, the Bradys' motion in the Prior Action for a preliminary injunction sought an order restraining "Defendants . . . from consummating or entering into any agreement pertaining to Transferable Development Rights and/or any zoning lot development agreement or other arrangement with respect to [the Building]" (Prior Action, order, Nov 13, 2007, Friedman, J.). Moreover, in the Bradys' opposition to the defendants' motion for summary judgment in the Prior Action, they describe air rights as "transferable development rights",[6] arguing that while their right to build was distinct from such "transferable development rights", it nevertheless gave them the ability to block the sale, a claim which the court, in the Prior Action, rejected (Prior Action, decision and order, Mar 13, 2009 at *2).

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[6] *See* Prior Action, plaintiffs' opposition brief, Apr 7, 2008 at 2: "Defendants would have the Court believe that Plaintiffs are claiming the transferable development rights that the Building gained by virtue of the Hudson Yards rezoning . . . Defendants intentionally mischaracterize Plaintiffs' Amended Complaint in a transparent effort to equate transferable development rights . . . with the right to build upon or above the roof" (emphasis in original).

In sum, the issue of who owns or controls the air rights appurtenant to the Building's lot has already been decided in favor of the Co-op. Any claim by Brady arising out of that question is barred. That the Co-op or Sherwood initially sought a waiver from Brady does not constitute an "admission" that the ZLDEA interfered with any of Brady's rights. Indeed, according to Brady, he was specifically told by the Co-op that "the transaction will be consummated with or without your waiver" (Co-op Complaint ¶ 222).[7] Finally, Brady's argument that Extell's abandonment of the air rights transaction in June 2008 rendered the Prior Action moot is unpersuasive, given that the Appellate Division failed to dismiss the matter as moot when it affirmed the decision (upon the Bradys' appeal) in 2010.

However, as Brady correctly notes, the court in the Prior Action recognized that the offering plan conferred upon him a right to build structures on the Building's roof, but expressly declined to reach the question of whether the Extell transaction would have violated that right. Brady, therefore, contends that he is not barred by the prior judgment from now claiming that the ZLDEA violated his right to build.

Again, the ZLDEA's conveyance of air rights cannot serve as the basis for a claim that Brady's right to build has been violated. It has already been adjudged that while the owners of the Unit may have the right to erect additional structures on the roof, that right does not entitle them to use any floor area in doing so (Prior Action, decision and order, Mar 13, 2009 at *2 & *4-*5 ["Nothing herein shall be construed as holding that plaintiffs have the right to use all or any part of the TDRs in connection with such construction or extension"]; *Brady v 450 W. 31st*

[7] In any case, nothing that the Co-op or any other party might have said would have any effect on the scope and finality of the court's prior existing judgment.

St. Owners Corp., 70 AD3d 469, 470 [1st Dept 2010] [holding that the offering plan "reserves for plaintiffs the right . . . to construct or extend structures on the roof that may be built without the use of the building's development rights"]). Contrary to Brady's contentions, and as the court in the Prior Action already noted, this is not a contradiction (Prior Action, decision and order, Mar 13, 2009 at *2, citing *Wing Ming Props. (USA) Ltd. v Mott Operating Corp.*, 79 NY2d 1021 [1992]). Nonetheless, the ZLDEA also imposes a light-and-air easement in favor of the adjoining lot on the space more than forty feet above the penthouse roof. Strictly speaking, Brady is correct that the question of whether such an easement interferes with his right to build structures on the roof otherwise permitted by applicable law has never been determined and so is not barred.

This court, like the prior court, however, declines to reach the issue, since, as before, Brady has not developed a sufficient record to show the existence of an actual controversy (Prior Action, decision and order July 2, 2008 at *5, citing *40-56 Tenth Ave. LLC v 450 W. 14th St. Corp.*, 22 AD3d 416 [1st Dept 2005]). As in the Prior Action, there is no indication that the Co-op or anyone else has told Brady that he cannot build on the Building's roof. Nor is there any contention that Brady had or has any plans to build *anything* on the Building's roof. Consequently, the question of whether the easement interferes with Brady's right to build is not ripe for adjudication, as "the courts may not issue judicial decisions that 'can have no immediate effect and may never resolve anything'" (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988] quoting *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1985]). This is especially so given that the light-and-air easement begins more than forty feet above the roof of Brady's penthouse. The absence of any indication that Brady intends to build a forty foot

structure or that any such structure would comply with all applicable laws, including the zoning code's limits on the Building's floor area, renders the question of whether the light-and-air easement violates Brady's right academic (*compare Big Four LLC v Bond Street Lofts Condominium*, 94 AD3d 401 [1st Dept 2012] [finding actual controversy over plaintiff's right to lease unit where defendant condominium had objected to actual proposed lease in writing] *with Waterways Dev. Corp. v Lavalle*, 28 AD3d 539, 540—41 [2d Dept 2006] [developer not entitled to declaration it was entitled to zoning variance where it had not applied for building permit and town had therefore made no final determination]).

In short, plaintiff cannot maintain any cause of action based on the Co-op's conveyance of air rights or the imposition of an easement, since a prior judgment of the court, affirmed on appeal, has held that the Co-op is entitled to do the former and there is no present, actual controversy involving the latter. As a result, Brady is not entitled to the declarations he seeks in his first cause of action in the Co-op Action and in the fifth and seventh causes of action in the Katz Action. Similarly, he is not entitled to a declaration that he has been partially constructively evicted and owes no maintenance (Co-op Complaint, second cause of action). To establish a constructive eviction, partial or other, "there must be a wrongful act of the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" (*see Barash v Penn. Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]). Also, the tenant must abandon the premises (*id.* at 83). Neither a wrongful act by the Co-op nor abandonment of the premises is alleged.

Furthermore, in the absence of any claim to air rights under the offering plan, plaintiff cannot sustain claims for breach of contract (*see Canzona v Atanasio*, 2014 NY Slip Op 4459 [2d

Dept 2014] [element of breach of contract is defendant's breach of its contractual obligation and damages resulting therefrom]), breach of the covenant of good faith and fair dealing (*see ABN AMRO Bank, N.V., v MBIA Inc.*, 17 NY2d 208, 228 [2011] [covenant of good faith and fair dealing embraces pledge not to do anything which destroys or injures rights of party under contract]), and tortious interference with contract (*see NBT Bancorp. v Fleet/Norstar Fin. Grp.*, 87 NY2d 614, 621 [1990] [breach of contract is element of tortious interference with contract]). Thus, the third and fourth causes of action in the Co-op Complaint and the first cause of action in the Katz Complaint are dismissed.

Brady's allegations of fraud (Co-op Complaint, fifth cause of action; Katz Complaint, fourth cause of action) or negligent misrepresentation (Co-op Complaint, sixth and tenth causes of action) based on the transfers or attempted transfers of the air rights also fail. Both fraud and negligent misrepresentation require justifiable reliance (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Nigro v Lee*, 63 AD3d 1490, 1492 [3d Dept 2009]), and an actionable injury (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Heard v City of New York*, 82 NY2d 66, 74 [1993]). These elements are missing here, since the prior court had found no actionable claim based on the same facts, a holding with which Brady was familiar. In a like manner, the air rights transfer cannot serve as a basis for breach of fiduciary duty (Co-op Complaint, fourteenth cause of action). To recover for breach of fiduciary duty there must be misconduct by the defendant and damages caused by the defendant's misconduct (*Varveris v Zacharakos*, 110 AD3d 1059 [2d Dept 2013], elements missing here. The failure to assert a viable claim for breach of fiduciary duty precludes the claim for aiding and abetting breach of fiduciary duty (Katz Complaint, third cause of action).

Brady further alleges causes of action for gross negligence (Co-op Complaint, eighth, and ninth causes of action), unjust enrichment (Co-op Complaint, twelfth cause of action; Katz Complaint, second cause of action), and slander of title (Co-op Complaint, eleventh cause of action; Katz Complaint, sixth cause of action). All are dismissed. "'[G]ross negligence is the commission or omission of an act or duty owing by one person to a second party which discloses a failure to exercise slight diligence....the act or omission must be of an aggravated character.'" *Dalton v Hamilton Hotel Operating Co., Inc.*, 242 NY 481487 (1926). The Co-op and Sherwood were entitled to enter into the ZLDEA and did not breach any duty or act negligently in doing so. Likewise, the remaining defendants breached no duty of care in negotiating, authorizing or participating in the further sale of the Co-op's rights. Additionally, the Prior Action, by holding that the air rights were the Co-op's to sell, also prevents Brady from bringing a claim that the benefit enjoyed by the Co-op or other parties from the transfer constitutes unjust enrichment (*Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1972] [essential inquiry in action for unjust enrichment is whether permitting defendant to retain what plaintiff seeks to recover is against equity and good conscience]). Moreover, Brady's claim that he is entitled to the air rights is grounded in a contract (the offering plan), a contention which forecloses a cause of action for unjust enrichment (*Coldwell Banker Commercial Hunter Realty v Rainbow Holding Co.*, 2014 NY Slip Op 5049 [1st Dept 2014]).

Finally, the prior court's determination that Brady has no claim to the Building's air rights obviates his cause of action for slander of title. "To support a claim for slander of title, it was incumbent on plaintiff to allege facts which demonstrate that defendants made false communications casting doubt on the validity of plaintiff's title with malicious intent, or at a

minimum, with 'reckless disregard for their truth or falsity'" (*Vollbrecht v Jacobson*, 40 AD3d 1243, 1247 [1st Dept 2007]). Further, special damages are an element of the cause of action (*Rosenbaum v City of New York*, 8 NY3d 1, 12 [2006]). Here, there were no false communications, malicious intent, or special damages.

2. Other Claims

Brady also seeks damages under theories of prima facie tort (against all defendants) and breach of fiduciary duty and gross negligence (against the Co-op, its board members and Hughes) for changing the Co-op's house rules and voting method (Co-op Complaint, ¶¶ 326—30, 383—99). The corporate acts complained of took place, at latest, in 2011. Thus, the Co-op Complaint's seventh cause of action for prima facie tort is time-barred (*Bohn v 176 W. 87th St. Owners Corp.*, 106 AD3d 598, 599 [1st Dept 2013] ["(T)he limitations period for a claim of prima facie tort is one year"] citing *Havell v Islam*, 292 AD2d 210 [1st Dept 2002]). Even were this not so, Brady has failed to make out a claim for prima facie tort which requires intentional infliction of harm, resulting in special damages and without excuse or justification (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-43 [1985]). The elements of measureable, special damages are not specifically alleged and excuse or justification on the part of defendants is clearly present (*id.* ["A critical element of [prima facie tort] is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages"]).

As to the Co-op Complaint's fourteenth cause of action, Brady concedes that the changes to the house rules proposed in 2009 and detailed in the Co-op Complaint were never adopted, and while a different set of changes were adopted in 2011, the complaint does not say what they are or how they have harmed Brady. Instead, in the sur-reply to the Co-op's motion to dismiss,

Brady's counsel[8] argues that the 2011 amendments gave the Board "more control" and *allowed* them to sanction the Bradys, without stating that the Co-op ever actually did so or explaining what additional "control" was assumed by the Co-op Board. Even accepting the unverified statement of Brady's counsel, and ignoring the broad discretion granted to the Co-op to take action under the business judgment rule (*see 40 W. 67th St. v Pullman*, 100 NY2d 147 [2003] [applying that standard in reviewing co-op's decision to terminate tenant's proprietary lease "after finding that his behavior was more than its shareholders could bear"]), the allegations in the sur-reply are too vague and conclusory to give any party actual notice of why or how the 2011 house rule amendments give rise to a cause of action (CPLR 3013).[9]

Further, in regard to the change in voting method, a provision for cumulative voting "can be made only by the certificate of incorporation or amendment thereto filed pursuant to law" (*Matter of Am. Fibre Chair Seat Corp.*, 265 NY 416, 420 [1934]). Brady does not controvert the Co-op's contention that the certificate of incorporation does not provide for cumulative voting, nor does he allege that the shareholders ever agreed to amend the certificate to so provide (*compare id.* at 421). He, therefore, cannot maintain a cause of action arising out of the Co-op's decision to discontinue the apparently unauthorized practice. In any case, "the exclusive method

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[8] Brady failed to verify the statements made by his lawyer, instead merely submitting an affidavit in which he avers that "[t]he exhibits submitted with [the] Sur-reply are true and correct copies of the originals kept in my files" (affidavit of James Brady, sworn to on April 1, 2014).

[9] Brady's counsel also claims in the sur-reply that Brady and his wife have been "charged additional charges without explanation" and that they pay higher fees than other Building tenants. This statement does not appear to be related to any of the allegations in the actual Co-op Complaint regarding the house rules, and the court declines to treat the sur-reply as an amended pleading, particularly where the allegations are not included in an affidavit from a person with knowledge and are conclusory.

for testing the validity of an election is either through an action . . . brought by the Attorney-General, or through a proceeding instituted under section 619 of the Business Corporation Law" (*Matter of Schmidt*, 97 AD2d 244, 249 [2d Dept 1983] [citations omitted]). Accordingly, the fourteenth cause of action in the Co-op Complaint are dismissed. Finally, statements or actions made or taken by the Co-op's attorneys in the course of their work in the Prior Action, in essence, asserted that Brady did not have the power to prevent the sale of the Building's air rights. This is not, as Brady would have it, deceit. It is argument, and, in the end, a statement of the law, and cannot serve as a basis for a cause of action under Section 487 of the Judiciary Law (Co-op Complaint, thirteenth cause of action).

D. Amend Caption

Brady seeks leave to "amend the caption" in the Katz complaint to name various Sherwood and McCourt-related entities as defendants in addition to Katz and McCourt, the entities' alleged principals. Leaving aside the viability of such a claim against entities with no connection to the subject transaction, the addition of these corporate defendants will not save the Katz Action from dismissal. The motion is denied as moot.

E. Sanctions

It is clear from the papers and the transaction's history that Brady acted in bad faith in bringing the instant cases. His misinterpretation of the prior judgment, his feigned ignorance of the origin or meaning of the phrase "transferable development rights", and his argument that a decision which he appealed to no avail is not binding are but a few examples of the frivolous arguments made in the instant actions. Further, plaintiff, a stranger to the McCourt transaction, had no basis for seeking compensatory and punitive damages from McCourt (*see* Katz

Complaint, prayer for relief, ¶¶ 5—6) or, for that matter, Katz. Both individuals were the mere principals of the entities involved in the subject transactions. Similarly, there are no allegations supporting any viable cause of action against Owain Hughes, the prior owner of the Unit, who appears to have been named as a defendant solely to retaliate for his refusal to support Brady's claim (*see* Co-op Action, NYSCEF Doc. No. 121, p. 5).[10]

In short, Brady has dragged more than twenty parties into court to litigate matters that have already been determined and claims that lack any substance. It appears from Brady's submissions that even before he purchased the unit he was well aware of the Co-op's efforts to sell the air rights and that his concern, at first, was only that the price the Co-op was entertaining was too low (Co-op Complaint ¶ 45; *see also* Co-op Action, NYSCEF Doc. No. 112; Prior Action, decision and order, Mar 13, 2009, at *2 n 1). While Brady claims to be scandalized by the substantial profits enjoyed by Sherwood in flipping the adjoining lot to the McCourt entity, he does not seem offended by the idea that *his* $5 million purchase of the Building's top unit should entitle him to control over what he claims are $100 million worth of air rights under a theory which only he is clever enough to understand and which was only revealed to him by certain "professionals" more than a year after he bought his shares. The trial and appellate courts in the Prior Action have denied him such control. Undeterred, he has ignored these court rulings

[10] Brady and Hughes had agreed that if the Building sold its air rights within a year of Hughes's sale to Brady, then Brady and Hughes would split the proceeds (Co-op Action, NYSCEF Doc. No. 121, p. 5). Needless to say, this does not constitute a representation that the owner of the unit owned the Building's air rights. Rather, it was merely an agreement to share in any dividends paid to the twelfth floor tenant as a shareholder of the Co-op. Indeed, according to the Co-op, Brady has received, without protest, a total of $205,066.08 of dividends from what he claims was the Co-op's unlawful and *ultra vires* sale (Co-op Action, affidavit of Desiree Greene, sworn to on March 26, 2014, ¶ 4).

and brought these meritless actions, abusing the judicial process (Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1). This is a near perfect example of frivolous conduct and warrants defendants' requests for the imposition of sanctions (*see, e.g., Pentalpha Enters., Ltd. v Cooper & Dunham LLP*, 91 AD3d 451 [1st Dept 2012]; *Great Am. Ins Cos. v Bearcat Fin. Servs., Inc.*, 90 AD3d 533 [1st Dept 2011]). The court declines to impose a filing injunction upon Brady at this time, though he is warned not to further test the court's patience by prosecuting claims that have either been determined or that he has been told are not ripe.

Accordingly, in the action entitled *Brady v 450 West 31st Street Owners Corp., et al.*, bearing the index number 157779/2013 it is

ORDERED that (1) the motion of James Brady to file a sur-reply is granted; (2) the motions of the defendants to dismiss the complaint are granted, the complaint is dismissed in its entirety against all the defendants with prejudice and the Clerk is directed to enter judgments dismissing the action with prejudice against all defendants, with costs and disbursements; (3) the motions for sanctions by defendants 450 West 31st Street Owners Corp., Desiree Greene, Jim Franco, Karen Atta, Molly Blienden, Priscilla McGeehon, Bill Smith, Owain Hughes, Linda Kramer, Chodosh Realty Services Inc., Jon Chodosh, Stanley Kaufman, Kaufman Friedman Plotnicki & Grun LLP, Vincent Hanley and Hanley & Goble are granted, and plaintiff James Brady is hereby directed to pay to the aforesaid defendants their reasonable attorney's fees and other expenses incurred as a result of this action, the amount of which is hereby referred to a Special Referee to hear and determine; and (4) the motions by defendants 450 West 31st Street Owners Corp., Desiree Greene, Jim Franco, Karen Atta, Molly Blienden, Priscilla McGeehon,

Bill Smith, Owain Hughes, Linda Kramer, Chodosh Realty Services Inc. and Jon Chodosh for an injunction against further litigation are denied; and it is further

ORDERED that counsel for the defendants on whose behalf the above reference is directed shall, within 30 days from the date of this order, serve a copy of this order with notice of entry upon the Special Referee Clerk by an email bearing the subject line "Service of Order" and sent to spref-nyef@nycourts.gov, which notice shall be accompanied by a completed Information Sheet (copies are available at http://www.nycourts.gov/courts/1jd/supctmanh/ under the "References" section of the "Courthouse Procedures" option in the "Court Operations" menu), and the Special Referee Clerk is hereby directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that upon the entry of said Special Referee's Report, the Clerk of the Court is hereby directed to enter judgment awarding attorney's fees as determined by the Special Referee; and it is further

ORDERED in the action entitled *Brady v Katz, et al.*, bearing the index number 654226/2013, that (1) the motion of James Brady for recusal is denied; (2) the motions of the defendants to dismiss the complaint are granted, the complaint is dismissed in its entirety against all the defendants with prejudice, and the Clerk is directed to enter judgments dismissing the action with prejudice against all defendants, with costs and disbursements; (3) the motion of James Brady to amend the complaint or the caption is denied; (4) the motions for sanctions by Jeffrey Katz, Long Wharf Real Estate Partners, LLC, Dennis W. Russo, and Herrick Feinstein LLP are granted, and plaintiff James Brady is hereby directed to pay the aforesaid defendants their reasonable attorney's fees and other expenses incurred as a result of said action, the amount

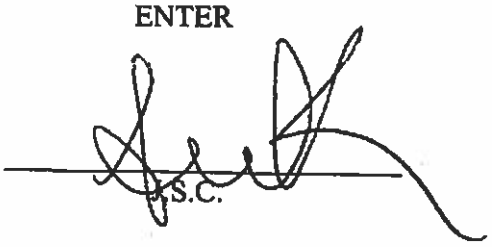
of which is hereby referred to a Special Referee to hear and determine; and (5) the motion by the aforesaid defendants for an injunction against further litigation is denied; and it is further

ORDERED that counsel for the defendants on whose behalf the above reference is directed shall, within 30 days from the date of this order, serve a copy of this order with notice of entry upon the Special Referee Clerk in the manner described above, and the Special Referee Clerk is hereby directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that upon the entry of said Special Referee's Report, the Clerk of the Court is hereby directed to enter judgment awarding attorney's fees as determined by the Special Referee.

ENTER

Dated: July 15, 2014



COURT OF APPEALS
STATE OF NEW YORK

----------X Action One

JAMES BRADY,

Plaintiff-Appellant,

Index No. 157779/2013

-against-

450 WEST 31ST STREET OWNER'S CORP., DESIREE GREENE, individually and as President of the Board for 450 West 31st Street Owner's Corp, JIM FRANCO individually and as a member of the Board of 450 West 31st Street Owner's Corp., KAREN ATTA, individually and as a member of the Board, of 450 West 31st Street Owner's Corp., MOLLY BLIENDEN, individually and as member of the Board of 450 West 31st Street Owners Corp., PRISCILLA MCGEEHON, individually and as a member of the Board of 450 West 31st Street Owners Corp., BILL SMITH, individually, and a member of the Board of 450 West 31st Owners Corp., OWAIN HUGHES, individually, LINDA KRAMER, individually, and as a member of the Board of 450 West 31st Owners Corp., JON CHODOSH, Chodosh Realty Services Inc., STANLEY KAUFMAN, ESQ., Kaufman Friedman Plotnicki & Grun, LLP, Deirdre A. Carson, Esq., Greenberg Traurig, LLP, Vincent Hanley, Hanley & Goble.

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITIONS TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OR ALTERNATIVELY FOR DECLARATORY RELIEF CLARIFYING WHICH DECISION GOVERNS IN THESE CASES

Defendants-Respondents.

----------X

JAMES BRADY,

Plaintiff-Appellant,

Action Two

-against-

Index No. 654226/2013

JEFFREY KATZ, individually and as CEO and principal owner of Sherwood Equities, Inc., LONG WHARF REAL ESTATE PARTNERS, LLC., CHICAGO TITLE INSURANCE CO., DENNIS W. RUSSO, ESQ., HERRICK, FEINSTEIN, LLP., FRANK MCCOURT individually, and as Chairman & CEO of McCourt Global LP,

Defendants-Respondents.

----------X

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, OR ALTERNATIVELY, FOR DECLARATORY RELIEF CLARIFYING WHICH DECISION GOVERNS IN THESE CASES

This reply by Plaintiff is necessary in light of the false claims made by Defendants in their opposition papers.

Four of the seven law firms representing Defendants responded with opposition papers to Plaintiff's motion to the Court of Appeals: Dentons US LLC for Chicago Title Insurance Co.; Lewis Brisbois Bisgaard & Smith LLP for the Kaufman and Hanley Defendants; Augustine & Eberle LLP for the Board of 450 West Owners Corp.; and Steptoe & Johnson LLP for Greenberg Traurig, LLP and Deirdre A. Carson.

These opposition papers are further proof of perjury, and aiding and abetting fraud on the courts by Defendants. The continued assertions that Plaintiff lost the prior litigation is entirely false. First, a review of the Oral Arguments of March 18, 2014 clearly prove that Plaintiff did not lose the prior litigation. Certain words of the affirmed February 11, 2010 decision can only be construed as giving Plaintiff the right to utilize the premise's permissible development rights to the extent allowed under applicable law. It should not be permissible for Defendants' lawyers to lie to the Court about the history of the prior litigation. The goal of the previous litigation was solely to enjoin the sale of the development rights, which Plaintiff successfully did.

Second, Defendants' attorneys do not hesitate to lie in asserting that all courts, including the Court of Appeals, have ruled that Plaintiff's claims have no merit.

Third, the words used in the First Department's February 11, 2010 decision mean that air rights are conveyed and reserved to the Plaintiff's Unit. As Defendants and their attorneys know, that would mean that a waiver is needed from Plaintiff in order for Defendants 450 West Owners Corp. to lawfully sell or transfer the premise's development rights.

Fourth, *Res judicata* should have prevented a lower court from rewriting the higher court decision, and giving a different interpretation of the Seventh Paragraph Footnote than what was given in the February 11, 2010 decision. - These are two Final Determinations that cannot coexist and must be ruled on by this Court.

Fifth, Defendants' attorneys are shown advancing Justice Kornreich's false claims made in her July 15, 2014 decision as true. It is untrue that Plaintiff's claim "is a near perfect example of frivolous conduct and warrants defendants' requests for the imposition of sanctions." The rights that were sold by 450 West Owners Corp. were for the difference between what is built and what was permitted under applicable law. This difference is called the premise's unused development rights. It was this difference between what was built and was is permitted that the Appellate Division's February 11, 2010 decision stated Plaintiff has.

In their opposition papers, the Kaufman and Hanley Defendants argue that Plaintiff's instant motion should be denied because there is no "novel issue or an issue of public importance; a conflict with prior decisions of this Court; or a conflict among the departments of the Appellate Division." (p.8 ¶ 22). Defendants are mistaken, as shown above and below.

In the present case, the Supreme Court of Manhattan County issued a July 15, 2014 decision that contradicts a higher Appellate Division, First Department decision of February 11, 2010.

The Supreme Court decision is the result of Justice Shirley Werner Kornreich rewriting both the underlying real estate contract (the offering plan), and the First Department's February 11, 2010 decision.

As Defendant's opposition papers reiterate, this Court has jurisdiction to hear cases where there is a conflict between two or more courts or judicial departments in New York State. In the present case, there is a conflict between a lower Supreme Court decision and the governing Appellate Division, First Department decision.

The Appellate Division, First Department's February 11, 2010 decision, which is lawfully the governing decision in this case, included the following words:

> "that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs." *Brady v. 450 W. 31st St. Owners Corp.*, 70 AD3d 469 (2010).

These words mean that Plaintiff has the exclusive use of the premise's development rights. It is precisely this difference between what is built and what is available that the Co-op sold to Sherwood. The Appellate Division decision follows the offering contract contract, which states:

> [Seventh Paragraph – New] The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law.

These words mean that plaintiff's unit has the right to utilize the premise's development rights to the extent permitted under applicable law. *Res judicata* protected plaintiff, which is why Justice Kornreich needed to rewrite the decision in order to impose sanctions of nearly $400,000. The two decisions cannot coexist. The Appellate Division decision does not simply disappear because Justice Kornreich rewrote it in order to void my rights.

Again, the Appellate Division's February 11, 2010 decision stated:

> "that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs." *Brady v. 450 W. 31st St. Owners Corp.*, 70 AD3d 469 (2010).

The July 15, 2014 Supreme Court decision has none of these words; they were all gone, removed by the Court, and replaced with the following words:

> "It has already been adjudged that while the owners of the unit may have the right to erect additional structures on the roof, that right does not entitle them to use

any floor area in doing so." *Brady v. Sherwood Equities, et. al*, Index No. 654226/2013.

This shows clearly that Justice Kornreich rewrote the February 11, 2010 decision and Plaintiff's real estate contract. This Court cannot permit lower courts to rewrite contracts and higher court decisions. As the State's highest court, this Court cannot allow judges to rewrite the description of commercial apartments in the Offering Plan.

Joseph Augustine for 450 West Owners Corp. is using the same tactics they successfully used with Justice Kornreich. In their opposition papers, they cite the website created by Plaintiff that catalogs the abuse suffered at the hands of the New York judiciary during the first round of litigation, from 2007-2010.

First, Plaintiff has every right to create a website detailing the evidence of what he has suffered. This is certainly protected by freedom of speech, expression and peaceful protest. All charges on the website were proven correct at the March 18, 2014 Oral Arguments – that Plaintiff was stuck with inconsistent decisions that nevertheless protected him and gave him the right to use the premise's development rights. Plaintiff stands by every word on that site. Defendants are simply attempting to prejudice the Court against Plaintiff.

***Res Judicata* Protected Plaintiff**

In the July 15, 2014 decision, Justice Kornreich dismissed my claims based on *res judicata* and collateral estoppel. The application of these very principles prevents

Justice Kornreich from rewriting a higher court's decision. Justice Kornreich used the Appellate Division's February 11, 2010 decision to dismiss my claims against Sherwood, the Board and other named defendants, when the whole purpose of suing them was because 450 West Owners Corp. sold to them the rights the court said belonged to Plaintiff. It was the rights that the offering plan and the February 11, 2010 decision said I have that were transferred to Sherwood without a waiver from Plaintiff. Collateral estoppel and *stare decisis* should have prevented Justice Kornreich from rewriting the higher court's decision.

By the time of the Justice Kornreich's July 15 2014 decision, my contract was rewritten beyond recognition and surrounded by court-created language that took out the whole grant of rights.

This was made explicit by Stanley Kaufman, litigation attorney for the Co-op in the first round of litigation, stated in "Defendant's Reply Memorandum of Law," April 14, 2008, p.5:

> **The clear intent** was to grant the 12th floor unit owner some latitude in adding **additional space, or structures**, so long as in doing so, the owner did not violate the local building code, **zoning regulations, or other ordinances**.

And further:

> The clear and logical meaning of the added footnote number 7 of the Second Amendment was to grant 12th floor owner some latitude ***in adding additional structures***, so long as in doing so, the owner did not endanger anyone else's health or safety or violate the building Code, ***zoning laws or any other laws or ordinances***." (*Ibid.* p. 28).

When the parties to the contract agree that the intent of the Seventh Paragraph Footnote was to convey air rights to plaintiff's unit, this Court certainly can and should make a declaration that this is the intent of the Footnote, and what the words of the Appellate Division mean. Thus, the July 15, 2014 decision putting forward a contrary interpretation is wrong.

DEFENDANTS' REFUSE TO ADDRESS THE MARCH 18, 2014 HEARING

At Oral Arguments, Justice Kornreich is seen struggling with the inconsistencies and unable to reconcile the Appellate Division's February 11, 2010 decision, which eliminated the provision that Justice Friedman unlawfully added to the end of the contract in the March 13, 2009 decision:

> "that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs." *Brady v. 450 W. 31st St. Owners Corp.*, 70 AD3d 469 (2010).

The Appellate Division also dismissed Plaintiff's appeal of the Supreme Court's July 2, 2008 decision as academic, and added *dicta* stating that Plaintiff could only build structures without the use of the premise's development rights – which is a direct contradiction of the rights the court said appellant had in its affirmed decision.

This is clearly shown by looking at what Justice Kornreich said at the March 18, 2014 Oral Arguments:

> THE COURT: How would you deal with the decision of the Court and say he has no development rights, he has no air rights, yet he has the right to

build? What does that mean? (Transcript p. 9:17-20).

THE COURT: The courts said that he has no air rights, but he has the right. But I think, perhaps, the courts didn't understand that air rights, FAR, all of that is probably the same things, development rights, so – (Transcript p.12:9-13).

THE COURT: I don't know what you said. Nor do I know what the Court said. (Transcript p. 14:12-13)

THE COURT: But I'm asking you because I have to in this action decide what the contract means, and I'd like your – you to weigh in on that. (Transcript p. 15:25-p. 16:2).

THE COURT: The decisions don't – don't address this, because, at least in this Court's mind, I don't see how you can build and build up without going into air rights or – you know, so ***I don't understand the decisions***. I'm asking you for guidance. (Transcript p. 17:18-22).

THE COURT: And the Appellate Division and lower court doesn't say, "You can only build to a certain height," they said **"Yeah, he has the right to build up and out but he can't use the air rights,"** ***which is really an enigma.*** **(Transcript, p. 27:3-29:3).**

THE COURT: **I don't understand how you can build a structure on a roof if you have no air rights.** (Transcript p. 28:4-5).

MR. BRADY: **So the correct reading it's an inconsistent decision. Please square the two, Your Honor. Square –**

THE COURT: **I don't know how.** (Transcript p. 53:17-19).

THE COURT: – it was the sponsor who put this in, it was the sponsor who owned the penthouse and roof. ***Perhaps that was his intent***. However, I can't rule that way because the Supreme Court already ruled and the Appellate Division already ruled that you do not own those air rights. (Tr. p. 54:11-20).

MR. BRADY: So the correct reading it's an inconsistent decision. Please square the two, Your Honor. Square –

THE COURT: I don't know how. (Transcript p. 53:17-19).

...

THE COURT: So, basically they affirmed and nobody really explained what the use of the building's – what Paragraph 7 – strike that – what Paragraph 7 meant and how plaintiff would have the right to construct or extend structures upon the roof or above and yet not have any right to the air rights. The Appellate – the Court of Appeals, as I said, did not grant leave. (Transcript p. 7:1-7).

THE COURT: They acknowledge that you have something. The question is what is that something.

The Co-op's litigation attorney, Joseph Augustine, acknowledged what that something is:

THE COURT: And what I'd like to know is what is your interpretation of Paragraph 7?

MR. AUGUSTINE: He has – our understanding he has a right to build structures. That's what it says. No one disagrees. The courts all said the same thing. He has a right to build structures. (Transcript p.12:5-8)

...

THE COURT: - which means you're going to have to commit the coop board to tell me: What does Paragraph 7 mean?

Mr. AUGUSTINE: It means he has the right to build structures once he submits a plan. And if those structures are permissible by law, such as Department of Buildings, and those plans do not pose a structural risk or any other risk to the building and it doesn't pose undue burden to the building in order to – for him to service the space that he has there, then the board would be inclined to approve it.
(Transcript p. 13:9-19).

In the July 15, 2014 decision, Justice Kornreich completely departed from all of her admissions and from her clear understanding of the case, and instead stated that Plaintiff's claims were frivolous and meritless, and imposed $400,000 of sanctions:

> "It is clear from the papers and the transaction's history that Brady acted in bad faith in bringing the instant cases."
>
> "His misinterpretation of prior judgment, his feigned ignorance or the origin or the meaning of the phrase "transferable development rights," and his argument that a decision, which he appealed to no avail, is not binding are but a few examples of the frivolous arguments made in the instant actions."
>
> "In short, Brady has dragged more than twenty parties into court to litigate matters that have already been determined and claims that lack any substance."
>
> "The trial court and the appellate court courts in the Prior Action have denied him such control. Undeterred, he has ignored these courts' rulings and brought these meritless actions, abusing the judicial process."
>
> "This is a near perfect example of frivolous conduct that warrants defendants request for the imposition of sanctions."

The July 15, 2014 decision is contradicted by other admissions Justice Kornreich made in the same decision:

> "Brady correctly notes" that the issue of whether the sale to Extell violated his rights was never reached, and that the issue of whether the sale of the air rights by 450 Owners Corp. to Sherwood violated Brady's rights could not have been reached in the prior actions."
>
> "Strictly speaking, Brady is correct that the question of whether such an easement interferes with his right to build structures on the roof otherwise permitted by applicable law has never been determined and so is not barred."

This Court Must Determine Which of the Prior Decisions Governs in This Case

In the July 15, 2014 decision, Justice Kornreich dismissed my claims based on *res judicata* and collateral estoppel. The application of these very principles prevents Justice Kornreich from rewriting a higher court's decision. Justice Kornreich used the Appellate Division's February 11, 2010 decision to dismiss my claims against Sherwood, the Board and other named defendants, when the whole purpose of suing them was to enforce that decision. It was the rights that the offering plan and the February 11, 2010 decision said I have that were transferred to Sherwood without a waiver from me. Collateral estoppel and stare decisis should have prevented Justice Kornreich from rewriting the higher court's decision.

Final Order

Defendants also argue that procedurally Plaintiff's motion fails because the December 3, 2015 order being appealed from is not a "final order" within the meaning of this Court's jurisprudence. The lower court ruled that Plaintiff cannot appeal the July 15, 2014 decision. Thus, there are two Final Determinations in this case that cannot be squared and cannot coexist. It is undisputed that the two cannot coexist.

The Oral Arguments on March 18, 2014 proved that the February 11, 2010 Appellate Division decision gives Plaintiff the right to the exclusive utilization of the premise's development rights, and that any other interpretation of that decision is

nonsensical. Defendants were unable and have remained unable to give any other interpretation of that decision.

The July 15, 2014 decision by the Supreme Court that effectively usurps the First Department's February 11, 2010 is a rewriting of both the Appellate Division's decision and the Offering Plan contract. Clearly, because the governing higher court decision grants Plaintiff the use of development rights, Justice Kornreich of the Supreme Court needed to rewrite it. This Court has not only jurisdiction but a proscriptive duty to rule which of the two conflicting decisions governs in these cases.

The Court Should Sanction Defendants

In their opposition papers, the Kaufman and Hanley Defendants retrace the many court decisions and papers filed in these cases – eight since the July 15, 2014 decision. Plaintiff's website www.bullyjudges.com discusses the first eight times Plaintiff has had to return to court over the meaning of a single sentence in a real estate contract. This means that there have been sixteen occasions over the meaning of one sentence.

Defendants have filled their papers with lies, unfounded assertions, fabrications, and *ad hominen* attacks, asking for sanctions against a Plaintiff who is attempting to vindicate his claim against billionaire Manhattan developers. It is Defendants who should be sanctioned in this case, not Plaintiff. It is Defendants who have misled the courts by prejudicing Plaintiff. It is Defendants who have consistently lied about Plaintiff losing the prior litigation.

CONCLUSION

After sixteen different motions in these related cases, this Court has a duty to rule that the higher court decision governs, and that the sale of the premise's development rights to Sherwood Equities was a violation of the Offering Plan contract and Plaintiff's rights pursuant to the Appellate Division, First Department's February 11, 2010 decision.

DATED: January 27, 2016
New York, NY

James Brady
Studio 450, 12th Floor
450 West 31st Street
New York, NY 10001
bradyny@gmail.com

February 5, 2016

Honorable John J. Bonacic
New York State Senate
Chair, NYS Senate Judiciary Committee
509 LOB
Albany, NY 12247

Re: Senate Judiciary Committee hearing on
the Nomination of Michael J. Garcia for Associate Judge of the
New York State Court of Appeals to be held on 2/8/2016

Dear Senator Bonacic:

The Puerto Rican Bar Association thanks the New York State Senate Judiciary Committee for its consideration of the nomination of Michael J. Garcia, Esq. for Associate Judge of the New York State Court of Appeals. In support of Mr. Garcia's nomination, we submit this letter and respectfully request that it be made part of the record of the New York State Senate Judiciary Committee hearing to be held on February 8, 2016.

As one of the oldest ethnic bar associations in the State of New York, founded in 1957, the Puerto Rican Bar Association has been at the forefront of fighting to ensure the inclusion of Puerto Rican attorneys and attorneys of diverse backgrounds into the Judiciary and diversity within our court system. The history of that struggle for inclusion has yielded men and women who stand as proud examples of judicial excellence and commitment to diversity in our court system. In our opinion, Michael J. Garcia, Esq. represents the excellence, quality and diversity merited by the New York State Court of Appeals and our judicial system.

Michael J. Garcia, Esq. is a graduate of Albany Law School of Union University. He served as United States Attorney for the Southern District of New York from 2005 to 2008, as such he became the first U.S. Attorney of Hispanic heritage to serve in this position. Prior to his appointment as U.S. Attorney, Mr. Garcia served as Assistant Secretary for Immigration and Customs Enforcement (ICE) at the Department of Homeland Security. From 2001 to 2002, he served as Assistant Secretary of Commerce for Export Enforcement in the Bureau of Industry and Security. He was Vice President of the Americas for Interpol and served on Interpol's Executive Committee.

From 1992 to 2001, Michael Garcia was a prosecutor with the Office of the U.S. Attorney for the Southern District of New York. During that time, he personally prosecuted a number of high-profile cases involving national security and complex extraterritorial issues, including the 1993 terrorist bombing of the World Trade Center and the 1998 bombing of U.S. embassies in East Africa. For his work on these cases, Mr. Garcia was twice awarded the Department of Justice's Exceptional Service Award, the Department's highest honor, as well as the Distinguished Service Award. From 1990-1992 he served as a Law Clerk for the Honorable Judith Kaye in the New York State Court of Appeals.

Michael Garcia has always displayed the highest level of integrity and professionalism. He has not only proven to be an excellent attorney but a friend and mentor to many of his colleagues, lawyers, judges, court personnel and staff. He is involved in the community and currently serves at Chair of the Board of Trustees for El Museo del Barrio.

Based on the foregoing, the Puerto Rican Bar Association endorses and recommends Michael J. Garcia to serve as an Associate Justice of the New York State Court of Appeals.

We respectfully thank you and the honored members of the New York State Judiciary Committee and ask that you confirm the appointment of Michael J. Garcia for Associate Judge of the New York State Court of Appeals.

Respectfully submitted,

Carmen A. Pacheco
President-Elect

Betty Lugo
President

cc: by email: NYS Senate Judiciary Committee Members:

Honorable Martin Malave-Dilan, Honorable George J. Amedore, Jr.
Honorable Tony Avella, Honorable Neil Breslin, Honorable Phil Boyle
Honorable Leroy Comrie, Honorable Thomas Croci, Honorable Adriano Espaillat
Honorable Ruben Diaz, Honorable Kemp Hannon, Honorable Ruth Hassell-Thompson, Honorable Brad Hoylman, Honorable Andrew Lanza,
Honorable Ken LaValle, Honorable Michael Nozzolio, Honorable Thomas O'Mara,
Honorable Leroy Perkins, Honorable Ranzenhofer, Honorable Diane Savino,
Honorable Sue Serino, Honorable Toby Ann Stavisky, Honorable Michael Venditto

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February 6, 2016

Hon. John Bonacic, Chair

New York State Senate Standing Committee on the Judiciary
Albany Office
509 LOB
Albany , NY 12247

Re: Michael Garcia for NYS Court of Appeals

Dear Senator Bonacic:

I'm writing to submit the following words in support of the nomination of Michael J. Garcia to the New York State Court of Appeals:

This coming week the New York State Senate Judiciary Committee will consider the nomination of Michael Garcia for the Court of Appeals, the highest court in our state. As a member of the New York State Bar I welcome Mr. Garcia's appointment. As a Latino and Republican, Michael Garcia brings diversity in heritage and viewpoint to a Court that has ideologically moved leftward since the Spitzer administration. More importantly Michael Garcia, a former U.S. Attorney along with the new Chief Judge, former Westchester District Attorney District Attorney Janet Di Fiore, promise to be refreshing voices in New York's highest court for Judicial Independence, Restraint, and the fair impartial interpretation of the law according to its intent and purpose. I urge is confirmation.

Sincere Yours,

Kevin Gomez

Testimony for the Nomination of Michael Garcia
for Associate Judge of the New York State Court of Appeals

February 6, 2016

Senator John J. Bonacic, Chair
Senate Standing Committee on Judiciary
The New York State Senate

Dear Chair Bonacic:

It is my privilege to submit this written testimony on behalf of Michael Garcia in consideration for his nomination to Associate Judge of the New York State Court of Appeals.

Since 2010, Mr. Garcia has been a member of the Board of Trustees of El Museo del Barrio, the nation's first Latin American museum of art. As trustee, he has played a significant leadership role in providing crucial support toward the realization of the museum's historic mission. In 2013, for instance, Mr. Garcia helped lead the institution through a critical period of transition and helped move the museum through its important strategic planning process.

For his steadfast commitment to the institution, his expertise and experience, and his even-tempered spirit of deliberation, Mr. Garcia was elected Chair of the Board of Trustees a year ago, in 2015. His election to chair came as a result of a search committee process.

Since becoming Chair, Mr. Garcia has brought new stability to the institution, focusing on matters of governance and procedures, which provide the museum a more solid foundation for all its operations. In presiding over board meetings, he has introduced a new and welcomed sense of reasoned discussion in addition to enhancing the access to such discussions among fellow board members, i.e., heightening equitable participation in ways that empower board members—not an easy accomplishment on a nonprofit board. These are qualities that translate well to judicial workings and proceedings. I can think of no one of greater integrity or commitment to public service than Michael Garcia for this post of Associate Judge.

Yours sincerely,

Jorge Daniel Veneciano
Executive Director

CENTER for JUDICIAL ACCOUNTABILITY, INC.

Post Office Box 8101
White Plains, New York 10602

Tel. (914)421-1200

E-Mail: cja@judgewatch.org
Website: www.judgewatch.org

Statement of Center for Judicial Accountability Director Elena Ruth Sassower in Opposition to Senate Confirmation of the Nomination of Michael Garcia as Associate Judge of the New York Court of Appeals

February 8, 2016

This is to vigorously protest the sham, unconstitutional manner in which this Committee is holding today's hearing to confirm the nomination of Michael Garcia as an associate judge of New York's highest court. The Committee's webpage hearing notice states "Oral testimony by invitation only", falsely implying that members of the public with evidence germane to the question of Mr. Garcia's fitness will be able to secure an "invitation". In fact, the ONLY witnesses being permitted to testify are the bar associations which favorably rated him.

My own request to testify, in opposition, was denied – without any inquiry as to its basis. That basis was and is Mr. Garcia's litigation misconduct in the declaratory judgment action against the Commission to Investigate Public Corruption which he purported to bring on behalf of both the Senate and former Temporary Senate President Dean Skelos, by an unverified November 22, 2013 complaint, in tandem with counsel purporting to represent the Assembly and former Assembly Speaker Sheldon Silver, and counsel purporting to represent Temporary Senate President Jeffrey Klein.[1]

So egregious was Mr. Garcia's litigation misconduct with his fellow counsel, as well as the litigation misconduct of the Commission's counsel, the State Attorney General – both sides injecting material falsehoods into the proceeding, detrimental to the public's rights, and ultimately colluding to close the case so as to wrongfully deprive the public of the determination to which they were entitled and for which they paid with their tax dollars – that, by order to show cause dated April 23, 2014, I moved to intervene in the declaratory judgment action, on behalf of the Senate and Assembly, seeking:

---

[1] The full title of the declaratory action, commenced in Supreme Court/New York County, under Index #16094/13, is:

> New York State Senate, New York State Assembly, Dean G. Skelos and Jeffrey D. Klein, as members and as Temporary Presidents of the New York State Senate, and Sheldon Silver, as member and as Speaker of the New York State Assembly,
>
> v.
>
> Kathleen Rice, William J. Fitzpatrick, and Milton L. Williams, Jr. in their official capacities as Co-Chairs of the Moreland Commission to Investigate Public Corruption.

(¶57);

'...impinging on the legislative process' (¶58);

'...to punish and harass the Legislature for exercising its constitutional function in deciding which laws to pass and not to pass. The Commission's actions amount to an unconstitutional interference in the discharge of the Legislature's functions and particular duties...' (1st cause of action: separation of powers violation: ¶62);

'...to harass and punish legislators for actions taken in their official capacity as duly-elected representatives of the People of this State....' (2nd cause of action: separation of powers violation: ¶68).

23. All this is materially false. The Legislature played NO part in the fate of the Governor's 2013 reform legislation. Upon the Governor's delivery of his Program Bills # 3, #4, #5, and #12 to the Legislature, plaintiffs Skelos, Klein, and Silver prevented 'the duly-elected representatives of the People of this State' from undertaking any consideration of the bills by neither introducing them nor circulating them for introduction. As a consequence, the bills had no legislative sponsors, were never assigned bill numbers, were never introduced in either the Senate or Assembly, never debated in committee or on the Senate and Assembly floor, and never voted upon. (Exhibit B-1, pp. 2-3; Exhibit G-2, pp. 6-7).

24. Plaintiffs' counsel may be presumed knowledgeable of this. Certainly plaintiffs Skelos, Klein, and Silver knew that within two weeks of the Governor's establishment of the Commission, I had already uncovered that they had aborted the legislative process by withholding all four of the Governor's program bills from the Legislature, for which I sought appropriate documentation by FOIL/records requests to them and the Governor (Exhibits C, D, E).

25. Tellingly, no specifics of the 'legislative process' pertaining to the Governor's Program Bills #3, #4, #5, and #12 appear in plaintiffs' complaint. Rather, there are a mere two paragraphs, each of two sentences (¶¶26, 27). ¶27 is especially laced with misleading, contradictory, and outrightly false claims. ...

26. Obviously, if what plaintiffs Skelos, Klein, and Silver did in withholding the Governor's program bills from the Legislature could support plaintiffs' separation of powers constitutional argument, their complaint would not conceal it. However, the actual separation of powers violation is in what plaintiffs Skelos, Klein, and Silver did, in collusion with the Governor, in depriving the 'democratically-elected members' of the Senate and Assembly of their 'constitutionally-ordained legislative function'[fn] – and in the Governor's out-sourcing

to a commission 'duties of a properly-functioning legislature, discharging its oversight and law-making functions.' (Exhibit G-2, p. 1, underlining in the original). Having colluded with the Governor to deprive the Senate and Assembly of their constitutional role – and bearing primary responsibility for the Legislature's dysfunction – plaintiffs Skelos, Silver, and Klein are without standing to raise the Senate and Assembly's separation of powers constitutional objection.

27. Normally, in an adversarial system, opposing counsel would expose misrepresentations and supply the true facts and corresponding law. Defendants were fully knowledgeable as to what plaintiffs Skelos, Klein, and Silver did in aborting the legislative process, as I provided them with this information repeatedly....

28. Here, however, the Commission did not take exception to plaintiffs' false presentation because the true facts would require it to expose the Governor's collusion with plaintiffs Skelos, Klein, and Silver in withholding his separate Program Bills #3, #4, #5, and #12 from the Legislature, as well as his collusion with Co-Chair Fitzpatrick in conflating his rhetorical 'clean-up Albany package', whose components are not specified, with his Public Trust Act, to make it appear that all 62 district attorneys endorsed the 'package', when what they endorsed was limited to his Program Bill #3.[fn]"

My accompanying proposed verified complaint opened as follows:

"1. This verified complaint seeks adjudication of the important separation of powers constitutional issues presented, but materially misrepresented by plaintiffs' unverified complaint."

The proposed verified complaint then continued with 100 fact-specific, document-supported paragraphs, culminating in three causes of action. So important are these three causes of action to the People of the State of New York that I herein quote them, in full:

"AS AND FOR A FIRST CAUSE OF ACTION
For a Declaration that the Governor's Still-Live Executive Order #106 Establishing the Commission to Investigate Public Corruption is, *As Written*, an Unconstitutional Violation of Separation of Powers

101. Sassower repeats, realleges, and reiterates ¶¶1-100 with the same force and effect as if more fully set forth herein.

102. To preserve separation of powers and the independence of the Legislature, the Constitution imposes a duty on the Governor to refrain from arrogating to himself powers residing in another branch of government.[fn]

103. The purposes the Governor conferred upon the Commission are

actually 'duties of a properly-functioning legislature, discharging its oversight and law-making functions.' (Exhibit G-2, pp. 1-2, underlining in original).

104. For the Governor's Executive Order #106, to be constitutional, *as written*, it would have had to recite the Legislature's failure and refusal to discharge its oversight and law-making functions concerning the matters whose investigation and recommendations its ¶II directs (Exhibit A-1).

105. Yet, the Governor's Executive Order #106 did not identify that the Legislature 'failed to act' in any of its seven WHEREAS paragraphs.

106. The Governor's verbal statements that the Legislature 'failed to act' are false. Plaintiffs Skelos, Klein, and Silver aborted the legislative process with respect to each of the Governor's program bills comprising his 'clean-up Albany package'. (Exhibit B-1, pp. 2-3; Exhibit G-2, pp. 6-8).

107. There is no evidence that the Governor could not have readily secured passage of his Public Trust Act, Program Bill #3, had he availed himself of legitimate legislative process, rather than, as he did, engaging in behind-closed-doors dealing-making governance with plaintiffs Skelos, Klein, and Silver. Likewise, there is no evidence that he could not have secured passage of key components of the other program bills that were part of his 'clean-up Albany package' through legitimate legislative process. Sassower's August 21, 2013 letter to the Governor sets this forth convincingly, and without contradiction from the Governor. Such only reinforces the unconstitutionality of Executive Order #106, *as written*, encroaching as it did upon the Legislature without just cause.

108. Had Executive Order #106 been constitutionally-drafted, it would have had to additionally direct the Commission's investigation and recommendations with respect to the Legislature's purported 'fail[ure] to act'.

109. That such direction is further requisite for Executive Order #106 to be constitutional, *as written*, is reinforced by the fact that the Commission was so insensitive and disrespectful of separation of powers concerns as to not have independently recognized its duty, in the first instance, to have examined why the Legislature 'failed to act' so as to evaluate the facts and circumstances and whether there might be some reasonable justification.

110. Had the Commission examined the Governor's verbally-stated reason for establishing the Commission, it would have ascertained the same true facts as Sassower had – and that the Governor's actual separation of powers violation was his colluding with plaintiffs Skelos, Klein, and Silver to deprive the Senate and Assembly's 'democratically-elected members' of their constitutionally-ordained legislative function, altogether preventing them from exercising their 'functional

responsibility to consider and vote on legislation', such that each 'legislator and the thousands of New Yorkers he or she represents [were] unlawfully precluded from participating in the governmental process', *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001).

111. The Commission would also have confirmed that the overriding cause of public corruption, including corruption in the Legislature, is this kind of 'three men in a room', behind-closed-doors governance, enabled by Senate and Assembly rules vesting the Temporary Senate President and Assembly Speaker with autocratic powers, emasculating committees and rank-and-file members and reducing the Legislature to a rubber-stamp, such that neither house remotely discharges its oversight and lawmaking functions (Exhibit G-2, pp. 3-6).

112. Indeed, the Commission would have discovered that so many of the varied proposals that its Preliminary Report would be putting forward – for example, closing the LLC 'loophole' – in addition to public campaign financing, etc. – had, year, after year, after year, again and again, failed to result in any legislative enactment solely because of the stranglehold of leadership, cutting off legitimate legislative process. And it would have discovered that so emasculated are committees and rank-and-file members that the Temporary Senate President and Assembly Speaker have been able to seize control of the legislative budget – unauthorized by legislative rules and violative of the state Constitution – and craft for themselves a slush-fund of countless millions of taxpayer dollars with which to exponentially fortify their power: 'rewarding the faithful and punishing the dissident' (Exhibit T-2, p. 6).

113. Senate and Assembly rules that foster such blatant unconstitutionality by conferring autocratic powers in the Temporary Senate President and Assembly Speaker – and do so not just here, but as a *modus operandi* of governance – are themselves unconstitutional.

AS AND FOR A SECOND CAUSE OF ACTION
For a Declaration that the Governor's Still-Live Executive Order #106 Establishing the Commission to Investigate Public Corruption is, *As Applied*, an Unconstitutional Violation of Separation of Powers

114. Sassower repeats, realleges, and reiterates ¶¶1-113 with the same force and effect as if more fully set forth herein.

115. Even were the Governor's Executive Order #106 not unconstitutional, *as written*, it is unconstitutional, *as applied*, by reason of the Commission's non-compliance with its terms.

116. Sassower's intervention affidavit highlights the many safeguarding

provisions of Executive Order #106 that would have prevented the Commission from invidiously and selectively targeting the Legislature to coerce its passage of legislation in accordance with the Governor's agenda and objectives of 'good government' groups, with whom the Governor was materially aligned. All were wilfully violated by the Commission in furtherance of that targeting. These are:

> Executive Order #106, ¶II(c): requiring the Commission to investigate and make recommendations with respect to 'weaknesses in existing laws, regulations and procedures relating to addressing public corruption, conflicts of interest, and ethics in State Government'. (intervention affidavit, ¶43);
>
> Executive Order 106, ¶V: vesting the investigative powers of Executive Law §§6 and 68.3 on 'the Commissioners', not on the three Co-Chairs who appear to have usurped this critical power, enabling the Governor and Attorney General to more easily influence the Commission's investigative course (intervention affidavit, ¶¶18-20, 43);
>
> Executive Order #106, ¶VI: requiring the Commission to 'promptly' communicate 'evidence of a violation of existing laws' obtained 'in the course of its inquiry…to the Office of the Attorney General and other appropriate enforcement authorities…and take steps to facilitate jurisdictional referrals.' (intervention affidavit, ¶¶45, 47, 54-57);
>
> Executive Order #106, ¶VIII: requiring that after the Commission's 'preliminary policy report on or before December 1, 2013', that it 'further issue an additional report or reports on or before January 1, 2015, or on or before a date to be determined.' (intervention affidavit, ¶¶43, 69);
>
> Executive Order #106, ¶IX: requiring the Commission to 'conduct public hearings around the State to provide opportunities for members of the public and interested parties to comment on the issues within the scope of its work.' (intervention affidavit, ¶¶44-46, 48-52).

117. The Commission's wilful and deliberate violation of these safeguarding provisions of Executive Order #106 to target the Legislature was a manifestation of its actual bias and interest, on which it knowingly acted in flagrant defiance of the most basic conflict of interest rules and obligations of disclosure and disqualification.

AS AND FOR A THIRD CAUSE OF ACTION

For a Declaration that the Commission's Refusal to Disclose its 'Procedures and Rules' for Conflicts of Interest and to Respond to Complaints Raising Disqualification on Grounds of Interest, Vitiates, if not Voids, the Recommendations of its December 2, 2013 Preliminary Report, *as a Matter of Law*, with a Further Declaration that the Commission's Preliminary Report Manifests Actual Bias and Interest, Endangering the Public in Material Respects

118. Sassower repeats, realleges, and reiterates ¶¶1-117 with the same force and effect as if more fully set forth herein.

119. The Commission's wilful and deliberate refusal to disclose its 'procedures and rules' with respect to conflict of interest and to respond to complaints raising issues of disqualification by reason of conflicts of interest, suffice to vitiate, if not void, the recommendations of its December 2, 2013 Preliminary Report, *as a matter of law*.

120. The Commission lives on by its December 2, 2013 Preliminary Report on which the public is being detrimentally led to rely.

121. As demonstrated herein and by Sassower's accompanying intervention affidavit, the Commission, collectively and by its members, special advisors, and staff, acted wilfully and deliberately in furtherance of its self-interests and bias with respect to the 'tips', 'comments', testimony, and evidence it received.

122. The December 2, 2013 Preliminary Report manifests the Commission's interest and actual bias. It is materially false and deceitful – and ¶¶58-68 of Sassower's accompanying intervention affidavit furnishes illustrative particulars.

123. A declaration is required to protect the public from such a Preliminary Report, whose most endangering aspect is its praise of 'Federal prosecutors like United States Attorneys Preet Bharara and Loretta Lynch' as 'root[ing] out and punish[ing] illegal conduct by our public officials' (p. 87) and of district attorneys as 'up to the job' (p. 86) – when the very opposite was attested to, again, and again, and again, by the ordinary citizens who managed to testify in the last 1-1/2 hours of the Commission's September 17, 2013 Manhattan hearing and, with respect to district attorneys, by former assistant district attorney Marc Sacha at the Commission's September 24, 2013 Albany hearing – and evidentiarily-proven by Sassower's July 19, 2013 corruption complaint.

124. To date, Albany County District Attorney Soares has been 'sitting on' Sassower's July 19, 2013 corruption complaint (Exhibit B-1). Likewise, all other

investigative, supervisory, and prosecutorial authorities have been 'sitting on' the corruption complaints that Sassower filed with them (Exhibits B), including three federal prosecutors: U.S. Attorneys, Bharara, Lynch, and Hartunian (Exhibits B-2, B-3, B-4).

125. The Governor's forceful, unequivocal directive to the Commission at his July 2, 2013 press conference was:

> '...Your mission is to put a system in place that says, A. we're going to punish the wrongdoers and to the extent that people have violated the public trust they will be punished. Two, there is a system in place so that the public should feel confident that if there is wrongdoing going on, there's a system in place that will catch those people and make sure it doesn't happen again.
> ...
> there is no substitute for enforcement. ...there is no substitute for effective enforcement. And any system, and any set of laws are only as good as the enforcement mechanism behind them.' (Exhibit A-2).

126. The Commission – filled with district attorneys; former assistant district attorneys, former federal prosecutors, assistant and deputy attorneys general, all having personal and political relationships with Governor Cuomo, himself a former state Attorney General, and with its current occupant, Attorney General Schneiderman – were duty bound to investigate and report on the efficacy of those offices with respect to public corruption complaints. Instead, and to cover-up the nonfeasance, misfeasance, and actual corruption of those primary 'enforcement mechanisms' in their handling of public corruption complaints – to which the September 17, 2013 hearing witnesses gave voice – they put their names to a Preliminary Report that misled the public as to what it most needed to know, betraying not only their trust, but well-being."

Mr. Garcia did not deny or dispute the accuracy of any aspect of my April 23, 2014 order to show cause with TRO and my accompanying proposed verified complaint. Rather, he engaged in sharp-practice with the Attorney General and his two fellow plaintiffs' counsel. This included their filing, on April 24, 2014, of a stipulation of discontinuance, which they sought to have so-ordered by the assigned judge, Supreme Court Justice Alice Schlesinger – while before her was my April 23, 2014 order to show cause with TRO. Without explanation, he then absented himself from the oral argument before her, on April 28, 2014, sending no attorney to appear on behalf of the Senate and Temporary Senate President Skelos.

I detailed this further misconduct by Mr. Garcia, his fellow counsel, and the Attorney General by my June 17, 2014 motion to vacate the five-sentence April 30, 2014 decision of Justice Schlesinger that had accepted their stipulation, without addressing ANY of the facts, law, or legal argument I had presented either at oral argument or by my order to show cause, and by falsely making it appear that

the filing of their stipulation had preceded my order to show cause. Additionally, the motion sought to vacate the stipulation for "fraud, misrepresentation, or other misconduct of an adverse party", pursuant to CPLR §5015(a)(3), and to refer the parties and their counsel "to disciplinary and criminal authorities for investigation and prosecution of their litigation fraud and conflict of interest", pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct.

To substantiate all this relief, my moving affidavit furnished a 12-page analysis demonstrating that Justice Schlesinger's decision was "insupportable, factually and legally, substantively and procedurally – and that no fair and impartial tribunal could have rendered it" (at ¶7). Similarly, her lack of impartiality was demonstrated by her cover-up of the attorney misconduct before her, as to which my affidavit stated:

> "10. Certainly, any fair and impartial tribunal reading my order to show cause would have reacted, strongly, to its particularized showing that counsel for both plaintiffs and defendants had materially deceived the Court by their unsworn court submissions in a manner 'prejudicial to proper determination of the important separation of powers constitutional issues' (moving affidavit, ¶2) – and raising threshold issues as to the propriety of Michael Garcia, Esq., of Kirkland & Ellis, LLP, to be representing both plaintiffs Senate and Temporary Senate President Skelos and Marc Kasowitz, Esq., of Kasowitz, Benson, Torres & Friedman, LLP, to be representing both plaintiffs Assembly and Assembly Speaker Silver because of the divergent interests of their individual and collective clients on the constitutional, separation of powers issues – and mootness (moving affidavit, ¶3).
>
> 11. Yet, at the oral argument the Court did not comment, let alone condemn, the litigation fraud of counsel for plaintiffs and defendants, laid out by nearly the entirety of my 41-page moving affidavit in support of my order to show cause. Nor did the Court make the slightest inquiry whether 'all the parties' were represented and about counsel's conflicts of interest – even as the appearances and non-appearances of counsel before it offered dramatic substantiation of the questions I had raised as to the parties and their counsel (Exhibit 14, pp. 3, 6-7, 16). Instead, the Court chastised me for 'impugn[ing] the motives of the attorneys', asserting they were 'doing their job' and that it held them in 'respect' and 'regard'. (Exhibit 14, p. 34). No fair and impartial tribunal could do this – and fail to recognize that no stipulation of discontinuance could be 'accept[ed]' where '[c]ounsel for all the parties' had not, in fact, signed it or where signing counsel suffered from disqualifying conflicts of interest, including as to the mootness of the constitutional, separation of powers issues. Such now, additionally, constitutes grounds for vacatur of the so-ordered stipulation of discontinuance, pursuant to CPLR §5015(a)(3) for 'fraud, misrepresentation, or other misconduct of an adverse party'.[fn] In this regard, it must also be recognized that the Attorney General is more than defense counsel. He is, in fact, part of the defendant Commission, which was empowered and operated through his office."

Mr. Garcia's sole response to this comprehensive motion was a flimsy three-page memorandum of law, which he submitted jointly with Temporary Senate President Klein's counsel. Under a title heading "NO GROUNDS EXIST TO REFER THE PARTIES OR THEIR ATTORNEYS TO DISCIPLINARY OR CRIMINAL AUTHORITIES", they baldly purported that my request for this relief was "meritless" and that I "[did] not and cannot offer any support...[and] No grounds exist to support [my] request, which should be denied." All the while, his joint memorandum – just as the responses of the Kasowitz firm and the Attorney General – concealed virtually the entire content of my June 17, 2014 motion, including my 12-page analysis of Justice Schlesinger's decision and my threshold question as to whether the Senate and Assembly were, in fact, plaintiffs and the propriety of Kirkland & Ellis' supposed dual representation of the Senate and Temporary Senate President Skelos and the Kasowitz firm's supposed dual representation of the Assembly and Assembly Speaker Silver.

My reply, consisting of a 26-page memorandum of law and 18-page affidavit, demonstrated my entitlement to all the relief sought by my June 17, 2014 motion, *as a matter of law*. Indeed, my reply affidavit annexed the results of extensive FOIL/records requests to the Senate, to the Assembly, to the Attorney General, and to the Comptroller, establishing that counsel for the so-called plaintiffs had no authorization to bring the declaratory judgment action. The single contract that had been produced – for the Kasowitz firm representing the Assembly – did not cover litigation. As for the not-produced contracts for Kirkland & Ellis and Loeb & Loeb, I surmised that either they had not been submitted for approval to the Attorney General and Comptroller, as required – or, if submitted, were not approved:

> "because the Legislature had no reason to retain more than a single special counsel inasmuch as the positions of the Senate and Assembly are perfectly aligned, with the consequence that the Kasowitz firm could represent both chambers without conflict of interest. So, too, the same special counsel as was representing Temporary Senate President Skelos – Kirkland & Ellis – could, without conflict, represent Temporary Senate President Klein, without need of a further counsel, Loeb & Loeb." (my September 26, 2014 reply affidavit, at ¶31).

I noted (at ¶32) that the Senate's April 1, 2008 contract with the law firm Lewis & Fiore, Esqs. for representation in the judicial compensation lawsuit brought by then Chief Judge Kaye asserted, at its very outset, as if in resolution form, "WHEREAS, the Senate in defense of said action has different legal positions, defenses and arguments than the Assembly and the Governor" – and that it annexed the proposal of Lewis & Fiore, Esqs., expressly stating:

> "The Senate has an objective separate from the other defendants. Unlike the Assembly and the Governor, the Senate in the closing days of last year's session passed a bill providing for exactly what the suit seeks to compel. To that end, our interest and our position in this litigation is in conflict with the Assembly which failed to adopt the Senate bill, and the Governor who, of course, was not then the Governor and had no power to act institutionally without the Assembly passing the pay raise bill." (at p. 3, underlining added).

Certainly, too, when the engagement of 'legal representation' is outside counsel, as at bar, such must conform with legal requirements and established procedures for retention. As stated in the Appellate Division, First Department's decision in *Silver v. Pataki*, 274 A.D.2d 57, 62 (2000):

> '...the legislative power to financially obligate the State is limited to those 'claims...audited and allowed according to law' (NY Const, art III, §19). In furtherance of this clearly defined grant of legislative fiscal authority, Legislative Law §21 commands that '[n]either house shall, without the consent of the other...incur any expense whatever except as provided by this chapter.' There is no authorization contained in the Constitution or the Legislative Law for a legislator, even one of the chosen leaders of either house, to unilaterally initiate and conduct litigation or even authorize a debt for attorneys' fees when backed by a resolution of one house (*Carr v. State of New York*, 231 NY 164).

Yet, neither the Senate nor Assembly appear to have followed any of the requisite procedures for authorizing this and other litigations against the Commission, including in contracting for the services of outside counsel. As such, the Senate and Assembly are not lawfully plaintiffs – and if Temporary Senate Presidents Skelos and Klein and Assembly Speaker Silver are lawfully plaintiffs, they are not being lawfully represented by law firms having contracts with the state entitling them to compensation.

Having had no authorization to commence this declaratory judgment action, the law firms are without authorization to seek to discontinue it. Nor can plaintiffs, who may not be plaintiffs – and who unlawfully used hundreds of thousands of taxpayer dollars in bringing and prosecuting this action – seek to discontinue it when the proposed intervening plaintiff, acting on her own behalf and on behalf of the People of the State of New York, is ready to step in and secure for the taxpayers the summary judgment resolution of the declaratory judgment issues to which they are entitled and for which they paid. ..." (at pp. 4-6)

On December 3, 2014, Justice Schlesinger held oral argument on my June 17, 2014 motion. This time, Mr. Garcia appeared. However, his brief presentation offered no facts and law in support of his conclusory statements that my motion be denied. I argued extensively as to the state of the record and the law pertaining thereto. I also reiterated the requests presented by both my June 17, 2014 motion and reply papers as to Justice Schlesinger's obligation to disqualify herself and absent that, to make disclosure based on her demonstrated actual bias and interest, including of her $40,000 financial interest in covering up the corruption of the Commission to Investigate Public Corruption, arising from the issue I had presented to it of the collusion of the three government branches in the fraudulent, statutorily-violative, and unconstitutional judicial salary increases recommended by the

Commission on Judicial Compensation.[3] My summation was as follows:

> "I will conclude by saying what I said when I testified before the Commission to Investigate Public Corruption on September 17, 2013. I said 'cases are perfect papers trails. So it's easy to document judicial corruption.' Your Honor, I rest on the record here. I was actually quite astonished that you calendared this motion for oral argument, because the record before the Court on this motion, left you nowhere to go, *as a matter of law*. Your duty, your duty, based upon the record before you on the motion, which apparently you are not familiar with, was not only to have vacated your decision, but also, as to the further relief that was being sought, to refer counsel to disciplinary and criminal authorities for their fraud, misconduct, both in connection with the underlying litigation and in opposing this intervention and reargument motion. (audio clip, at 5:50 minutes)[4]

By decision dated December 23, 2014, Justice Schlesinger again – as she had by her April 30, 2014 decision – rendered a fraudulent decision demonstrating her actual bias. Once again, her decision identified NONE of the facts, law or legal argument I had presented. She denied the motion "in its entirety", not even identifying what that "entirety" consisted of, *to wit*, not only reargument and renewal pursuant to CPLR §2221, but my relief against counsel for their demonstrated fraud, misconduct, and misrepresentation, entitlement to which I had established by a mountain of particularized evidence, all uncontested by Mr. Garcia and his fellow counsel and the Attorney General.

The record of my intervention and reargument motions documentarily establishes the combination of judicial misconduct and attorney misconduct that completely eviscerated any cognizable judicial process, robbing the People of the State of New York of hundreds of thousands of their taxpayer dollars paid to Mr. Garcia and other lawyers who had no lawful, approved contracts for what they were doing and who were defrauding them of the declarations to which they were entitled and for which they paid – declarations that would have given rise to a tsunami of real reforms to restore the kind of functioning, responsible, and accountable government that we do not have, remotely.

Mr. Garcia – the predecessor U.S. Attorney for the Southern District of New York to Preet Bharara, who ironically is coming to Albany today for a full day of speaking about ethics and fighting government corruption – could have easily been a hero to the People simply by acting with the honesty and integrity that New York's Rules of Professional Conduct require of every attorney. This, even without blowing the whistle on the strangling mass of government corruption of which

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[3] See, my June 17, 2014 moving affidavit, ¶¶6-13, as well as ¶¶14-18 under the title heading "Disclosure of the Court's Interest & Relationships"; my September 26, 2014 reply affidavit: ¶¶38-44, under the title heading "The Further Evidence of this Court's Demonstrated Actual Bias", and my reply memorandum of law, pp. 21-25 under the title heading "This Court's Duty to Disqualify Itself for Actual Bias and Interest & to Vacate its April 30, 2014 Decision by Reason Thereof – and, if Denied, to Confront the Particularized Facts, Law, & Argument Presented by the Motion and to Make Disclosure".

[4] The audio clip is posted on CJA's website, on the webpage pertaining to the oral argument.

the proposed verified complaint furnished him with the most breathtaking evidentiary proof – which New York's Rules of Professional Conduct also required him to do.

Can a lawyer who so violated his professional duties, not to mention a multitude of provisions of New York's penal law pertaining to corruption, fraud, larceny, conspiracy – to the profound injury of the People of the State of New York – be seated on the state's highest court? In New York, where, thanks to him, the Legislature continues its abandonment of all respect for evidence and rules of procedure, substituting a "rubber stamp" for its "advice and consent", he sure can.