SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN
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TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VIOLANTE,

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, AND THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

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Steuben County Index No. E2022-0116CV

Motion Sequence No. 8

AFFIRMATION OF JOHN R. CUTI IN OPPOSITION TO PETITIONERS' MOTION FOR SANCTIONS

JOHN R. CUTI, ESQ., hereby affirms under penalty of perjury that the following is true and correct:

1. I am an attorney duly licensed to practice law in New York State, and a member of Cuti Hecker Wang LLP, counsel for Respondents Senate Majority Leader and President *Pro Tempore* of the Senate Andrea Stewart-Cousins and the New York State Senate Majority's appointees to the New York State Legislative Task Force on Demographic Research and

Reapportionment (collectively, the "Senate Respondents"). I submit this Affirmation in opposition to Petitioners' motion for sanctions, filed on March 13, 2022. Dkt. Nos. 174-197.

PRELIMINARY STATEMENT

2. Petitioners are not entitled to adverse inferences because the Senate Respondents have not engaged in anything close to sanctionable conduct. Counsel for the Senate Respondents never understood this Court to have granted Petitioners leave to obtain deposition testimony from Senator Gianaris in his capacity as a member of LATFOR, Philip Chonigman in his capacity as the Senate Co-Executive Director of LATFOR, and/or Eric Katz, counsel to the Senate Majority Leader, in his capacity as a member of LATFOR (collectively, the "Legislative Witnesses").

3. That is why counsel informed Petitioners last Thursday that they did not have permission to seek deposition testimony. Despite the timely objection, and notwithstanding that this Court's order granting leave for Petitioners to seek discovery never mentioned deposition testimony, Petitioners never bothered to request that Your Honor clarify the matter. Nor did they move to compel, despite Fourth Department Justice Lindley's direction regarding the procedures that were to be followed if a discovery dispute arose after Petitioners served any requests for disclosure. Instead, Petitioners plowed ahead, demanding that the Legislative Witnesses – in the midst of intensive budget deliberations – appear at their Manhattan offices on 17 hours' notice or else. There is no basis to draw an adverse inference against any Respondent.

4. Even assuming *arguendo* that counsel for the Senate Respondents misunderstood the scope of this Court's Decision and subsequent Order and Petitioners in fact had permission

to serve deposition notices, this motion for sanctions is still baseless given the undisputed record of Petitioners' failure to follow the CPLR. After a series of missteps, Petitioners did not serve notices of deposition until 3:50 p.m. on the Thursday before the Saturday discovery cutoff in a case set down for trial on Monday. They plainly sought to question the Legislative Witnesses about their legislative activity. That is why counsel asserted their absolute legislative privilege. To be sure, the Court ruled on March 3 that Petitioners would be permitted to seek "limited discovery" based in part on the view that there was only a qualified legislative privilege. But the Court's decision – rendered after an oral argument at which Petitioners' counsel responded to Your Honor's observation that the proposed discovery demands were overbroad by inviting the Court to narrow the proposed document demands, but never mentioned or asked for depositions – did not direct any Respondent to do anything. Nor did the Court decide any specific assertion of privilege because Respondents had not been served with any discovery requests.

5. For the reasons explained below, Petitioners' assertions that the Senate Respondents "brazenly defied this Court's directives" and that their counsel's assertion of his clients' evidentiary privileges was "obstinate and obtuse" are as offensive as they are false.[1] Petitioners made the decision not to try to seek an order compelling the depositions at issue. The Court should deny the motion for adverse inferences and decide this case on the merits.

[1] These regrettable *ad hominem* attacks are contained in Petitioners' Memorandum of Law in Support of their motion for sanctions ("Pet. Sanctions Mem."), Dkt. 175 at 4, 8.

BACKGROUND

6. Because Petitioners' papers provide an incomplete statement of the procedural history, the Senate Respondents here recite the relevant facts.

7. On March 3, 2022, the Court issued a Decision granting Petitioners leave to serve "limited discovery" demands on Respondents. *See* Dkt. No. 126 (the "Decision"), at 2.

8. The Speaker of the Assembly filed a notice of appeal from the Decision on March 3, 2022, *see* Dkt. No. 128, and the Senate Respondents filed a notice of appeal from the Decision on March 4, 2022, *see* Dkt. No. 130 (collectively, the "Notices of Appeal").

9. Although the Decision did not order any Respondent to provide disclosure or take any action at all, on March 7, 2022, four days after this Court entered the Decision, Petitioners filed an emergency application in the Appellate Division, Fourth Department seeking to vacate what they misunderstood to be an automatic stay arising from the filing of the Notices of Appeal. *See* Ex. A (Proposed Order to Show Cause to the Fourth Department).

10. Over the next two days, there was intensive motion practice in the Appellate Division. In the early morning hours of March 8, 2022, the Senate Respondents and the Speaker each filed papers opposing Petitioners' emergency application.

11. At 9:30 a.m. on March 8, the parties argued the application before Justice Stephen K. Lindley. Following the extensive oral argument before Justice Lindley, he invited Petitioners to submit reply papers by 12:30 p.m. that day, and he invited Respondents to file sur-reply papers in further opposition to the motion by 3:00 p.m. that day.

12. At 10:49 a.m. on March 9, 2022, Justice Lindley declined to sign Petitioners' proposed Order to Show Cause, explaining that the Decision was not an order, but merely a

ruling, and therefore not appealable. *See* Ex. B (March 9, 2022 decision declining to sign Petitioners' proposed Order to Show Cause). Justice Lindley also explained that even if the Decision were interpreted to have been an Order, no automatic stay would have resulted from filing the Notices of Appeal because the Decision did not direct any Respondent to take any affirmative action. Specifically, Justice Lindley observed that the decision "did not compel discovery or direct any of the respondents to do anything, *such as sit for depositions*." *Id.* (emphasis added). Instead, the Decision merely reflected this Court's ruling granting Petitioners leave to seek limited discovery. *Id.*

13. Later that day, six days after the Decision granting them leave to serve discovery, Petitioners sought "from this court an order granting limited discovery consistent with" the Decision. *See* Dkt. No. 135. The Court entered such order at 4:28 p.m., *id.* (the "Order").

14. At 6:28 p.m. on March 9, 2022, Petitioners sent an email to counsel for the Senate Respondents (and the other Respondents) purporting to serve subpoenas commanding the Legislative Witnesses to produce documents and appear for a deposition. *See* Exhs. C - E (the "Subpoenas"). As counsel for Petitioners should have known, subpoenas are for non-parties (entities described in CPLR § 3101(a)(2) as "person[s]"), and notices of deposition and requests for inspection and production of documents are sent to "part[ies]." *Id*. § 3101(a)(1).

15. At 2:05 p.m. on March 10, 2022, counsel for the Senate Respondents sent a letter to counsel for Petitioners explaining that the Subpoenas were invalid because the Legislative Witnesses, as members and a director of LATFOR, were parties to this proceeding for purposes of disclosure under CPLR §3101(a), not non-parties subject to subpoena. *See* Ex. F (J. Cuti

Letter to Bennet Moskowitz, March 10, 2022, 2:05 p.m.).[2] That letter also noted that even had Petitioners sent notices of deposition, the Senate Respondents would object to same because the Order did not authorize Petitioners to obtain deposition testimony, and in any event the notices sought information plainly protected by absolute legislative privilege and thus sought information not discoverable under CPLR § 3101(b). *Id*.

16. At 3:50 p.m. on March 10, 2022, counsel for Petitioners (apparently recognizing that the Subpoenas had been invalid on their face) purported to serve by email notices of deposition directed to the three Legislative Witnesses. *See* Ex. G (B. Moskowitz Letter to J. Cuti, March 10, 2022, 3:50 p.m.); Exhs. H - J (the "Deposition Notices"). The Deposition Notices do not contain any requests for the production of documents. *Id*.

17. At 8:35 p.m. on March 10, 2022, counsel for the Senate Respondents sent a letter to counsel for Petitioners, stating as follows:

[2] Petitioners now concede that the Legislative Witnesses are treated as parties for purposes of discovery under Article 31 of the CPLR. *See* Pet. Sanctions Mem. at 6. Yet they insist that they also had the right to serve subpoenas for documents and testimony from the same witnesses. *Id*. at 4. Again, Petitioners either misunderstand or misstate the rules of civil procedure. A party obtains information from another party in litigation through discovery demands addressed to the party and/or by serving notices of deposition on the party, including the party's employees or other agents. *See* CPLR §§ 3101(a)(1), 3107, 3111, 3120. A party obtains information from a non-party by service of a subpoena which can request both documents and deposition testimony. *See* CPLR §§ 3101(a)(2), 3111; *see also* CPLR Art. 23. The distinction is fundamental. A subpoena is directed at a non-party and must be served in the same way as a summons. CPLR § 2303(a). But discovery demands and notices of deposition directed at a party are served like any other interlocutory paper in a litigation by sending them to the party's counsel. *See* Siegel, N.Y. Prac. § 354 (6th ed. 2021) ("One difference [between deposition notices and subpoenas] is that the notices served on the parties are interlocutory papers which go by mail to the parties' lawyers, while the subpoena must be served on the witness in the same manner as a summons.").

Thank you for withdrawing the improper subpoenas that you served. Sending your agents to contact represented parties in a litigation to serve subpoenas was highly improper.

The deposition notices that you emailed at 3:50 pm today purporting to require witnesses to appear at 9:00 am tomorrow, in person at your Manhattan offices, for an examination to "continue from day to day until complete" are invalid on numerous grounds.

First, we do not read the March 3 Decision or the March 9 Order to have granted Petitioners leave to conduct depositions. Neither the Decision nor the Order ever mentions depositions, nor did the Court mention depositions during the March 3 oral argument.

Second, your assertion that the Court already rejected the objection that these deposition notices seek discovery of information that is protected by an absolute evidentiary privilege is baseless. The only issue the Court decided on March 3 was whether Petitioners could seek discovery. The Court did not rule on any specific privilege objection because no requests had been served.

Third, Petitioners have made plain that they seek to question these witnesses about core legislative activities. For example, the papers Petitioners filed in the Fourth Department reveal that there is substantial confusion even on Petitioners' side about what discovery from LATFOR would or would not be protected by the legislative privilege. Because it is clear that Petitioners seek information from LATFOR members or employees that falls squarely within the absolute legislative privilege, the Senate Respondents hereby assert the objection under CPLR § 3101(b) that the information you seek is privileged matter that is not obtainable under Article 31.

Fourth, the Court granted Petitioners leave to serve discovery on March 3 at 11:45 am. It is not Respondents' fault that you misunderstood the scope of the Court's decision or the effect that the filing of a notice of appeal had with respect to your right to seek discovery. You did not serve subpoenas on these witnesses until yesterday, and those were nullities. Then, at 3:50 p.m. today, *more than a week after the Court permitted you to serve discovery requests*, you emailed notices of deposition. As we explained in our submissions to Justice Lindley, the Senate Respondents are in the midst of the heat of budget season, yet you demand that senior legislative officials appear in your office tomorrow morning on 17 hours notice. That is so unreasonable that any party would have valid objections on that ground alone. That you purport to command these government witnesses to appear on such a schedule only makes the point more clear.

> Fifth, Petit[i]oners do not have even a colorable basis to seek sanctions under CPLR § 3126. As Justice Lindley's decision explained, Justice McAllister has not ordered Respondents to do anything, much less to appear on extremely truncated notice to sit for a deposition, much less to do so to accommodate your failure to serve deposition notices for more than a week. The papers you filed in the Appellate Division make clear that you intend to question these witnesses about their intentions and motivations with respect to debating and participating in the legislative enactment of the challenged plans. Such inquiry is absolutely foreclosed by the New York Constitution's Speech or Debate Clause and the case law construing it. The Fourth Department's ruling makes clear that there is no operative Order or ruling compelling Respondents to appear for depositions, and we doubt that Justice McAllister would order these witnesses to appear in the first instance. At the bare minimum, they have a good faith basis to assert their objections (which they have done by this letter and in my letter of earlier today).
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> Finally, the Senate Respondents and their counsel have been working diligently to search through documents and identify any non-privileged information that can be produced. We anticipate that we will serve responses and objections to Petitioners' document demands, together with responsive documents, by the date specified in the notice. There is no basis to suggest that the Senate Respondents are acting in anything other than good faith. Once the privilege is invaded, the bell cannot be unrung. Petitioners have no right to purport to force these witnesses to surrender their privilege based on Petitioners' threats of sanctions and Petitioners' self-serving interpretation of Justice McAllister's Decision and Order.
>
> If Petitioners move to compel, we will of course respond. In the meanwhile, we will continue to prepare our discovery responses and document production and for the expert testimony that begins in four days.

See Ex. K (J. Cuti Letter to B. Moskowitz, March 10, 2022, 8:35 p.m.).

18. At 9:29 p.m., Petitioners' counsel replied, claiming that Petitioners had not withdrawn the Subpoenas to Senator Gianaris, a member of LATFOR, Mr. Katz, Counsel to the Senate Majority Leader and a member of LATFOR, and Philip Chonigman, the Senate Co-Executive Director of LATFOR, but also insisting that these legislative officials appear for a deposition pursuant to the Deposition Notices the following morning. *See* Ex. L.

19. At 10:16 p.m. on March 10, 2022, counsel for the Senate Respondents sent a letter in reply, advising Petitioners' counsel as a courtesy that, having interposed privilege objections to the demands for the depositions, we would not produce these legislative officials to be interrogated about their legislative activities. *See* Ex. M. Three days later, Petitioners filed this motion. Dkt. Nos. 174-197.

20. Apparently on the morning of Friday, March 11, 2022, lawyers for Petitioners posed questions to an empty chair that they "had intended to ask each deponent." Pet. Sanctions Mem. at 2.

ARGUMENT

21. There is no basis to impose sanctions on this record. Counsel for the Senate Respondents' appointees to LATFOR reasonably interposed objections to the Deposition Notices that commanded that the Legislative Witnesses appear for depositions on 17 hours' notice during budget negotiations. First, Petitioners did not have leave to serve these Deposition Notices. Second, even assuming *arguendo* that Petitioners had leave to serve these notices, there was no court order compelling these witnesses to appear for depositions. Third, there is no basis to conclude that these witnesses willfully and contumaciously refused to comply with a valid demand for deposition testimony, especially given the extraordinarily truncated return date (17 hours). Fourth, the testimony Petitioners seek regarding the intentions and motivations of these legislative officials is barred by absolute legislative privilege under the New York Constitution's Speech or Debate Clause.

A. Petitioners Did Not Have Leave to Serve the Deposition Notices

22. The only disclosure permitted in this special proceeding is that which the court

grants leave to pursue. *See* CPLR 408 (requiring leave of court for disclosure in a special proceeding). Petitioners thus are constrained by this Court's March 3 Decision and March 9 Order, which tightly cabined the disclosure Petitioners were permitted to seek.

23. During the oral argument on Petitioners' motion for leave to serve disclosure, neither Petitioners nor the Court ever mentioned depositions. To the contrary, the colloquy between Your Honor and Petitioners' counsel focused solely on Petitioners' proposed discovery demands for the production of documents.

24. In response to a question from the Court regarding whether some of the material that Petitioners sought would be subject to privilege objections, counsel for Petitioners replied: "Of course, Your Honor. If Your Honor thin[k]s this aspect of our request is overbroad or subject to that privilege, we would certainly be open to a narrowing of our discovery request." Tr. 38.

25. The Court then made clear that it was focused on Petitioners' proposed demands for production of documents: "Well, your request seemed a little overbroad to me. It was just sort of open ended. Anything relating to the redistricting, that's pretty broad." *Id*. at 38-39.

26. Petitioners' presentation related solely to their proposed document demands. Thus, counsel for Petitioners noted that "again, I will reiterate, if Your Honor thinks some of those later requests we have in our five requests are overbroad, anything to do with redistricting, you know we certainly would welcome Your Honor narrowing that to get to the nub of what we're really trying to get to, which is the political data they looked at, and the communications they had with third parties." *Id.* at 41-42.

27. Counsel for the Senate Respondents who argued the motion understood the preceding colloquy to reflect that the Court was contemplating permitting only document

demands: "Now, no discovery request[s] have yet been propounded. The issue before you is whether they should be allowed to [be], and as Your Honor noted, they're rather dramatically overbroad. So one assumes if leave is granted [Petitioners] would serve some sort of narrowed requests." *Id*. at 46.

28. The Decision that Your Honor issued shortly after the oral argument never mentions Petitioners taking depositions.

29. After the interlocutory litigation before the Appellate Division, Petitioners wrote to Your Honor to ask the Court to prepare and enter the Order. *See* Ex. N (B. Moskowitz letter to Court, March 9, 2022). Petitioners represented to Your Honor that they "expect that Respondents will timely comply with any forthcoming *discovery demands* and intend to complete discovery within the Court's original deadline." *Id.* at 1 (emphasis added). Again, Petitioners never mentioned that they sought leave to serve notices of deposition. To the contrary, their letter sought entry of an Order permitting them to serve only "discovery demands."

30. "Discovery demands" is a term of art referring to requests for discovery and inspection of documents. The Fourth Department has consistently distinguished between "discovery demands" for documents and "depositions." *See Burke v. Arcadis G & M of New York Architectural and Engineering Servs., P.C.*, 149 A.D.3d 1514, 1515-16 (4th Dep't 2017) (discussing "discovery demands" and notices to take depositions separately); *Rauls v. DirecTV*, 81 A.D.3d 1252, 1253 (4th Dep't 2011) (same); *Hobbs v. Enprotech Corp.*, 12 A.D.3d 1063,

1064 (4th Dep't 2004) (same); *Truesdale v. Cnty. Of Erie*, 229 A.D.2d 907, 908 (4th Dep't 1996) (same).[3]

31. Senate Respondents did not object to Petitioners' letter because they understood from the Fourth Department and this Court's Decision that Petitioners had the right to serve demands for production, subject to Senate Respondents having the right to object to any specific requests that called for privileged material.

32. Petitioners asked Your Honor to enter an order permitting them to serve "discovery demands." But then, without authorization, they first improperly served facially invalid subpoenas and then served notices of deposition.

33. Because Petitioners did not seek and were not granted leave to serve the Deposition Notices, their motion for sanctions is baseless.

B. No Court Order Required the Legislative Witnesses to Appear for Depositions

34. Even assuming for the sake of argument that Petitioners had leave to serve the Deposition Notices, such notices obviously were not tantamount to a court order compelling the witnesses to appear. Petitioners conceded during oral argument before Justice Lindley on March 8, 2022 that Your Honor merely had granted Petitioners leave to seek disclosure and did not direct Respondents to do anything. Justice Lindley so ruled on March 9, 2022. *See* Ex B at p. 1.

[3] Petitioners' citation to *Lopez v. Imperial Delivery Serv.*, 282 A.D.2d 190, 197 (2d Dep't 2001), is inapposite. Of course the discovery phase of a case and the general term "discovery" can include the exchange of documents and depositions. The point is that Petitioners' March 9 letter sought leave to serve only "discovery *demands*" (emphasis added), a recognized term of art. Moreover, *Lopez* was an ordinary action, not a special proceeding in which the only discovery permitted is that which the Court grants leave to pursue. *See* CPLR 408.

And this Court's subsequent Order does nothing more than effectuate this Court's decision that Petitioners were permitted leave to seek disclosure.

35. Therefore, Petitioners' citation to *Iskalo Elec. Tower LLC v. Stantec Consulting Servs.*, 113 A.D.3d 1105 (4th Dep't 2014), Pet. Sanctions Mem. at 3, is beside the point because that case involved a party's alleged failure to comply with a court order. *Id*. at 1106. Here, the Order – which did not mention depositions at all – certainly did not specifically direct the Senate Respondents to make the Legislative Witnesses available for depositions on less than a day's notice or submit to sanctions.

C. The Senate Respondents Acted Reasonably by Objecting to the Deposition Notices

36. Where, as here, there has not been a court order directing disclosure, sanctions are not available unless a party "wilfully fails to disclose information which the court finds ought to have been disclosed." CPLR § 3126. There is no basis to find that the Senate Respondents' failure to produce legislative officials on 17 hours' notice, in the middle of budget season, and in the absence of a court order authorizing such disclosure, was a "wilful" refusal to comply with lawful disclosure requests for purposes of CPLR § 3126.

37. Such a finding under the statute is reserved for situations in which a party engages in repeated, indefensible refusals to provide discovery. *See, e.g.*, *Rogers v. Howard Realty Estates*, 145 A.D.3d 1051, 1052 (2d Dep't 2016) (imposing sanctions only after defendant's representative "failed to appear for a court-ordered deposition on several separate dates [and] defendant failed to demonstrate a reasonable excuse for those failures"); *Longo v. Armor Elevator Co., Inc.*, 307 A.D.2d 848, 849 (1st Dep't 2003) (order under CPLR 3126(1) was "appropriate" sanction for defendants' "repeated and continuing failure to produce documents

that they were ordered to produce in a decision of this Court . . . or to adequately explain their inability to do so"); *Chamberlain, D'Amanda, Oppenheimer & Greenfield v Beauchamp*, 209 A.D.2d 983, 983 (4th Dep't 1994) (defendants' failure to attend deposition did not constitute a "willful failure to disclose," where, *inter alia*, plaintiff's service of the notice of deposition was improper); *Herzog v. Progressive Equity Funding Corp.*, 199 A.D.2d 897, 898 (3d Dep't 1993) (willfulness for purposes of CPLR 3126 "can be inferred from [a] persistent course of conduct evincing an intent to frustrate [a party's] pursuit of discovery"); *County of Westchester v. Unity Mech. Corp. et al.*, Index No. 59897/2016, Dkt. No. 891, at 7 (Sup. Ct. Westchester Cnty. 2021) (refusing to impose any sanction, including adverse inference, because moving party "failed to establish that the alleged spoliation was willful, contumacious or in bad faith or that the conduct deprives it of proving its case"). In most of these cases, the party that is sanctioned has *also* refused to comply with a direct court order. *See, e.g.*, *Rogers*, 145 A.D.3d at 1052; *Longo*, 307 A.D.2d at 849; *Herzog*, 199 A.D.2d at 898. Moreover, even the least severe sanctions are not warranted unless "a party has not made a 'meaningful attempt to comply with disclosure and [has] an entirely inadequate excuse for such failure.'" *Kumar v. Kumar*, 63 A.D.3d 1246, 1248 (3d Dep't 2009) (internal citation omitted).

38. Petitioners cite a single case, *Leahy v. Allen*, 221 A.D.2d 88 (3d Dep't 1996), in ostensible support for their motion for adverse inferences. *See* Pet. Sanctions Mem. at 4. *Allen* was a negligence case in which the defendant engaged a physician to examine the plaintiff's claimed injuries, but then failed to call the physician at trial. The court noted that a missing witness charge was appropriate, relying on the well-established rule that "where a party fails to call an available witness in support of his or her case and such witness is under that party's

control and in a position to provide noncumulative evidence favorable to the opposing party, the jury should be permitted to draw an adverse inference by reason thereof." *Id*. at 92. That rule has no application here, where Petitioners served eleventh-hour deposition notices without leave of the Court, in an Article 4 special proceeding, on individuals asserting claims of privilege.

39. The Senate Respondents have acted reasonably and diligently at every stage of this dispute. As explained above, Petitioners never obtained leave to serve the Deposition Notices. If anything, it is Petitioners who engaged in sharp practice by serving them and demanding, on threat of moving for sanctions against senior government officials, that these legislative officials appear on 17 hours' notice for a deposition noticed to continue from day to day until concluded. *See* Ex. K.

40. As soon as counsel received Petitioners' invalid Subpoenas directed at the Legislative Witnesses, counsel wrote to explain that the Subpoenas were nullities and that, even assuming they were proper notices of deposition, they would be invalid because the Court had not granted Petitioners leave to obtain deposition testimony. *See* Ex. F.

41. In addition, counsel explained that – even assuming that Petitioners had obtained permission to seek depositions – it was palpably unreasonable to expect these witnesses to appear on 17 hours' notice during intensive budget negotiations. *See* Ex. K at 1-2.

42. In addition to objecting to the inadequate notice, counsel also noted that – again assuming Petitioners even had permission to serve notices of deposition – the Legislative Witnesses would object to them on the grounds of absolute privilege. *See* Ex. F; Ex. K at 1.

43. In inviting Petitioners to move to compel if they disagreed, *see* Ex. K at 2, counsel for the Senate Respondents was relying on Justice Lindley's discussion of how matters were to

proceed if Petitioners were to serve discovery demands: "Of course*, if respondents object to those demands, petitioners may file a motion to compel, and the trial court will then be called upon to resolve the discovery dispute*." Ex. B at 2 (emphasis added). There was nothing willful or contumacious in following the process that an appellate judge had specifically outlined. To the contrary, counsel made clear that if Petitioners moved to compel, we would oppose that motion. *See* Ex. K at 2.

44. It is telling that Petitioners never moved to compel the testimony at issue. Not only did they wait four and a half days after the Decision was issued on Thursday morning, March 3, before first seeking emergency relief in the Appellate Division on the afternoon of Monday, March 7, and not only did they fail to serve deposition notices for another day and a half after Justice Lindley ruled at 10:49 a.m. on March 9 that there never was an automatic stay in the first place, but Petitioners never sought an order from Your Honor compelling the testimony that is the subject of this sanctions motion. The record supports the conclusion that Petitioners want an adverse inference instruction more than they wanted to take the depositions.

45. Moreover, the undersigned counsel believed, and believes, that he has a professional duty to protect the privilege afforded to the Legislative Witnesses under the New York Constitution's Speech or Debate Clause. To have failed to object to these Deposition Notices and permit these witnesses to be subjected to questioning outside the Legislature about their legislative activities would have destroyed the privilege, even if the appellate courts subsequently vindicated its assertion. *See* Ex. K at 2 ("Once the privilege is invaded, the bell cannot be unrung").

46. New York law makes clear that LATFOR is a legislative body whose members perform legislative functions. *See* N.Y. Leg. Law § 83-m (creating LATFOR); *id*. at subd. 5 ("The primary function of the task force shall be to compile and analyze data, conduct research for and make reports and recommendations to the legislature, legislative commissions and other legislative task forces."); *id*. at subd. 10 ("The task force may hold public and private hearings and otherwise have all of the powers of a legislative committee under this chapter."); *id*. at subd. 12 ("Employees of the task force shall be considered to be employees of the legislature for all purposes."). In short, these members of LATFOR whom Petitioners sought to depose are integrally involved in core legislative activities; they are not remotely akin to lobbyists.

47. As the Senate Respondents have repeatedly asserted, the proper body of precedent for privilege rulings in this proceeding is comprised of cases from state courts, not federal courts, and such cases establish an absolute legislative privilege for persons performing legislative functions under the New York Constitution's Speech or Debate Clause. *See, e.g.*, Senate Majority Leader's Opposition to Petitioners' Motion for Leave to Engage in Disclosure ("Disclosure Opp."), at 9-12, Dkt. 96 (Feb. 25, 2022) (citing *inter alia People v. Ohrenstein*, 77 N.Y.2d 38, 53 (1990), *Humane Soc'y of New York v. City of New York*, 188 Misc. 2d 735, 739-

40 (Sup. Ct. N.Y. Cnty. 2001), and *Campaign for Fiscal Equity v. State of New York*, 179 Misc. 2d 907 (Sup. Ct. N.Y. Cnty. 1999)).[4]

48. But even assuming that the federal precedents from *Rodriguez* and *Favors* are relevant – and for the reasons explained in the preceding paragraph and footnote 4 they are not – those courts held unequivocally that LATFOR employees and members are entitled to assert legislative privilege for activities related to legislative acts. *See Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 305 (S.D.N.Y. 2003); *Favors v. Cuomo*, No. 11 CV 5632, 2013 WL 11319831, at *9 (E.D.N.Y. Feb. 8, 2013).

49. Before this Court's Decision, no court had ever held that LATFOR is categorically outside the zone of legislative privilege.[5] To the contrary, the court in *Favors* expressly held that even unelected third parties employed by LATFOR as "experts and staff" were protected by the legislative privilege because they engaged in activity that was integrally related to the quintessentially legislative function of redistricting. 2013 WL 11319831, at *9.

50. The Legislative Witnesses' well-established entitlement to privilege makes sanctions particularly inappropriate. Where a defendant – or respondent, as the case is here –

[4] In their papers submitted to the Fourth Department in opposition to Petitioners' (unnecessary) motion to vacate a non-existent automatic stay, the Senate Respondents explained that the federal common law relied on by the federal courts in the decisions on which Your Honor relied in rendering the Decision does not apply in this proceeding. *See* Ex. O (Affirmation of John R. Cuti in Opposition to the Motion by Order to Show Cause to Vacate the Automatic Stay), at 25-26; Ex. P (Sur-Reply Affirmation of John R. Cuti in Further Opposition to the Motion by Order to Show Cause to Vacate the Automatic Stay), at 7. The privilege that does apply in this proceeding brought under the New York Constitution is the absolute legislative privilege afforded to persons performing legislative functions under the New York Constitution's Speech or Debate Clause. *See* Disclosure Opp. at 9-12; Ex. O at 17-25; Ex. P at 2-4. By this reference, the Senate Respondents incorporate those arguments here.

[5] For a more in-depth analysis, *see* Exhibit O, at 26-29, incorporated by reference here.

"legitimately" invokes a privilege, "no sanction may be invoked because the privilege is a shield and that's the way the defendant is using it." Siegel, N.Y. Prac. § 367 (6th ed. 2021) (contrasting a situation where "the . . . person who brought the case to court" attempts to "use the privilege as a sword" to refuse disclosure, in which case "he will face a civil sanction under CPLR 3126"); *see also Pinnock v. Mercy Med. Ctr.*, 180 A.D.3d 1086, 1087 (2d Dep't 2020) (denying motion for sanctions, including adverse inference instruction, where defendant's refusal to answer questions during deposition was on basis of privilege, and thus "was not demonstrated to be willful or contumacious so as to warrant the sanctions sought").

51. For all these reasons, there is no basis to conclude that counsel, and these witnesses, acted in anything other than good faith. There plainly is no basis to find that we engaged in willful, contumacious conduct. The motion for sanctions should be denied.

52. Petitioners drop a footnote that objects to the responses and objections to Petitioners' discovery demands that the Senate Respondents served on March 12. *See* Pet. Sanctions Mem. at 3 n. †. There is no basis for this complaint. Along with their responses, and the 388 pages of documents produced, the Senate Respondents offered "to meet and confer with [Petitioners' counsel] about any areas of disagreement or to discuss any specific responses." *See* Ex. Q (Senate Respondents' Responses and Objections and cover email dated March 12, 2020). Petitioners made no effort to confer with Senate Respondents about their responses or anything related to the Senate Respondents' good-faith efforts to comply with Petitioners' demands. Judicial intervention would be improper for that reason alone, in addition to the fact that Senate Respondents served compliant and proper responses. *Cf. Yargeau v. Lasertron*, 74 A.D.3d 1805, 1806 (4th Dep't 2010) (reversing as abuse of discretion trial court's grant of motion to compel

because movant failed to submit a compliant affirmation of good faith as required by Rule 202.7); *Baez v. Sugrue*, 300 A.D.2d 519, 521 (4th Dep't 2006) (affirming trial court's denial of motion to preclude expert from testifying at trial because movant failed to submit compliant Rule 202.7 affirmation).

53. Finally, we repeat that Justice Lindley expressly ruled that the Decision did not "direct any of the respondents to do anything, such as sit for depositions." Ex. B at 1. Petitioners' motion for sanctions is baseless in light of that ruling alone. The fact that Petitioners engaged in such dilatory behavior and either failed to understand or chose not to follow the rules makes it all the more clear that their motion should be denied.

54. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: March 15, 2022
New York, New York

/s/ John R. Cuti

John R. Cuti, Esq.
CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

Attorneys for Respondent Senate Majority Leader Andrea Stewart-Cousins and the New York State Senate Majority's appointees to the New York State Legislative Task Force on Demographic Research and Reapportionment