

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

In the Matter of

DAVID A. PATERSON, as Governor of the State of New York,

Petitioner,

-- against --

ERIC ADAMS, JOSEPH P. ADDABBO, JR., JAMES S. ALESI,
DARREL J. AUBERTINE, JOHN J. BONACIC, NEIL D.
BRESLIN, JOHN A. DEFRANCISCO, RUBEN DIAZ, SR.,
MARTIN MALAVE DILAN, THOMAS DUANE, PEDRO
ESPADA, JR., HUGH T. FARLEY, JOHN J. FLANAGAN,
BRIAN X. FOLEY, CHARLES J. FUSCHILLO, JR., MARTIN
J. GOLDEN, JOSEPH A. GRIFFO, KEMP HANNON, RUTH
HASSELL-THOMPSON, SHIRLEY L. HUNTLEY, CRAIG M.
JOHNSON, OWEN H. JOHNSON, JEFFREY D. KLEIN, LIZ
KRUEGER, CARL KRUGER, ANDREW J. LANZA, WILLIAM
J. LARKIN, KENNETH P. LAVALLE, VINCENT L. LEIBELL,
THOMAS LIBOUS, ELIZABETH LITTLE, CARL
MARCELLINO, GEORGE D. MAZIARZ, ROY J. MCDONALD,
HIRAM MONSERRATE, VELMANETTE MONTGOMERY,
THOMAS P. MORAHAN, MICHAEL F. NOZZOLIO, GEORGE
ONORATO, SUZI OPPENHEIMER, FRANK PADAVAN,
KEVIN S. PARKER, BILL PERKINS, MICHAEL H. RANZEN-
HOFFER, JOSEPH E. ROBACH, STEPHEN M. SALAND, JOHN
L. SAMPSON, DIANE J. SAVINO, ERIC T. SCHNEIDERMAN,
JOSE M. SERRANO, JAMES L. SEWARD, DEAN G. SKELOS,
MALCOLM A. SMITH, DANIEL L. SQUADRON, WILLIAM
T. STACHOWSKI, TOBY ANN STAVISKY, ANDREA
STEWART-COUSINS, ANTOINE M. THOMPSON, DAVID J.
VALESKY, DALE M. VOLKER, GEORGE H. WINNER, JR.
and CATHARINE YOUNG, as Members of the New York State
Senate,

Respondents.

Index No. 5835/09

(Teresi, J.)

VERIFIED ANSWER

Respondent Senators ERIC ADAMS, JOSEPH P. ADDABBO, JR., DARREL J.

AUBERTINE, NEIL D. BRESLIN, RUBEN DIAZ, SR., MARTIN MALAVE DILAN,

THOMAS DUANE, BRIAN X. FOLEY, RUTH HASSELL-THOMPSON, SHIRLEY L. HUNTLEY, CRAIG M. JOHNSON, JEFFREY D. KLEIN, LIZ KRUEGER, CARL KRUGER, HIRAM MONSERRATE, VELMANETTE MONTGOMERY, GEORGE ONORATO, SUZI OPPENHEIMER, KEVIN S. PARKER, BILL PERKINS, JOHN L. SAMPSON, DIANE J. SAVINO, ERIC T. SCHNEIDERMAN, JOSE M. SERRANO, MALCOLM A. SMITH, DANIEL L. SQUADRON, WILLIAM T. STACHOWSKI, TOBY ANN STAVISKY, ANDREA STEWART-COUSINS, ANTOINE M. THOMPSON and DAVID J. VALESKY (hereinafter "DEMOCRATIC CONFERENCE RESPONDENTS"), by and through their attorney, Shelley Mayer, respectfully state as follows as and for their Verified Answer to the Petition in the above-captioned proceeding:

1. Admit the allegations specified in Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the Petition.
2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 9 and 10 of the Petition.
3. Admit the allegations specified in Paragraphs 11, 12, 13 and 14 of the Petition, except deny the allegation of Paragraph 12 that Democratic Conference Respondents failed to convene on June 24, 2009.
4. Admit the allegations specified in Paragraph 15 of the Petition, except deny that Democratic Conference Respondents left the Senate Chamber on June 25, 2009, without conducting or attempting to conduct any substantive business, inasmuch as Petitioner did not place any legislation before the Senate that constitutionally could be enacted in that day's Extraordinary Session into which Petitioner called only the Senate and not the full Legislature.

5. Deny the allegations specified in Paragraph 16, except admit that when members of the Republican Conference indicated their refusal to attend timely the Extraordinary Session of June 25, 2009, Democratic Conference Respondents agreed not to object if members of the Republican Conference would enter the Senate Chamber after members of the Democratic Conference adjourned.

6. Deny the allegations specified in Paragraph 17 of the Petition.

7. Admit the allegations specified in Paragraphs 18 and 19 of the Petition.

8. Admit the allegations specified in Paragraph 20 of the Petition, except deny that Democratic Conference Respondents left the Senate Chamber on June 26, 2009, without conducting or attempting to conduct any substantive business, inasmuch as Petitioner did not place any legislation before the Senate that constitutionally could be enacted in that day's Extraordinary Session into which Petitioner called only the Senate and not the full Legislature.

9. Deny the allegations specified in Paragraph 21, except admit that when members of the Republican Conference indicated their refusal to attend timely the Extraordinary Session of June 26, 2009, Democratic Conference Respondents agreed not to object if members of the Republican Conference would enter the Senate Chamber after members of the Democratic Conference adjourned.

10. Admit the allegations specified in Paragraph 22 of the Petition to the extent that Article IV, section 3, of the Constitution empowers the governor "to convene the [L]egislature, or the [S]enate only, on extraordinary occasions."

11. Admit the allegations specified in Paragraphs 23 and 24 of the Petition.

12. Admit the allegations specified in Paragraph 25 of the Petition to the extent that Article IV, section 3, of the Constitution empowers the governor “to convene the [L]egislature, or the [S]enate only, on extraordinary occasions.”

13. Admit the allegations specified in Paragraph 26 of the Petition to the extent that the Senate cannot pass legislation without the assent of a majority of Senators elected to the Senate, but otherwise deny.

14. Admit the allegations specified in Paragraph 27 of the Petition, to the extent that a number of important laws expire on June 30, 2009, and the expiration of some of such laws, unless extended by the enactment of appropriate legislation, could harm New Yorkers and their state and local governments, but otherwise deny.

15. Deny as to the Democratic Conference Respondents the allegations specified in Paragraph 28 of the Petition.

16. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29 of the Petition.

FIRST AFFIRMATIVE DEFENSE

17. This matter is nonjusticiable under the separation of powers and therefore not within the jurisdiction of this Court. The Petition therefore should be dismissed.

SECOND AFFIRMATIVE DEFENSE

18. Democratic Conference Respondents assembled in the Senate Chamber in Extraordinary Session at the precise time specified in each Proclamation issued by Petitioner that

called an Extraordinary Session of the New York State Senate on June 23, 2009, June 24, 2009, June 25, 2009, and June 26, 2009.

19. Respondent Senators PEDRO ESPADA, JR., DEAN G. SKELOS and the other members of the Republican Conference failed without explanation or excuse to appear in the Senate Chamber for the Extraordinary Session called by Petitioner for June 24, 2009.

20. Respondent Senators PEDRO ESPADA, JR., DEAN G. SKELOS and the other members of the Republican Conference did not timely appear in the Senate Chamber for the Extraordinary Sessions called by Petitioner for June 25, 2009, and June 26, 2009.

21. Accordingly, Democratic Conference Respondents have satisfied the very obligations whose fulfillment Petitioner seeks a writ of mandamus against them to compel.

22. For this reason alone, mandamus does not lie as against Democratic Conference Respondents and judgment should be granted in their favor.

THIRD AFFIRMATIVE DEFENSE

23. Democratic Conference Respondents repeat the allegations in Paragraphs 16, 17 and 18 as though fully set forth herein.

24. Because Democratic Conference Respondents appeared in the Senate Chamber at the times designated in Petitioner's Proclamations, the Senate was convened pursuant to Article IV, section 3, of the New York State Constitution, notwithstanding that the absence of other Senators denied a quorum to do business within the meaning of Article III, section 9, of the New York State Constitution.

25. Because the Senate convened, mandamus does not lie and the Petition must be denied.

FOURTH AFFIRMATIVE DEFENSE

26. In addition to assembling in the Senate Chamber for each Extraordinary Session, Democratic Conference Respondents repeatedly offered to members of the Republican Conference a number of alternative approaches – modeled on best practices nationwide – by which a tied Senate immediately could take up important public business despite the ongoing pendency of disputes regarding leadership of the Senate.

27. To expedite resolution of important legislative business and place the public interest above any political matter that could delay or disrupt the legislative agenda, Democratic Conference Respondents proposed a Bipartisan Operating Agreement stipulating that the Democratic and Republican Conferences would share equal control over governance of the Senate and its legislative agenda during each Extraordinary Session called by the governor.

28. To encourage the most conducive environment for compromise to occur, Respondent Senator MALCOLM A. SMITH voluntarily vacated the Notice of Appeal in the litigation *Smith v. Espada*, ___ Misc. 3d ___, Index No. 4912-09 (Sup. Ct. Albany Co., June 16, 2009) (McNamara, J.), that had sought to declare that he remains the duly elected Temporary President of the Senate. In *Smith*, the Court determined that the primary issue of that case – the identity of the Temporary President of the Senate – was a non-justiciable matter that called not for judicial intervention but for a future “solution by members of the State Senate, using the art of negotiation and compromise.” *Id.* at 4.

29. Instead, Respondent Senators PEDRO ESPADA, JR., and DEAN G. SKELOS, on behalf of the Senate Republican Conference, rejected the Bipartisan Operating Agreement and all other offers by Democratic Conference Respondents -- and offered no

alternative proposal of their own – that would have allowed the Senate to enact legislation without prejudice to the ongoing dispute over Senate leadership.

30. Moreover, at approximately 8:30pm on June 24, 2009, Respondent Senator JOHN A. DEFRANCISCO stated on a prominent television program that he and the Republican Conference deliberately were holding up important legislation, including matters on Petitioner's agenda for Extraordinary Sessions, in service of the Republican Conference overriding goal to wrest control of the Senate. This statement is available on the Internet at http://capitalnews9.com/Video/video_pop.aspx?vids=158193&sid=311&rid=12.

31. Furthermore, in defiance of the culture of compromise that Justice McNamara sought to encourage in the *Smith* decision and that the Democratic Conference Respondents sought to foster by vacating the Notice of Appeal, Respondent Senators GEORGE H. WINNER, JR. and JOHN J. FLANAGAN commenced on June 24, 2009, a new litigation, *Winner et al. v. Aponte*, Index No. 5300-09 (Sup. Ct. Albany Co.), seeking judicial findings on the very matters that Senator PEDRO ESPADA, JR., argued were non-justiciable in *Smith*.

32. In the foregoing ways, Democratic Conference Respondents have done everything reasonably within their power to make possible prompt Senate passage of legislation.

33. Accordingly, mandamus does not lie as against Democratic Conference Respondents.

FIFTH AFFIRMATIVE DEFENSE

34. Petitioner's Proclamations calling the above-stated Extraordinary Sessions for June 24, 2009, June 25, 2009 and June 26, 2009, did not seek also to convene the Assembly.

35. As Respondent Senators JOHN L. SAMPSON and MALCOLM A. SMITH informed Petitioner by letter, because Petitioner did not convene the Assembly in Extraordinary Session and only both Houses together can enact legislation into law by each passing the same bill in the same legislative session, Petitioner was placing before the Senate in the above-stated Extraordinary Sessions no bills that constitutionally could be enacted into law pursuant to Senate passage in such Extraordinary Sessions. For this reason, the Senate had no choice but to adjourn the Extraordinary Sessions.


36. For like reasons, until such time as Petitioner convenes both Houses together in Extraordinary Session to enact such measures as Petitioner may recommend, pursuant to Article IV, section 3, of the New York State Constitution, mandamus to compel the Senate alone to convene in Extraordinary Session to act on such legislation can have no practical effect.

37. Accordingly, the Petition should be dismissed or mandamus denied.

WHEREFORE, Democratic Conference Respondents request that this Court dismiss the Petition with prejudice or enter judgment in favor of Respondents

Dated: June 29, 2009
Albany, New York

Respectfully submitted,


SHELLEY B. MAYER, ESQ.

Attorney for Democratic Conference Respondents

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