SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of Senator George Winner, and Senator John Flanagan, Individually and as members of the New York State Senate Petitioners, -against- Angelo Aponte, individually, and in his official capacity as Secretary of the New York State Senate Respondent.	:	Index No.: 09/5300

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

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Respondent Angelo Aponte submits this memorandum of law in opposition to petitioners' request for a preliminary injunction and in support of respondent's motion to dismiss pursuant to CPLR 3211 and 7804(f).

PRELIMINARY STATEMENT

In a backdoor attempt to relitigate the *Smith v. Espada* case dismissed by Your Honor last week, two Republican Senators now sue the Secretary of the Senate for one reason and one reason only: because he reports to Temporary President Smith, not to claimed-President Espada. This Court already ruled the case non-justiciable, but if the case were justiciable, and if the proper parties (Smith and Espada) had been included in the lawsuit (which they were not), Smith – the real party in interest here – would plainly win on the merits. He is the Temporary President, not Senator Espada.

Though the Court previously ordered the parties to seek a political solution to the dispute, the Republican Party refuses to seek a political solution, instead running to the same Court that, just last week, it claimed had no power or right to intervene in the workings of the Senate. The case should be dismissed, the preliminary injunction motion should be denied, and the parties should resolve this issue in the Senate, as previously directed by the Court.

ARGUMENT

I. This Court Already Held That The Case is Not Justiciable

Just last week, Your Honor ruled that "[S]eparation of powers principles dictate that courts must accord due respect to the Legislature by exercising restraint whenever a litigant seeks judicial review of 'wholly internal' legislative affairs or prerogatives." *Smith v. Espada*, Index No. 4912-09 (Sup.Ct. June 16, 2009) (the "*Smith* case") (*citing People v. Ohrenstein*, 153

A.D.2d 342, 343 (1989)). As the Court held, "Clearly, the selection of a presiding officer, a constitutionally prescribed duty here, is a matter of internal legislative prerogative." *Id.*

Your Honor made clear that "The Constitution leaves to the Senate the responsibility of selecting a Temporary President. The issues raised by the parliamentary maneuvering on the Senate floor and the issue of whether a new Temporary President may be chosen without first removing the incumbent should be answered by the Senate." *Id.* The Court also held that "a judicially imposed resolution would be an improvident intrusion into the internal workings of a co-equal branch of government. The practical effect of having a court decide this issue would be that its decision, if only by perception, would have an influence on the internal workings of the Senate including the setting of the Senate agenda. To have a court do so would be improper. In the present context, the question calls for a solution by the members of the State Senate, utilizing the art of negotiation and compromise. The failure of the Senate to resolve this issue is an appropriate manner will make them answerable to the electorate." *Id.* On this basis, the Court dismissed the *Smith* case outright.

Now, apparently unwilling to "utilize[e] the art of negotiation and compromise," and not content to be "answerable to the electorate," two Republican Senators ask this Court to do what their own claimed Temporary President said this Court could not do: intervene in the internal workings of the Senate. If anything, this Petition interferes much more in the internal workings of the Senate, seeking to have this Court supervise the Senate down to the last light, door, drawer, and bill jacket. If the *Smith* case was non-justiciable, because it concerned the procedure to select Senate leadership, then by the logic of the Court's ruling, the duties and procedures of staff answering to Senate leadership are even less justiciable. These petitioner-

Senators would rather have the Senate thrown into quasi-receivership than seek a political compromise or solution through the political process.

If the *Smith* case were non-justiciable, it would seem inescapable from the Court's ruling that this case is not justiciable either. For the reasons set forth in the *Smith* decision, the Court should dismiss this case.

II. Petitioners Failed to Join Necessary Parties

CPLR 1001 requires that "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in this action shall be made plaintiffs or defendants."

This "new" case is fundamentally about one thing: the identity of the Temporary President of the New York State Senate. Angelo Aponte, Secretary of the Senate, reports to the Temporary President. The reason petitioners are suing Mr. Aponte is *because* he reports to Senator Smith, not Senator Espada. *See* Petition ¶¶ 26, 33 (referring to respondent as Smith's "apparatchik" and to Smith as respondent's "patron.").

Currently, two people claim to be the Temporary President: Temporary President Malcolm Smith, and Senator Espada. This case cannot possibly proceed unless both are parties in the case. For whatever reason, petitioners failed to join either of the two Senators with the greatest interest in this case. If petitioners sue the "apparatchik," why did they deliberately choose not to join the "patron"? Petitioners also failed to join claimed-Majority Leader Senator Skelos, even though the Petition repeatedly seeks relief on behalf of the "Majority Leader." Petition ¶¶ 9, 24, 49.

This suit is brought by the wrong petitioners, against the wrong respondent. The joinder issue is not a close one. The case must be dismissed. *Hitchcock v. Boyack*, 256 A.D.2d

842 (3d Dep't 1998) (affirming dismissal of complaint that failed to name necessary parties); *Buckley v. MacDonald*, 231 A.D.2d 599 (2d Dep't 1996) (same); *Mount Pleasant Cottage Sch. Union Free Sch. Dist. v. Sobol*, 163 A.D.2d 715 (3d Dep't 1990) (same); *see also Rainbow Shop Patchogue Corp. v. Roosevelt Nassau Operating Corp.*, 304 N.Y.S.2d 92 (N.Y. Sup. 1969) (denying preliminary injunction because necessary party was not joined).

III. Petitioners Fail on the Merits

If the Court were ever to reach the merits, petitioners would plainly lose. Their entire case – every single "cause of action" – is premised upon the faulty assumption that Senator Espada is the President of the Senate. He is not. Senator Smith is the Temporary President of the Senate. Because Secretary Aponte is properly fulfilling his duties with Senator Smith as President, the entire Petition fails. The Republican claim that Secretary Aponte should report to Senator Espada has no basis in the Senate Rules, in Mason's, or in the Public Officers' Law. It is simply lawless.

A. There Was No Vote to Remove the Temporary President; Therefore Senator Smith Remains the Temporary President and Aponte Is Properly Reporting to Senator Smith

On January 7, 2009, the Senate passed Senate Resolution 1, resolving "That Senator Malcolm A. Smith be, and he hereby is, elected Temporary President of the Senate for the years 2009-2010." The Senate's language is plain: Senator Smith was elected "for the years 2009-2010."

Senate Rules do not address how to remove a Temporary President, and Mason's Manual on Legislative Procedure applies when the Senate Rules do not speak to an issue of parliamentary procedure. But Mason's section 581(1) provides that the *only* way to remove an

elected "presiding officer" (such as a Temporary President) with a fixed term is to "remove[]" the officer "upon a majority vote of all the members elected."[1]

Here, the Senate did not vote to remove Temporary President Smith. That is undisputed. That Mason's provides for a removal process is no mere technicality or talisman to be overlooked as excessive formalism. Especially in the legislative context, the bedrock notion of due process requires clear, express and timely notice of legislation, resolutions and motions in service of a legislature's purpose to be a deliberative body. Inherent in this purpose are safeguards against undue rush to judgment, rights of lawmakers to speak on matters properly before them, and rights of lawmakers to hear and consider those views. Notice and opportunity to be heard thus are values no less important in a legislative body than for a judicial tribunal, and these values only rise in prominence when the underlying matter rises to a level of constitutional import. Especially when those constitutional matters include the leadership of the legislative body itself, accession to the Executive and the countless powers that attend those offices, it is utterly vital that well-settled parliamentary procedures be followed.

Here, it is undisputed there was no vote to remove Temporary President Smith. Absent a vote to remove Senator Smith, he remains and is currently Temporary President of the Senate, and Secretary Aponte is properly reporting to him, not to the lawless orders of a self-proclaimed "Temporary President" and "Majority" Leader.

B. Because the Attempt to Appoint Senator Espada Violated the Public Officers Law, Secretary Aponte Properly Reports to Smith, Not Espada

The Libous Resolution that purported to name Senator Espada violated the New York Public Officers Law, and is null and void. Secretary Aponte therefore must report to Senator Smith, not Senator Espada.

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[1] Mason's makes no allowance for the narrow, inapposite, and disfavored doctrine of "implied repeal."

The Legislature directed that "*[e]very* office shall be vacant upon the happening of" an enumerated but brief list of conditions, including the incumbent's "death," "resignation" or "removal." Public Officers Law § 30(1)(a)-(c) (emphasis added). The Temporary President of the Senate unquestionably is an office. *See* Public Officers Law § 2 ("state officer" includes every "member of the [L]egislature" and "every officer, appointed by one or more state officers, or by the [L]egislature, and authorized to exercise his [or her] official functions throughout the entire state, or without limitation to any political subdivision of the state"); *see also* 1909 Op. Atty. Gen. 267 (members of Legislature are "state officers" for purposes of Public Officers Law); 1907 Op. Atty. Gen 482 (same). Thus, section 30 unquestionably applied to the Libous Resolution.

Under Public Officers Law section 35, the Legislature established a specific and mandatory process for removing officers under section 30: if this process is not followed, then there can be no removal lest section 35 be meaningless. Section 35 requires that to remove a public officer:

(1) the "body" effectuating the removal (here, the Senate) must enact a specific "order" of removal;

(2) such order must be signed by either "a majority of the officers making the removal" or the president and clerk (in this case, the Secretary of the Senate);

(3) such order must be signed in duplicate;

(4) the duplicate signed orders must be delivered to the Secretary of State; and

(5) a signed order must be served on the officer to be removed (here, the Temporary President of the Senate).

These section 35 requirements plainly governed the Libous Resolution and the related "proceedings" of the Senate for the same reasons that section 30 applies: the Temporary

President is a "state officer" appointed by other "state officers," including members of the Legislature or the Legislature itself. *See* Public Officers Law §§ 2, 35.

Nor can it be disputed that the Senate "proceedings" of June 8 violated these section 35 requirements in every respect. The Libous Resolution was silent as to removal, was not signed by a majority of the Senate or by its president and clerk, was not signed in duplicate, was not delivered to the Secretary of State and was not served on Plaintiff. The Libous Resolution thus is null and void, and the Senate therefore never removed Temporary President Smith. Because Senator Smith was not removed and did not resign, die or trigger any other section 30 condition to create a vacancy in his office, he remains Temporary President of the Senate under the plain language of the law.

Like the Mason's requirement of a removal process, these statutes have important purposes that cannot be dismissed as mere formalities. In addition to providing clear and explicit notice to every member of the body effectuating a removal, the statutes impose procedures, such as a signature requirement, that require the body's members to slow down and carefully consider their steps. The statutes also require notice and limited involvement of the Secretary of State because, as shown *infra* in the case of the Temporary President, some public offices enjoy broad powers that affect the operation of government or even the Executive itself, and the Secretary of State's administrative support of government requires that the Secretary of State be notified properly of removals from public office – especially in relation to constitutional officers.

Because the Public Officers Law was violated, Senator Smith is the Temporary President of the Senate. Because Senator Smith is the Temporary President of the Senate, the Petition must be dismissed.

C. Because the Libous Resolution Illegally Purported to Appoint a Temporary President *and* Majority Leader, Secretary Aponte Properly Reports to Senator Smith

The Libous Resolution improperly purported to divide the duties of Temporary President and Majority Leader, in violation of Senate Rule II, section 1, which states: "the Senate shall choose a Temporary President who shall be the Majority Leader." In contravention of this plain Senate rule, the Libous Resolution provided "for the election of Pedro Espada Jr. as Temporary President of the Senate and Dean G. Skelos as Vice President Pro Tem and Majority Leader."

Under the Senate Rules, the Temporary President and Majority Leader constitute a unified position. By purportedly nominating and electing one person (Senator Espada) to hold one office of this unified position and a different person (Senator Skelos) to hold the other office of this unified position, the Libous Resolution proposed a *de facto* Rules change, in clear violation of applicable Senate Rules that require extensive notice to the Senate for any amendment to the Senate Rules. *See* Senate Rule XI, § 1. The purported resolution further failed to unambiguously identify the person who was purportedly nominated to the unified position of Temporary President and Majority Leader. Without a clear and unambiguous nomination, the purported election of Senator Espada was illegal and a nullity, and Secretary Aponte properly reports to Senator Smith, not Senator Espada.

D. Because the Libous Resolution Was Not Properly on the Senate Floor, Secretary Aponte Properly Reports to Senator Smith

The Libous Resolution was not properly introduced on the floor under the Senate Rules, and is therefore null and void. Senators are not free to introduce resolutions on the floor at will. Rather, under Senate Rule VI, section 9(a), "[a]ll original resolutions shall be in the

quadruplicate, and no original resolution may be introduced unless copies thereof first shall have been furnished the Temporary President and Minority Leader." In addition, "[a]ll resolutions, upon introduction, shall be referred to a standing or select committee by the Temporary President or an officer designated by the Temporary President."

The Libous Resolution, however, was (i) not furnished to the Temporary President, Senator Smith, and (ii) not referred to a standing or select committee by the Temporary President or an officer designated by the Temporary President. Recognizing this fundamental failing and ostensibly attempting to excuse it, Senator Libous claimed that his resolution was "privileged" under Senate Rule VI, section 9(e).

Neither the Senate Rules nor Mason's defines "privilege," nor do they state expressly the procedure for determining what is "privilege[d]." However, Mason's section 4(2) provides that rules of legislative procedure are derived from several sources and take precedence in the following order: (a) constitutional provision and judicial decision thereon; (b) adopted rules; (c) custom, usage and precedent; (d) statutory provisions; (e) adopted parliamentary authority; and (f) parliamentary law.

Here, there being no constitutional provision, judicial decision or adopted Rules on the matter, Senate customs and precedents govern and they are longstanding and well-settled. Under Temporary President Smith as well as under previous Republican Temporary Presidents, it is the Temporary President or his or her designee who determines whether resolutions are privileged. Affirmation of Keith C. St. John, dated June 10, 2009, at ¶¶ 20-21 ("St. John Aff.") (attached hereto as Ex. A and originally submitted as an exhibit in the *Smith* case). As befits longstanding Senate procedure, this practice has been recognized and this process followed by *Republican* Senators, both in the current legislative session and in past legislative sessions

controlled by the Republican Party under different Temporary Presidents of the Senate. St. John Aff. ¶¶ 21-22.

Absent these well-settled and reasonable procedures, if any Senator could simply deem for himself or herself what is and is not privileged, then any Senator could at any time bring any resolution to the floor of the Senate and claim privilege, a process that would lead to chaos and impermissibly render Senate Rule VI, section 9(a), nugatory and meaningless. *Cf., e.g., Sanders v. Winship*, 57 N.Y.2d 391, 396 (1982) ("it is . . . [a] rule of statutory construction that effect and meaning must, if possible, be given to the entire statute and every part and word thereof") (internal quotations and citations omitted). For this reason, the Temporary President *always* has been the gatekeeper for privileged resolutions, whether the Senate was controlled by Democrats *or* Republicans.

Here, because neither Temporary President Smith nor his designee deemed the Libous Resolution privileged, it was not privileged and not properly before the Senate. The Libous Resolution thus was invalid on its face, and Senator Espada cannot be Temporary President. Because Senator Smith is the Temporary President, Secretary Aponte properly reports to Senator Smith.

E. Because the Senate Never Voted That the Libous Resolution Was Privileged, Secretary Aponte Properly Reports to Senator Smith

There was never a vote to overturn the Presiding Officer's ruling that the Libous Resolution was out of order; therefore, the Senate did not and could not properly vote on the Libous Resolution. Respondent hereby incorporates the arguments set forth in the Memorandum of Law in Opposition to the Motion to Dismiss in the *Smith* case. Because the Senate never ruled the Libous resolution in order, the Senate could not vote on the resolution, and Senator

Espada could not become the Temporary President. Because Senator Smith is the Temporary President, Secretary Aponte properly reports to Senator Smith.

F. Because the Senate Adjourned Before Anyone Voted on the Libous Resolution, Secretary Aponte Properly Reports to Senator Smith

The Libous Resolution was never duly passed by a majority of the Senators elected, because the Senate adjourned at the conclusion of the motion deeming the Libous Resolution out of order. The gavel came down; under Senate Rule V, section 8(a), a motion to adjourn takes precedence over all other motions when a question is before the Senate; and under Senate Rule V, section 8(b), a motion to adjourn "shall be decided without debate, and shall always be in order" except under limited circumstances set forth in Senate Rules V, VII and IX – none of which were present here. St. John Aff., ¶ 39. When the Presiding Officer announced that the House was adjourned and gaveled the Senate out of session, the Senate was adjourned and whatever followed was null and void. *Id.*

Because Senators cannot vote after the Senate is adjourned, any purported vote after adjournment was illegal, including any purported vote to elect Senator Espada Temporary President. Because Senator Smith is the Temporary President, Secretary Aponte properly reports to Senator Smith.

G. The Individual Causes of Action Fail On Numerous Other Grounds

All of the causes of action fail for one fundamental reason: Senator Smith is the Temporary President for all the reasons set forth *supra* §§ III(A-F). A number of causes of action fail on other grounds as well.

i. First Cause of Action

In their first cause of action, petitioners claim that they "are entitled access to the Chamber of the New York State Senate in order to perform their duties" and that "the laws of this State require that the doors of the Senate Chamber be, and remain open." Petition ¶¶ 12-13. This claim has no basis and should be dismissed.

In recent weeks, the Senate has not had any sessions other than those called by President Smith. During all these sessions, the doors of the Senate were appropriately open, and Aponte complied with his constitutional duties. At other times – when the Senate was not in session – the doors to the Senate Chamber were not required to be opened, there were no bills under consideration, and there was no need for bill jackets, the PA system, lights, video, or a stenographer. Every session has been open; there have been no secret sessions in the Chamber. But there is plainly no requirement that the Chamber be open when the Senate is not in session. The claim fails.

ii. Second Cause of Action

The second cause of action is premised on the false allegation that a "Regular Session of the New York State Senate was scheduled for June 23, 2009, at 2:00 P.M. in the Senate Chamber." Petition ¶ 21. There was no regular session of the Senate scheduled at that time because President Smith did not call such a session. As Secretary Aponte explained to Minority Leader Senator Dean Skelos, the Senate Chamber was not available on June 23, 2009 at 2 p.m. "[d]ue to the preparation required for the Governor's Extraordinary Session at 3:00 [the same day]." *See* Memorandum from A. Aponte to D. Skelos, June 23, 2009, Ex. D to Petition. As Secretary Aponte noted, "there is time required for the Journal Clerks to prepare for Session and therefore, the Chamber needs to be available for their important task." *Id.* In preparing the Senate for the Governor's Extraordinary Session, Secretary Aponte was faithfully upholding the

New York Constitution by enabling the Governor to carry out his duties. *See* N.Y. Const. Art. IV, § 3. The claim should be dismissed.

iii. Third Cause of Action

The third cause of action, like all the others, is based upon the mistaken premise that Senator Espada is the Temporary President. Because he is not, Secretary Aponte cannot and should not obey the "orders of the [false, self-proclaimed] President Pro Tempore and the Vice President Pro Tempore of the Senate." Petition ¶ 37.

iv. Fourth Cause of Action

The fourth cause of action, by its own terms, is not based on facts or even allegations, but upon a reckless "fear" and speculation concerning hypothetical, future conduct. A petition cannot be granted based upon a completely baseless fear of action that is not even alleged to be probable or imminent.

v. Fifth Cause of Action

Petitioners essentially seek a mandamus to compel the printing and distribution of materials from "sessions" that never occurred. There is absolutely no basis for such a request, which again, assumes that a President (allegedly Senator Espada) called the Senate into session at all. Because Senator Smith is the Temporary President, Secretary Aponte was correct not to print materials from the rump sessions.

CONCLUSION

For these reasons, the request for a preliminary injunction should be denied, the motion to dismiss the Petition should be granted, and the Court should grant all other relief as is just and proper.

Dated: June 25, 2009
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