

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

-----X

In the Matter of

Senator George Winner, and Senator John Flanagan,  
Individually and as members of the New York State Senate :

Index No.: 09/\_\_\_\_\_

-against-

Petitioners, :

Angelo Aponte, individually, and in his official capacity as :  
Secretary of the New York State Senate :

Respondents. :

-----X

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR TEMPORARY  
RESTRAINING ORDER**

EMERY CELLI BRINCKERHOFF  
& ABADY LLP  
75 Rockefeller Plaza, 20th Floor  
New York, New York 10019  
(212) 763-5000

*Attorneys for Defendant*

Defendant Angelo Aponte submits this memorandum of law in opposition to plaintiffs' request for a Temporary Restraining Order.

## 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 in 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 Order to Show Cause 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. These 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, this case is not even close to justiciable. For the reasons set forth in the *Smith* decision, the Court should deny any request for a temporary restraining order and dismiss this case.

## **II. Plaintiffs 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 plaintiffs are suing Mr. Aponte is *because* he reports to Senator Smith, not Senator Espada.

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, plaintiffs failed to join either of the two Senators with the greatest interest in this case.

This suit is brought by the wrong plaintiffs, against the wrong defendant. It 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. CPLR 6313 Bars This Request for a Temporary Restraining Order**

Defendant is a public officer and a Senate official. CPLR 6313(a) provides that “No temporary restraining order may be granted . . . against a public officer . . . to restrain the performance of statutory duties.” On June 11, 2009, this Court held in the *Smith* case that CPLR 6313(a) barred it from issuing a temporary restraining order against a senate official, Senator Espada. For purposes of CPLR 6313(a), the *Smith* case is indistinguishable from the instant action. The case should be dismissed. *See DiFate v. Scher*, 45 A.D.2d 1002 (2d Dep’t 1974) (where Supreme Court issued TRO against public officer, the TRO “was void on its face because the issuing court was without authority to grant it”); *Donnelly v. Roosevelt*, 259 N.Y.S. 355 (N.Y. Sup. 1932) (“A Supreme Court justice . . . has no authority to restrain a state officer from the performance of a duty imposed upon him . . .”).

### **IV. Plaintiffs Fail on the Merits**

If the Court were ever to reach the merits, plaintiffs would plainly lose. For all the reasons set forth in plaintiff Malcolm Smith’s papers in the *Smith* case (all of which are incorporated herein), Senator Smith is the Temporary President of the Senate. Secretary Aponte

is properly fulfilling his duties with Senator Smith as President. The Republican claim the 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.

In addition, defendant is compelled to note the reckless and false accusations in the Petition, for example that he will tempt to "alter and/or destroy" the Senate Journal (paragraph 51). Defendant is a respected public official who, unlike many others in the Senate, has behaved with integrity and honor. The scandalous and reckless accusations in the Petition should be deleted, and in any event, a Petition based on false and reckless predictions of future activity cannot be the basis for a temporary restraining order.

### **CONCLUSION**

For these reasons, the request for a Temporary Restraining Order should be denied, the Petition should be dismissed, and the Court should grant all other relief as is just and proper.

Dated: June 24, 2009  
New York, New York

EMERY CELLI BRINCKERHOFF  
& ABADY LLP  
75 Rockefeller Plaza, 20th Floor  
New York, New York 10019  
(212) 763-5000

By: \_\_\_\_\_  
Andrew G. Celli, Jr.  
Richard D. Emery  
Ilann M. Maazel  
Elora Mukherjee

WILLIAM J. CONBOY  
112 State Street  
Albany, New York 12207  
(518) 447-7117

By: \_\_\_\_\_  
William J. Conboy

*Attorneys for Defendant*