SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA DAVIDS, *et al.*,

Plaintiffs,

- against -

THE STATE OF NEW YORK, *et al.*,

Defendants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant,

SETH COHEN, *et al.*,

Intervenors-Defendants,

PHILIP A. CAMMARATA, *et al.*,

Intervenors-Defendants.

JOHN KEONI WRIGHT, *et al.*,

Plaintiffs,

- against –

THE STATE OF NEW YORK, *et al.*,

Defendants

-and-

SETH COHEN, *et al.*,

Intervenors-Defendants,

PHILIP A. CAMMARATA, *et al.*,

Intervenors-Defendants,

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant.

Consolidated Index No. 101105/14
DCM Part 6

REPLY AFFIRMATION OF JANICE BIRNBAUM

Hon. Alan Marin, J.S.C.

JANICE BIRNBAUM, an attorney duly admitted to practice law before the Courts of the State of New York, affirms pursuant to Rule 2106 of the New York Civil Practice Law and Rules that the foregoing statements are true upon penalty of perjury.

1. I am an Assistant Corporation Counsel for Defendant City of New York ("City") and Defendant/Defendant-Intervenor New York City Department of Education ("DOE") (collectively "Municipal Defendants"), in the above-captioned consolidated actions. I am fully familiar with the facts set forth in this reply affirmation, which is submitted in further support of the Municipal Defendants' motion pursuant to Rule 2201 of the New York Civil Practice Law and Rules staying all trial proceedings pending a determination on the Municipal Defendants' motion for leave to appeal the Second Department's decision and order of March 28, 2018, to the New York Court of Appeals, and if leave is granted, pending a determination by the New York Court of Appeals.

2. I have three points that I would like to make in reply to the *Wright* Plaintiffs' opposition to the Municipal Defendants' motion for a stay. First, in this case of first impression by which plaintiffs seek to strip teachers of the statutory protection of tenure and seniority, if leave to appeal is granted to the Municipal Defendants, the Court of Appeals will be hearing dispositive motions to dismiss and ruling on threshold issues such as lack of justiciability, failure to state a claim, among others. At a minimum, it will be waste of attorney and judicial resources to have defendants file answers and/or have the parties conduct discovery prior to a determination from the appellate proceedings. I further note that in *Campaign for Fiscal Equity, Inc. v. State* ("*CFE*"), the Court of Appeals heard three separate appeals[1] – and specifically remanded back to the trial court after the first appeal denying the motion to dismiss for development of the record. *Id.*, 100 N.Y.2d 893, 902, 769 N.Y.S.2d 106, 107 (2003). Judge

[1] The three decisions issued by the New York Court of Appeals in *Campaign for Fiscal Equity, Inc. v. State* are:
1. 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995) ("*CFE I*");
2. 100 N.Y.2d 893, 769 N.Y.S.2d 106 (2003) ("*CFE II*"); and
3. 8 N.Y.3d 14, 828 N.Y.S.2d 235 (2006) ("*CFE III*").

Minardo similarly stayed the consolidated litigation before this Court to permit completion of the appellate process related to the motions to dismiss, prior to permitting this case to proceed to the filing of answers and discovery.

3. Second, the answers currently due on June 20 apply to *two* amended complaints, not one as posited by the *Wright* plaintiffs, since the *Davids* plaintiffs' verified amended complaint also must be answered. The *Wright* plaintiffs' amended complaint is 25 pages long, with 19 attachments totaling another 370 pages. The *Davids* plaintiffs' verified amended complaint is 18 pages long and cites at least four articles and/or scholarly authorities with hyperlinks. Both amended complaints cite statutes that have been superseded and amended in material ways. For instance, under the current scheme, a teacher is eligible to be considered for tenure after four years, not three. The disciplinary scheme for removing a tenured teacher has been materially revised. Yet plaintiffs have chosen *not* to re-amend their complaints to bring them current. In their current state, both complaints are insufficient to support the injunctive relief requested. Given the pending appellate practice, filing answers at this juncture to the current complaints would be a waste of attorney resources and do little to clarify the various parties' positions concerning material facts.

4. Third, discovery will be anything but ordinary. Even if limited at this juncture to document requests, as suggested by the *Wright* plaintiffs' counsel, discovery is likely to be voluminous. After all, plaintiffs have alleged state-wide claims and have specifically cited the city school district of the City of New York as their prime example of the alleged problems with the teacher tenure system and its alleged effect on the opportunity for City public school students to receive a sound basic education. In *CFE*, discovery was voluminous and extensive. The trial, alone, lasted over seven months, and included the testimony of 72 witnesses and 4,300 exhibits. *CFE II,* 100 N.Y.2d at 902, 769 N.Y.S.2d at 107. Thus even paper discovery promises to be anything but ordinary. Moreover, at this juncture, the ediscovery likely to be sought will probably be staggering and will probably require substantial Court involvement. The cost of

such discovery will ultimately be borne by the City's public fisc and its taxpayers. Moreover, the same is true for the State Defendants (i.e., State of New York, the Board of Regents of the University of the State of New York, and the New York State Education Department).

5. For these reasons and those set forth in the memorandum of law in support of the Municipal Defendants' stay motion dated June 5, 2018, the Municipal Defendants respectfully urge this Court to issue an order staying all discovery and the answers, pending a determination on their motion for leave to appeal the Second Department's decision and order of March 28, 2018, to the Court of Appeals, and if leave is granted, pending a determination by the Court of Appeals.

Dated: New York, New York
June 13, 2018

Janice Birnbaum
Senior Counsel