STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MARIA C. CASATAÑEDA, individually and in her capacity as Mayor of the Village of Brockport, New York, and derivatively on behalf of the VILLAGE OF BROCKPORT, NEW YORK,

PLAINTIFF-PETITIONER,

v.

Index No.:
Justice Assigned:

THE BOARD OF TRUSTEES OF THE VILLAGE OF BROCKPORT, NEW YORK, KENT R. BLAIR, in his capacity as Trustee of the Village of Brockport, New York, SCOTT W. HUNSINGER, in his capacity as Trustee of the Village of Brockport, New York, CAROL L. HANNAN, in her capacity as Trustee of the Village of Brockport, New York, and JOHN R. PARRINELLO,

DEFENDANTS-RESPONDENTS.

MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PROCEEDING AND APPLICATIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIIMINARY INJUNCTION

Respectfully Submitted
FIX SPINDELMAN BROVITZ & GOLDMAN, P.C.
Attorneys for Petitioners-Plaintiffs
Karl S. Essler, Esq., of counsel
Reuben Ortenberg, Esq., of counsel
295 Woodcliff Drive – Suite 200
Fairport, New York 14450
585-641-8000

BACKGROUND

The Petitioner-Plaintiff, Maria C. Castaneda (hereinafter "Mayor" or "Castaneda"), is the duly elected Mayor of the Village of Brockport, New York. She brings this action-proceeding, in both her personal and official capacities, for the purpose of vacating an erroneous and illegal act voted upon by three members of the Village of Brockport Board of Trustees, KENT R. BLAIR, SCOTT W. HUNSINGER and CAROL L. HANNAN, on December 22, 2010. The illegal act of the three above named trustees is the adoption of a resolution authorizing the expenditure of $5,000 of public funds (and leaving the door open for more) for the purpose of engaging private counsel to investigate activity of the Mayor as yet unidentified, and referred to in the enabling resolution as follows:

> Based on information that may or may not be true, that has been forwarded to me by individuals that have requested annominity (*sic*), but are personally known to me, and upon personal knowledge of possible action(s) and/or inaction(s), relative to Mayor Castañeda, I'd like to make the following motion:
> To hire a special counsel, specifically John Parrinello, to investigate any possible inappropriate action(s) and/or inaction(s) of Mayor Castañeda since being elected to the village board, both as a trustee and/or mayor, and determine if any action(s) or inaction(s) should be referred to the State Attorney General and/or any other appropriate governmental entity for appropriate action. That said fees for this investigation shall not exceed $5000 unless specifically authorized by this board. (Emphasis added).

This combined Article 78 Proceeding - Declaratory Judgment action seeks to have the resolution declared void, and the activity authorized by the resolution enjoined. Also sought, pending the hearing and determination of the matter, is a Temporary Restraining

Order, to restrain the Defendant-Respondents from take any action in furtherance of the resolution of December 22, 2010. This Memorandum of Law is submitted in support of the relief sought.

POINT I
THIS COURT IS EMPOWERED TO ISSUE A TEMPRORARY RESTRAINING ORDER PENDING HEARING AND DETERMINATION OF THE MATTER IN ORDER TO PREVENT THE ILLEGAL EXPENDITURE OF PUBLIC FUNDS

As part of this application, the Plaintiff-Petitioner seeks a Temporary Restraining Order (TRO) against the Defendants-Respondents. This Court has the inherent power, and is authorized to issue a TRO directed to public officials and bodies where the issuance is necessary to prevent an illegal act. *See Fortuna v. Prusinowski,* 22 Misc. 3rd 974 (Sup. Ct. Suffolk Cnty. – 2008); *Komyathy v. Board of Education of Wappinger Central Sch. Dist. No. 1,* 75 Misc.2d 859 (Sup. Ct. Dutchess Cnty. – 1973).

As set forth below, as well as in the Complaint-Petition, the Affirmation of Karl S. Essler and the Affidavit of Daniel Kuhn (a Trustee and Vice Mayor who voted against the resolution), submitted herewith, a resolution was "adopted" on December 22, 2010, by the vote of the three named trustees, Blair, Hunsinger and Hannan, using improper procedures, to engage in the ultra vires activity of engaging a private attorney at public expense to conduct an investigation which the Village of Brockport (indeed any village) has no authority to conduct. A TRO is necessary to preserve the status quo by preventing the illegal expenditure of public funds.

POINT II
THE DECEMBER 22nd RESOLUTION IS AN IMPROPER ATTEMPT TO PROVIDE PUBLIC FUNDING TO UNDERWRITE PRIVATE RIGHTS UNDER §36 PUBLIC OFFICERS LAW AND/OR §51 GENERAL MUNICIPAL LAW

Generally, a municipality has no authority to institute or to finance a citizens' action or taxpayer action. *See Inc. Village of Northport v. Town of Huntington,* 199 A.D.2d 242 (2nd Dep't – 1993); *Cooper v. Wertime,* 164 A.D.2d 354 (3rd Dep't – 1990); General Municipal Law §51; *Town of Remsen v. Albright,* 82 Misc. 2d 470 (Sup. Ct. Oneida Cnty – 1974). Nor is it appropriate for a municipality to finance private litigation. Because the New York statutory scheme which provides a mechanism for removal or prosecution of public officials for misconduct has provided that an application for such relief is to be made by a citizen resident or by the district attorney, a municipality does not have the authority to investigate or prosecute such matters. Accordingly, the purported action of the Board of Trustees of Brockport on December 22, 2010, engineered by procedures also challenged here, in engaging an attorney at public expense for the purpose of investigating whether some action should be taken by the Village against one of its elected officials is completely ultra vires for the Village. There is simply no authority for the Village to take such action even if its procedure were beyond question.

Public Officers Law §36 provides that "[a]ny town, village, improvement district or fire district officer, except a justice of the peace, may be removed from office by the supreme court for any misconduct, maladministration, malfeasance or malversation in office. An application for such removal may be made by any citizen resident of such town, village, improvement district or fire district or by the district attorney of the county

in which such town, village or district is located, and shall be made to the appellate division of the supreme court held within the judicial department embracing such town, village, improvement district or fire district. Such application shall be made upon notice to such officer of not less than eight days, and a copy of the charges upon which the application will be made must be served with such notice."

There is no provision in Public Officers Law §36 or elsewhere for a village board of trustees to have the authority to remove any elected official. At 1978 N.Y. Op. Atty Gen. (inf.) 197, 1978 WL 27599 (N.Y.A.G.), the New York Attorney General opined that a town board does not have authority to commence a proceeding for the removal of a town board member under Public Officers Law §36, or to pay for the legal expense of such a proceeding. In reaching his conclusion, the Attorney General wrote, "...the application for removal of an officer under Public Officers Law §36 must be made by 'any citizen resident' or the district attorney of the county, not by the town board.... [I]t would be inappropriate for the legal expense to be paid by the municipality." *Citing Matter of Citizens Council Village of New Hyde Park, Inc.* 55 A.D.2d 911 (2nd Dep't – 1977); *Application of Tompkins*, 11 A.D.2d 895 (3rd Dep't – 1960). In *Matter of Citizens Council, supra,* the Appellate Division construed strictly the provisions of Public Officers Law §36 by holding that the term "citizen resident" does not include a corporation despite the fact that the general membership of the corporation are citizens of the village. The Village of Brockport and its Board of Trustees, acting as such, are no more "citizen residents" than corporations are.

In *Application of Tompkins, supra,* the Appellate Division dismissed a §36 application to remove an elected official because the Special Assistant Attorney General

who brought the proceeding was not authorized by Public Officers Law §36 to bring the proceeding. In so holding, the Appellate Division said, "[t]he court has no power whatever to remove a town officer except as it is expressly conferred by the Legislature, and in accordance with the conditions imposed. Section 36 of the Public Officers Law authorizes us to entertain such an application only when it is made by a citizen resident of the town or the District Attorney of the county." 11 A.D.2d 895 (3rd Dep't – 1960). Again, a village board could not qualify to bring such a proceeding and on that basis, is without authority to finance an investigation designed to determine if such a proceeding should be brought.

Indeed, it is easy to see why the expenditure of public funds for such fishing expeditions is and should be prohibited. Without it, there would no doubt be countless similar attempts by majorities of local legislative bodies to waste municipal funds on meaningless "investigations" of fellow board members whose views did not align with theirs in order to pressure a resignation or to bring the member "into line." That would clearly not be a benefit to the public, particularly when other means to investigate official misconduct exist.

POINT III
THE RESOLUTION WAS "ADOPTED" BY THE BOARD OF TRUSTEES BASED UPON IMPROPER, FATAL PROCEDURES

Basic principles of governmental procedure are premised on the concept that a councilman or trustee applies his or her expertise and philosophy to a particular proposed local law, ordinance or resolution, and makes his or her voice heard as part of the discussion which results in a government decision. In the instant case, the members of the

Board of Trustees of the Village of Brockport were asked to decide whether to approve a resolution authorizing the engagement of private counsel to investigate the Mayor of the Village. The resolution (See Complaint and Petition, par. 10) discloses no grounds, facts or even allegations from which one could intelligently determine whether an issue exists which needs to be addressed in some way.

That the December 22, 2010 Brockport resolution did not identify any basis for its introduction – not even an alleged basis – is compounded by the bizarre fact that whatever formed the basis for the introduction of the resolution, that basis was not shared with all the members of the Board of Trustees. It was almost as if the three trustees who voted for the resolution decided to conduct their own secret government operation merely on the strength of having three votes. It apparently made no difference to this secretive group that two of the people entitled to see the "evidence" underlying the need for this drastic action, and who were entitled to vote on the proposal, were not shown anything.

Keeping from any board members information essential to determine what if any action to take against an elected official subject to removal under Public Officers Law §36, or prosecution under General Municipal Law §51 would deprive Board members of essential information regarding the alleged conduct that might constitute "...misconduct, maladministration, malfeasance or malversation in office", as required by Public Officers Law §36, or the conduct for which prosecutions under GML §51 are authorized.

Though not involving a village board of trustees acting on a resolution, the opinion in *Taub v. Pirnie,* 3 N.Y.2d 188 (1957), is instructive. In *Taub, supra,* a member of the zoning board of appeals had been absent from a hearing and had not read a transcript of the proceedings. Nevertheless, the Court of Appeals was satisfied that he had

full knowledge of the problems presented by the request for variance, and thus the board member's vote was held not to be objectionable. The court said, however, "...there is presented a decision by a board, each member of which had full access to all information necessary for an informed decision....Under the circumstances, ...no basis exists for finding the vote of [absent member] objectionable or for upsetting the determination of the board." *Taub v. Pirnie,* 3 N.Y.2d 188 at 195, 196. In the case at bar, however, the precise opposite is the case. Two of the three board members did not have full access to all information necessary for an informed decision. Only the three board members who had apparently met secretly beforehand, in violation of the Open Meetings Law, had any information as to the basis for the resolution, and as to information upon which Board members were asked to make an intelligent, informed decision. Under the circumstances of this case, the resolution adopted by a procedure which excluded two of the five board members from receiving necessary information should not be allowed to stand.

POINT IV
THE RESOLUTION IS THE PRODUCT OF A SECRET MEETING OF A QUORUM OF THE BOARD OF TRUSTEES, HELD IN VIOLATION OF THE OPEN MEETINGS LAW AND SHOULD BE HELD TO BE VOID

Public Officers Law §105 requires that executive sessions of the board of trustees be noticed at public meetings and be limited to specific subjects. No board member may be excluded from an executive session. Nor are the requirements of the Open Meetings Law limited to formal meetings. *See Orange County Publications et al v. Council of the City of Newburgh,* 60 A.D.2d 409, aff'd 45 N.Y.2d 947 (1978); *Goodson Todman Enterprises, Ltd. v. City of Kingston,* 153 A.D.2d 103 (3rd Dep't – 1990).

The staff of the State of New York Department of State Committee on Open Government, in its advisory opinion No. OML-AO-4534, after discussing the *Orange County, supra,* and *Goodson Todman, supra*, cases, as well as unreported *Cheevers v. Town of Union,* 1998 WL 35314685, concluded that serial telephone calls, or e-mails among board members involves action taken by a board, are therefore just as subject to the requirements of the Open Meetings Law as formal in person meetings. Interestingly, *Cheevers, supra,* involved a town board consisting of five members. One member contacted another via telephone, who in turn contacted a third, and that member contacted a fourth member. Together the four members drafted a letter, had it published and submitted a voucher for payment to a newspaper. The fifth board member, who had not been contacted, claimed that the serial telephone activity constituted a meeting subject to the Open Meetings Law. The court agreed.

The three secretive board members herein, Blair, Hunsinger and Hannan, who constitute a quorum of the Board of Trustees, obviously met, in person or otherwise, sometime prior to the December 22, 2010 public meeting of the Board of Trustees and presumably communicated with Mr. Parrinello as well. The introduction and adoption of the subject resolution could not have occurred as it did, without discussion, if the secretive trustees had not conferred on the resolution in advance, and if they had not also conferred with the attorney they intended to engage. Defendants-Respondents Blair, Hunsinger and Hannan failed, however to hold such meeting in conformity with the requirements of the Open Meetings Law, and they failed to include all members of the Board (*See* Kuhn Affidavit).

CONCLUSION

For the reasons set forth, the relief sought in this action/proceeding should be granted in all respects.

Dated: January 4, 2011

Respectfully Submitted
FIX SPINDELMAN BROVITZ & GOLDMAN, P.C.
Attorneys for Petitioners-Plaintiffs

By:_____
Karl S. Essler, Esq.
Reuben Ortenberg, Esq.
295 Woodcliff Drive – Suite 200
Fairport, New York 14450
585-641-8000