

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

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In the Matter of the Application of

FEMINISTS CHOOSING LIFE OF NEW YORK, INC.,

and

KELLY BRUNACINI, PATRICIA CLAWSON,
CAROL CROSSED, MARY MAHER,
MARGARET RUSCIO, and
MARGARET GORDON SMERBECK,
Individually and as Board Members of FEMINISTS
CHOOSING LIFE OF NEW YORK, INC.,

Petitioners,

-- against --

EMPIRE STATE STEM CELL BOARD,

and

RICHARD F. DAINES, M.D., as COMMISSIONER OF
THE NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents.

VERIFIED PETITION

Index No. ____/2009

8594/2009

Petitioners Feminists Choosing Life of New York, Inc. ("FCLNY") and Kelly Brunacini, Patricia Clawson, Carol Crossed, Mary Maher, Margaret Ruscio, and Margaret Gordon Smerbeck, individually and as Board Members of FCLNY, by their attorneys, Thomas J. Marcelle, Esq. and Kathleen M. Scanlon, Esq., as and for their Verified Petition, respectfully allege as follows:

NATURE OF PROCEEDING

1. In 2007, the New York State Legislature enacted a new Title V-A to Article 2 of the Public Health Law (the "Stem Cell Act") which committed \$600 million to be spent on stem

cell research.

2. The Legislature did not itself decide how the money would be spent. Instead, they created the Respondent Empire State Stem Cell Board (“ESSCB” or the “Board”) “for the purpose of administering the empire state stem cell trust fund” pursuant to State Finance Law § 99(p) (the “Fund”) and “empowered” the ESSCB “to make grants to basic, applied, translational or other research and development activities that will advance scientific discoveries in fields related to stem cell biology.” Pub. Health L. § 265-a(1).

3. The Stem Cell Act expressly provides that “[n]o grants made available in the fund from any source shall be directly or indirectly utilized for research involving human reproductive cloning.” Pub. Health L. § 265-a(2).

4. On June 11, 2009, the ESSCB passed a “Resolution” allowing state grants made under the Fund to be used for payments to “women donating oocytes solely for research purposes” (the “Payment for Eggs Program”). See ESSCB Resolution dated June 11, 2009, attached as Exhibit A (“June 11, 2009 Resolution”).

5. New York State is the first U.S. State to use taxpayer money to pay women who donate their eggs (called “oocytes”) for stem cell research and has no precedent to guide it in terms of the liability it is assuming for any future medical costs and other injuries suffered by women donors. The donation of eggs involves serious health risks, including, but not limited to, ovarian hyper-stimulation, clotting disorders, kidney damage, ovarian twisting, pulmonary embolism, damage to future reproductive ability, and stroke.

6. The use of taxpayer funds has been improperly delegated under the Payment for Eggs Program, including the delegation by ESSCB itself of the amounts of permissible payments to women for their eggs to “guidelines” promulgated by a private organization that is not

affiliated with, or accountable to, New York State.

7. Respondents created the Payment for Eggs Program without sufficient regard for the prohibition against taxpayer funding that will be “directly or indirectly utilized for research involving human reproductive cloning” in violation of the Stem Cell Act, Pub. Health L. § 265-a(2).

8. Because the funding mechanism created under the Stem Cell Act and the Payment for Eggs Program is both contrary to New York State law and unconstitutional, Petitioners, pursuant to CPLR Article 78 and CPLR 3001, seek an Order declaring that the creation of the ESSCB and the manner in which its members are appointed is in violation of the New York State Constitution and separation of powers doctrine, invalidating the June 11, 2009 Resolution and/or otherwise enjoining Respondents from making grants or otherwise authorizing spending for research on stem cell lines derived from using female human eggs where the donor was, or will be, compensated with state funds.

PARTIES AND VENUE

9. Petitioner FCLNY is a domestic, not-for-profit corporation registered in the State of New York. FCLNY is a pro-woman and pro-life, nonpartisan and nonsectarian, organization whose mission and purpose is to provide a voice for the rights of women in New York State and for a consistent life ethic from conception to natural death through education, advocacy, and outreach efforts.

10. FCLNY supports stem cell research that is ethical, legal and constitutional.

11. FCLNY brings this proceeding on behalf of its members, which include women and taxpayers of the State of New York.

12. Petitioners Kelly Brunacini, Patricia Clawson, Carol Crossed, Mary Maher,

Margaret Ruscio, and Margaret Gordon Smerbeck are members of the board of FCLNY and are each residents and taxpayers of the State of New York.

13. Respondent ESSCB is a state entity created by the New York State Legislature in 2007 with the enactment of the Stem Cell Act.

14. Respondent Richard F. Daines, M.D. is the Commissioner of the New York State Department of Health. Respondent Daines chairs the ESSCB and serves as an *ex officio* member of the Board.

15. Venue in Albany County is proper for this special proceeding pursuant to CPLR 506(b).

CREATION OF THE ESSCB

16. In 2007, the New York State Legislature committed \$600 million to be spent pursuant to the Stem Cell Act.

17. The Legislature did not itself decide how the money would be spent.

18. Instead, they created the Fund and an entity within the Department of Health, the ESSCB, to spend monies from the Fund. Public Health Law § 265-a(1).

19. The ESSCB is “empowered, subject to annual appropriations and other funding authorized or made available, to make grants to basic, applied, translational or other research and development activities that will advance scientific discoveries in fields related to stem cell biology.” Public Health Law §265-a(1).

20. The ESSCB has 13 members — six (6) members are appointed by the Governor, six (6) members are appointed on the nomination of Legislative leaders, and the Commissioner of the Department of Health (Respondent Daines), who chairs the Board and serves as an *ex officio* member. Public Health Law § 265-b(1).

21. The Legislature explicitly prohibited the ESSCB from using any state monies from the Fund for grants “directly or indirectly” involving “human reproductive cloning.” Public Health Law § 265-a(2).

22. The phrase “human reproductive cloning” is not defined in the Stem Cell Act.

**ESSCB ADOPTS A RESOLUTION TO FUND
THE PURCHASE OF HUMAN FEMALE EGGS FOR “RESEARCH PURPOSES”**

23. On or about June 11, 2009, the ESSCB approved the Payment for Eggs Program and its funding of research on stem cell lines derived from female human eggs where the donor was, or will be, compensated from monies in the Fund by adopting the June 11, 2009 Resolution.

24. The June 11, 2009 Resolution provides in part that:

. . . the Ethics Committee recommends that the Funding Committee adopt changes to the standards for hESC research with regard to the compensation of donors appended to all NYSTEM contracts, to add language to the effect that:
“Contractors may conduct research involving the use of stem cell lines or deriving new stem cell lines, in which women donating oocyte solely for research purposes have been, or are being, reimbursed for out-of-pocket expenses, including payments for travel, housing, medical care, child care and similar expenses incurred as a result of donation of the oocytes for research purposes and compensated for the time, inconvenience and burden associated with the donation in a manner consistent with the New York standards applicable to women who donate oocytes for reproductive purposes and in an amount not to exceed the payments permitted by the guidelines of the American Society of Reproductive Medicine. Payments made to oocyte donors in accordance with the provisions of this section are an allowable expense under this contract. If reimbursement for oocyte donation is provided, there must be a detailed and rigorous review by the ESCRO Committee, and the IRB, if required, to ensure that reimbursement of direct expenses and/or other compensation do not constitute an undue inducement. At no time should financial consideration of any kind be given for the number or quality of the oocytes themselves that are provided for research.”

(Ex. A) (emphasis added).

25. By virtue of the June 11, 2009 Resolution, New York became the first U.S. State to allow taxpayer money to be used for paying women who donate their eggs for stem cell research. None of the other 12 U.S. states that currently finance stem cell research allow taxpayer money to be used for this purpose.

26. The June 11, 2009 Resolution and accompanying Statement of the ESSCB does not address the limitation on funding contained in the Stem Cell Act barring the use of any monies for research that “directly” or “indirectly” involves human reproductive cloning.

**THE JUNE 11, 2009 RESOLUTION CONTAINS NO SAFEGUARDS
TO ENSURE THAT FUNDS WILL NOT BE USED IN MANNER
THAT “DIRECTLY” OR “INDIRECTLY” APPLIES TO RESEARCH
INVOLVING HUMAN REPRODUCTIVE CLONING**

27. Neither the June 11, 2009 Resolution nor the accompanying Statement contain any standards, guidelines or safeguards to ensure that the funding of research on stem cells line derived from using compensated-for eggs will not be “directly or indirectly utilized for research involving human reproductive cloning” as required by the Stem Cell Act.

28. On information and belief, the use of stem cells line created by oocytes in the Payment for Eggs Program violates the prohibition against the use of state taxpayer funds that “directly” or “indirectly” apply to research on “human reproductive cloning.”

29. On information and belief, stem cell lines derived from human female eggs in the Payment for Eggs Program require the creation of a human embryo either by means of cloning using somatic cell nuclear transfer (“SCNT”) or fertilization with a sperm (in vitro fertilization).

30. On information and belief, after a human egg undergoes SCNT, it can be stimulated by electrical charges or chemical impulses whereby the egg begins to divide and

develop into an embryo that is identical to the person (or animal) of the cell used in the SCNT. Dolly the Sheep was produced by such a cloning method.

31. On information and belief, the resulting human clone produced using SCNT for research purposes is no different from a clone produced for any other purpose – including “human reproductive purposes.” The only difference is one of subjective intent for the clone’s end purpose.

32. On information and belief, using cloned embryos to investigate the basis of disease in adults and children will often, if indeed not always, require that the embryos undergo maturation. On information and belief, when a human embryo is cloned and if it is implanted into an artificial uterus (which are under development), the embryo may then develop to the point that tissues and organs will be harvested from the developing human embryo.

33. Although the Stem Cell Act prohibits the use of funds that “directly” or “indirectly” apply to research on “human reproductive cloning,” the ESSCB has set forth no guidelines, safeguards, prohibitions, or any type of scrutiny to ensure that this limitation is not breached in the use of female eggs from the Payment for Eggs Program when the eggs are used to create embryos by cloning using SCNT.

AS AND FOR A FIRST CLAIM FOR RELIEF

34. Petitioners repeat and reallege the preceding allegations with the same force and effect as if set forth fully herein.

35. The creation of ESSCB and the manner in which its members are appointed was done in violation of the New York State Constitution and the separation of powers doctrine.

36. ESSCB has neither the power to spend or administer State monies nor the power to adopt and implement resolutions. Consequently, the June 11, 2009 Resolution is void.

37. ESSCB itself further impermissibly delegated the amount of payments permissible under the Payment for Eggs Program to “an amount not to exceed the payments permitted by the guidelines of the American Society of Reproductive Medicine.” June 11, 2009 Resolution. (See also *American Society of Reproductive Medicine, Financial Compensation of Oocyte Donors*, 88 Fertility & Sterility 305 (stating that “at this time sums of \$5,000 or more require justification and sums above \$10,000 are not appropriate”)).

38. ESSCB is operating in violation of the New York State Constitution and has and/or is about to expend state money without legal authority.

39. Petitioners are entitled to judgment declaring that the ESSCB and the manner in which its members are appointed is in violation of the New York State Constitution and the separation of powers doctrine and invalidating the June 11, 2009 Resolution on the same grounds.

AS AND FOR A SECOND CLAIM FOR RELIEF

40. Petitioners repeat and reallege the preceding allegations with the same force and effect as if set forth fully herein.

41. Public Health Law § 265-a(2) restrains the ability of ESSCB to authorize grants of state funds.

42. In particular, Section 265-a(2) provides that “[n]o grants made available in the fund from any source shall be directly or indirectly utilized for research involving human reproductive cloning.”

43. Respondents’ enactment of the June 11, 2009 Resolution which provides funding for the purchase and use of human eggs to produce embryonic stem cells fails to create any safeguards to ensure that State monies are not utilized “directly” or “indirectly” for research

involving “human reproductive cloning.”

44. Respondents’ enactment of the June 11, 2009 Resolution was arbitrary and capricious, in excess of their statutory authority, and constituted an abuse of discretion.

45. Accordingly, Petitioners are entitled to judgment annulling the June 11, 2009 Resolution and preventing its enforcement.

AS AND FOR A THIRD CLAIM FOR RELIEF

46. Petitioners repeat and reallege the preceding allegations with the same force and effect as if set forth fully herein.

47. Respondents created the Payment for Eggs Program without themselves sufficiently ensuring informed consent and other necessary safeguards to protect women in New York State from the serious health risks involved in the egg extraction procedure, including, but not limited to, ovarian hyper-stimulation, clotting disorders, kidney damage, ovarian twisting, pulmonary embolism, damage to future reproductive ability, and stroke.

48. The Payment for Eggs Program provides significant monetary inducements to women to engage in this painful and risky procedure, which in part disproportionately appeals to economically vulnerable women who may not meet the “profile” required to receive private payments for their eggs to be used for in vitro fertilization purposes.

49. The June 11, 2009 Resolution fails to satisfactorily provide for informed consent and other safeguards to ensure adequate disclosure to women of the risks of egg harvesting. There are no studies on the long-term safety effects of the medications and procedures used to extract eggs via hormonal stimulation, including the types, duration, and severity of side effects, as well as associated risks for other medical conditions. For this reason, researchers cannot fully inform donors of the risks of egg harvesting, making the woman’s consent incomplete and of

dubious validity.

50. Moreover, Respondents in adopting the Payment for Eggs Program are needlessly exposing women to the pain and health risk of having their eggs extracted for embryonic stem cell research when, on information and belief: (i) adult stem cell research has already led to treatments and therapies for Alzheimer's disease, bone cancer, brain damage, leukemia, diabetes, eye degeneration, heart disease, immune system disorders, kidney/liver problems, MS, MD, Parkinson's disease, spinal cord injuries and burn traumas; (ii) adult stem cells, amniotic stem cells and umbilical cord blood cells are plentiful and their collection is safe, non-evasive and completely ethical; and (iii) no exploitation of women or pre-born humans is required for research involving adult stem cells.

51. New York State is the first U.S. State to use taxpayer money to pay women who donate their eggs for stem cell research and has no precedent to guide it in terms of the liability it is assuming for any future medical costs and other injuries suffered by women donors.

52. Use of New York State taxpayer funds for the Payment of Eggs Program exposes New York State taxpayers to future open-ended liability for injuries suffered by women who participate in the Payment for Eggs Program.

53. Accordingly, Petitioners are entitled to judgment invalidating the June 11, 2009 Resolution because the Payment for Eggs Program constitutes a wrongful expenditure and misappropriation of state funds within the meaning of State Finance Law § 123-b.

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that this Court issue an Order: (1) declaring that the creation of the Empire State Stem Cell Board and the manner in which its members are appointed was done in violation of the New York State Constitution and the separation of powers doctrine; (2) declaring that Respondents have no

authority to adopt a resolution to use, spend or administer State funds; (3) declaring that Respondents acted in excess of their jurisdiction by adopting the June 11, 2009 Resolution which is described in the Petition herein; (4) enjoining Respondents from granting, spending or utilizing State money for the implementation of the June 11, 2009 Resolution; (5) annulling the June 11, 2009 Resolution of the ESSCB; (6) granting Petitioners' costs and attorneys' fees as provided under State Finance Law § 123-g; and (7) granting such further and different relief that the Court deems just and proper.

Dated: Albany, New York
October 9, 2009

By /s/ Thomas J. Marcelle
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ATTORNEY VERIFICATION

The undersigned affirms and verifies the foregoing is true, except as to matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true. The grounds for my belief are the examination of the papers in this case and conversations with witnesses, and events. The reason for Attorney Verification is that Petitioners are not in the county where their attorney has his office.

Dated on this 9th day of October 2009,

/s Thomas J. Marcelle
Thomas J. Marcelle, Esq.

**Resolution of the Funding Committee
Regarding Recommended Standards
For the Compensation of Women
Donating Oocytes Solely for Research Purposes
June 11, 2009**

On June 11, 2009, the Funding Committee adopted the following resolution recommended by the Ethics Committee on May 12, 2009, as modified by a subsequent resolution of the Ethics Committee on June 11, 2009:

In recognition of the fact that New York State currently permits compensation for oocyte donation for reproductive purposes for expenses and for time, inconvenience and burden, and such compensation is widely considered to be ethically permissible, and since there is no significant difference in the risks associated with oocyte donation solely for research purposes and oocyte donation for reproductive purposes and the lack of certain types of payment to oocyte donors for research purposes can serve as an impediment to furthering stem cell research, the Ethics Committee recommends that the Funding Committee adopt changes to the standards for hESC research with regard to the compensation of donors appended to all NYSTEM contracts, to add language to the effect that:

“Contractors may conduct research involving the use of stem cell lines, or deriving new stem cell lines, in which women donating oocytes solely for research purposes have been, or are being, reimbursed for out-of-pocket expenses, including payments for travel, housing, medical care, child care and similar expenses incurred as a result of the donation of the oocytes for research purposes and compensated for the time, inconvenience and burden associated with the donation in a manner consistent with the New York standards applicable to women who donate oocytes for reproductive purposes and in an amount not to exceed the payments permitted by the guidelines of the American Society of Reproductive Medicine. Payments made to oocyte donors in accordance with the provisions of this section are an allowable expense under this contract.

If reimbursement for oocyte donation is provided, there must be a detailed and rigorous review by the ESCRO Committee, and the IRB, if required, to ensure that reimbursement of direct expenses and/or other compensation do not constitute an undue inducement.

At no time should financial consideration of any kind be given for the number or quality of the oocytes themselves that are provided for research.”