No. APL-2015-00125

Supreme Court, New York County, Index No. 159160/2012

State of New York
Court of Appeals

EILEEN BRANSTEN, Justice of the Supreme Court
of the State of New York, et al.,

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK,

Defendant-Appellant.

RECORD ON APPEAL – VOLUME II (R245-R429)

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ADDITIONAL STATEMENT PURSUANT TO C.P.L.R. 5531

6A. This appeal is taken from the Judgment entered May 1, 2015 in Office of the Clerk of New York County. The Notice of Appeal was filed May 4, 2015.

[*No document reproduced on this page*]

Sweeny, J.P., Renwick, Freedman, Gische, JJ.

11881 Eileen Bransten, etc., et al., Index 159160/12
Plaintiffs-Respondents,

-against-

The State of New York,
Defendant-Appellant.

____

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for appellant.

Stroock & Stroock & Lavan LLP, New York (Alan M. Klinger of counsel), for respondents.

____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 21, 2013, which denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs, who are sitting and retired members of the New York State Judiciary, seek a declaratory judgment and injunctive relief stating that the State's recent decrease in its contribution to the cost of judges' health care insurance premiums violates the Compensation Clause of the New York State Constitution (NY Const. art VI, § 25[a]) which provides "compensation [of a judge] shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed."

Defendants move to dismiss the complaint pursuant to CPLR 3211 for failure to state a claim. We hold that the reduced

contribution, which in turn increased the amounts withheld from judicial salaries, constitutes an unconstitutional diminution of judicial compensation and deny the motion to dismiss.

The reduction in contribution to health insurance premiums occurred in 2011, when the State, faced with a serious budget shortfall, threatened to lay off thousands of workers unless unionized employees made wage and benefit concessions that included bearing more of the cost of their health care insurance. While negotiations with unionized employees were underway, the Legislature in August 2011 amended Civil Service Law § 167.8 (Section 167.8) to authorize the Civil Service Department, with the State Budget Director's approval, to reduce the State's contribution to health care insurance premiums not only for unionized employees who had agreed to the reductions through collective bargaining, but also for some nonunionized employees.

Section 167.8, as amended, separated State employees into three categories. First, the State's decreased contribution was imposed on unionized employees who, through collective bargaining, had agreed to the reduction in exchange for immunity from layoffs. Second, State premium contributions remained unchanged for unionized employees who had rejected the reductions, but those employees remained vulnerable to layoffs. Third, reductions were imposed on nonunionized employees without

their consent in exchange for which those employees were also promised immunity from layoffs.

The statute was silent as to whether the reductions applied to judges. However, in September 2011, the Civil Service Department promulgated rules reducing State contributions for healthcare insurance premiums for individuals designated as managerial or confidential or otherwise excluded from collective bargaining within the meaning of the Taylor Law (Civil Service Law article 14). Members of the judiciary fell within this category. In accordance with the new rules, in September 2011 the State notified judges that it would reduce its contribution to sitting judges' premiums by 6% and reduce its contributions to retired judges' premiums by 2%.

Plaintiffs now seek a permanent injunction against the reductions based on a declaration that the amendment to Section 167.8, as applied to them, violates the Compensation Clause of the New York State Constitution, which prohibits diminution.

In its motion to dismiss for failure to state a claim, the State argues that the Compensation Clause does not prohibit the State from decreasing its contributions to the insurance premiums because any reduction to judicial compensation was "indirect" and nondiscriminatory. Denying the motion, Supreme Court found that the State's reduced contribution amounted to a direct diminution

of judicial compensation because it increased the amount withheld from judicial salaries. The court further held that the amendment to Section 167.8 was discriminatory as applied to judges because they were differently situated from other state employees.

On appeal, defendant does not argue that reducing its contribution to insurance premiums did not directly diminish judges' compensation. Instead, the State first argues that its contribution to judges' health insurance premiums are not "compensation" within the meaning of the Compensation Clause.[1] However, it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits. This Court has recognized that judicial "compensation" under the Compensation Clause includes both "the pay scale and benefits" (*Larabee v Governor of State of N.Y.*, 65 AD3d 74, 85-86 [1st Dept 2009], *mod on other grounds sub nom Matter of Maron v Silver*, 14 NY3d 230 [2010]), and the Second Department has expressly found that health insurance benefits are a component of a judge's compensation (*see Roe v Board of Trustees of the Vil. Of Bellport*, 65 AD3d 1211 [2d Dept 2009]

[1]Defendant did not make this argument below, but this Court can consider new arguments on appeal that present pure questions of law (*DiFigola v Horatio Arms*, 189 AD2d 724 [1st Dept 1993]).

[striking down legislation terminating health insurance provided to a village justice during his term of office]).

As applied to New York judges, the amended Section 167.8 subjects them to discriminatory treatment also in violation of the state Compensation Clause. In its implementation, the amended statute affects judges differently from virtually all other State employees, who either consented to the State's reduced contribution in exchange for immunity from layoffs or were otherwise compensated by the State's promise of job security. Unlike other State employees, judges were forced to make increased contributions to their health care insurance premiums, without receiving any benefits in exchange. The judiciary had no power to negotiate with the State with respect to the decrease in compensation, and received no benefit from the no-layoffs promise, because their terms of office were either statutorily or constitutionally mandated. Thus, Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they received no compensatory benefit.

New Jersey judges were recently faced with a similar situation. The New Jersey Constitution also prohibits diminution of judicial compensation although it uses the word "salary" instead of "compensation." In *DePascale v State* (211 NJ 40 [NJ

2012]), the New Jersey Supreme Court found that the term "salary" encompassed contributions to judges' health care insurance premiums and, accordingly, that New Jersey's reduced contribution to the premiums of sitting judges violated the state's Compensation Clause (*DePascale* at 43).

Defendant argues that, even if the State's reduced contribution to judges' insurance premiums constitutes a diminution of their compensation, the reduction is permissible under *United States v Hatter* (532 US 557 [2001]) because *Hatter* permitted imposition of a Federal Medicare tax on judges. We find to the contrary because *Hatter* also found that under the Compensation Clause of the United States Constitution, which prohibits reductions in compensation, judges could not be subject to a Social Security tax.

In *Hatter*, the question before the Supreme Court was whether the Compensation Clause precluded the federal government from imposing Medicare and Social Security taxes on already sitting federal judges when it extended imposition of those taxes to all federal employees. The Supreme Court found that applying the Social Security tax to sitting Federal judges violated the Federal Compensation Clause because it effectively singled out federal judges for unfavorable treatment in comparison to other government employees. The 1983 law at issue permitted about 96%

of all federal workers who were employed when the statute took effect to opt out of the Social Security system and avoid paying Social Security taxes. Of the remaining 4% of the then-current federal employees, all of whom were high-ranking employees and almost all of whom were paying into a pension system, the new federal law permitted that group to join the Social Security program without paying more than they had been contributing to their existing pension system (*id.* at 572-579).

But, the statutory scheme left a subset of employees, virtually all of whom were sitting federal judges, in an anomalous position. These employees were required to pay Social Security taxes even though previously they had participated in a noncontributory pension plan. Because the law imposed unique burdens on federal judges, the Supreme Court held, its application violated the Federal Compensation Clause (*id.*).

Defendant argues that the amendment to Section 167.8 is akin to that aspect of a 1982 law that extended the Medicare tax to all employees and was upheld in *Hatter*, (532 US at 561). But that argument is without merit because that tax is similar to an across the board income tax imposed upon all citizens, regardless of who employs them.

Like the 1983 law that was considered in *Hatter*, the effect of the amendment to Section 167.8 on New York's judges uniquely

and detrimentally affects the judiciary and diminishes its compensation. As has been discussed, the increased withholding sustained by judges was not imposed uniformly upon all state employees, much less upon all employees in general. The increased deduction here is therefore more akin to the Social Security tax which the Supreme Court struck down than it is to the Medicare tax which the Supreme Court upheld (*see Larabee*, 65 AD3d at 85-87).

Accordingly, defendant's motion to dismiss was properly denied.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 6, 2014

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, PHYLLIS ORLIKOFF FLUG, Justice of the Supreme Court of the State of New York, MARTIN J. SCHULMAN, Justice of the Supreme Court of the State of New York, F. DANA WINSLOW, Justice of the Supreme Court of the State of New York, BETTY OWEN STINSON, Justice of the Supreme Court of the State of New York, MICHAEL J. BRENNAN, Justice of the Supreme Court of the State of New York, ARTHUR M. SCHACK, Justice of the Supreme Court of the State of New York, BARRY SALMAN, Justice of the Supreme Court of the State of New York, JOHN BARONE, Justice of the Supreme Court of the State of New York, ARTHUR G. PITTS, Justice of the Supreme Court of the State of New York, THOMAS D. RAFFAELE, Justice of the Supreme Court of the State of New York, PAUL A. VICTOR, retired Justice of the Supreme Court of the State of New York, JOSEPH GIAMBOI, retired Justice of the Supreme Court of the State of New York, THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, INC. and JOHN AND MARY DOES 1-2000, current and retired Judges and Justices of the Unified Court System of the State of New York

Plaintiffs,

-against-

STATE OF NEW YORK.

Defendant.

Index No: 159160/12

Justice C. Edmead

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Alan M. Klinger, dated December 4, 2014, the Exhibits annexed thereto, and the Memorandum of Law in Support of the Motion, Plaintiff will move this Court in the Submissions Part, Room 130, at 60

Centre Street, New York, New York, on the 9th Day of January, 2015 at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order pursuant to CPLR 3212, granting Plaintiff's request for declaratory judgment that L 2011, c. 491 § 2 and amended Civil Service Law § 167.8 is unconstitutional as applied to judges and justices of the Unified Court System.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 2214(b), answering papers, if any, are required to be served upon the undersigned counsel at least seven (7) days before the return of this motion.

Dated: December 4, 2014
New York, New York

STROOCK & STROOCK & LAVAN LLP

BY: /s/ Alan M. Klinger
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Joseph L. Forstadt
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Counsel for Plaintiffs

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, PHYLLIS ORLIKOFF FLUG, Justice of the Supreme Court of the State of New York, MARTIN J. SCHULMAN, Justice of the Supreme Court of the State of New York, F. DANA WINSLOW, Justice of the Supreme Court of the State of New York, BETTY OWEN STINSON, Justice of the Supreme Court of the State of New York, MICHAEL J. BRENNAN, Justice of the Supreme Court of the State of New York, ARTHUR M. SCHACK, Justice of the Supreme Court of the State of New York, BARRY SALMAN, Justice of the Supreme Court of the State of New York, JOHN BARONE, Justice of the Supreme Court of the State of New York, ARTHUR G. PITTS, Justice of the Supreme Court of the State of New York, THOMAS D. RAFFAELE, Justice of the Supreme Court of the State of New York, PAUL A. VICTOR, retired Justice of the Supreme Court of the State of New York, JOSEPH GIAMBOI, retired Justice of the Supreme Court of the State of New York, THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, INC. and JOHN AND MARY DOES 1–2000, current and retired Judges and Justices of the Unified Court System of the State of New York Plaintiffs, -against- STATE OF NEW YORK. Defendant.	Index No.: 159160/12 Justice C. Edmead **AFFIRMATION OF ALAN M. KLINGER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

ALAN M. KLINGER, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am a member of Stroock & Stroock & Lavan LLP, counsel for Plaintiffs Honorable Eileen Bransten, Honorable Phyllis Orlikoff Flug, Honorable Martin J. Schulman, Honorable F. Dana Winslow, Honorable Betty Owen Stinson, Honorable Michael J. Brennan, Honorable Arthur M. Schack, Honorable Barry Salman, Honorable John Barone, Honorable Arthur G. Pitts, Honorable Thomas D. Raffaele, Honorable Paul A. Victor and Honorable Joseph Giamboi, the Association of Justices of the Supreme Court of the State of New York, the Supreme Court Justices Association of the City of New York, Inc. current and retired Justices of the Supreme Court of the State of New York (collectively, "Plaintiffs").

2. Plaintiffs seek an order pursuant to CPLR 3212 granting summary judgment against the defendant State of New York.

BACKGROUND

3. In 2011, in the face of asserted fiscal difficulties, the State attempted to resolve the status of two distinct groups with respect to the cost of health care. One group consisted of 173,000 state employees (both 161,000 unionized and 12,000 managerial and confidential), the vast majority of whom were asked to help defray health care costs in the context of collective bargaining over wages and other terms and conditions of employment. The largest state employee unions accepted this deal in exchange for a promise of no layoffs for the duration of the agreement.

4. The second group consisted of 1,200 state judges and justices. Members of the Judiciary had not received a raise in over a decade, and the year prior the State had enacted L. 2010, Ch. 567 (the "Salary Commission Law") to create a special commission on judicial compensation. The Commission was to examine, evaluate and make findings every four years

with respect to judicial compensation. In August 2011, the Commission issued a final report, annexed as Exhibit A.

5. In August 2011, the Legislature amended Civil Service Law §167.8 in order to implement the bargain reached with unionized employees. As the State concedes, the amendments to Section 167.8 also extended substantially similar terms to unrepresented employees, including members of the Judiciary, and left unchanged premium contributions for unionized employees who rejected the deal. Governor's Program Bill, L 2011, c. 491, § 2; see also Defendant's Motion to Dismiss, annexed as Exhibit B, at 5. On September 27, 2011, the Civil Service Department proposed rules to implement Section 167.8. N.Y. St. Reg. CVS-41-11-00007-E.

6. On September 30, 2011, the Office of Judicial Support notified current and retired judges and justices that they, too, despite the absence of any of the benefits of the "bargain," would have to pay more for health care health benefits provided through the New York State Employee Health Insurance Plan ("NYSHIP") because the State would be decreasing its contributions to premiums on their behalf. (Affidavit of Honorable Philip R. Rumsey, annexed as Ex. C, ¶ 2 & attach. 1).

7. Plaintiffs sought an injunction and declaratory judgment that Section 167.8 as applied to judges and justices is a violation of the Compensation Clause. (Complaint, annexed as Exhibit D). The State moved to dismiss the Complaint. By Decision and Order dated May 21, 2013, this Court denied the State's motion. (Decision of Supreme Court, New York County, annexed as Exhibit E) [hereinafter, "Bransten I, Ex. E"]. Rejecting the State's claim that Section 167.8 was non-discriminatory and that the subsequent salary increase cured the violation, the

Court determined that the amended statute effectuated a "direct diminishment" of judicial compensation and in the alternative, discriminated against judges. (See Bransten I, Ex. E). This Court also explained that "[i]t is beyond cavil that 'compensation' in the context of one's employment constitutes more than mere wages….Health benefits are as much compensation, when the benefits are more critical and carry as much weight as the salary itself." (Bransten I, Ex. E, at 11-12).

8. On September 3, 2013, the State appealed to the Appellate Division, First Department, arguing that (i) the Compensation Clause does not cover health insurance premiums and (ii) Section 167.8 did not discriminate against members of the Judiciary. The First Department rejected both arguments. (Decision of First Department, annexed as Exhibit F) [hereinafter, "Bransten II, Ex. F"]. Affirming this Court's determination, it concluded that "it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits." (Bransten II, Ex. F, at 56). Further, the First Department held that "Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they receive no compensatory benefit." (Bransten II, Ex. F, at 57).

9. Following its unsuccessful appeal, the State moved to reargue or, in the alternative, for leave to appeal to the Court of Appeals. This motion was denied on September 18, 2014 in an order annexed as Exhibit G.

THIS COURT SHOULD GRANT THE MOTION FOR SUMMARY JUDGMENT

10. The Compensation Clause of the New York State Constitution prohibits any diminution of judicial compensation. N.Y. Const., art. VI, § 25(a). As this Court and the First

Department have determined, and as set forth in the accompanying Memorandum of Law, the undisputed factual record demonstrates that Section 167.8 violates this provision.

11. Section 167.8 has directly reduced the value of Plaintiffs' compensation by requiring a higher contribution rate for health insurance. Prior to the enactment of Section 167.8, the State contributed 90% of the cost of Plaintiffs' health insurance. Civ. Serv. Law §167(1). Once the amendment took effect on October 1, 2011, the State contributed only 84% of the cost of coverage for current judges and 88% of the cost of coverage for then-retired judges. (Bransten I, Ex. E). As the State admits, this reduction consequently increased the amount that state judges and justices paid for health insurance.[1] (Defendant's Motion to Dismiss, Ex. B, page 13). However, the Compensation Clause protects these health insurance benefits. (Bransten I, Ex. E, at 11; Bransten II, Ex. F, at 56). It is noteworthy that NYSHIP documents advises that a cash payment offered in exchange for opting-out of health insurance is treated as taxable income. (See Ex. C, attach. 1; see also Empire Plan Special Report for Employees of the State of New York Represented by Council 82, annexed as Exhibit H; Empire Plan Special Report for Employees of the State of New York in Law Enforcement Represented by the New York State Correction Officers and Police Benevolent Association, annexed as Exhibit I). The direct diminution therefore violates the Compensation Clause.

12. This Court and the Appellate Division have also already held that Section 167.8 did not treat all state employees equally. As the State acknowledges, Section 167.8 was enacted as part of a *quid pro quo* with the State's public sector unions in exchange for limiting layoffs of its represented employees. (Defendant's Motion to Dismiss, Ex. B, at 3-5, n. 1, 4-9).

[1] The State also reduced its contribution by 6% for judges retiring on or after January 1, 2012.

13. Members of the Judiciary are not represented by a union, and indeed, are not eligible for collective bargaining. N.Y. Civ. Serv. L. § 201(7)(a). With no seat at the bargaining table and not gaining the layoff protection achieved by the represented employees, the regulations implementing Section 167.8 required judges and justices to pay an increased amount under Section 167.8. (Defendant's Motion to Dismiss, Ex. B, at 5). Thus, they were subject to terms of a bargain from which they could not benefit. Id.

14. The State's reduced contribution to the Judiciary's health care premiums effect a direct diminution in compensation. Additionally, the diminution is discriminatory as compared to all state citizens and all state employees. Thus, Section 167.8 as applied to the Judiciary violates the Compensation Clause, and this Court should declare the reductions void *ab initio* and enjoin its further enforcement as to judges and justices active and retired.

Dated: New York, New York
December 3, 2014

/s/Alan M. Klinger
Alan M. Klinger

Exhibit G - Notice of Entry, dated Sept. 18, 2014, with
Order, First Department, dated Sept. 18, 2014 (R263-R265)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, PHYLLIS ORLIKOFF FLUG, Justice of the Supreme Court of the State of New York, MARTIN J. SCHULMAN, Justice of the Supreme Court of the State of New York, F. DANA WINSLOW, Justice of the Supreme Court of the State of New York, BETTY OWEN STINSON, Justice of the Supreme Court of the State of New York, MICHAEL J. BRENNAN, Justice of the Supreme Court of the State of New York, ARTHUR M. SCHACK, Justice of the Supreme Court of the State of New York, BARRY SALMAN, Justice of the Supreme Court of the State of New York, JOHN BARONE, Justice of the Supreme Court of the State of New York, ARTHUR G. PITTS, Justice of the Supreme Court of the State of New York, THOMAS D. RAFFAELE, Justice of the Supreme Court of the State of New York, PAUL A. VICTOR, retired Justice of the Supreme Court of the State of New York, JOSEPH GIAMBOI, retired Justice of the Supreme Court of the State of New York, THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, INC. and JOHN AND MARY DOES 1-2000, current and retired Judges and Justices of the Unified Court System of the State of New York

Plaintiffs-Respondents.

-against-

STATE OF NEW YORK.

Defendant-Appellant.

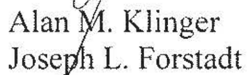
Index : 159160/12

NOTICE OF ENTRY

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk in the Appellate Division of the Supreme Court in and for the First Judicial Department on the on the 18th day of September, 2014.

Dated: New York, New York
September 18, 2014

STROOCK & STROOCK & LAVAN LLP

By: 

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Attorneys for Plaintiff-Respondents

TO: Eric T. Schneiderman
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At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on September 18, 2014.

PRESENT - Hon. John W. Sweeny, Jr., Justice Presiding,
Dianne T. Renwick
Helen E. Freedman
Judith J. Gische, Justices.

---------------------------------------X
Eileen Bransten, etc., et al.,
Plaintiffs-Respondents,

-against-

M-2938
Index No. 159160/12

The State of New York,
Defendant-Appellant.
---------------------------------------X

Defendant-appellant having moved for reargument of or, in the alternative, leave to appeal to the Court of Appeals from the decision and order of this Court entered on May 6, 2014 (Appeal No. 11881),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTER:

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Plaintiffs,

-against-

STATE OF NEW YORK.

Defendant.

Index No.: 159160/12

Justice C. Edmead

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs, current and retired Judges and Justices and the named representative associations, hereby submit this memorandum of law in support of their motion for summary judgment against the defendant State of New York.

PRELIMINARY STATEMENT

This Court, as affirmed by the Appellate Division, First Department, has already resolved the legal questions at issue in this proceeding. Both courts have concluded that Article VI, Section 25 of the New York State Constitution (the "Compensation Clause") protects against the diminution of health benefits provided to state judges and justices and is unconstitutional as applied. Branstén v. State, Index No. 159160/12, 2013 N.Y. Slip Op. 23175, at 11 (Sup. Ct. N.Y. Cnty. May 21, 2013) (C. Edmead, J.) [hereinafter, Bransten I, Ex. E]; Bransten v. State, Index No. 159160/12, 2014 N.Y. Slip Op. 03214, at 56 (1st Dep't May 6, 2014) [hereinafter, Bransten II, Ex. F]. Both courts have also held that the specific diminishment at issue was discriminatory, and therefore impermissible even if characterized as "indirect." Bransten I slip op., Ex. E at 16; Bransten II slip op., Ex. F at 59-60. As there are no factual issues in dispute, this motion for summary judgment is timely, and the state judges and justices are entitled to a final resolution of the issues previously presented, argued, and determined.

The purpose of the Compensation Clause is to ensure that the Judiciary remains independent from the other branches of government. Matter of Maron v. Silver, 14 N.Y.3d 230, 250 (2010). The Framers of the Federal Constitution shared similar concerns. In Federalist No. 79, Alexander Hamilton wrote: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." The Federalist No. 79 (Alexander Hamilton). Similarly, among the grievances listed in the Declaration of Independence was that King George III had "made judges dependent on his will alone, for the

tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence, para. 11 (U.S. 1776).

Yet, despite these well-established principles of separation of powers, the New York State Legislature for some eleven years held hostage salary increases for the Judiciary, largely to gain political leverage in a dispute with the Governor over legislative salary increases and other unrelated political issues. In 2010, the Court of Appeals in Maron concluded that this practice that linked judicial salary adjustments to other unrelated legislative and policy issues was in violation of the Separation of Powers doctrine and hence, unconstitutional. Hardly had the ink dried on the Maron decision that the Compensation Clause was violated yet again, giving rise to the instant litigation. In 2011, in response to ongoing state budgetary issues, the Legislature amended Civil Service Law §167.8 to increase health care contribution rates for state judges and justices, among some other state officers and employees. Plaintiffs brought this action seeking an injunction and a declaration that Section 167.8, as applied to members of the Judiciary, is a violation of the Compensation Clause.

This Court has recognized that Federal case law provides a proper framework to analyze the outstanding issues. See, e.g., Bransten I slip op., Ex. E. at 11. As set forth by the United States Supreme Court, unconstitutional diminution of judicial compensation may occur "directly" or "indirectly." See U.S. v. Hatter, 532 U.S. 557, 569 (2001). Direct diminutions, like the reduction in health care contributions here, are *per se* impermissible. See, e.g., U.S. v. Will, 449 U.S. 200, 225 (1980) (concluding that Judicial compensation was directly diminished after a statute purported to repeal a cost of living adjustment that had already taken effect). Indirect diminution occurs when the government effectively reduces judicial compensation through, for example, a tax, even if such a diminution is not the government's primary intent. See, e.g., Hatter, 532 U.S. at 576-77 ("[T]he Compensation Clause bars indirect efforts to reduce judges'

salaries through taxes when those taxes discriminate.") Still, even if Section 167.8 is considered an indirect diminution, it is impermissible because it discriminates against judges. Id. (holding that a tax which applied only to judges was impermissible under the Federal Compensation Clause).

In February 2013, the State moved to dismiss Plaintiffs' cause of action arguing that Section 167.8 was non-discriminatory and that, in any case, the subsequent salary increase cured the violation. Rejecting the State's arguments, this Court concluded that the amended statute effectuated a "direct diminishment" of judicial compensation or, the alternative, discriminated against judges. . See Bransten I, Ex. E. This Court explained that "[i]t is beyond cavil that 'compensation in the context of one's employment constitutes more than mere wages." Id. slip op. at 11. It also determined that Section 167.8 is akin to a discriminatory tax found unconstitutional by the Supreme Court in Hatter because "while the terms of the agreement giving rise to plaintiffs' increase in contributions were negotiated between the State and the union, *plaintiffs are unrepresented, and not eligible for collective bargaining*, and were…*left without a choice and required to contribute*." See Bransten I slip op., Ex. E at 15-16 (emphasis in original).

On appeal, the Appellate Division, First Department, affirmed this Court's conclusion. See Bransten II, Ex. F. In particular, the First Department held that "the reduced contribution, which in turn increased the amounts withheld from judicial salaries, constitutes an unconstitutional diminution of judicial compensation…" See Bransten II slip op., Ex. F at 53-54. It further concluded that "the effect of the amendment to Section 167.8 on New York's judges uniquely and detrimentally affects the judiciary and diminishes its compensation." Id. at 59-60. The Court also denied the State's subsequent motion to reargue or, in the alternative, for leave to

appeal to the Court of Appeals. See Bransten v. State, Index. No. 159160/12, 2014 N.Y. Slip Op. 83782(U) (1st Dep't Sept. 18, 2014), Ex. G.

Here, Plaintiffs request that this Court grant judgment based upon its two primary findings affirmed by the Appellate Division. First, State contributions to Plaintiffs' health care premiums constitute constitutionally-protected compensation and, therefore, any diminution of such contributions is *per se* unconstitutional. Both this Court and the First Department have already concluded that the Compensation Clause protects health care premiums.

Second, the reduction is unconstitutional even if indirect. As this Court and the Appellate Division have concluded, the reduction did not affect all state employees equally, for most state employees negotiated the reductions as part of a package that included other benefits in exchange for the State's decreased contributions to health insurance premiums. Bransten I slip op., Ex. E at 15-16. Plaintiffs neither offered their consent, nor were promised anything in exchange. As such, Plaintiffs' motion for summary judgment should be granted.

FACTS

The facts of this proceeding have been set forth in Plaintiffs' prior papers, were discussed in Bransten I, and are not in dispute. Affirmation of Alan M. Klinger, ¶ 3. To summarize, in 2011, the State attempted to resolve asserted budget difficulties by asking state unionized employees to defray health care costs. The largest unions accepted this deal in exchange for a no-layoff promise. Defendant's Motion to Dismiss, Ex. B at 3-4 & n.2. The legislation implementing this bargain, Section 167.8, left unchanged premium contributions for unionized employees who rejected the deal and also extended substantially similar terms to unrepresented employees. See New York State Senate Introducer's Memorandum in Support, L. 2011, c. 491 (describing the purpose of the bill as "implementing the terms of a collective bargaining agreement" reached with state unions, and "providing the State's approximately 12,000

unrepresented employees…with benefits and increases in compensation at levels that are comparable" to those received by represented employees). On September 30, 2011, as part of this sweeping effort to reduce health care costs, members of the Judiciary were informed that the State would reduce its contribution to their health insurance premiums. Affidavit of Honorable Philip R. Rumsey, Ex. C ¶ 2.

In December 2012, Plaintiffs brought suit alleging that the reduction in contribution to Plaintiffs' health care premiums violated the Compensation Clause. The State moved to dismiss the complaint. This Court denied that motion, finding, that the amended statute directly reduced the Judiciary's compensation. The State appealed to the Appellate Division, First Department, arguing (i) that the Compensation Clause does not cover health insurance premiums and (ii) that Section 167.8 did not discriminate against the Plaintiffs-Respondents, but the First Department rejected both arguments. Following its unsuccessful appeal, the State moved to reargue or, in the alternative, for leave to appeal to the Court of Appeals. That motion was also denied. See Ex. G.

ARGUMENT

POINT I

PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE ANY REDUCTION IN CONTRIBUTION TO PLAINTIFFS' HEALTH INSURANCE BENEFITS IS *PER SE* UNCONSTITUTIONAL

Section 167.8 diminishes judicial compensation in violation of the Compensation Clause of the New York State Constitution. The Compensation Clause provides:

> [t]he compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate's court, a judge of the family court, a judge of the court for the city of New York … , a judge of the district court or of a retired judge or justice shall be established by law and *shall not be diminished* during the term of office for which he or she was elected or appointed.

N.Y. Const., art. VI, § 25(a) (emphasis added). The plain language of this provision prohibits any direct diminishment of a justice's or retired justice's "compensation." See Maron, 14 N.Y.3d at 252 ("the State Compensation Clause plainly prohibit[ed] the diminution of judicial compensation by legislative act during a judge's term of office"); Matter of Catanise v. Town of Fayette, 148 A.D.2d 210, 213 (4th Dep't 1989) ("the Constitution expressly prohibited any reduction in the compensation of a justice of the Peace during his term of office").

As this Court and the Appellate Division have held, Section 167.8 has increased the amount that judges need to pay for health insurance and therefore has directly diminished their compensation. Prior to the enactment of Civil Service Law §167.8, the State contributed 90% of the cost of Plaintiffs' health insurance. Civ. Serv. Law §167.1. Once the amendment took effect on October 1, 2011, the State contributed only 84% of the cost of coverage.[1] See Bransten I slip op., Ex. E at 3-4. This reduction indisputably increased the amount that state judges and justices paid for health insurance. See Defendant's Motion to Dismiss, Ex. B at 13 (acknowledging that "when the State reduced its contribution here, it increased the remaining balance that [the New York State Health Insurance Program] then collected from Judges' salaries").

The reduction effected an unconstitutional diminution in Judicial compensation. As this Court explained, "the general consensus among courts is that compensation includes wages and benefits including health insurance benefits." Bransten I slip op., Ex. E at 11. The First Department affirmed this determination, holding that "it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits." Bransten II slip op., Ex. F at 56. Roe v. Bd. of Trustees of the Vill. of Bellport, 65 A.D.3d 1211, 1211-12 (2d Dep't 2009) (defining compensation as "wages and

[1] The State also reduced its contribution by 2% for then-retired judges, and by 6% for judges retiring on or after January 1, 2012.

benefits"). Supporting this conclusion is that State documents evidence health care contributions as compensation: NYSHIP permits eligible employees to opt-out of health insurance in exchange for a cash payment that is considered to be taxable income. Ex. C, attach. 1; Ex. H at 3; Ex. I at 3. In this context, the cash payment is not a gratuity (as the State suggests); it is undisputedly additional compensation to the affected state employees.

Sister courts have similarly found health insurance premiums to comprise part of judicial compensation. DePascale v. State, 211 N.J. 40 (2012) is instructive. There, the plaintiff, a judge, challenged the constitutionality of the recently-enacted Pension and Health Care Benefits Act, which required increased contributions from public employees and officers, including judges. Id. at 42. Although the provision at issue specifically protected judicial "salary," rather than "compensation," the Court nevertheless found for the plaintiff, concluding that the No-Diminution Clause of the New Jersey State Constitution makes an "employer-generated reduction in the take-home salaries of justices and judges during the terms of their appointments—a direct violation of the No-Diminution Clause of our State Constitution."[2] Id. at 62. Both this Court and the First Department have already concluded that this logic applies to the instant case. See Bransten I slip op., Ex. E at 13 ("As pointed out by DePascale, contributions to health insurance benefits which are deducted from a judge's paycheck is directly related to the amount of salary paid to a judge."); Bransten II slip op., Ex. F at 57-58 (characterizing DePascale as addressing a "similar situation"). See also Hudson v. Johnstone, 660 P.2d 1180, 1182 (Alaska 1983) ("Requiring a judge to contribute via a salary deduction to a retirement system diminishes a judge's compensation."); Stiftel v. Carper, 378 A.D.2d 124, 132 (Del. Ch. 1977), aff'd 384 A.D.2d 2 (Del. Sup. Ct. 1977) (finding a violation of the Delaware

[2] The New Jersey Supreme Court concluded that health benefits were protected by the No-Diminishment Clause of the New Jersey State Constitution, even though the text

Constitution where the State amended the State Judiciary Pension Act to require an increased contribution rate for participation in the judicial retirement system); see also Roe, 65 A.D.3d at 1211-12 (a legislative reduction of wages and benefits violates the separation of powers doctrine).

Moreover, case law and common practice in the employment context demonstrate that "compensation" includes health insurance and other benefits. The New York Public Employment Relations Board, charged with resolving labor disputes throughout the State, construes health insurance benefits to be "a form of current wages for services that are being rendered by them" and that therefore "the healthcare insurance benefits extended to an individual upon that individual's retirement from employment are a form of deferred compensation." Matter of Civil Service Employees Ass'n, 32 PERB 3042 (1999). See also Aeneas McDonald Police Benev. Ass'n. v. City of Geneva, 92 N.Y.2d 326, 331-32 (1998) ("Health benefits for current employees can be a form of compensation, and thus a term of employment that is a mandatory subject of negotiation."); Matter of Town of Haverstraw v. Newman, 75 A.D.2d 874, 874-75 (2d Dep't 1980) ("There is no reason to distinguish legal insurance from health insurance or group life insurance. *All are a form of compensation* and, as such, are encompassed within the definition of terms and conditions of employment.") (emphasis added).

Similarly, the Fourth Circuit has affirmed that insurance is a form of compensation when construing Congressional authority. In Liberty University, Inc. v. Lew, 733 F.3d 72 (4th Cir. 2013), the court determined that the "employer mandate" of the Patient Protection and Affordable Care Act, which requires certain employers to offer health coverage to their employees and dependents, was a valid exercise of Congress's power under the Commerce Clause. Id. at 84. Its holding hinged upon a finding that the employer mandate was "simply another example of Congress's longstanding authority to regulate employee compensation

offered and paid for by employers in interstate commerce." Id. at 93. In the court's view, "[r]equiring employers to offer their employees a certain level of compensation though health insurance coverage is akin to requiring employers to pay their workers minimum wage." Id. at 95.

Thus, health care premiums are part and parcel of Plaintiffs' constitutionally protected "compensation," and a reduction in those premiums is necessarily a direct reduction in judicial "compensation." By definition, any diminishment of "compensation" is direct and therefore unconstitutional. Hatter, 532 U.S. at 571 ("[T]his Court has held that the Legislature cannot directly reduce judicial salaries even as part of an equitable effort to reduce all Government salaries") (emphasis omitted).

The State's prior arguments are unavailing. Thus, the State has incorrectly argued that the Court of Appeals has historically read the Compensation Clause to preclude coverage of non-salary benefits such as health insurance premium contributions. In People ex rel. Bockes v. Wemple, 115 N.Y. 302, 309 (1889), the Court of Appeals held that the Compensation Clause covered money provided by an 1872 law that granted an annual sum of $1,200 to cover expenses in lieu of a *per diem* allowance, explaining that "[t]he word *compensation* means…the sum of money which the judicial officer had been in receipt of from the State…" See also Gilbert v. Bd. Of Supervisors, 136 N.Y. 180, 185 (1892) ("[T]he word compensation…was understood to mean the salary of the judge as such, *and the allowance for expenses*…") (emphasis added); People ex rel. Follett v. Fitch, 145 N.Y. 261, 264 (1895) (reading Bockes to distinguish between constitutionally-significant "compensation for services" and mere reimbursements for expenses incurred).

Nor can the State succeed in its argument that Matter of Lippman v. Board of Education, 66 N.Y.2d 313 (1985), changes the analysis. In Lippman, the Court of Appeals concluded that a

reduction of health care contributions did not unconstitutionally diminish the petitioner teachers' pension benefits (as distinct from *judicial* compensation protected by the Compensation Clause). For the teacher petitioners, it was the pension alone which was constitutionally-protected and health benefits did not constitute a part of their pension benefits. There was no question that the constitutional provision at issue did not protect either health benefits or compensation more generally. The Lippman Court recognized only that the constitution did not protect "indirect" diminutions in pension benefits.

POINT II

EVEN IF IT WAS AN INDIRECT DIMINUTION IN JUDICIAL COMPENSATION, SECTION 167.8 VIOLATES THE COMPENSATION CLAUSE

A. The State's Reduction Is Discriminatory And Singles Out Judges

Even if Section 167.8 did not effect a direct diminution in judicial compensation, summary judgment would still be warranted because the statute had a discriminatory impact on judges. The relevant law is set forth in Hatter, in which federal judges brought an action challenging the constitutionality of two taxes, a Medicare tax and a Social Security tax. The Supreme Court upheld only the Medicare tax, because it applied to all citizens and therefore did not uniquely disadvantage the judiciary. It was an additional cost imposed by the government in its role *as a sovereign*. Id. at 569-70. Conversely, the Court struck down the Social Security tax as applied to judges. This imposition, the Court explained, was discriminatory because it uniquely burdened Federal judges, since almost all non-Judicial federal employees could opt-out. Id. at 573.

This Court has correctly concluded, and the First Department properly affirmed, that the diminution at issue here is not saved by the Hatter exception for nondiscriminatory taxes. Bransten I slip op., Ex. E at 14-16; Bransten II slip op., Ex. F at 59-60 ("Like the 1983 [Social

Security] law…the effect of the amendment to Section 167.8 on New York's judges uniquely and detrimentally affects the judiciary and diminishes its compensation."). In Hatter, four features of the Social Security tax persuaded the Court that it violated the Federal Compensation Clause as applied to Federal judges, and those same features equally apply here.

B. Plaintiffs Have Been Discriminated Against Within Their Class

In Hatter, the Court first assessed the appropriate class against which to measure the asserted discrimination. Id. at 572. This Court has determined that "[t]he State's withdrawal of its contributions which comprise compensation…stands upon different footing than a nondiscriminatory, generally applied tax imposed *against* the compensation of *all citizens* by the government in its status as a sovereign" (emphasis in original). Bransten I slip op., Ex. E at 15. Thus, Plaintiffs have suffered discrimination as compared to all State citizens. See Hatter, 532 U.S. at 572 ("Thus, history, context, statutory purpose, and statutory language, taken together, indicate that the category of 'federal employees' is the appropriate class against which we must measure the asserted discrimination."); see also DePascale, 211 N.J. at 43 (finding a constitutional violation where increased pension contributions were applied to all public employees, including judges, but not all of the state's citizens).

Even if the proper comparator were all state employees, the diminution would still fail the Hatter analysis because not all state employees were treated equally. As this Court found:

> Nor does Section 167.8 affect all employees of the State of New York. Indeed, plaintiffs did not receive the same benefits that represented State employees received. Thus, Section 167.8 is akin to the "Social Security tax" imposed upon federal judges, previously held to be unconstitutional by the United States Supreme Court in *Hatter* . . .Plaintiffs are unrepresented and ineligible for collective bargaining, and thus, have been discriminated against within their class of State employees.

Bransten I slip op., Ex. E at 6. The First Department affirmed this finding. See Bransten II slip op., Ex. F at 57 ("In its implementation, the amended statute affects judges differently from

virtually all other State employees…”). Accordingly, in failing to have universal application among even State employees, the reduction falls far short of the Hatter test for constitutionality.

The Record bears this out: the State negotiated collective bargaining agreements with its 161,000 represented employees, thereby reducing its contribution to their health insurance premiums in exchange for limiting further layoffs of its employees. Defendant’s Motion to Dismiss, Ex. B at 3-5, n. 1, 4-9. Plaintiffs are unrepresented, and indeed, not eligible for collective bargaining. N.Y. Civ. Serv. Law § 201(7)(a). The State amended Section 167.8 to include unrepresented state employees and retired state employees in a bargain to which they were not subject and from which they could not benefit. Defendant’s Motion to Dismiss, Ex. B at 5. In exchange for the reduction in health insurance premiums contribution, the State agreed to not lay off represented state employees. Defendant’s Motion to Dismiss, Ex. B at 4. With no seat at the bargaining table and not gaining the layoff protection achieved by the represented employees, as Plaintiffs’ employment is set by statutory term limits, Plaintiffs were nevertheless required to pay an increased amount. Defendant’s Motion to Dismiss, Ex. B at 5.

The State’s contention that there was no discrimination because judges did not suffer discrimination as compared to 12,000 managerial and confidential (“M/C”) employees is meritless. There is no basis for this Court to compare the treatment of judges against the treatment of a subgroup of State employees. In U.S. v. Hatter, the Supreme Court concluded that proper comparator was all Federal employees. Id. at 572. In DePascale, the Supreme Court of New Jersey determined that the proper comparator was all public employees. Id. at 40. Defendant cannot insist that this Court compare judges to M/C employees simply because they may have been treated similarly.

C. Defendant Has Imposed A New Financial Obligation On Plaintiffs

The second Hatter factor is whether judges face a new financial obligation which was not faced by other state employees. See Hatter, 532 U.S. at 573 ("the new law imposed a substantial cost on federal judges with little or no expectation of substantial benefit for most of them"). Here, Section 167.8 *imposes* a new financial obligation upon the Judiciary that nearly every other state employee *chose* to bear through the bargaining process. This Court has already concluded that this added financial burden is unconstitutional, a finding which has been affirmed by the First Department. Bransten I slip op., Ex. E at 16 ("Like the Social Security tax [in *Hatter*], Section 167.8 imposes an additional financial burden upon judges…"); Bransten II slip op., Ex. F at 59-60. By comparison, the Hatter Court found that the Social Security tax was being imposed on federal judges when virtually all of the remaining federal employees (but not the judges) could opt out of it. The Court determined that such disparate treatment violated the no-diminution protection. Id. Hatter therefore instructs that this Court should once again conclude that Plaintiffs face a new financial obligation that violates the Compensation Clause.

D. Plaintiffs Received No Benefit In Exchange For Their Increased Health Care Premiums

The third question in Hatter was whether the new law adversely affected federal judges. Section 167.8 also fails this test. Inclusion in amended Section 167.8 meant that all members of the Judiciary were forced to pay more for their health insurance premiums each year. Most State employees covered by the amendment either consented to the increase or were protected from layoffs, but Plaintiffs received nothing in return for their increased contribution. Even according to the State, the agreement between the unions and the State was that "[i]n exchange for avoiding layoffs of thousands of state employees, the union[s] agreed to a three-year salary freeze, an unpaid furlough, and a reduction in the percentage contribution that the State pays towards their

health insurance premiums." Defendant's Motion to Dismiss, Ex. B at 3. Any benefit was inapplicable to Plaintiffs.

E. Defendant Can Assert No Sound Justification For Violating The Compensation Clause

Finally, the Hatter Court explained that there must be a sound justification for the discrimination which outweighs the objectives of the Compensation Clause. See Hatter, 532 U.S. at 573. The State has previously argued that the reduction is necessary to ameliorate a statewide budget crisis, but this justification does not withstand constitutional scrutiny. R. 61. First, this was the precise argument advanced by the State of New Jersey and rejected by that state's Supreme Court. DePascale, 211 N.J. at 44 ("Whatever good motives the Legislature might have, the Framers' message is simple and clear. Diminishing judicial salaries during a jurist's term of appointment is forbidden by the Constitution."); see also Stilp v. Commonwealth, 588 Pa. 539, 584-85 (Pa. 2006) ("for this Court to accept the notion that legislative pronouncements of benign intent can control a constitutional inquiry concerning diminishing judicial compensation would be tantamount to ceding our constitutional duty, and our independence"). The State must adhere to the requirements of the Constitution when solving the State's fiscal issues. See Maron, 14 N.Y.3d at 257 (judicial compensation cannot be linked to other unrelated policy initiatives); DePascale, 211 N.J. at 64 ("[A]ny solution to the State's serious fiscal issues must conform to the requirements of our Constitution").

Indeed, the State's own representation that Judges comprise less than 1% of the active state employees demonstrates that the dollar amount at issue here could hardly be material in remedying the state budgetary concerns. Defendant's Motion to Dismiss, Ex. B at 14. In other words, continuing the Judges' benefits at their pre-amendment levels could not possibly cause such financial distress that would justify violating the Constitution.

Moreover, at the time that the collective bargaining terms were being negotiated, the Salary Commission was analyzing the appropriate level of judicial salaries. The Salary Commission had already taken into account the ability of the State to pay Judges' salaries in determining its recommended salary increases. See Ex. A at 11-12 (Fiske Jr., dissenting) (recommending an increase to $195,754, Fiske stated: "No discussion of the state's ability to fund increased judicial compensation can be complete without noting what the state has saved by failing to adjust judicial salaries for twelve years. Since 1999, by not giving the judges appropriate cost-of-living increases, the state has saved approximately $515 million to spend in other areas."); See Ex. A at 15 (Mulholland, dissenting) (recommending an increase to $192,000, Mulholland stated: "Mr. Megna admitted New York could cover the cost if need be. Our judges have already paid over $500 million toward the cost, through their salary forfeitures suffered since 1999"). The undisputed fact that no notice was given to either the Salary Commission or the Judiciary that the State's healthcare contribution percentage was to be reduced further demonstrates that the State has once again disregarded and ignored its constitutional obligations to its co-equal branch of government to forebear from linking policy considerations with judicial compensation.

The State's reduction in judicial compensation is discriminatory in its impact on Plaintiffs and is prohibited by the Compensation Clause. See Hatter, 532 U.S. at 575 (finding that the Compensation Clause does not authorize the Legislature to diminish or to equalize away those very characteristics of the Judicial Branch that Article III guarantees – *i.e.,* protection of judicial compensation).

CONCLUSION

The State's reduced contribution to Plaintiffs' health care premiums effect a direct diminution in compensation. Additionally, the diminution is discriminatory as compared to all state citizens and all state employees. This Court should therefore grant the instant motion.

Dated: New York, New York
December 3, 2014

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al. Plaintiffs, - against - STATE OF NEW YORK, Defendant.	Index No. 159160/2012 Hon. Carol Edmead **ANSWER**

Defendant, State of New York, by its attorney, Eric T. Schneiderman, Attorney General of the State of New York, for its Answer to the Complaint in this action, alleges as follows:

1. Denies the allegation of paragraph 1 of the Complaint, except admits that plaintiffs seek certain relief in this action.

2. Admits the allegations of paragraphs 2 through 14 of the Complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of the Complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the Complaint.

5. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 of the Complaint.

6. Admits the allegations in Paragraph 18 of the Complaint.

7. Admits the allegations in the first sentence of paragraph 19 of the Complaint, and denies the allegations in the second sentence because they are too vague to permit an informed response.

8. Denies the allegations of paragraph 20 of the Complaint, except admits that the

referenced constitutional and statutory provisions relate to judicial compensation, and respectfully refers the Court to those provisions for a full and complete statement of their contents.

9. Denies the allegations of paragraph 21 of the Complaint on the ground that they set forth a legal conclusion, except admits that the referenced constitutional provisions relate to judicial compensation, and respectfully refer the Court to those provisions for a full and complete statement of their contents.

10. Denies the allegations of paragraph 22 of the Complaint, except admits that the Judiciary is a co-equal and, in certain respects, independent branch of government.

11. Admits the allegations of paragraph 23 of the Complaint.

12. Denies the allegations of paragraph 24 of the Complaint on the ground that they set forth legal conclusions concerning the legislative intent and meaning of certain statutory language, and respectfully refers the Court to the referenced statutory language for a full and complete statement of its contents.

13. Admits the allegations of paragraph 25 of the Complaint.

14. Denies the allegations of paragraph 26 of the Complaint, except admits that members of the New York State judiciary generally are eligible for health insurance through NYSHIP, and denies knowledge and information sufficient to form a belief as to whether NYSHIP was established in 1957.

15. Admits the allegations of paragraphs 27 through 29 of the Complaint.

16. Denies the allegations of paragraph 30 of the Complaint, except admits that, pursuant to amended Section 168.7, on October 1, 2011, the Civil Service Commission increased in certain respects the cost of plaintiffs' health insurance premiums pursuant to NYSHIP rate

changes.

17. Denies the allegations of paragraph 31 of the Complaint, except admits that, pursuant to amended Section 168.7, the Civil Service Commission increased the cost of plaintiffs' health insurance premiums and certain other aspects of plaintiffs' insurance, such as co-payments, deductibles and prescription drugs.

18. Admits the allegations of paragraph 32 of the Complaint.

19. Denies the allegations of paragraph 33 of the Complaint.

20. Denies the allegations of paragraph 34 of the Complaint on the ground that they set forth a legal conclusion, and respectfully refers the Court to the referenced constitutional provision for a full and complete statement of its contents.

21. Denies the allegations of paragraph 35 of the Complaint on the ground that they set forth a legal conclusion.

22. Denies the allegations of paragraph 36 of the Complaint, and respectfully refers the Court to the statutory provisions from which plaintiffs quote for a full and complete statement of its contents.

23. Denies the allegations of paragraph 37 of the Complaint, except admits that New York State has increased the premium contribution rate and co-payments for all State employees who elect to participate in the State's health benefit plan, including plaintiffs and other judges.

24. Denies the allegations of paragraph 38 of the Complaint.

25. Denies the allegations of paragraph 39 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

26. The State's contribution to the cost of health insurance premiums is not "compensation" as that term is used in the Constitution, and the State's reduction in the amount

by which it reimburses all State employees, including judges, who elect to participate in the State's health benefit plan for the cost of such plan does not constitute a reduction in plaintiffs' "compensation" within the meaning of the Constitution.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

27. The State's reduction in its premium contributions for all State employees, including judges, who elect to participate in the State's health benefit plan does not discriminate against judges, and is therefore does not violate the Compensation Clause of the Constitution.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

28. Plaintiffs' total compensation has not been diminished, and therefore the State's reduction in its premium contributions for all State employees, including judges, does not violate the Compensation Clause of the Constitution.

Dated: New York, New York
December 30, 2014

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendant

By: /s/ Mark E. Klein
Mark E. Klein
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8663

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al.	Index No. 159160/2012
Plaintiffs,	Hon. Carol Edmead
- against -	**DEFENDANT'S NOTICE OF CROSS-MOTION**
STATE OF NEW YORK,	
Defendant.	

PLEASE TAKE NOTICE that, upon the annexed affidavit of David Boland, sworn to January 30, 2015, and the exhibits annexed thereto, the annexed affidavit of Robert E. Brondi, sworn to January 28, 2015, and the annexed affirmation of Mark E. Klein, dated January 30, 2015, and the exhibits annexed thereto, and the accompanying memorandum of law, defendant will cross-move this Court, in the Submissions Part, Room 130 of the Courthouse, located at 60 Centre Street, New York, New York, on the 24th day of February 2015, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order, pursuant to Rule 3212 of the Civil Practice Law and Rules, granting defendant summary judgment dismissing plaintiffs' Complaint, dated December 26, 2012, in all respects, on the ground that, as a matter of law, L. 2011, c. 491 § 2 and amended Civil Service Law § 167(8) is not unconstitutional as applied to judges and justices of the United Court System.

Dated: New York, New York
February 2, 2015

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendant

By: /s/ Mark E. Klein
Mark E. Klein
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8663

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al.,

Plaintiffs,

- against -

STATE OF NEW YORK,

Defendant.

Index No. 159160/2012

Hon. Carol Edmead

AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

DAVID BOLAND, being duly sworn, deposes and says:

1. I am employed as Director of Employee Benefits in the Department of Civil Service, Employee Benefits Division, of the State of New York, where I have worked since December 1983. In my position as Director of Employee Benefits, I direct the division that administers the New York State Health Insurance Plan ("NYSHIP"), which is the vehicle for providing health, dental, vision and disability insurance for New York State employees and retirees. The health insurance benefits are made available to the employees and retirees of participating local units of government. I am fully familiar with the State's implementation of health insurance premium changes in 2011.

2. I make this affidavit in opposition to plaintiffs' motion for summary judgment in this action and in support of the State's cross-motion for summary judgment dismissing plaintiffs' Complaint. I have personal knowledge of the facts set forth below and have relied on information stored and maintained in the computer systems of the Department of Civil Service in the ordinary course of its activities.

3. In 2011, the State, faced by an extraordinary strain on its financial resources, and as part of an effort to avoid layoffs, asked its employees, through the collective bargaining process, to aid the State. In response, in exchange for avoiding layoffs of thousands of state employees, agreements were reached with most state unions (which were thereafter ratified by their members), wherein they agreed to a salary freeze, unpaid furloughs and a reduction in the percentage contribution that the State pays toward employee health insurance premiums, as well as other benefit changes.

4. To carry out these agreements, the Legislature amended the Civil Service Law to authorize the president of the Civil Service Commission to reduce the State's contribution to employee health insurance premiums for retirees and State employees. *See* Civil Service Law § 167(8). Pursuant to that authority, the acting president and head of the Department of Civil Service promulgated a regulation, effective October 1, 2011, that reduced the State's contribution from ninety to eighty-eight percent for state employees receiving the equivalent of "salary grade 9 or below," and reduced the State's contribution from ninety to eighty-four percent for those employees receiving the equivalent of "salary grade 10 or above." *See* 4 N.Y.C.R.R. § 73.3(b). These provisions are inapplicable, however, to members of unions which have not yet agreed to modify their collective bargaining agreements. *See id.* § 73.12.

5. All Supreme Court justices receive a salary that is greater than "salary grade 10," and therefore, for justices who elect to enroll in the State's health insurance plan, the State pays eighty-four percent of the cost of coverage. For all state employees who elected to participate in the State's plans and retired between January 1, 1983 and January 1, 2012, the State pays eighty-eight percent of the cost of coverage. *See* 4 N.Y.C.R.R. § 73.3(b).

6. As a result of the 2011 enactment of Civil Service Law § 167(8) and subsequent

collective bargaining agreements, to date almost 98% of the State's approximately 189,000 active employees enrolled in NYSHIP are paying higher insurance premium contributions. *See* spreadsheet annexed hereto as Exhibit A.[1] Fewer than 3,900 employees[2] -- who are members of unions which have not yet reached any collective bargaining agreement or otherwise agreed to the premium changes -- have *not* had their insurance premiums contributions increased as a result of the enactment of Civil Service Law § 167(8).

7. In excess of 12,000 state employees are similarly situated to plaintiffs in this case, because (i) like plaintiffs, their insurance premiums were increased as a result of the enactment of Civil Service Law § 167(8); and (ii) like plaintiffs, they are not members of a union and had no power to bargain for any benefit in exchange for the premium changes. These employees are those designated as "managerial" or "confidential" ("M/C") under Civil Service Law § 201(7)(a) and include, for example, certain supervisory and "confidential" personnel in State agencies (including myself) and in the Legislature, and certain Court personnel. The approximately 12,000 M/C employees, who constitute more than six percent of the State workforce covered under NYSHIP, are covered under Benefit Programs A05, A06, A29, A33, A34 and A61, as

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[1] The spreadsheet was made from information obtained from the New York Benefit Enrollment and Accounting System ("NYBEAS") maintained by the Department of Civil Service. The NYBEAS reports are generated in the regular course of the Department's activities, and the Department generates spreadsheets of this type in the regular course of its activities.

[2] These employees, who are members of the Police Benevolent Association State Troopers (Benefit Program A09) and the Bureau of Criminal Investigation Unit of the New York State Police (Benefit Program A11), have not agreed to the premium changes in a collective bargaining agreement with the State, so they have been excluded from having to pay the premium increases thus far. *See* spreadsheet annexed hereto as Exhibit A.

reflected in the spreadsheet annexed hereto as Exhibit A and the list of NYSHIP Benefit Programs annexed hereto as Exhibit B.[3]

DAVID BOLAND

Sworn to before me this
30th day of January, 2015

Notary Public

MARK F. WORDEN
Notary Public, State of New York
Qual. in Rensselaer Co. No. 02W04743963
My Commission Expires January 31, 2018

[3] This document is made and maintained in the regular course of the Department's activities.

All NYSHIP Options

Month	Year	BP	SumOfEnrollee	Program	Rate Qualifier
12	2014	A01	5	10	0
12	2014	A01	26,895	10	E1
12	2014	A01	18,653	10	E2
12	2014	A01	140	10	T1
12	2014	A02	9	10	0
12	2014	A02	898	10	E1
12	2014	A02	44,135	10	E2
12	2014	A02	73	10	T1
12	2014	A03	1	10	E
12	2014	A03	4,188	10	E1
12	2014	A03	22,440	10	E2
12	2014	A03	82	10	T1
12	2014	A04	13	10	0
12	2014	A04	1,074	10	E1
12	2014	A04	16,991	10	E2
12	2014	A04	1	10	T
12	2014	A04	41	10	T1
12	2014	A05	2	10	0
12	2014	A05	1,191	10	E1
12	2014	A05	9,718	10	E2
12	2014	A05	21	10	T1
12	2014	A06	2	10	E1
12	2014	A09	5	10	0
12	2014	A09	2,783	10	E
12	2014	A09	1	10	E2
12	2014	A09	2	10	T
12	2014	A10	3	10	0
12	2014	A10	703	10	E
12	2014	A11	2	10	0
12	2014	A11	1,061	10	E
12	2014	A11	1	10	T
12	2014	A12	18	10	E1
12	2014	A12	217	10	E2
12	2014	A13	32	10	E1
12	2014	A13	4,947	10	E2
12	2014	A13	7	10	T1
12	2014	A14	191	10	E1
12	2014	A14	981	10	E2
12	2014	A14	6	10	T1
12	2014	A15	1,148	10	E2
12	2014	A17	1	10	0
12	2014	A17	798	10	E2
12	2014	A17	1	10	T1
12	2014	A19	2	10	E
12	2014	A19	1,008	10	E1
12	2014	A19	3,041	10	E2
12	2014	A20	1	10	0
12	2014	A20	37	10	E1
12	2014	A20	5,343	10	E2
12	2014	A20	17	10	T1
12	2014	A21	665	10	E
12	2014	A22	1,143	10	E
12	2014	A23	184	10	E

Not Ratified
3,855 2.01%

12	2014	A24	13	10	E
12	2014	A25	1	10	0
12	2014	A25	462	10	E2
12	2014	A27	3,167	10	E
12	2014	A28	1	10	E
12	2014	A28	51	10	E1
12	2014	A28	54	10	E2
12	2014	A29	20	10	E1
12	2014	A29	1,286	10	E2
12	2014	A29	2	10	T1
12	2014	A33	5	10	E2
12	2014	A34	1	10	E2
12	2014	A36	202	10	E2
12	2014	A37	1	10	0
12	2014	A37	31	10	E1
12	2014	A37	1,077	10	E2
12	2014	A39	1	10	0
12	2014	A39	1	10	E
12	2014	A39	8,734	10	E1
12	2014	A39	115	10	E2
12	2014	A39	21	10	T1
12	2014	A40	25	10	E1
12	2014	A41	1	10	E2
12	2014	A44	1	10	E2
12	2014	A45	1	10	E
12	2014	A47	1	10	0
12	2014	A47	1	10	E1
12	2014	A47	1,323	10	E2
12	2014	A47	3	10	T1
12	2014	A48	242	10	E1
12	2014	A48	1,210	10	E2
12	2014	A48	2	10	T1
12	2014	A50	54	10	E2
12	2014	A52	2,216	10	E
12	2014	A53	9	10	E1
12	2014	A60	27	10	E1
12	2014	A60	3	10	E2
12	2014	A61	38	10	E1
12	2014	A61	2	10	E2
12	2014	A63	29	10	E1
12	2014	A63	17	10	E2
12	2014	A64	146	10	E1
12	2014	A64	2	10	E2
12	2014	A65	2	10	E1

	191,523	100.00%
With Premium Shift	187,668	97.99%

Total	Total	191,523	
LESS Roswell Park		2,005	
Total NYS		189,518	100.00%
Less PBA Troopers		2,791	
PIA		1,064	
Total NYS with Premium Shift		185,663	97.97%

BI-WEEKLY BENEFIT PROGRAMS

Benefit Program	Program Description	NEGOTIATING UNITS	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	PEP Eligibility	M/C Life
A01	CSEA	02, 03, 04, 47	YES	NO	NO	PEP	NO
A02	PEF	05	YES	YES	YES	PEP	NO
A03	UUP	08	YES	NO	NO	PEP	NO
A04	NYSCOPBA Correction Officers 8700100,8700101,8700105, 8700110,8700200,8700500, 8706000	01	YES	YES	YES	NONE	NO
A05	M/C	06, 18, 46, 52, 66, 77, 79, 98	YES	YES	YES	PEP	YES
A06	M/C - Leg. Employees and Other Misc. Unrepresented Employees	76	YES	NO	NO	PEP	YES
A07	M/C - College of Ceramics Alfred University	40	YES	YES	NO	PEP	YES
A09	PBA **Troopers**	07	YES	YES	YES	NONE	NO
A10	PBA Supervisors	17	YES	YES	YES	NONE	NO
A11	PIA	62	YES	YES	YES	NONE	NO
A12	DC-37	67	YES	NO	NO	PEP	NO
A13	Courts CSEA	87	YES	NO	NO	PEP	NO
A14	Courts DC-37	SK	YES	NO	NO	PEP	NO
A15	Courts CSEA Judges and Justices (Agencies 05519, 05529, 05539, 05589, 05599, 05609, 05979)	86	YES	NO	NO	NONE	Yes
A17	Courts	86	YES	NO	NO	PEP	YES
A19	Cornell 11990	00, N/A	YES	YES	NO	PEP	NO
A20	Courts	DR, F8, G9, S9,SA, SD, SG, SN, SR	YES	NO	NO	PEP	NO
A21	Roswell Park - CSEA PE	PE CSEA 02, 03, 04	YES	NO	NO	PEP	NO
A22	Roswell Park - PEF PE	PE PEF 05	YES	YES	YES	PEP	NO
A23	Roswell Park - M/C PE	PE M/C 06	YES	YES	YES	PEP	YES
A24	NYSCOPBA Law Enforcement Roswell Pk	PE NYSCOPBA 21	YES	YES	YES	NONE	NO
A25	Council 82 Correction Officers	61	YES	YES	YES	NONE	NO

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

Benefit Program	Program Description	NEGOTIATING UNITS	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	PEP Eligibility	M/C Life
A27	SUNY SEHP – **No MED B**	28	Yes	YES	YES	NONE	NO
A28	Non Military & Naval [Non–employee (Agency 01070)]	MIL	YES	NO	NO	NONE	NO
A29	M/C SUNY 13	13	YES	YES	YES	PEP	YES
A33	M/C	43, 48, 65	YES	YES	YES	PEP	NO
A34	M/C - Leg. Employees and Other Misc. Unrepresented Employees	14, 71, 99	YES	NO	NO	PEP	NO
A35	M/C - College of Ceramics Alfred University 21265	00, 41, 42, 43	YES	YES	NO	PEP	NO
A36	Courts	88, CT	YES	NO	NO	PEP	NO
A37	APSU	31	YES	YES	YES	NONE	NO
A38	M/C – Life Only	06, 13, 18, 46, 52, 66, 77, 79, 76, 40, 86, CT	NO	NO	NO	NONE	YES
A39	CSEA – Reduced Coinsurance Max (came from A01)	02, 03, 04, 47	YES	NO	NO	PEP	NO
A40	DC-37 - Reduced Coinsurance Max (came from A12)	67	YES	NO	NO	PEP	NO
A41	Courts CSEA - Reduced Coinsurance Max (came from A13)	87	YES	NO	NO	PEP	NO
A42	Courts DC-37 - Reduced Coinsurance Max (came from A14)	SK	YES	NO	NO	PEP	NO
A43	Courts - Reduced Coinsurance Max (came from A17)	86	YES	NO	NO	PEP	YES
A44	Courts - Reduced Coinsurance Max (came from A20)	DR, F8, G9, S9,SA, SD, SG, SN, SR	YES	NO	NO	PEP	NO
A45	Roswell Park - CSEA PE - Reduced Coinsurance Max (came from A21)	PE CSEA 02, 03, 04	YES	NO	NO	PEP	NO
A46	Courts - Reduced Coinsurance Max (came from A36)	88, CT	YES	NO	NO	PEP	NO

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

Benefit Program	Program Description	NEGOTIATING UNITS	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	PEP Eligibility	M/C Life
A47	Courts - Supreme Court Officers	SY	YES	NO	NO	PEP	NO
A48	NYSCOPBA Law Enforcement	21	YES	YES	YES	NONE	NO
A50	Council 82 Law Enforcement	91	YES	YES	YES	NONE	NO
A51	APSU – (no one in here)	81	YES	YES	YES	NONE	NO
A52	CUNY – **NO MED B**	AJ, GA, T8	YES	YES	YES	NONE	NO
A53	UUP Lifeguards	68	YES	NO	NO	NONE	NO
A60	PEF - **Reduced Coinsurance Max (came from A02)**	05	YES	YES	YES	PEP	NO
A61	M/C - **Reduced Coinsurance Max (came from A05)**	06, 18, 46, 52, 66, 77, 79, 98	YES	YES	YES	PEP	YES
A62	M/C SUNY 13 - **Reduced Coinsurance Max (came from A29)**	76	YES	YES	YES	PEP	YES
A63	UUP-**Reduced Coinsurance Max (came from A03)**	08	YES	NO	NO	PEP	NO
A64	NYSCOPBA Law Enforcement - **Reduced Coinsurance Max (came from A48)**	21	YES	YES	YES	NONE	NO
A65	UUP Lifeguards - **Reduced Coinsurance Max (came from A53)**	68	YES	NO	NO	NONE	NO
L19	Cornell M/C (LWOP)	00, N/A	YES	YES	NO	PEP	NO

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

COBRA BENEFIT PROGRAMS

Benefit Program	Program Description	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision
C01	COBRA CSEA – formerly A01, M01	YES	NO	NO
C02	COBRA PEF - formerly A02	YES	YES	YES
C03	COBRA UUP - formerly A03, M03	YES	NO	NO
C04	NYSCOPBA Correction Officers - formerly A04	YES	YES	YES
C05	COBRA M/C – formerly A05, A29, A33	YES	YES	YES
C06	COBRA M/C – formerly A06, A28, A34	YES	NO	NO
C07	COBRA M/C – formerly A07, A19, A35, L19	YES	YES	NO
C09	COBRA PBA – formerly A09	YES	YES	YES
C10	COBRA PBA Supervisors – formerly A10	YES	YES	YES
C11	COBRA PIA – formerly A11	YES	YES	YES
C12	COBRA DC37 - formerly A12	YES	NO	NO
C13	COBRA Courts CSEA – formerly A13	YES	NO	NO
C14	COBRA Courts DC37 – formerly A14	YES	NO	NO
C15	COBRA Courts Judges & Justices - formerly A15	YES	NO	NO
C17	COBRA Courts - formerly A17, A36	YES	NO	NO
C20	COBRA Courts – formerly A20	YES	NO	NO
C21	COBRA CSEA – Roswell Park – formerly A21	YES	NO	NO
C25	Council 82 Correction Officers – formerly A25	YES	YES	YES
C27	COBRA SUNY SEHP – formerly A27 – **NO MED B**	YES	YES	YES
C29	COBRA M/C – Monthly – formerly M04, M11	YES	YES	YES
C30	COBRA M/C – Monthly No Rx – formerly M05, M12	NO	YES	YES
C31	COBRA Retiree – formerly E01, M07, R01, R03, R04, R05, R06, R07, R08, R09, R10, R11, R15, R16, R17, R19, R20, R21, R23, R24, R25, R26	YES	YES	YES

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

Benefit Program	Program Description	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision
C32	COBRA Retiree – formerly E11, R02, R14, R18, R22, R53, R54, R55, R56, R57, R58, R59, R61, R65, R69, R71, R73, R74, R75	NO	YES	YES
C37	COBRA APSU – formerly A37	YES	YES	YES
C39	COBRA CSEA – formerly A39, M09 - Reduced Coinsurance Max	YES	NO	NO
C40	COBRA DC37 - formerly A40 - Reduced Coinsurance Max	YES	NO	NO
C41	COBRA Courts CSEA – formerly A41 - Reduced Coinsurance Max	YES	NO	NO
C42	COBRA Courts DC37 – formerly A42 - Reduced Coinsurance Max	YES	NO	NO
C43	COBRA Courts - formerly A43, A46 - Reduced Coinsurance Max	YES	NO	NO
C44	COBRA Courts – formerly A44 - Reduced Coinsurance Max	YES	NO	NO
C45	COBRA CSEA – Roswell Park – formerly A45 - Reduced Coinsurance Max	YES	NO	NO
C47	COBRA Courts – formerly A47	YES	NO	NO
C48	COBRA NYSCOPBA Law Enforcement - formerly A48	YES	YES	YES
C50	COBRA Council 82 Law Enforcement – formerly A50	YES	YES	YES
C51	COBRA APSU – formerly A51	YES	YES	YES
C52	COBRA CUNY SEHP – formerly A52 – **NO MED B**	YES	YES	YES
C53	COBRA UUP Lifeguards – formerly A53, M02	YES	NO	NO
C60	COBRA PEF - formerly A60- Reduced Coinsurance Max	YES	YES	YES
C61	COBRA M/C – formerly A61, A62 - Reduced Coinsurance Max	YES	YES	YES
C62	COBRA UUP – formerly A63, M13 - Reduced Coinsurance Max	YES	NO	NO
C63	COBRA NYSCOPBA Law Enforcement– formerly A64 - Reduced Coinsurance Max	YES	YES	YES
C64	COBRA UUP Lifeguards – formerly A65, M14 - Reduced Coinsurance Max	YES	NO	NO

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

Young Adult Option (YAO) BENEFIT PROGRAMS

Benefit Program	Program Description	NYSHIP Drugs
D01	YAO - Participating Employers - formerly C29, M04, M11	YES
D02	YAO -M/C - formerly A05, A06, A07, A19, A28, A29, A33, A34, A35, C05, C06, C07, L19	YES
D03	YAO -PEF - formerly A02, C02	YES
D04	YAO -UUP - formerly A03, C03, M03	YES
D05	YAO -DC–37 – formerly A12, C12	YES
D06	YAO -DC-37 Reduced Coinsurance Max – formerly A40, C40	YES
D07	YAO -PBA – formerly A09, C09	YES
D08	YAO -PIA – formerly A11, C11	YES
D09	YAO NYSCOPBA Correction Officers – formerly A04, C04	YES
D10	YAO -NY Retiree Benefits – formerly C31, M07, R01, R03, R04, R05, R06, R07, R08, R09, R10, R11, R13, R15, R16, R17, R19, R20, R21, R23, R24, R25, R27,	YES
D11	YAO Without Drug Coverage - NY Retiree Benefits – formerly C32, R02, R14, R18, R22, R51, R53, R54, R55, R56, R57, R58, R59, R61, R65, R69, R71, R73, R74, R75	NO
D12	YAO Without Drug Coverage – PE – formerly M05, M12, C30	NO
D13	YAO -NYSCOPBA Law Enforcement – formerly A48, C48	YES
D14	YAO -UUP Lifeguards - formerly M02	YES
D15	YAO -Council 82 Law Enforcement – formerly A50, C50	YES
D16	YAO-UCS Settled –former A13, A15, A17, A36, A41, A43, A46, C13, C15, C17, C41,C43	YES
D17	YAO-UCS Unsettled – formerly A14, A20, A42, A44, A47, C14, C20, C42, C44, C47	YES
D18	YAO -CSEA– formerly A01, C01, M01	YES
D19	YAO -CSEA Reduced Coinsurance Max – formerly A39, C39, M09	YES
D20	YAO -Council 82 Correction Officers - formerly A25, C25	YES
D21	YAO -SEHP – formerly A27, A52, C27, C52 – **NO MED B**	YES
D22	YAO -PBA Supervisors – formerly A10, C10	YES
D23	YAO -UUP Lifeguards – formerly A53, C53	YES
D24	YAP -APSU - formerly A37, A51, C37, C51	YES
D25	YAO -M/C - Reduced Coinsurance Max - formerly A61, A62, C61	YES
D26	YAO -PEF - Reduced Coinsurance Max -formerly A60, C60	YES
D27	YAO -UUP - Reduced Coinsurance Max -formerly A63, C62, M13	YES
D28	YAO -NYSCOPBA Law Enforcement - Reduced Coinsurance Max -formerly A64, C63	YES
D29	YAO -UUP Lifeguards - Reduced Coinsurance Max -formerly A65, C64, M14	YES
PD7	YAO –PA's in Empire Plan – formerly PA7, PC7, PE7, PN7, PR7, PS7, PV7	YES
PD9	YAO –PA's in Excelsior Plan – formerly PA9, PC9, PE9, PN9, PR9, PS9, PV9	YES

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

EXTENDED BENEFITS AND NO BENEFITS ELIGIBILITY BENEFIT PROGRAMS

Benefit Program	Program Description	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	Subsidy Eligible?
E01	Extended Benefits - NYS Grandfathered	YES	N/A	N/A	YES
E02	Extended Benefits - PE Non-Grandfathered	YES	N/A	N/A	YES
E11	Extended Benefits - LIS - NYS Grandfathered	NO	N/A	N/A	NO
E12	Extended Benefits - LIS PE Non-Grandfathered	NO	N/A	N/A	NO
N00	No Benefit Eligibility	N/A	N/A	N/A	NO

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

PE RETIREE BENEFIT PROGRAMS

Benefit Program	Program Description	BP Prior to 10/1/10	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	M/C Life	Subsidy Eligible?
G01	Retiree (90/75)	R01	YES	NO	NO	NO	YES
G02	Retiree (90/75)	R02	NO	NO	NO	NO	NO
G03	Retiree pre-1983 (100/75)	R03	YES	NO	NO	NO	YES
G04	Retiree (100/100)	R04	YES	NO	NO	NO	YES
G05	Amended Dependent Survivors (75/75)	R05	YES	NO	NO	NO	YES
G06	Attica Survivors	R06	YES	NO	NO	NO	YES
G07	Full Share Survivors	R07	YES	NO	NO	NO	YES
G08	Survivors (90/75)	R08	YES	NO	NO	NO	YES
G09	Vestees	R09	YES	NO	NO	NO	YES
G10	Preferred list	R10	YES	NO	NO	NO	NO
G11	Long Term Disability (Dental/Vision)	R11	YES	YES	YES	NO	YES
G13	G01 Retiree Return to Work w/Rx Some with M/C Life (No '2D' – '2G')	R13	YES	NO	NO	YES	NO
G14	Retiree (100/100) Mthly	R14	NO	NO	NO	NO	NO
G15	Retiree (100/100 DepSur)	R15	YES	NO	NO	NO	YES
G16	G01 Retiree Return to Work w/Rx (Active Dent/Vis) Some with M/C Life (No '2D' – '2G')	R16	YES	YES	YES	YES	NO
G17	G04 Retiree Return to Work w/Rx (100/100) (Active Dent/Vis) Some with M/C Life (No '2D' – '2G')	R17	YES	YES	YES	YES	NO
G18	G14 Retiree Return to Work w/nRx (100/100) (Active Dent/Vis) Some with M/C Life (No '2D' – '2G')	R18	NO	YES	YES	YES	NO
G19	LTD Retirees w/Rx (D/V) Some with M/C Life (No '2D' – '2G')	R19	YES	YES	YES	YES	YES
G20	G03 Retiree who return to work Dent/Vis at EE rate Some with M/C Life (No '2D' – '2G')	R20	YES	YES	YES	YES	NO
G21	Retiree (90/75) with M/C Life (No '2D' – '2G')	R21	YES	NO	NO	YES	YES
G22	Retiree (90/75) with M/C Life (No '2D' – '2G')	R22	NO	NO	NO	YES	NO
G23	Retiree pre-1983 (100/75) with M/C Life (No '2D' – '2G')	R23	YES	NO	NO	YES	YES
G24	Retiree (100/100) with M/C Life (No '2D' – '2G')(Dental/Vision)	R24	YES	YES	YES	YES	YES

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

PE RETIREE BENEFIT PROGRAMS

Benefit Program	Program Description	BP Prior to 10/1/10	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	M/C Life	Subsidy Eligible?
G25	LTD with M/C Life	R25	YES	YES	YES	YES	YES
G27	Preferred list with M/C Life (No '2D' – '2G')	R27	YES	NO	NO	YES	NO
G51	Retiree (90/75) – LIS	R51	NO	NO	NO	NO	NO
G53	Retiree pre-1983 (100/75) – LIS	R53	NO	NO	NO	NO	NO
G54	Retiree (100/100) – LIS	R54	NO	NO	NO	NO	NO
G55	Amended Dependent Survivors (75/75) – LIS	R55	NO	NO	NO	NO	NO
G56	Attica Survivors – LIS	R56	NO	NO	NO	NO	NO
G57	Full Share Survivors – LIS	R57	NO	NO	NO	NO	NO
G58	Survivors (90/75) – LIS	R58	NO	NO	NO	NO	NO
G59	Vestees – LIS	R59	NO	NO	NO	NO	NO
G61	Long Term Disability – Dental/Vision; - LIS	R61	NO	YES	YES	NO	NO
G65	Retiree (100/100 DepSur) – LIS	R65	NO	NO	NO	NO	NO
G69	LTD Retirees (D/V) Some with M/C Life (No '2D' – '2G') – LIS	R69	NO	YES	YES	YES	NO
G71	Retiree (90/75) with M/C Life (No '2D' – '2G') – LIS	R71	NO	NO	NO	YES	NO
G73	Retiree pre-1983 (100/75) with M/C Life (No '2D' – '2G') – LIS	R73	NO	NO	NO	YES	NO
G74	Retiree (100/100) with M/C Life (No '2D' – '2G') – LIS	R74	NO	NO	NO	YES	NO
G75	LTD with M/C Life – D/V; - LIS	R75	NO	YES	YES	YES	NO
G77	Retiree (0/0) Monthly	M07	YES	NO	NO	NO	N/A
G78	COBRA Retiree – formerly G01, G03, G04, G05, G06, G07, G08, G09, G10, G11, G15, G16, G17, G19, G20, G21, G23, G24, G25, G26	C31	YES	YES	YES	N/A	N/A
G79	COBRA Retiree – formerly G02, G14, G18, G22, G53, G54, G55, G56, G57, G58, G59, G61, G65, G69, G71, G73, G74, G75	C32	NO	YES	YES	N/A	N/A
G80	YAO -NY Retiree Benefits – formerly G01, G03, G04, G05, G06, G07, G08, G09, G10, G11, G15, G16, G17, G19, G20, G21, G23, G24, G25, G27, G76, G77	D10	YES	NO	NO	N/A	N/A
G81	YAO Without Drug Coverage - NY Retiree Benefits – former G02, G14, G18, G22, G51, G53, G54, G55, G56, G57, G58, G59, G61, G65, G69, G71, G73, G74, G75	D11	NO	NO	NO	N/A	N/A

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

PE COBRA/YAO BENEFIT PROGRAMS

Benefit Program	Program Description	BP Prior to 10/1/10	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	M/C Life	Subsidy Eligible?
G84	COBRA Roswell Park PEF - formerly A22	C02	YES	YES	YES	N/A	N/A
G85	COBRA Roswell Park M/C – formerly A23	C05	YES	YES	YES	N/A	N/A
G86	COBRA NYSCOPBA Law Enforcement Roswell Pk – former A24	C48	YES	YES	YES	N/A	N/A
G87	YAO –Roswell Park M/C - formerly A23, G85	D02	YES	NO	NO	N/A	N/A
G88	YAO - Roswell Park PEF - formerly A22, G84	D03	YES	NO	NO	N/A	N/A
G89	YAO -NYSCOPBA Law Enforcement Roswell Pk – formerly A24, G86	D14	YES	NO	NO	N/A	N/A
G90	YAO - Roswell Park CSEA– formerly A21, C21	D18	YES	NO	NO	N/A	N/A
G91	YAO -CSEA Reduced Coinsurance Max – formerly A45, C45	D19	YES	NO	NO	N/A	N/A

MONTHLY AGENCY BENEFIT PROGRAMS

Benefit Program	Program Description	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	M/C Life
M01	CSEA Monthly	YES	NO	NO	NO
M02	UUP Lifeguards	YES	NO	NO	NO
M03	UUP Monthly	YES	NO	NO	NO
M04	M/C (100/100) Monthly (D,V) NU 96 ees with M/C Life	YES	YES	YES	YES
M05	M/C (100/100) Monthly (D,V)	NO	YES	YES	NO
M07	Retiree (0/0) Monthly	YES	NO	NO	NO
M08	M/C (100/100) Monthly with M/C Life – Life only no Medical	NO	NO	NO	YES
M09	CSEA Monthly - Reduced Coinsurance Max	YES	NO	NO	NO
M11	M/C LTD with Med(100/100) Monthly (D,V) NU 96 ees with M/C Life	YES	YES	YES	YES
M12	M/C LTD with MED (100/100) Monthly (D,V)	NO	YES	YES	NO
M13	UUP Monthly Reduced Coinsurance Max (came from M03)	YES	NO	NO	NO
M14	UUP Lifeguards with Reduced Coinsurance Max (came from M02)	YES	NO	NO	NO

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

PARTICIPATING AGENCY BENEFIT PROGRAMS

Benefit Program	Program Description	NYSHIP Drugs	Subsidy Eligible?
PA7	PA Active Employee in Option 7	YES	NO
PA9	PA Active Employee in Excelsior	YES	NO
PC1	PA COBRA in Option 7 – LIS	NO	NO
PC3	PA COBRA in Excelsior – LIS	NO	NO
PC7	PA COBRA in Option 7	YES	NO
PC9	PA COBRA in Excelsior	YES	NO
PD7	YAO -Participating Agencies in Empire Plan – formerly PA7, PC7, PE7, PN7, PR7, PS7, PV7	YES	NO
PD9	YAO -Participating Agencies in Excelsior Plan – formerly PA9, PC9, PE9, PN9, PR9, PS9, PV9	YES	NO
PE1	PA Extended Benefits Option 7 – LIS	NO	NO
PE3	PA Extended Benefits Excelsior – LIS	NO	NO
PE7	PA Extended Benefits Option 7	YES	YES
PE9	PA Extended Benefits Excelsior	YES	YES
PF7	PA Emergency Volunteers Option 7 (Retiree Benefit Package)	YES	NO
PF9	PA Emergency Volunteers Excelsior (Retiree Benefit Package)	YES	NO
PN7	PA NYS Continuity Option 7	NO	NO
PN9	PA NYS Continuity Excelsior	NO	NO
PR1	PA Retiree in Option 7 – LIS	NO	NO
PR3	PA Retiree in Excelsior – LIS	NO	NO
PR7	PA Retiree in Option 7	YES	YES
PR9	PA Retiree in Excelsior	YES	YES
PS1	PA Survivor in Option 7 – LIS	NO	NO
PS3	PA Survivor in Excelsior – LIS	NO	NO
PS7	PA Survivor in Option 7	YES	YES
PS9	PA Survivor in Excelsior	YES	YES
PV1	PA Vestee Option 7 – LIS	NO	NO
PV3	PA Vestee Excelsior – LIS	NO	NO
PV7	PA Vestee Option 7	YES	YES
PV9	PA Vestee Excelsior	YES	YES

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

RETIREE, SURVIVOR, VESTEE, PREFERRED LIST and LONG TERM DISABILITY BENEFIT PROGRAMS

Benefit Program	Program Description	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	M/C Life	Subsidy Eligible?
R01	Retiree (90/75)	YES	NO	NO	NO	YES
R02	Retiree (90/75)	NO	NO	NO	NO	NO
R03	Retiree pre-1983 (100/75)	YES	NO	NO	NO	YES
R04	Retiree (100/100)	YES	NO	NO	NO	YES
R05	Amended Dependent Survivors (75/75)	YES	NO	NO	NO	YES
R06	Attica Survivors	YES	NO	NO	NO	YES
R07	Full Share Survivors	YES	NO	NO	NO	YES
R08	Survivors (90/75)	YES	NO	NO	NO	YES
R09	Vestees	YES	NO	NO	NO	YES
R10	Preferred list	YES	NO	NO	NO	NO
R11	Long Term Disability (Dental/Vision)	YES	YES	YES	NO	YES
R13	R01 Retiree Return to Work w/Rx Some with M/C Life (No '2D' – '2G')	YES	NO	NO	YES	NO
R14	Retiree (100/100) Mthly	NO	NO	NO	NO	NO
R15	Retiree (100/100 DepSur)	YES	NO	NO	NO	YES
R16	R01 Retiree Return to Work w/Rx (Active Dent/Vis) Some with M/C Life (No '2D' – '2G')	YES	YES	YES	YES	NO
R17	R04 Retiree Return to Work w/Rx (100/100) (Active Dent/Vis) Some with M/C Life (No '2D' – '2G')	YES	YES	YES	YES	NO
R18	R14 Retiree Return to Work w/nRx (100/100) (Active Dent/Vis) Some with M/C Life (No '2D' – '2G')	NO	YES	YES	YES	NO
R19	LTD Retirees w/Rx (D/V) Some with M/C Life (No '2D' – '2G')	YES	YES	YES	YES	YES
R20	R03 Retiree who return to work Dent/Vis at EE rate Some with M/C Life (No '2D' – '2G')	YES	YES	YES	YES	NO
R21	Retiree (90/75) with M/C Life (No '2D' – '2G')	YES	NO	NO	YES	YES
R22	Retiree (90/75) with M/C Life (No '2D' – '2G')	NO	NO	NO	YES	NO
R23	Retiree pre-1983 (100/75) with M/C Life (No '2D' – '2G')	YES	NO	NO	YES	YES

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

RETIREE, SURVIVOR, VESTEE, PREFERRED LIST and LONG TERM DISABILITY BENEFIT PROGRAMS

Benefit Program	Program Description	NYSHIP Drugs	NYSHIP Dental	NYSHIP Vision	M/C Life	Subsidy Eligible?
R24	Retiree (100/100) with M/C Life (No '2D' – '2G') (Dental/Vision)	YES	YES	YES	YES	YES
R25	LTD with M/C Life	YES	YES	YES	YES	YES
R26	**Retirees with M/C Life Only** M/C Life enrollees eligible for the retirement system, but not eligible to vest in Health Insurance. (No '2D' – '2G')	NO	NO	NO	YES	NO
R27	Preferred list with M/C Life (No '2D' – '2G')	YES	NO	NO	YES	NO
R51	Retiree (90/75) – LIS	NO	NO	NO	NO	NO
R53	Retiree pre-1983 (100/75) – LIS	NO	NO	NO	NO	NO
R54	Retiree (100/100) – LIS	NO	NO	NO	NO	NO
R55	Amended Dependent Survivors (75/75) – LIS	NO	NO	NO	NO	NO
R56	Attica Survivors – LIS	NO	NO	NO	NO	NO
R57	Full Share Survivors – LIS	NO	NO	NO	NO	NO
R58	Survivors (90/75) – LIS	NO	NO	NO	NO	NO
R59	Vestees – LIS	NO	NO	NO	NO	NO
R61	Long Term Disability – Dental/Vision; - LIS	NO	YES	YES	NO	NO
R65	Retiree (100/100 DepSur) – LIS	NO	NO	NO	NO	NO
R69	LTD Retirees (D/V) Some with M/C Life (No '2D' – '2G') – LIS	NO	YES	YES	YES	NO
R71	Retiree (90/75) with M/C Life (No '2D' – '2G') – LIS	NO	NO	NO	YES	NO
R73	Retiree pre-1983 (100/75) with M/C Life (No '2D' – '2G') – LIS	NO	NO	NO	YES	NO
R74	Retiree (100/100) with M/C Life (No '2D' – '2G') – LIS	NO	NO	NO	YES	NO
R75	LTD with M/C Life – Dental/Vision; - LIS	NO	YES	YES	YES	NO

A53,A65,C53,C64 lost Dent/Vis 8/31/2013, effected 12/31/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al., Plaintiffs,	Index No. 159160/2012
- against -	Hon. Carol Edmead
STATE OF NEW YORK, Defendant.	**AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION**

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

ROBERT E. BRONDI, being duly sworn, deposes and says:

1. I am employed as a Chief Budget Examiner of the New York State Division of the Budget ("DOB"). I have held that position since August 20, 2008, and have worked for DOB since 1984.

2. I make this affidavit in opposition to plaintiffs' motion for summary judgment in this action and in support of the State's cross-motion for summary judgement. I have personal knowledge of the facts set forth below.

3. I have been advised that, in February 2014, at oral argument before the Appellate Division, First Department, on defendant's appeal from the denial of its motion to dismiss plaintiffs' complaint in this action, counsel for plaintiffs asserted that state employees designated as "managerial" or "confidential" ("M/C") under Civil Service Law § 201(7)(a) had received a lump sum payment under Part B, § 3(3) of chapter 491 of the Laws of 2011 in exchange for the State's reduction in employer health premium contributions. Plaintiffs' contention is incorrect.

In fact, not only has the State *not* made a "lump sum payment" to M/C employees under Part B, § 3(3) of chapter 491 (there are a total of two lump sum payments referenced in this statutory provision, one for $775 and one for $225) in exchange for the State's reduction in employer health premium contributions, *to date it has not made a lump sum payment at all under that statutory provision.* Nor, to the best of my knowledge, is there any present intention that the State will make any such "lump sum payment" in the future under that statutory provision.

4. Chapter 491 provides that any salary increase or lump sum payment or other payment associated with M/C employees may be withheld at the broad discretion of the director of the budget (see pt. B, § 13(1)). Chapter 491 further provides that such lump sum payments may not be implemented until the director of the budget delivers notice to the comptroller that such amounts may be paid (see pt. B, § 13(2)). Pursuant to that authority, the director declined to make the "lump sum payment" authorized in Part B, § 3(3).

5. In November 2011, the director of the budget issued a bulletin announcing that he would allow M/C employees to receive year-over-year step increases in pay (*i.e.*, "performance advances"), discretionary merit awards and longevity awards where appropriate.[1] These payments implemented a written budget policy that had been in place for years and were not part of any "exchange" for reduced employer health premium contribution rates.[2] At the same time, however, in accordance with Part A, §7 of chapter 491 of the Laws of 2011 (which amended section 200 of the state finance law) and Part B, §13(3) of chapter 491 of the Laws of 2011, the budget director announced (in the same bulletin) that the State would withhold part of M/C employees' paychecks from December 2011 to April 2013 pursuant to its deficit reduction plan,

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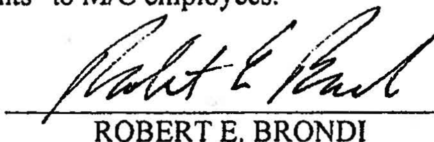
[1] *See* Budget Bulletin No. B-1197 (Nov. 14, 2011), http://www/budget.ny.gov/guide/bprm/bulletins/b-1197(11).pdf.

[2] *See* Budge Policy and Reporting Manual, Item D-280 (last updated Jan. 31, 2008), http://www.budget.ny.gov/guide/bprm/d/d-280.pdf.

and would not begin to repay the amounts withheld until April 2015.

6. Even if the State had made a "lump sum payment" to M/C employees -- which it did not -- such a payment could not be viewed as an "exchange" for the reduction in employer health premium contribution rates. First, M/C employees are specifically excluded from collective bargaining. *See* Civil Service Law §§ 201(7)(a), 202, 214. Second, the Legislature did not mandate any change in employer health premium contribution rates for M/C employees or lump sum payments to M/C employees, but instead the Legislature addressed these items separately by leaving (i) any change to employer health premium contribution rates to the discretion of the president of the Civil Service Commission and the Director of the Division of the Budget (See Part A, § 2 of chapter 491 of the Laws of 2011), and (ii) the payment of the $775 and $225 lump sums specified in § 3(3) of Part B of chapter 491 of the Laws of 2011 to the discretion of the Director of the Division of the Budget. (See Part B, § 13(1) and Part B, § 13(2) of chapter 491 of the Laws of 2011.) To the best of my knowledge, that discretion was separately exercised to reduce health premium contribution rates for all non-unionized employees, and not make "lump sum payments" to M/C employees.



ROBERT E. BRONDI

Sworn to before me this
29th day of January, 2015

Notary Public

MICHAEL P. KENDALL
Notary Public, State of New York
No. 01KE6031437
Qualified in Albany County
Commission Expires October 4, 2017

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al. Plaintiffs, - against - STATE OF NEW YORK, Defendant.	Index No. 159160/2012 Hon. Carol Edmead **AFFIRMATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS CROSS-MOTION FOR SUMMARY JUDGMENT**

MARK E. KLEIN, an attorney duly admitted to practice before the courts of this State, hereby affirms the following under penalties of perjury pursuant to CPLR 2106:

1. I am an Assistant Attorney General in the Office of the Attorney General of the State of New York, attorney for defendant, the State of New York. I submit this affirmation (i) in opposition to plaintiffs' motion for summary judgment, and (ii) in support of the State's cross-motion for an order, pursuant to Rule 3212 of the Civil Practice Law and Rules, granting defendant summary judgment dismissing plaintiffs' Complaint, dated December 26, 2012, in all respects, on the ground that, as a matter of law, L. 2011, c. 491 § 2 and amended Civil Service Law § 167(8) are not unconstitutional as applied to judges and justices[1] of the United Court System.

2. Plaintiffs, who are thirteen current and retired justices of New York Supreme Court, brought this action on December 26, 2012, more than a year after the acting president of the Civil Service Commission reduced the State's percentage contribution toward health insurance premiums for state employees. Plaintiffs seek a declaration that Civil Service Law §

[1] All judges and justices covered by the Compensation Clause of the New York State Constitution are, unless otherwise indicated, herein referred to as "judges."

167(8), which authorizes the president of the Civil Service Commission to reduce the State's percentage contribution toward health insurance premiums for all state employees, is unconstitutional as applied to judges.

The State's Motion to Dismiss

3. In February 2013, the State moved, pursuant to CPLR 3211(a)(7), for an order dismissing plaintiffs' complaint for failure to state a cause of action. In so moving, the State argued, among other things, that the State's premium contributions are not "compensation" as that term is used in the "Compensation Clause" of the New York Constitution, N.Y. Const. art. VI, § 25(a). The State also argued that § 167(8) did not *directly* reduce judges' salaries, but merely increased judges' other costs, and thereby *indirectly* reduced their take-home pay. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, dated February 22, 2013, a copy of the relevant portion of which is annexed hereto as Exhibit A; Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss, dated April 29, 2013, a copy of the relevant portion of which is annexed hereto as Exhibit B, at 4-5. In particular, the State argued that "adjustments to non-salary benefits" are "indirect" (*see* Exh. A, at 11), that laws having such indirect effects on take-home pay do not violate the Compensation Clause unless they discriminate against judges, and that, because the 2011 change in contribution rates was non-discriminatory, it did not violate the Compensation Clause. Given, however, that the State was moving to dismiss pursuant to CPLR 3211(a)(7), the State submitted no evidentiary proof of its contention that the challenged legislation did not discriminate against judges.

4. This Court, assuming the allegations of plaintiffs' Complaint to be true,[2] as

[2] *See* this Court's May 21, 2013 Decision/Order (the "May 2013 Order"), a copy of which is annexed as Exhibit E to the affirmation of Alan M. Klinger, dated December 4, 2013 ("Klinger Aff."), at 8 ("the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must 'accept the facts as alleged

required on a motion to dismiss, denied the State's motion to dismiss. Rejecting the State's first argument, this Court held that healthcare benefits constitute "compensation" within the meaning of the New York Compensation Clause. (May 2013 Order (Klinger Aff., Exh. E), at 11-13, 15.) This Court also rejected the State's second argument, concluding that, while the challenged law "does not single out judges," it nevertheless diminishes their compensation. (*Id.* at 13.)

The State's Appeal

5. On September 3, 2013, the State appealed to the Appellate Division, First Department, from this Court's May 2013 Order. On appeal, the State again argued that the State's premium contributions are not "compensation" protected by the Compensation Clause of the New York Constitution. The State also again argued that the reduction in premium contributions did not directly diminish judges' compensation. *See* Brief for Appellant, a copy of the relevant portion of which is annexed hereto as Exhibit C, at 29 (the change in premium contributions "does not directly affect judicial compensation"), and Reply Brief for Appellant, a copy of the relevant portion of which is annexed hereto as Exhibit D, at 17-18 (same).

6. I have been advised that, at oral argument before the Appellate Division, First Department, on defendant's appeal from the denial of its motion to dismiss, counsel for plaintiffs asserted that, in exchange for the State's reduction in employer health premium contributions, the State's "management" or "confidential" ("M/C") employees supposedly had received a lump sum payment under Part B of § 3(3) of chapter 491 of the Laws of 2011. Following this assertion at oral argument, plaintiffs submitted a letter to the First Department making the same contention. (*See* Exhibit E hereto.)

---

in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory.'" (Citations omitted.)

7. In its Decision and Order, dated May 6, 2014 (the "First Department's Order"),[3] the First Department affirmed this Court's May 2013 Order, rejecting both of the State's arguments. As to the first argument, the First Department concluded that "it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits." (Klinger Aff., Exh. F, at 56.) For purposes of plaintiffs' motion and the State's cross-motion now before this Court, the State does not ask the Court to re-visit this legal issue, subject to the State's right of further appellate review.

8. The First Department also rejected the State's second argument, concluding that "Section 167.8 *uniquely* discriminates against judges because it imposes a financial burden on them for which they receive no compensatory benefit." (Klinger Aff., Exh. F., at 57 (emphasis added).) The State does not, however, accept this determination to be law of the case, for the following two reasons:

9. First, in reaching this determination, the First Department *incorrectly* relied on the assumption that the State had *not* contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation. In its Decision and Order, the First Department stated, incorrectly, that, "[o]n appeal, defendant does *not* argue that reducing its contribution to judges' insurance premiums did not directly diminish judges' compensation." (Klinger Aff., Exh. F, at 56 (emphasis added).) But, as demonstrated above, the State had expressly made that argument, not only before this Court, but before the First Department.

10. Second, as set forth in the State's accompanying memorandum of law, the doctrine of the law of the case is inapplicable where, as here, a summary judgment motion follows a motion to dismiss. *See Friedman v. Conn. Gen. Life Ins. Co.*, 30 A.D.3d 349, 349 (1st Dep't 2006), *aff'd as modified on other grounds*, 9 N.Y.3d 105 (2007). As the *Friedman* court

[3] A copy of the First Department's Order is annexed as Exhibit F to the Klinger Aff.

further stated, this is because "the scope of review on the two motions differs; the motion to dismiss examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings." *Id.* at 349-50, citing *Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry*, 128 A.D.2d 467, 469 (1st Dep't 1987).

11. The inapplicability of the law of the case doctrine is particularly inappropriate here, given that, on its motion to dismiss, the State had not yet had the opportunity to submit *evidentiary proof* demonstrating Civil Service Law § 167(8) and its implementing regulations did not discriminate against plaintiffs. Specifically, the evidentiary proof the State now submits demonstrates that more than 12,000 M/C employees were treated identically to plaintiffs, because (i) like plaintiffs, the insurance premiums of M/C employees[4] were increased as a result of the enactment of Civil Service Law § 167(8) and its implementing regulations; and (ii) like plaintiffs, M/C employees are not members of a union and had no power to bargain for any benefit in exchange for the premium changes. Accordingly, far from "uniquely" discriminating against judges, as a matter of law § 167(8) does not discriminate at all against judges.

12. In part because of the First Department's incorrect assumption that that the State had *not* contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation, the State moved for reargument of the First Department's Order. By notice of motion dated June 5, 2014, the State moved before the First Department for reargument of the First Department's Order, or, in the alternative, an order granting permission to appeal to the Court of Appeals. By Order dated September 18, 2014, the First Department denied, without opinion, the State's motion. (*See* Klinger Aff., Exh. G.)

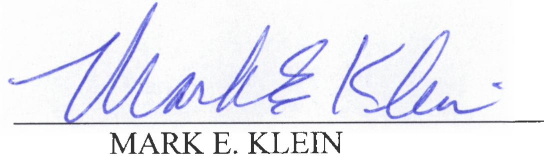
13. A copy of the State's Answer to plaintiffs' Complaint is annexed hereto as

[4] It is my understanding that M/C employees include certain supervisory and "confidential" personnel in the State's executive and legislative branches, all Assistant Attorneys General, and certain personnel of the United Court System, such as Law Secretaries.

Exhibit F.

14. For all the foregoing reasons, and those set forth in the accompanying affidavits of David Boland and Robert E. Brondi and the accompanying memorandum of law, the State respectfully requests that plaintiffs' motion for summary judgment be denied, and the State's cross-motion for an order dismissing plaintiffs' Complaint should be granted, in all respects.

Dated: New York, New York
January 30, 2015



MARK E. KLEIN

No. 159160/2012

To be argued by:
BRIAN A. SUTHERLAND

Supreme Court, New York County

Supreme Court of the State of New York
Appellate Division – First Department

EILEEN BRANSTEN, Justice of the Supreme Court
of the State of New York, et al.,

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK,

Defendant-Appellant.

BRIEF FOR APPELLANT

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Dated: September 3, 2013

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POINT I

THE STATE'S PREMIUM CONTRIBUTIONS ARE NOT CONSTITUTIONALLY PROTECTED COMPENSATION

The New York Constitution provides that the judicial "compensation" protected by the Compensation Clause "shall be established by law." N.Y. Const. art. VI, § 25(a). This language, which does not appear in the federal analogue, U.S. Const. art. III, § 1, explicitly requires protected "compensation" to be formalized in a statute, and rules out any interpretation of "compensation" that turns on nonstatutory factors such as the expectations of employees or the general usage of the term in the nonconstitutional employment context.[30]

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[30] In *Beer v. United States*, for example, the United States Court of Appeals for the Federal Circuit relied on the "'employment expectation'" of judges to determine whether a legislative act violated the federal Compensation Clause. 696 F.3d 1174, 1182 (Fed. Cir. 2012) (en banc) (citing *United States v. Hatter*, 532 U.S. 557, 585 (2001) (Scalia, J., concurring in part and dissenting in part)), *cert. denied*, 133 S. Ct. 1997 (2013). That theory is unavailable under the New York Constitution because only compensation "established by law" is protected. *Cf. also* Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 Colum. L. Rev. 501, 534 (2002) (identifying myriad problems inherent in an "employment expectation"-based regime).

Plaintiffs' complaint did not identify any statute creating a constitutionally protected entitlement to healthcare benefits. Instead, it simply asserted that "[t]he term compensation encompasses health benefits" (R. 36 [¶ 35]). The trial court likewise concluded that "'compensation' in the context of one's employment" includes "health insurance benefits" (R. 17), without identifying any statute or relevant case law to support that assertion.[31]

In their brief in opposition to the State's motion to dismiss (R. 203), plaintiffs finally identified the statutory source of their claims: Civil Service Law § 167(1). That statute provides that "[n]ine-tenths of the cost of premium or subscription charges for the coverage of state

---

[31] The trial court relied on *Larabee v. Governor of State of New York*, but this Court's references to "wages and benefits" in that case are dicta. 65 A.D.3d 74, 86 (1st Dep't 2009), *affirmed as modified by Matter of Maron v. Silver*, 14 N.Y.3d 230 (2010). Plaintiffs there alleged that their statutory *salaries* were unconstitutionally low; they did not allege that their employee benefits were constitutionally inadequate. *See id.* at 85. In any event, this Court expressly *rejected* plaintiffs' Compensation Clause claim. *See id.* at 87. The Second Department's decision in *Roe v. Board of Trustees of the Village of Bellport* is similarly inapposite; it too expressly *rejects* the Compensation Clause as a source of authority for its ruling. *See* 65 A.D.3d 1211, 1212 (2d Dep't 2009). The remaining cases cited by the trial court (R. 18) do not involve judges at all.

employees . . . who are enrolled in . . . health benefit plans shall be paid by the state." Civil Service Law § 167(1). But this provision does not create constitutionally protected compensation because it bears no resemblance to the statutorily fixed salaries (or closely related payments that have a fixed and permanent character) that the Compensation Clause was intended to cover.

A. The State's Premium Contribution Defrays the Cost of an Optional Benefit, Rather Than Providing a Fixed and Permanent Payment Similar to a Salary.

As described above, the framers of each successive constitution and amendment thought that "compensation" was synonymous with "salary," using the terms interchangeably throughout their debates.[32] See *supra* at 4-14. For example, when summarizing the work of the

---

[32] The framers of the United States Constitution also viewed "compensation" as synonymous with "salary." *See* Pfander, *Judicial Compensation, supra,* at 4 (observing that debates concerning "the impact of inflation on fixed judicial salaries assume that Article III calls for payment of salary-based compensation"); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 701-02 (1995) ("[O]ther than its guarantee against salary reduction, Article III imposes no further limitations on congressional authority to regulate judicial benefits.").

Judiciary Convention of 1921, Judge Pound said that the Compensation Clause "makes it very plain that the Legislature has full power in the matter, except that it may not diminish *salaries* as established."[33] At most, as the Court of Appeals made clear in *People ex rel. Bockes*, the constitutional term "compensation" can be stretched to cover statutorily established payments that are not formally designated as a salary but that nonetheless bear the crucial hallmarks of a salary because "the intention of the legislature was to make a *permanent* addition" to "increase the *fixed* compensation" of judges. *People ex rel. Bockes*, 115 N.Y. at 310 (emphasis added). But "compensation" does not include mere reimbursements for expenses incurred by judges. *See People ex rel. Follett*, 145 N.Y. at 264-66.

The State's contribution to employees' health insurance premiums is more similar to reimbursement for expenses than to a salary, and accordingly does not fall within the scope of the Compensation Clause.

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[33] Proceedings of the Judiciary Constitutional Convention of 1921, *reprinted in Problems, supra*, at 593 (emphasis added). The fact that the framers viewed "compensation" as synonymous with "salary" is not surprising because, in those times, the practice of offering employer-based insurance benefits to employees did not exist. See *supra* at 17 n.27.

Employees are not required to join the State's health insurance plan; instead, the plan is available only to those state employees, including judges, "*who elect to participate*," Civil Service Law § 163(1) (emphasis added),[34] and who thus *voluntarily* decide to incur the expense of health insurance premiums for that plan.[35] The sole effect of the State's contribution is to cover part of the healthcare expenses voluntarily assumed by state employees, including judges—in essence, offering a discount for a product that an employee may opt to purchase. And all that the challenged premium contribution reductions accomplish is a slight diminishment of that discount from ninety percent to eighty-eight or eighty-four percent. This reduction in the State's coverage of an optional expense does not diminish "compensation" in the constitutional

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[34] The trial court stated, without citation, that plaintiffs were "*left without a choice and required to contribute*" (R. 22 (emphasis in original)). But plaintiffs do not make this allegation in their complaint, and even if they had, it is plainly refuted by the Civil Service Law.

[35] By contrast, the New Jersey law invalidated by a narrow 3-2 majority in *DePascale v. State of New Jersey*, 211 N.J. 40, 56-62 (2012), *required* judges to contribute a portion of their salary to healthcare and pension benefits. This Court should also decline to follow the reasoning of *DePascale*, which is a non-binding out-of-state decision, for the reasons persuasively stated in the dissent. *See id.* at 65-94.

sense. *See People ex rel. Follett*, 145 N.Y. at 266 (reimbursement is not protected because "it is only when these expenses and disbursements have been incurred" that reimbursement takes place).

The Court of Appeals reached the same conclusion in a closely related case interpreting New York Constitution article V, § 7, which provides in part that pension or retirement "benefits . . . shall not be diminished." In *Matter of Lippman v. Board of Education*, the Court considered whether a school district's decision to reduce its contribution toward health insurance premiums, with the result that retirees would receive a smaller pension check, unconstitutionally "diminished" retirees' "benefits." 66 N.Y.2d 313, 317-19 (1985). The Court held that this reduction did not affect retirees' "benefits" at all. It acknowledged that "a retiree will receive a smaller . . . check" because a larger share of his or her pension payments would be used to pay for health insurance, but concluded that "this is no more a change in retirement benefits than would be an increase in the price of eggs at the supermarket . . . . The retiree has less to spend, but there has been no change in his *retirement benefit*." *Id.* at 318-19 (emphasis in original).

That reasoning applies equally here: the recent premium contribution reductions increase the price of (optional) health insurance by diminishing the State's discount, but that change does not directly affect judicial *compensation*. Rather, the only relationship between state health benefits and compensation "is the purely incidental one that the latter provides the means by which the former is paid in those instances where the employer has elected to pay less than the full premium." *Id.* at 318. Because judicial compensation has not itself been directly affected, Supreme Court erred in concluding that the recent reduction in premium contributions is unconstitutional.[36]

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[36] Although plaintiffs' principal theory is that health insurance benefits are "compensation" within the meaning of the Compensation Clause (*see* R. 36-37 [¶¶ 35-36], 203-206), they also seem to proffer an alternative argument that the Civil Service Law directly reduces their salaries (see R. 206 ("Regardless of wordplay, Plaintiffs' take-home pay . . . would be less")). The reasoning in the main text above responds equally to this alternative argument.

No. 159160/2012

To be argued by:
BRIAN A. SUTHERLAND

Supreme Court, New York County

Supreme Court of the State of New York
Appellate Division – First Department

EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, et al.,

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK,

Defendant-Appellant.

REPLY BRIEF FOR APPELLANT

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Dated: November 8, 2013

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POINT II

THE STATE'S REDUCTION IN PREMIUM CONTRIBUTIONS IS NON-DISCRIMINATORY

Even if the State's premium contributions could be construed as constitutionally-protected "compensation" (and they cannot), plaintiffs' claim here would still fail. The Compensation Clause permits judicial compensation to be indirectly diminished so long as judges are not "effectively singled out . . . for unfavorable treatment." *United States v. Hatter*, 532 U.S. 557, 561 (2001). The State's broadly applicable and non-discriminatory reduction in premium contributions for the overwhelming majority of state employees easily satisfies this principle. See State's Br. at 34-37.

As a threshold matter, plaintiffs argue that they do not have to allege discrimination at all because the "State does not contest . . . that the diminishment [in judicial compensation] was direct," and direct reductions of judicial compensation are prohibited even if non-discriminatory. Pls. Br. at 3-4; *see also id.* at 23-24 (same). But the State's opening brief could not have been clearer: it stated unequivocally that "the recent premium contribution reductions increase the price of (optional) health insurance by diminishing the

State's discount, but that change *does not directly affect* judicial compensation." State's Br. at 29 (emphasis added); *see also id.* at 29 n.36 (explicitly stating that arguments in the text were intended to respond to any contention that "the Civil Service Law directly reduces [plaintiffs'] salaries"). The State's brief further explained that the effect of reducing the State's premium contributions was indirect because "the only relationship between state health benefits and compensation 'is the purely incidental one that the latter provides the means by which the former is paid in those instances where the employer has elected to pay less than the full premium.'" *Id.* (quoting *Matter of Lippman*, 66 N.Y.2d at 318). Plaintiffs make no response to these arguments. Accordingly, plaintiffs cannot avoid the requirement that they show how judges have been singled out for differential treatment.

Plaintiffs have failed to make that showing here. To the contrary, the State's reduction in premium contributions applied to *all* non-unionized state employees (a class that includes judges), and the overwhelming majority of state employees overall. Thus, plaintiffs have not met their burden of proving a diminishment of compensation that

applies exclusively or "almost exclusively" to judges. *Matter of Maron v. Silver*, 14 N.Y.3d 230, 255 (2010) (quoting *Hatter*, 532 U.S. at 564).

Plaintiffs contend that the State has discriminated against judges because a tiny fraction of unionized state employees have not had their premium contributions reduced. *See* Pls. Br. at 26 ("[I]n failing to have complete application, the reduction falls far short of the *Hatter* test for constitutionality."). But as *Hatter* made clear, discrimination sufficient to violate the Compensation Clause occurs only when judges are singled out—*i.e.*, treated differently from *everybody* else—not when judges are being treated differently from *anybody* else.

The Court of Appeals' decision in *Maron* also disposes of plaintiffs' discrimination argument. In that case, the Court rejected a claim that judges had been singled out by not receiving raises, reasoning that "the Governor, Lieutenant Governor, members of the Legislature and other constitutional officers have also not received salary increases since 1999." 14 N.Y.3d at 256. In other words, *Maron* found no discrimination against judges based on the fact that they were treated the same as a small number of other high-level state employees. Here, with respect to the State's reduction in premium contributions, judges are being treated the

same as 96 percent of state employees, constituting nearly two hundred thousand people. This near-universal treatment of state employees does not impermissibly discriminate—let alone single out—judges.

Plaintiffs also assert that judges have been discriminated against because low-ranking union members received a "specific benefit, no layoffs" (Br. at 28) in exchange for the State's reduction in its contributions to health insurance premiums—but judges received no similar benefit because they are already protected from "layoffs" under the Constitution. Plaintiffs' argument, in other words, is that judges have been singled out by not being given a meaningful quid pro quo. It is highly doubtful that the Compensation Clause guarantees to judges any benefit granted to any other state employee, as opposed to merely protecting their compensation from diminishment. And it is equally doubtful that the Compensation Clause bars the Legislature from giving other state employees a privilege (namely, job protection) already enjoyed by judges. But even putting those points aside, plaintiffs' argument about the lack of a "specific benefit" still does not show that judges have been exclusively singled out. In addition to judges, the State has also reduced its premium contributions to every non-

unionized member of government—a group that includes over 12,000 employees who did not collectively bargain and accordingly did not receive any "special benefit" in the form of layoff protections or otherwise (R. 51 n.8). Plaintiffs cannot and do not argue that they have been treated any differently from these thousands of non-unionized state employees.

CONCLUSION

The decision and order of Supreme Court, New York County should be reversed and vacated, and the complaint dismissed with prejudice.

Dated: New York, NY
November 8, 2013

Respectfully submitted,

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Attorney General of the State of New York
Attorney for Appellant

By: ____________________
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VIA HAND DELIVERY

February 14, 2014

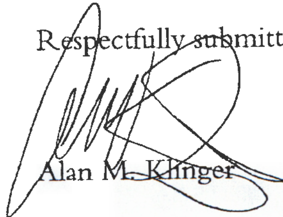
Hon. John W. Sweeny, Jr.
Hon. Helen E. Freedman
Hon. Dianne T. Renwick
Hon. Judith J. Gische
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: Bransten, et al. v. State of New York; Index No. 159160/2012

Your Honors:

The enclosed is a response to an email from the Assistant Solicitor General received shortly after argument.

Respectfully submitted,



Alan M. Klinger

cc:

Brian A. Sutherland, Esq., Assistant Solicitor General

Enclosure

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VIA EMAIL AND USPS

February 14, 2014

Brian A. Sutherland, Esq.
Assistant Solicitor General
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Re: Bransten, et al. v. State of New York; Index No. 159160/2012

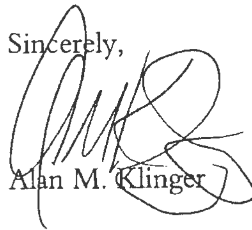
Brian:

We write in response to your post-court inquiry concerning the basis for the statement that lump sum payments were directed for employees designated as managerial/confidential. Chapter 491 of the Laws of 2011, Part B, §3 authorizes lump sum payments to certain state officers and employees, including managerial/confidential employees. L. 2011 c. 491 pt. B §3. We have enclosed the bill jacket for your reference. This was the same bill that amended Civil Service Law §167(8) to authorize the State Department of Civil Service to reduce health care contributions to all state officers and employees, including judges and justices. L. 2011 c. 491 pt. A §2.

According to the bill jacket, the bill was to "implement the terms of a collective bargaining agreement...between the executive branch of the State of New York" and the Civil Service Employees' Association and to maintain parity with unrepresented employees. Governor's Bill Jacket, Laws of 2011, Chapter 491, Introducer's Memorandum of Support, at 8. The Introducer's Memorandum of Support explains that Part B of the bill directs that managerial or confidential employees receive "compensation increases and payments that are comparable to recently negotiated increases and payments for certain represented employees. Such parity is essential to provide for appropriate salary administration...assure productivity, maintain good morale, and to allow for the

recruitment and retention of competent staff." Id. at 13. The lump sum amounts referenced yesterday were part of the package designed to effectuate that intent.

Sincerely,



Alan M. Klinger

cc:

Justice John W. Sweeny, Jr. (by hand with enclosures)
Justice Helen E. Freedman (by hand with enclosures)
Justice Dianne T. Renwick (by hand with enclosures)
Justice Judith J. Gische (by hand with enclosures)

Enclosure

FILED: NEW YORK COUNTY CLERK 02/02/2015 04:34 PM INDEX NO. 159160/2012

NYSCEF DOC. NO. 63 RECEIVED NYSCEF: 02/02/2015

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al. Plaintiffs, - against - STATE OF NEW YORK, Defendant.	Index No. 159160/2012 Hon. Carol Edmead

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT

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PRELIMINARY STATEMENT

Defendant, the State of New York, respectfully submits this memorandum of law (i) in opposition to plaintiffs' motion for summary judgment, and (ii) in support of the State's cross-motion for an order, pursuant to Rule 3212 of the Civil Practice Law and Rules, granting the State summary judgment dismissing plaintiffs' Complaint, dated December 26, 2012, in all respects, on the ground that, as a matter of law, L. 2011, c. 491 § 2 and amended Civil Service Law § 167(8) are not unconstitutional as applied to judges and justices[1] of the United Court System.

As shown below, the State's reduction in its health insurance premium contributions for State employees, including judges, who elect to participate in the State's health benefit plan does not discriminate against judges, and therefore, as a matter of law, does not violate the Compensation Clause of the New York State Constitution.

STATEMENT OF FACTS

The material facts relevant to this motion, as to which there is no genuine dispute, are set forth in the accompanying affidavits of David Boland, the Director of Employee Benefits in the New York State Department of Civil Service, Employees Benefits Division, sworn to January 30, 2015 ("Boland Aff."), and the exhibits annexed thereto; the affidavit of Robert E. Brondi, a Chief Budget Examiner of the New York State Division of the Budget, sworn to January 28, 2015 ("Brondi Aff."); and the affirmation of Mark E. Klein, dated January 30, 2015 ("Klein Aff.), and the exhibits annexed thereto.

Briefly, the undisputed facts are as follows:

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[1] All judges and justices covered by the Compensation Clause of the New York State Constitution are, unless otherwise indicated, herein referred to as "judges."

A. Civil Service Law § 167(8) and the Implementing Regulations

In 2011, in the wake of the worst financial crisis since the Great Depression, the State faced an extraordinary strain on its financial resources. As part of an effort to avoid layoffs, the State asked its employees, through the collective bargaining process, to aid the State. In response, in exchange for avoiding layoffs of thousands of state employees, agreements were reached with most state unions (which were thereafter ratified by their members), wherein they agreed to a salary freeze, unpaid furloughs and a reduction in the percentage contribution that the State pays toward employee health insurance premiums, as well as other benefit changes. (Boland Aff. ¶ 3.)

To carry out this agreement, the Legislature amended the Civil Service Law to authorize the president of the Civil Service Commission to reduce the State's contribution to employee health insurance premiums. *See* Civil Service Law § 167(8). Pursuant to the authority granted by § 167(8), the acting president and head of the Department of Civil Service promulgated a regulation, which took effect October 1, 2011, that reduced the State's contribution from ninety to eighty-eight percent for state employees receiving the equivalent of "salary grade 9 or below," and reduced the State's contribution from ninety to eighty-four percent for those employees receiving the equivalent of "salary grade 10 or above." *See* 4 N.Y.C.R.R. § 73.3(b). These provisions do not apply, however, to members of unions which have not yet agreed to modify their collective bargaining agreements. *See id.* § 73.12.

All Supreme Court justices receive a salary that is greater than "salary grade 10," and therefore, for justices who elect to enroll in the New York State Health Insurance Plan ("NYSHIP"), the State pays eighty-four percent of the cost of coverage. (Boland Aff. ¶ 5.) For all state employees who elected to participate in the State's plans and retired between January 1,

1983 and January 1, 2012, the State pays eighty-eight percent of the cost of coverage. *See* 4 N.Y.C.R.R. § 73.3(b).

As a result of the 2011 enactment of Civil Service Law § 167(8) and its implementing regulations, almost 98% of the State's approximately 189,000 active employees enrolled in NYSHIP are paying higher premium contributions. (*See* spreadsheet annexed as Exhibit A to the Boland Aff.)[2] Fewer than 3,900 employees,[3] who are members of unions which have not reached any collective bargaining agreement or otherwise agreed to the premium changes, have *not* had their insurance premiums contributions increased as a result of the enactment of Civil Service Law § 167(8). (Boland Aff. ¶ 6.) Thus, only approximately 2% of State employees have not had their insurance premium contributions increased as result of the enactment of § 167(8) and its implementing regulations.

B. The State's More than 12,000 M/C Employees Were Treated Identically to Plaintiffs

Of course, Civil Service Law § 167(8) and its implementing regulations apply not only to members of unions, but also to those state employees who, like judges, are not members of unions and thus had no opportunity to bargain for any benefit in exchange for the insurance premium changes. But judges are not the only state employees in this category. Rather, more than 12,000 state employees were treated identically to plaintiffs, because (i) like plaintiffs, their insurance premiums were increased as a result of the enactment of Civil Service Law § 167(8);

[2] The spreadsheet was made from information obtained from the New York Benefit Enrollment and Accounting System ("NYBEAS") maintained by the Department of Civil Service. The NYBEAS is generated in the regular course of the Department's activities, and the Department generates spreadsheets of this type in the regular course of its activities. (Boland Aff. ¶ 6 n.1.)

[3] These employees, who are members of the Police Benevolent Association State Troopers (Benefit Program A09) and the Bureau of Criminal Investigation Unit of the New York State Police (Benefit Program A11), have not agreed to the premium changes in a collective bargaining agreement with the State, so they have been excluded from having to pay the premium increases thus far. (*See* Boland Aff. ¶ 6 n.2 and Exh. A thereto.)

and (ii) like plaintiffs, they are not members of a union and had no power to bargain for any benefit in exchange for the premium changes. (Boland Aff. ¶ 7.)

These employees are those designated as "managerial" or "confidential" ("M/C") under Civil Service Law § 201(7)(a). They include, for example, certain supervisory and "confidential" personnel in the Executive and Legislative branches, all Assistant Attorneys General, and certain personnel of the Unified Court System, such as Law Secretaries**.** (Boland Aff. ¶ 7; Klein Aff. ¶ 11 n.4.) The more than 12,000 M/C employees, who are covered under NYSHIP Benefit Programs A05, A06, A07, A29, A33, A34 and A61, constitute more than six percent of the State workforce. (Boland Aff. ¶ 7, and Exhs. A and B thereto.)

In an effort to evade the fact that more than 12,000 other state employees were treated identically to plaintiffs, at oral argument before the Appellate Division, First Department, on defendant's appeal from the denial of its motion to dismiss, counsel for plaintiffs asserted that, in exchange for the State's reduction in employer health premium contributions, M/C employees supposedly had received a lump sum payment under Part B of § 3(3) of chapter 491 of the Laws of 2011. (Klein Aff. ¶ 6.) Following this assertion at oral argument, plaintiffs submitted a letter to the First Department making the same contention. (Klein Aff. ¶ 6 and Exh. E thereto.) Plaintiffs' contention, however, is and was incorrect. In fact, not only has the State has *not* made a "lump sum payment" to M/C employees under Part B of § 3(3) of chapter 491 in exchange for the State's reduction in employer health premium contributions, it has not made a lump sum payment *at all* under that statutory provision. (Brondi Aff. ¶ 3.) Nor is there any present intention that the State will make any such "lump sum payment" in the future. (*Id.*)

Chapter 491 provides that such lump sum payments may not be implemented until the director of the budget delivers notice to the comptroller that such amounts may be paid (*see* pt.

B, § 13(2)). Pursuant to that authority, the director has declined to make the "lump sum payment" authorized in Part B, § 3(3). (Brondi Aff. ¶ 5.) Moreover, in November 2011, the director of the budget issued a bulletin announcing, among other things, that the State would withhold part of M/C employees' paychecks from December 2011 to April 2013 pursuant to its deficit reduction plan, and would not begin to repay the amounts withheld until April 2015. (*Id.*)

Even if the State had made a "lump sum payment" to M/C employees -- which the State did *not* -- for at least two reasons such a payment could not be viewed as an "exchange" for the reduction in employer health premium contribution rates. First, M/C employees are specifically excluded from collective bargaining. *See* Civil Service Law §§ 201(7)(a), 202, 214. Thus, M/C employees, like judges, had no power to negotiate with the State.

Second, the Legislature did not mandate any change in employer health premium contribution rates for M/C employees or lump sum payments to M/C employees. Instead the Legislature addressed these items separately, by leaving (i) any change to employer health premium contribution rates to the discretion of the president of the Civil Service Commission and the Director of the Division of the Budget (*see* Part A, § 2 of chapter 491 of the Laws of 2011), and (ii) the payment of the $775 and $225 lump sums specified in § 3(3) of Part B of chapter 491 of the Laws of 2011 to the discretion of the Director of the Division of the Budget. (See Part B, § 13(1) and Part B, § 13(2) of chapter 491 of the Laws of 2011.) That discretion was separately exercised to (i) reduce health premium contribution rates for *all* non-unionized employees, and (ii) *not* make "lump sum payments" to M/C employees. (Brondi Aff. ¶ 6.)

In short, the State's reduction in its health insurance premium contributions for State employees, including judges, who elect to participate in the State's health benefit plan does not single out judges. Rather, that reduction also applied to more than 12,000 M/C employees -- a

number that is ten times larger than the number of state judges.

PROCEDURAL HISTORY AND STANDARD OF REVIEW

Plaintiffs, who are thirteen current and retired justices of New York Supreme Court, brought this action on December 26, 2012, more than a year after the acting president of the Civil Service Commission reduced the State's percentage contribution toward health insurance premiums for state employees. Plaintiffs seek a declaration that Civil Service Law § 167(8), which authorizes the president of the Civil Service Commission to reduce the State's percentage contribution toward health insurance premiums for all state employees, is unconstitutional as applied to judges.

A. The State's Motion to Dismiss

In February 2013, the State moved, pursuant to CPLR 3211(a)(7), for an order dismissing plaintiffs' Complaint for failure to state a cause of action. In so moving, the State argued, among other things, that the State's premium contributions are not "compensation" as that term is used in the "Compensation Clause" of the New York Constitution, N.Y. Const. art. VI, § 25(a). The State also argued that § 167(8) did not *directly* reduce judges' salaries, but merely increased judges' other costs, and thereby *indirectly* reduced their take-home pay. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, dated February 22, 2013, at 11 (Klein Aff., Exh. A); Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss, dated April 29, 2013, at 4-5 (Klein Aff., Exh. B). In particular, the State argued that "adjustments to non-salary benefits" are "indirect" (*see* Klein Aff., Exh. A, at 11), that laws having such indirect effects on take-home pay do not violate the Compensation Clause unless they discriminate against judges, and that, because the 2011 change in contribution rates was non-discriminatory, it did not violate the Compensation Clause. Given, however, that the State

was moving to dismiss pursuant to CPLR 3211(a)(7), the State submitted no evidentiary proof of its contention that the challenged legislation did not discriminate against judges.

This Court, assuming the allegations of plaintiffs' Complaint to be true, [4] as required on a motion to dismiss, denied the State's motion to dismiss. Rejecting the State's first argument, this Court held that healthcare benefits constitute "compensation" within the meaning of the New York Compensation Clause. (May 2013 Order (Klinger Aff., Exh. E), at 11-13, 15.) This Court also rejected the State's second argument, concluding that, while the challenged law "does not single out judges," it nevertheless diminishes their compensation. (*Id*. at 13.)

B. <u>The State's Appeal</u>

On September 3, 2013, the State appealed to the Appellate Division, First Department, from this Court's May 2013 Order. On its appeal, the State again argued that the State's premium contributions are not "compensation" protected by the Compensation Clause of the New York Constitution. The State also again argued that the reduction in premium contributions did not directly diminish judges' compensation. *See* Brief for Appellant, at 29 (Klein Aff., Exh. C) (the change in premium contributions "does not directly affect judicial compensation"), and Reply Brief for Appellant, at 17-18 (Klein Aff., Exh. D) (same).

In its Decision and Order, dated May 6, 2014 (the "First Department's Order"),[5] the First Department affirmed this Court's May 2013 Order, rejecting both of the State's arguments. As to the first argument, the First Department concluded that "it is settled law that employees'

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[4] *See* this Court's May 21, 2013 Decision/Order (the "May 2013 Order"), a copy of which is annexed as Exhibit E to the affirmation of Alan M. Klinger, dated December 4, 2013 ("Klinger Aff."), submitted in support of plaintiffs' motion for summary judgment, at 8 ("the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory.'" (Citations omitted.)

[5] A copy of the First Department's Order is annexed as Exhibit F to the Klinger Aff.

compensation includes all things of value received from their employers, including wages, bonuses, and benefits." (Klinger Aff., Exh. F, at 56.) For purposes of plaintiffs' motion and the State's cross-motion now before this Court, the State does *not* ask the Court to re-visit this legal issue, subject to the State's right of further appellate review.

The First Department also rejected the State's second argument, concluding that "Section 167.8 *uniquely* discriminates against judges because it imposes a financial burden on them for which they receive no compensatory benefit." (Klinger Aff., Exh. F., at 57 (emphasis added).) The State does not, however, accept this determination to be law of the case, for the following two reasons:

First, in reaching this determination, the First Department *incorrectly* relied on the assumption that the State had *not* contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation.[6] In its Decision and Order, the First Department stated, incorrectly, that, "[o]n appeal, defendant does *not* argue that reducing its contribution to judges' insurance premiums did not directly diminish judges' compensation." (Klinger Aff., Exh. F, at 56 (emphasis added).) But, as demonstrated above, the State had expressly made that argument, not only before this Court, but before the First Department.

Second, as the First Department has expressly recognized, the doctrine of the law of the case is inapplicable "'where . . . a summary judgment motion follows a motion to dismiss . . . .'" *Friedman v. Conn. Gen. Life Ins. Co.*, 30 A.D.3d 349, 349 (1st Dep't 2006), *aff'd as modified on*

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[6] In part because of the First Department's incorrect assumption that that the State had *not* contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation, the State moved for reargument of the First Department's Order. (Klein Aff. ¶ 12.) By notice of motion dated June 5, 2014, the State moved before the First Department for reargument of the First Department's Order, or, in the alternative, an order granting permission to appeal to the Court of Appeals. By Order dated September 18, 2014, the First Department denied, without opinion, the State's motion. (*See* Klinger Aff., Exh. G.)

other grounds, 9 N.Y.3d 105 (2007), quoting *Riddick v. City of New York*, 4 A.D.3d 242, 245 (1st Dep't 2004). As the *Friedman* court further stated, this is so because "the scope of review on the two motions differs; the motion to dismiss examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings." *Id*. at 349-50, citing *Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry*, 128 A.D.2d 467, 469 (1st Dep't 1987).

The inapplicability of the law of the case doctrine is particularly appropriate here, given that, on its motion to dismiss, the State had not yet had the opportunity to submit *evidentiary proof* demonstrating that Civil Service Law § 167(8) did not discriminate against plaintiffs. Specifically, the evidentiary proof the State now submits demonstrates that more than 12,000 M/C state employees were treated identically to plaintiffs, because (i) like plaintiffs, the insurance premiums of M/C employees were increased as a result of the enactment of Civil Service Law § 167(8) and its implementing regulations, and (ii) like plaintiffs, M/C employees are not members of a union and had no power to bargain for any benefit in exchange for the premium changes. (Boland Aff. ¶ 7.) Accordingly, far from "uniquely" discriminating against judges, as a matter of law § 167(8) does not discriminate at all against judges. Thus, as further shown below, there is no basis for finding the challenged legislation to be unconstitutional and, for this reason, plaintiffs' motion for summary judgment should be denied and the State's cross-motion should be granted.

ARGUMENT

THE STATE'S REDUCTION IN INSURANCE PREMIUM CONTRIBUTIONS DOES NOT DISCRIMINATE AGAINST JUDGES

A. Plaintiffs Have Not Been "Singled Out" for Unfavorable Treatment as a Result of the Enactment of Civil Service Law § 167(8) and Its Implementing Regulations

As the authorities upon which plaintiffs themselves rely make clear,[7] statutes that merely increase a judge's costs do not violate the Compensation Clause unless they also *discriminate* against judges. *See Matter of Maron v. Silver*, 14 N.Y.3d 230, 253-55 (2010), citing *United States v. Hatter*, 532 U.S. 557 (2001). Rather, indirect reductions in judges' compensation are constitutional so long as judges are not "effectively singled out . . . for unfavorable treatment." *Hatter*, 532 U.S. at 561.

The Court of Appeals' decision in *Matter of Lippman v. Board of Education*, 66 N.Y.2d 313 (1985), which involved a challenge to the reduction to contributions to teachers' health care insurance premiums, is directly on point here. In *Lippman*, the Court of Appeals held that a school district's contributions to the teachers' health care insurance premiums did not *directly* reduce those employees' constitutionally-protected retirement benefits. *Id.* at 317-319. Although it is true, as plaintiffs assert,[8] that the *Lippman* Court also found that health insurance benefits were not within the protection of the Constitutional provision at issue there, that finding has no relevance to the Court's holding that a reduction of contributions to the teachers' health care premiums was *not* a direct reduction of their constitutionally-protected retirement benefits.

In this case, because the increase in plaintiffs' costs for health insurance premiums was, at most, an indirect reduction in judges' "compensation," in order to prevail in this action

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[7] *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, dated December 3, 2014 ("Pls.' Mem."), at 1, 2, 9, 12, 13, 14, and 15.

[8] *See* Pls.' Mem. at 10.

plaintiffs must show that the legislation of which they complain discriminated against judges. However, contrary to plaintiffs' contention, Civil Service Law § 167(8) does not discriminate against judges. Indeed, that statute neither mentions judges nor establishes criteria that are applicable "almost exclusively" to judges. *See Maron*, 14 N.Y.3d at 255 (quoting *Hatter*, 532 U.S. at 564).

In fact, the provision of the Civil Service Law that plaintiffs challenge here does not reduce premium contributions *at all*, but instead authorizes the president of the Civil Service Commission, with the approval of the director of the budget, to do so. (*See* Boland Aff. ¶ 4.) Plaintiffs have *not*, however, asked this Court to declare that the regulations implementing § 167(8) are unconstitutional. (*See* plaintiffs' Complaint, Klinger Aff., Exh. D, WHEREFORE clause a.) For this reason alone, plaintiffs' motion for summary judgment should be denied and the State's cross-motion for summary judgment dismissing plaintiffs' Complaint should be granted.

Even had plaintiffs asked this Court to declare the regulations implementing § 167(8) to be unconstitutional -- which they have not -- the statute's implementing regulations also do not discriminate against judges. *See* 4 N.Y.C.R.R. §§ 73.3(b), 73.12. To the contrary, the implementing regulations distinguish only between (i) employees who belong to a union that has yet to ratify a new collective bargaining agreement, and (ii) all other state employees. *See id.* § 73.12. Almost 98% of the State's more than 189,000 employees enrolled in NYSHIP fall into the latter category, which includes members of unions that have ratified a new agreement, as well as non-union members of the executive, legislative and judicial branches. (Boland Aff. ¶¶ 6, 7 and Exh. A.) Thus, the vast number of *non*-judge state employees affected by the reduction

in premium contributions belies any argument that plaintiffs have been singled out as a result of the enactment of Civil Service Law § 167(8).

Because the regulations implementing § 167(8) treat judges like almost every other state employee, it is, as a matter of law, non-discriminatory.[9] *See Hatter*, 532 U.S. at 564; *Maron*, 14 N.Y.3d at 255-56. In *Hatter*, the Supreme Court concluded that a law was discriminatory *only* because it applied "almost exclusively" to judges. 532 U.S. at 564. And in *Maron*, the New York Court of Appeals *rejected* the plaintiffs' argument that the Judiciary was being discriminated against, even though, unlike the Judiciary, "nearly *all* of the other 195,000 state employees ha[d] received salary increases." 14 N.Y.3d at 256 (emphasis added). In so doing, the Court distinguished *Hatter*, stating that, unlike the case before it, "*Hatter* involved a legislative enactment that discriminated against federal judges by reducing the compensation of judges *only* . . . ."[10] *Id*. at 256 (emphasis added). The *Maron* Court concluded: "We therefore cannot say that judges have been disadvantaged in a manner comparable to the discriminatory treatment in *Hatter*." *Id*.

As these precedents make clear, a law is not discriminatory merely because some other group of public employees is being treated better than judges. Rather, discrimination sufficient to violate the Compensation Clause occurs *only* when judges are singled out -- *i.e*., treated differently from *everybody* else. Plaintiffs have not demonstrated, and cannot demonstrate, that they have been singled out as a result of the enactment of §167(8) and its implementing regulations. In fact, the undisputed evidence is demonstrably to the contrary. For this reason,

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[9] This is especially so given the absence of any allegation on plaintiffs' part that the Legislature had any actual intent to single out judges.

[10] The *Maron* Court also noted that "judges are not the only state employees whose salaries have not been adjusted; the Governor, Lieutenant Governor, members of the Legislature and other constitutional officers have also not received salary increases since 1999." *Id*.

plaintiffs' claim that the reduction in contribution to their health insurance benefits is unconstitutional under the Compensation Clause should be rejected as a matter of law. Accordingly, plaintiffs' motion for summary judgment should be denied, and the State's cross-motion for an order dismissing plaintiffs' Complaint should be granted, in all respects.

B. The "New Financial Obligation" About Which Plaintiffs Complain Also Was "Imposed" on the State's More Than 12,000 M/C Employees, Who, Like Plaintiffs, Also Are Excluded From Collective Bargaining

Plaintiffs contend that § 167(8) violates the Compensation Clause because plaintiffs supposedly face "a new financial obligation which was not faced by other state employees." (Pls.' Mem. at 13.) Plaintiffs assert that "Section 167.8 *imposes* a new financial obligation upon the Judiciary that nearly every other state employee *chose* to bear through the bargaining process." (*Id*. (emphasis in original).) Relying on *Hatter* -- where, according to plaintiffs, the "Court found that the Social Security tax was being imposed on federal judges when *virtually all* of the remaining federal employees (but not the judges) could opt out of it" (Pls.' Mem. at 13 (emphasis added)) -- plaintiffs conclude that the "new financial obligation" which plaintiffs face violates the Compensation Clause of the New York Constitution.

But, unlike in *Hatter*, in this case "virtually all" of the State's employees could *not* opt out of the "new financial obligation" which was "imposed" on plaintiffs. To the contrary, in addition to the approximately 1,200 judges, the "new financial obligation" resulting from the regulations implementing § 167(8) that was "imposed" on plaintiffs also was imposed on more than 12,000 *other* state employees -- the State's M/C employees.[11] (Boland Aff. ¶ 7.) Indeed, the State's more than 12,000 M/C employees were treated identically to plaintiffs, because (i)

[11] These employees include, for example, certain supervisory and "confidential" personnel in the State's executive and legislative branches, all Assistant Attorneys General, and certain personnel of the Unified Court System, such as Law Secretaries. (Boland Aff. ¶ 7; Klein Aff. ¶ 11 n.4.)

like plaintiffs, their insurance premiums were increased as a result of the enactment of Civil Service Law § 167(8); and (ii) like plaintiffs, they are not members of a union and had no power to bargain for any benefit in exchange for the premium changes. (*Id.*)

Thus, because "virtually all" of the other state employees could *not* opt out of the "new financial obligation" of which plaintiffs complain, *Hatter* has no application here. For this additional reason, plaintiffs' contention that the reduction in contribution to their health insurance benefits is unconstitutional under the Compensation Clause should be rejected as a matter of law.

In an effort to evade the fact that more than 12,000 other state employees were treated identically to plaintiffs, at oral argument before the First Department on defendant's appeal from the denial of its motion to dismiss, counsel for plaintiffs asserted that, in exchange for the State's reduction in employer health premium contributions, M/C state employees supposedly had received a lump sum payment under Part B of § 3(3) of chapter 491 of the Laws of 2011. (Klein Aff. ¶ 6.) Following this assertion at oral argument, plaintiffs submitted a letter to the First Department making the same contention. (*Id.*, and Exh. E thereto.)

Plaintiffs' contention, however, is and was incorrect. The State has *not* made a "lump sum payment" to M/C employees under Part B of § 3(3) of chapter 491 in exchange for the State's reduction in employer health premium contributions; in fact, it has not made a lump sum payment *at all* under that statutory provision. (Brondi Aff. ¶ 3.) Nor is there any present intention that the State will make any such "lump sum payment" in the future. (*Id.*)

Even had the State made a "lump sum payment" to M/C employees -- which it did not -- for at least two reasons such a payment could not be viewed as an "exchange" for the reduction in employer health premium contribution rates. First, as stated above, M/C employees are

specifically excluded from collective bargaining. *See* Civil Service Law §§ 201(7)(a), 202, 214. Thus, M/C employees, like judges, had no power to negotiate with the State. And, because M/C employees could not bargain, as a matter of law they also could not enter into any "exchange" with the Legislature or Executive.

Second, the Legislature did not mandate any change in employer health premium contribution rates for M/C employees or lump sum payments to M/C employees. Instead the Legislature addressed these items separately, by leaving (i) any change to employer health premium contribution rates to the discretion of the president of the Civil Service Commission and the Director of the Division of the Budget (*see* Part A, § 2 of chapter 491 of the Laws of 2011), and (ii) the payment of the $775 and $225 lump sums specified in § 3(3) of Part B of chapter 491 of the Laws of 2011 to the discretion of the Director of the Division of the Budget. (*See* Part B, § 13(1) and Part B, § 13(2) of chapter 491 of the Laws of 2011.) That discretion was separately exercised to (i) reduce health premium contribution rates for *all* non-unionized employees, and (ii) *not* make "lump sum payments" to M/C employees. (Brondi Aff. ¶ 6.)

There therefore is no basis for plaintiffs' assertion that the State's reduction in premium contributions affects judges differently from "virtually all" other state employees. This is particularly so when 12,000 M/C employees -- a number that is ten times larger than the number of state judges -- were treated identically to judges. Indeed, in *Maron*, the Court of Appeals found no unconstitutional discrimination when judges were treated the same as a much smaller number of state employees. *Maron*, 14 N.Y.3d at 255-56. Plaintiffs thus cannot plausibly complain that they have been "singled out . . . for unfavorable treatment." *See Hatter*, 532 U.S. at 561.

Finally, plaintiffs contention that § 167(8) can be found to be nondiscriminatory *only* if it applies to all New York citizens also should be rejected. (*See* Pls.' Mem. at 11 (". . . Plaintiffs have suffered discrimination as compared to all State citizens.")) The Supreme Court's decision in *Hatter* disposes of any contention that a law is nondiscriminatory only if it applies universally to "all State citizens." In *Hatter*, which involved a claim of discrimination by federal judges, the Supreme Court held that "the category of 'federal employees' is the appropriate class against which we must measure the asserted discrimination." 532 U.S. at 572. Indeed, *plaintiffs* themselves concede that, for purposes of determining in this case whether the challenged statute discriminates against judges, the "proper comparator" is public employees. (*See* Pls.' Mem. at 12, citing *Hatter* and *DePascale v. State*, 211 N.J. 40 (2012).)[12] Because, as plaintiffs themselves recognize, the "proper comparator" for determining whether the enactment of § 167(8) and its implementing regulations discriminated against plaintiffs is the State's public employees, this Court should reject, as a matter of law, plaintiffs' contention that Civil Service Law § 167(8) can be found to be nondiscriminatory *only* if it applies to all New York citizens.

In short, all of the grounds upon which plaintiffs seek summary judgment in this case are invalid as a matter of fact and law. Accordingly, plaintiffs' motion for summary judgment should be denied, and the State's cross-motion for an order dismissing plaintiffs' Complaint should be granted, in all respects.

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[12] In yet another effort to evade the fact that the State's more than 12,000 M/C employees were treated identically to plaintiffs, plaintiffs state:

> There is no basis for this Court to compare the treatment of judges against the treatment of a subgroup of State employees. In U.S. v. Hatter, the Supreme Court concluded that [the] proper comparator was all Federal employees. Id. at 572. In DePascale, the Supreme Court of New Jersey determined that the proper comparator was all public employees.

See Pls.' Mem. at 12.

CONCLUSION

For all the foregoing reasons, and those set forth in the accompanying affidavit of David Boland and Robert E. Brondi and the affirmation of Mark E. Klein, the State respectfully requests that plaintiffs' motion for summary judgment be denied, and the State's cross-motion for an order dismissing plaintiffs' Complaint be granted, in all respects.

Dated: New York, New York
February 2, 2015

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, PHYLLIS ORLIKOFF FLUG, Justice of the Supreme Court of the State of New York, MARTIN J. SCHULMAN, Justice of the Supreme Court of the State of New York, F. DANA WINSLOW, Justice of the Supreme Court of the State of New York, BETTY OWEN STINSON, Justice of the Supreme Court of the State of New York, MICHAEL J. BRENNAN, Justice of the Supreme Court of the State of New York, ARTHUR M. SCHACK, Justice of the Supreme Court of the State of New York, BARRY SALMAN, Justice of the Supreme Court of the State of New York, JOHN BARONE, Justice of the Supreme Court of the State of New York, ARTHUR G. PITTS, Justice of the Supreme Court of the State of New York, THOMAS D. RAFFAELE, Justice of the Supreme Court of the State of New York, PAUL A. VICTOR, retired Justice of the Supreme Court of the State of New York, JOSEPH GIAMBOI, retired Justice of the Supreme Court of the State of New York, THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE. CITY OF NEW YORK, INC and JOHN AND MARY DOES 1–2000, current and retired Judges and Justices of the Unified Court System of the State of New York

Plaintiffs,

-against-

STATE OF NEW YORK.

Defendant.

Index No.:
159160/12

Justice C. Edmead

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR DISMISSAL

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Plaintiffs, current and retired Judges and Justices and the named representative associations, hereby submit this reply memorandum of law in further support of their motion for summary judgment against the defendant State of New York and in opposition to the State's cross-motion for dismissal.[1]

INTRODUCTION

The State admits that the material facts of this case are undisputed, as, indeed, they have been from the start. Thus, contrary to the State's machinations, there is no new fact or argument that could or should move this Court from its prior conclusion that the State has unconstitutionally diminished judicial compensation by increasing the portion of medical health benefit costs borne by Judges. Moreover, this Court can be even more sure of its original determination as the Appellate Division, First Department has affirmed the finding of unconstitutionality. The State's technical discussions of the "law of the case" doctrine are mere diversions as there is no material fact now presented by the State that would alter this Court's or the First Department's analysis determining that the reduction of State contributions to health care premiums is unconstitutional as applied to Judges.

This Court, as affirmed by the First Department, has already resolved the legal questions at issue. Both courts have concluded that Article VI, Section 25 of the New York State Constitution (the "Compensation Clause") protects against the diminution of health benefits provided to Judges, and that the challenged statute, as applied to Judges, is in violation of that protection. Bransten v. State, Index No. 159160/12, 2013 N.Y. Slip Op. 23175, at 11 (Sup. Ct. N.Y. Cnty. May 21, 2013) (C. Edmead, J.) (hereinafter, Bransten I, Ex. E); Bransten v. State, Index No. 159160/12, 2014 N.Y. Slip Op. 03214, at 56 (1st Dep't May 6, 2014) (hereinafter,

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[1] All judges and justices covered by the Compensation Clause of the New York State Constitution are, unless otherwise indicated, herein referred to as "Judges."

Bransten II, Ex. F).[2] Both courts have also held that the specific diminishment at issue was discriminatory, and therefore impermissible even if characterized as "indirect."Bransten I, Ex. E at 16; Bransten II, Ex. F at 59-60.

The First Department's holding is clear and cannot be swept aside by the State's self-serving declaration that the First Department "incorrectly" assumed the State had abandoned one of its arguments. The State cannot obtain judicial review of the First Department in this Court. Indeed, following its unsuccessful appeal, the State moved to reargue or, in the alternative, for leave to appeal to the Court of Appeals based in part on this same perceived error. See Defendant's Brief in Opposition, dated February 2, 2015 ("Opp. Br."), at p. 8, n. 6. That motion was denied. See Ex. G.

As a threshold matter, the plain language of the Compensation Clause prohibits diminution of judicial "compensation." The Court of Appeals has explicitly recognized this prohibition. Maron v. Silver, 14 N.Y.3d 230 (2010) ("the State Compensation Clause plainly prohibit[ed] the diminution of judicial compensation by legislative act"). The United States Supreme Court has reached the same conclusion in interpreting the federal analogue. See U.S. v. Hatter, 532 U.S. 557, 571 (2001) ("[T]his Court has held that the Legislature cannot directly reduce judicial salaries even as part of an equitable effort to reduce all Government salaries.") (emphasis omitted). Here, the First Department also held unequivocally that health benefit premiums, like those at issue here, are part and parcel of constitutionally protected judicial "compensation." Bransten II, Ex. F at 56. That determination affirmed this Court's prior determination of the same issue. Bransten I, Ex. E, at 11. While the State had previously

[2] Unless otherwise indicated, all exhibit references are to the Affirmation of Alan M. Klinger, dated December 3, 2014, previously submitted in support of Plaintiffs' motion for summary judgment.

contested this point, it now concedes it for purposes of the instant motions. Opp. Br., at 8. Thus, there is no dispute that the challenged legislation, as applied to Judges, directly reduced a component of protected judicial "compensation." Such direct diminution of judicial compensation is *per se* unconstitutional. The State's reliance on Lippman v. Bd. of Educ., 66 N.Y.2d 313 (1985), in this regard is inapposite. Lippman does not address what components fall within constitutionally protected judicial "compensation." Rather, as addressed below, Lippman interprets an entirely separate and more narrow constitutional protection limited to public employee pensions.

Even assuming, *arguendo*, that this Court were to disregard a portion of the First Department's decision – which it may not do – and find that any reduction in compensation was indirect, the State still cannot escape the First Department's legal determination as to the proper comparator for determining whether Judges were discriminated against. The First Department compared Judges to all employees, and, at the outside, all state employees – both unionized as well as managerial and confidential ("M/C"). Bransten II, Ex. F at 60 (holding that "the increased withholding sustained by judges was not imposed uniformly upon all state employees, much less all employees in general"). Despite the State's urging, the First Department did not compare Judges, as the State would have liked, to a small subset of State employees.

Contrary to the State's implication, who the appropriate comparators are is not a factual question to be re-determined by this Court; rather, it is a legal determination. How those comparators were treated may be a factual question, but there is no dispute as to those facts here, nor have the facts materially changed. As the First Department explicitly held, the at-issue statute and implementing regulations divided State employees and Judges, who are constitutional officers, into three categories: (i) those who negotiated increased contributions in exchange for

immunity from layoff; (ii) those who declined to agree to such arrangement; and (iii) those, including the judiciary, upon whom the same arrangements were imposed. Bransten II, pg. 54-55. The first category of unionized employees comprises the vast majority of all State employees. The second category includes a group of unionized State employees who declined the State's bargain and *have not been* subjected to the reduction in premium payments by the State. These facts alone, irrespective of whether the small group of M/C employees in the third category were treated the same as Judges, justifies this Court to reaching the same conclusion as the First Department: that the State's decrease in its premium contributions was not uniformly applied to State employees and that Judges were discriminated against in an unconstitutional manner.

To escape the two prior decisions in this case and the fact that virtually all State employees voluntarily bargained for the increased employee contributions in exchange for other benefits, the State attempts to focus narrowly on a small group of State employees, some 6% of all employees, who the State believes were treated most similarly to Judges. But this small group, even if treated similarly to Judges, cannot cure the fact that Judges were discriminated against as compared to some 94% of State employees who had the ability to negotiate for or decline the State's reduction in premium contributions.

The State further attempts to evade the impact of the First Department's decision by turning the analysis on its head and asking not whether Judges were discriminated against, but whether any State employee was treated the same as Judges. In absolute terms, the State argues that to fall within the First Department's ruling and the United States Supreme Court's analysis in Hatter, 532 U.S. 557 (2001), Judges had to be treated in an entirely *sui generis* manner. Thus, according to the State, selecting any one other State employee and treating him or her in the

same manner as Judges automatically absolves any potential constitutional violation as to judicial compensation. That is not the law. If it were, it would be susceptible to easy and obvious abuse that the Constitution cannot permit.

The material facts in this case are unchanged from those assumed on the motion to dismiss: unionized State employees had a choice and made a bargain, M/C employees were promised additional compensation, though the State asserts they never received it. In both cases these State employees were treated materially differently than Judges who could make no bargain, could not opt out and did not even receive a promise, albeit a perhaps empty one, of additional compensation.

ARGUMENT

POINT I

THE APPELLATE DIVISION, FIRST DEPARTMENT DETERMINATION IS CONTROLLING PRECEDENT AS TO THE LEGAL FRAMEWORK TO BE APPLIED

In a section entitled "Procedural History and Standard of Review," the State makes much of its belief that the First Department "incorrectly" assumed that the State had not, on appeal, contested that reduction of its contribution to the judges' insurance premiums "directly" diminished judge's compensation. Opp. Br. at 8. This was no oversight by the First Department. Indeed, the First Department explicitly held that the State raised this issue for the first time on appeal. See Bransten II, Ex. F at fn. 1.[3] For that reason, the State explains, it does not "accept" the First Department's determination that "Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they receive no compensatory benefit." Opp Br. at 8. As a threshold matter, the assertion is logically flawed. The discrimination

[3] The First Department's conclusion is confirmed by a review of the arguments presented before this Court on the State's motion to dismiss. See Bransten I, Ex. E at 13 (summarizing the State's arguments).

analysis under Hatter applies to indirect diminutions, thus is it not impacted by whether the State had argued such reduction was not direct. The First Department's statement of the law as to whether Judges were discriminated against applies if we assume the reduction was indirect. Moreover, the First Department's decision cannot be reviewed here, nor does it permit this Court to ignore the First Department's determination as to the legal standard to be applied.

A. The Appellate Division Has Provided The Legal Standard

The State has no authority to simply declare that it does not "accept" the First Department's ruling. Indeed, they urge that this Court should not accept the First Department's rulings. However, a Trial Court is bound by interpretations of law articulated by its appellate level court. See Bolm v. Triumph Corp., 71 A.D.2d 429, 434 (4th Dep't 1979), lv dismissed 50 N.Y.2d 928 (1980) ("decisions of the appellate Division made in a case, whether correct or incorrect, are the law of the case until modified or reversed by a higher court. The trial court… is bound by what is decided…."). The precedential impact of decisions of the Court of Appeals and the Appellate Divisions is fundamental to our judicial system. While the State notes (Opp. Br., at 8) that (i) differences in the availability of facts versus assertions and (ii) the standards applied in the motion to dismiss phase and the summary judgment phase *may* have an impact on the outcome of the case, they do not alter the legal standard applied to such claims. Nor does the State offer an alternative "standard of review." The State simply re-argues its prior unsuccessful positions as if the First Department had never spoken on this issue, with no legal authority sanctioning such disregard for precedent.

The law of the case doctrine cited by the State does not alter the analysis. The sole case relied upon by the State in its attempt to divert the Court's attention from the First Department's determination is inapplicable here. In Friedman v. Conn. Genl. Life Ins. Co., 30 A.D.3d 349 (1st Dep't 2006), the Appellate Division held that the trial court improperly treated a motion for

summary judgment as one to reargue the prior motion to dismiss and treated its own prior determination as "law of the case." Here, Plaintiffs have not argued that this motion should be viewed under the standard applicable to a motion for reargument. But, hearing the motion on its merits does not mean, as the State seems to suggest, that this Court can or should ignore the First Department's articulation and application of the law not simply in a similar case, but in this very case, where all material facts were assumed to be true on the motion to dismiss and remain undisputed on this motion for summary judgment.

The law of the case rule merely recognizes that asserting sufficient facts to maintain a claim and actually providing those factual assertions are distinct analyses turning upon record evidence. However, the quantum of proof ultimately adduced does not alter an appellate court's articulation of the appropriate legal standard applied to measure those facts. Moreover, in a case like this, where there are and were no material facts in dispute at any point and all material facts have remained unchanged, there is no reason to deviate from the Appellate Division's assessment of both the legal standard to be applied and its application in this instance. As has been recognized by other courts, while the denial of a pre-answer motion to dismiss is not typically law of the case,

> where the denial of the motion, as in the instant proceeding, was based on law, as opposed to facts, such disposition is law of the case. The law of the case doctrine is designed 'to preclude the defendant from relitigating an issue which was previously addressed in an order of the same court.'

Gansburg v. Blachman, 2015 N.Y. Slip Op. 50060, 2015 WL 505227, *5 (Sup. Ct., Kings Cty. Jan. 30, 2015) (internal citations omitted).

Further, as set forth in the subsequent section, the State here concedes, for purposes of this motion, the point that it believes formed the basis of the First Department's "erroneous" assumption; specifically, that health benefit premiums are part of compensation and thus were

directly diminished by Section 167.8. Opp. Br., at 8 ("For purposes of plaintiffs' motion and the State's cross-motion now before this Court, the State does *not* ask the Court to re-visit [the issue of whether compensation includes benefits premiums], subject to the State's right of further appellate review.")(emphasis in original). Thus, whether the State properly raised this issue before the First Department is doubly irrelevant since it is also not raising the issue here.

B. The Material Facts Are Undisputed And Have Not Changed

Fundamentally, the State argues that this Court should deviate from its prior ruling and ignore the First Department's articulation of the law, primarily because, unlike on the motion to dismiss, the State has now "submitted evidentiary proof of its contention that the challenged legislation did not discriminate against Judges." Opp. Br. , at 7. Yet, save for the issue of whether M/C employees actually received a lump sum payment (not whether the statute authorized such payment, which is not in dispute), all relevant facts are unchanged from what was assumed to be true by this and the Appellate Court on the motion to dismiss. The supposed new facts identified by the State – that some 12,000 M/C State employees were, according to the State, treated identically to Judges – is neither new, nor entirely factual. Opp. Br., at 9. Contrary to the State's attempt to blur the two, whether Judges were discriminated against is a legal conclusion drawn from the facts, not a fact itself. Likewise, the appropriate comparators for determining whether the Judges were discriminated against is also a legal question. See Levin v. Yeshiva Univ., 96 N.Y.2d 484 (2001) (considering a sexual orientation discrimination, disparate impact claim and holding as a matter of law that the appropriate comparators for evaluating the claim should include the full composition of those impacted by the challenged policy, not merely a subgroup of applicants). Indeed, a key element of the First Department's analysis was of precisely this legal issue: as part of its analysis of constitutionality where a reduction is assumed to be indirect, the First Department compared Judges to all employees in general, or, at the least

all State employees – not a select sub-group of State employees. See Bransten II, Ex. F at 59-60 (stating that the Medicare tax upheld in Hatter applied to all citizens regardless of employment, while Section 167.8 "was not imposed uniformly upon all state employees, much less upon all employees in general"). Thus, even if Judges were viewed to have been treated the same as M/C employees, that would not be determinative. The facts – that the State treated three groups of its employees in different ways (not applying the change to unionized employees who declined the deal, negotiated a deal with other unionized employees and imposed the terms on M/C employees), two of which were indisputably different from Judges – have not changed. Thus, applying the First Department's articulation of the law to those unchanged facts yields the same result: the State's actions in applying Section 167.8 to Judges was unconstitutional.

POINT II

PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE STATE CONCEDES BENEFITS PREMIUMS ARE PART OF "COMPENSATION," MAKING ANY REDUCTION IN SUCH BENEFIT *PER SE* UNCONSTITUTIONAL

As held by the First Department, "it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits." Bransten II, Ex. F at 56). This ruling affirmed and was in accord with this Court's own determination that "the general consensus among courts is that compensation includes wages and benefits including health insurance benefits."[4] Bransten I, Ex. E at 11. Although the State had previously contested this point, it now concedes it for purposes of this motion, though attempting to reserve its right to revisit the issue upon further appeal. Opp. Br., at 8. Yet, this one conclusion alone is sufficient to support summary judgment.

[4] Further supporting this conclusion is that the State's documents reference health care contributions as compensation: NYSHIP permits eligible employees to opt-out of health insurance in exchange for a cash payment that is considered to be taxable income. Ex. C, attach. 1; Ex. H at 3; Ex. I at 3.

The plain language of the Compensation Clause – that Judicial compensation "shall be established by law and *shall not be diminished"* – prohibits any direct diminishment of a justice's or retired justice's "compensation." See Maron, 14 N.Y.3d at 252 ("the State Compensation Clause plainly prohibit[ed] the diminution of judicial compensation by legislative act during a judge's term of office"); Catanise v. Town of Fayette, 148 A.D.2d 210, 213 (4th Dep't 1989) ("the Constitution expressly prohibited any reduction in the compensation of a justice of the Peace during his term of office"). Accordingly, if health benefit premiums – the very thing reduced by Section 167.8 – is part and parcel of constitutionally protected judicial "compensation," then any reduction of that benefit is, by definition, *per se* unconstitutional.[5] The Court need not reach the issue of whether Judges were treated differently than all or some State employees in this regard, for the Constitution itself treats Judges differently by forbidding direct reductions in their compensation. As set forth in Plaintiffs' moving brief (Br., at 7), sister courts are in accord with this determination. See DePascale v. State, 211 N.J. 40, 62 (2012)(concluding that the No-Diminution Clause of the New Jersey State Constitution makes an "employer-generated reduction in the take-home salaries of justices and judges during the terms of their appointments—a direct violation of the No-Diminution Clause of our State Constitution.").

Both this Court and the First Department have already concluded that the logic of DePascale applies to the instant case. See Bransten I, Ex. E at 13 ("As pointed out by DePascale, contributions to health insurance benefits which are deducted from a judge's paycheck is directly

[5] As this Court and the Appellate Division have held, Section 167.8 has increased the amount that judges need to pay for health insurance by decreasing the amount paid for on the Judges' behalf by the State and therefore has directly diminished their compensation. Prior to the enactment of Civil Service Law §167.8, the State contributed 90% of the cost of Plaintiffs' health insurance. Civ. Serv. Law §167.1. Now, under Section 167.1, the State contributed only 84% of the cost, increasing the cost borne by Judges. See Bransten I slip op., Ex. E at 3-4

related to the amount of salary paid to a judge."); Bransten II, Ex. F at 57-58 (characterizing DePascale as addressing a "similar situation"). See also Hudson v. Johnstone, 660 P.2d 1180, 1182 (Alaska 1983) ("Requiring a [sitting] judge to contribute via a salary deduction to a retirement system diminishes a judge's compensation."); Stiftel v. Carper, 378 A.2d 124, 132 (Del. Ch. 1977), aff'd 384 A.2d 2 (Del. Sup. Ct. 1977) (finding a violation of the Delaware Constitution where the State amended the State Judiciary Pension Act to require an increased contribution rate for participation in the judicial retirement system); see also Roe v. Bd. Of Trustees of Village of Bellport, 65 A.D.3d 1211, 1211-12 (2d Dep't 2009) (a legislative reduction of wages and benefits violates the separation of powers doctrine).

Health care premiums are part and parcel of Plaintiffs' constitutionally protected "compensation," and a reduction in the portion of those premiums paid for by the State is necessarily a direct reduction in judicial "compensation." By definition, any diminishment of "compensation" that is direct is unconstitutional. Hatter, 532 U.S. at 571 ("[T]his Court has held that the Legislature cannot directly reduce judicial salaries even as part of an equitable effort to reduce all Government salaries") (emphasis omitted).

The State's attempt at an end-run around the First Department's determination and its own concession by relying on Lippman v. Bd. of Educ., 66 N.Y.2d 313 (1985), fails. First, any argument that Section 167.8 "merely increase a Judge's costs" and thus only indirectly reduces "compensation," is diametrically contrary to the First Department's determination (as well as this Court's prior determination) that health benefit premiums *are included within the meaning of the term compensation*. Read in light of the First Department's ruling, the State's argument in essence states that a reduction of one part of judicial compensation only indirectly results in an overall reduction of compensation. That is illogical. If, as held by the First Department and this

Court, health benefit premiums are simply one component of overall judicial compensation, then there can be no question that Section 167.8 directly reduced compensation. Lippman is not to the contrary. There, the Court of Appeals concluded that a reduction of health care contributions did not unconstitutionally diminish the petitioner teachers' *pension benefits* (as distinct from *judicial compensation* protected by the Compensation Clause). Though the State declares them irrelevant (Opp. Br., at 10), the terms being used and defined by the courts in the two cases are significant. Unlike here, the Lippman court found that the health benefits provided to teachers in that case did not fall within the ambit of the *constitutional* protection because, in that case, the protection extended solely to public employee pension benefits, which did not include health benefits. There was no question that the constitutional provision at issue did not protect either health benefits or compensation more generally. The Lippman Court recognized only that the Constitution did not protect "indirect" diminutions of pension benefits. The Lippman ruling, based upon a more narrow constitutional protection, cannot be transplanted to the instant case and cannot be used to overrule the First Department's clear holding that health benefit premiums are a part of constitutionally protected judicial compensation.

POINT III

EVEN IF THE DIMINUTION IN JUDICIAL COMPENSATION WAS INDIRECT, SECTION 167.8 VIOLATES THE COMPENSATION CLAUSE

A. The State's Diminution Discriminates Against Judges

Even if Section 167.8 did not effect a direct diminution in judicial compensation, summary judgment would still be warranted because the statute had a discriminatory impact on judges. The parties agree that the relevant law is set forth in Hatter, in which federal judges brought an action challenging the constitutionality of two taxes, a Medicare tax and a Social Security tax. The Supreme Court upheld only the Medicare tax, because it applied to all citizens

and therefore did not disadvantage the judiciary. It was an additional cost imposed by the government in its role *as a sovereign*. Id. at 569-70. Conversely, the Court struck down the Social Security tax as applied to judges. This imposition, the Court explained, was discriminatory because it disproportionately burdened Federal judges, since almost all non-judicial federal employees could opt-out or limit contributions. Id. at 573.

This Court has correctly concluded, and the First Department properly affirmed, that the diminution at issue here is not saved by the Hatter exception for nondiscriminatory taxes. Bransten I, Ex. E at 14-16; Bransten II, Ex. F at 59-60 ("Like the 1983 [Social Security] law…the effect of the amendment to Section 167.8 on New York's judges uniquely and detrimentally affects the judiciary and diminishes its compensation."). While the Hatter court focused on four features of the Social Security tax in assessing whether federal judges had been discriminated against (discussed fully in Plaintiffs' moving brief at 10-13), the State's opposition relies almost exclusively on the argument that the proper Hatter comparator for Judges is the subset of State employees designated M/C.

Initially, the State's argument that the challenged statute and regulations are neutral on their face is belied by the State's own description, admitting that the implementing regulations "distinguished" between at least two groups: unionized employees who rejected the State's agreement and "all other state employees." Opp. Br., at 11. Defendant improperly places Judges in the category of "other state employees." Judges are not State employees, they are constitutional officers. Further, the very existence of the first category means that Judges were not treated as favorably as at least a portion of State employees, some 2% of those participating

in the State's health benefits plan.[6] The State attempts to gloss over this fact by noting that this first group was small, and thus, presumably, their treatment was immaterial, yet this group is more than twice the number of Judges.

But the distinctions between groups does not end there. Concealed within the general label "all other state employees" are three distinct groups: (i) unionized employees who did accept the State's deal; (ii) M/C employees who are not unionized and (iii) Judges. Thus, upon careful review, it becomes clear that the State's supposedly neutral regulations have already distilled into two general categories, one of which is further broken down into three sub-categories in terms of how they were treated under Section 167.8. Again, the State attempts to gloss over these distinct categories by vaguely stating that the vast majority of State employees were impacted by the reduction in premium contributions. That is true. But nearly all of those impacted were unionized employees who had a choice in the matter. Neither the choice, nor the benefits enjoyed by this group of State employees, were available to Judges.

To obscure these stark facts, the State engages in a result-oriented and convoluted argument which alternatively relies upon and dismisses the import of how the vast majority of State employees were treated. First, the State argues that Judges were not discriminated against because "almost every" other State employee was also subject to reductions in health benefit premiums (ignoring how each group came to be impacted by those reductions). Opp. Br. at 12 (because the regulations treats Judges "like almost every other state employee" it is non-discriminatory as a matter of law). But, "almost every" other State employee was not similarly

[6] According to the State, there are approximately 189,000 active employees participating in State benefits. Affidavit of David Boland, submitted by Defendant and sworn to on January 30, 2015 ("Boland Aff."), at ¶6. Some 3,900 of those are members of unions which did not accept the State's deal and did not agree to reduce the State's premium contributions. This group of excluded State employees comprises approximately 2% of the total group.

situated. *Unionized employees that accepted the deal made up 92% of State employees*. M/C State employees make up about 6% of State employees. Judges number less than 1% of the number of State employees. Accordingly, the State does not, because it cannot, deny that the vast majority of "almost everyone," consists of unionized State employees who were treated materially differently from both Judges and M/C employees, who could not opt out of the reduction in premiums. Indeed, the State's own affiant explicitly states that only 6% of State employees – the M/C group – "are similarly situated to plaintiffs in this case." Boland Aff., at ¶ 7. Unable to escape the fact that nearly all State employees were not treated the same as Judges, the State then switches its ground – based on two words from the Hatter decision – that even though Judges were treated differently than at least 94% of State employees, they were not treated differently than "virtually all" employees. Apparently, in the State's view, 94% does not rise to the level of "virtually all."

From this perspective, the State focuses again on that 6% minority of employees in the M/C group. It argues that Judges could not have been treated differently than "virtually all" State employees because the group of M/C employees is just large enough (6%) that Judges were merely treated differently from the vast majority of State employees (94%). See Opp. Br., at 13 ("in this case 'virtually all' of the State's employees could not opt out of the 'new financial obligation' which was imposed on plaintiffs [because] in addition to the approximately 1,200 judges, the 'new financial obligation'…was [also] imposed on more than 12,000 other state employees – the State's M/C employees."). Not only is this abstract distinction between "almost all" state employees (98%) and "virtually all" state employees (according to the State some

proportion higher than 94%) illogical, it is also baseless.[7] Still, the State takes this argument one step further, affirmatively arguing that to make out a claim for discrimination, the Judges would need prove not that they were discriminated against, but that *not one other State employee was treated the same*. Opp. Br., at 12 ("discrimination sufficient to violate the Compensation Clause occurs *only* when judges are singled out – *i.e.*, treated differently from *everybody* else")(emphasis in original). According to the State, so long as a single State employee is subjected to the same change in compensation as Judges, such action would be acceptable under Hatter and constitutional. That is not the law. The State's own description of the holding in Hatter states that the Hatter court found the law discriminatory because it applied "almost exclusively" to judges (quoting Hatter). Opp. Br., at 12. Moreover, such rule would be susceptible to obvious and easy abuses that the Constitution does not and should not permit.

There is no authority for this type of parsing that would permit the State to self-servingly define the appropriate comparators as those the State feels were treated most similarly to the Judges, no matter how few. The reduction in premiums was applied or intended to be applied to all State employees. Thus, as this Court and the First Department have held, the appropriate comparator is, at the least, all State employees.

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[7] Indeed, the facts and percentages here are very similar to those presented in Hatter and noted by the First Department. There, the 1983 law permitted some 96% of federal workers to opt out of the social security system. Bransten II, Ex. F at 58-59 (discussing Hatter). Another 4% of federal employees were permitted to join the system without paying more than they had previously been contributing to an existing pension system. Id. Finally, the remaining group which consisted mainly but not entirely of federal judges was treated in yet a third manner. Id. Here, approximately 94% of State employees could opt in or out of the arrangement (with 92% opting in and 2% opting out). Likewise, a second group of employees – M/C employees – could not opt out but was promised, although not provided, additional compensation. Such group makes up about 6% of State employees. Finally, Judges were given no option, and promised no benefits.

Thus, when compared to all State employees, the diminution plainly fails the Hatter analysis. As this Court found:

> Nor does Section 167.8 affect all employees of the State of New York. Indeed, plaintiffs did not receive the same benefits that represented State employees received. Thus, Section 167.8 is akin to the "Social Security tax" imposed upon federal judges, previously held to be unconstitutional by the United States Supreme Court in *Hatter* . . .Plaintiffs are unrepresented and ineligible for collective bargaining, and thus, have been discriminated against within their class of State employees.

Bransten I, Ex. E at 6. The First Department affirmed this finding. See Bransten II, Ex. F at 57 ("In its implementation, the amended statute affects judges differently from virtually all other State employees…"). Likewise, in DePascale, the Supreme Court of New Jersey determined that the proper comparator was all public employees. Id. at 40. Accordingly, in failing to have universal application among even State employees, the reduction falls far short of the Hatter test for constitutionality.[8]

B. The State's Failure To Pay Promised Lump Sum Payments To Managerial And Confidential Employees Is A Red Herring And Does Not Alter The Analysis

The State attempts to make much of the fact that it has welched on its promise to M/C employees to, in conjunction with the reduction in health care contributions, pay certain lump sums.[9] All these protestations are a diversion from the fact that the statute explicitly made such

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[8] Defendant's mischaracterization of the Court's holding in Maron does not alter the analysis. The State intentionally leaves out the first and primary component of the Court's analysis in Maron, turning on the issue of whether the State affirmatively acted to reduce compensation or simply neglected to act in the face of inflation. Maron, 14 N.Y.3d at 256. There is no indication in Maron that had the legislature affirmatively reduced Judicial compensation – as it has done here – the reduction could be sanitized by simply also bargaining a reduction in compensation from the majority of State employees.

[9] The State's brief incorrectly asserts that Plaintiffs insisted the payments were actually made. Opp Br., at 4. Rather, Plaintiffs asserted then, as they assert now, that the statute authorized such payments, whether or not they were made. See Letter from Alan M. Klinger to appellate counsel for the State responding to counsel's post-argument inquiry regarding the lump sum payments provision, annexed to the Affirmation of Mark E. Klein, submitted by Defendant

promises. In his affidavit, Chief Budget Examiner of the New York State Division of the Budget, Robert Brondi, admits that Part B, §3(3) of Chapter 491 of the laws of 2011 (applicable to M/C employees) authorized not one, but two lump sum payments. Affidavit of Robert E. Brondi, submitted by Defendant and sworn to on January 28, 2015, at ¶3. See also Opp. Br., at 4 (stating that Chapter 491 provides that such lump sum payments may be made upon the authorization of the director of the budget). That the law allowed the director of the budget to, in appropriate circumstances, withhold such payments, which, Defendant asserts occurred, is beside the point.[10] The mere promise of possible lump sums payments – subject to further administrative action – is still more than was available to Judges. Moreover, the State's fixation with whether these lump sums were received is merely a distraction from the analysis laid out by the First Department and is immaterial to the determination of this Motion. Indeed, the State's

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and dated January 30, 2015 ("Klein Aff."), as Ex. E (specifically stating that Part B, § 3 "authorizes lump sum payment…"). The enforcement of that promise is left to the employees it was promised to.

[10] The State's lame attempt at arguing that even if the M/C employees received the lump sum payment they would still have been treated the same as Judges reveals the contrived nature of the argument. Opp. Br., at 5. First, the State argues that even the hypothetical receipt of lump sums could not be considered an exchange for reduced health care contributions because M/C employees, like Judges, have no collective bargaining rights. The attempted parallel fails. The question defined by the First Department is not whether some group of State employees had the same – more accurately, lacked the same – bargaining rights as Judges, but whether the State treated them the same. That M/C employees could not have insisted that the State make a deal with them regarding health benefits, does not mean that the State could not offer them some form of parity with unionized State employees, which is precisely what occurred. Having offered that parity, which was neither offered nor available to Judges, demonstrates that Judges were treated differently than all State employees. No more convincing is the second distinction drawn by the State, that the authorizing statute left implementation of the two components – reduction in health benefit contributions and lump sum payments – to the discretion and action of two separate State officers. The one does not follow the other, nor does it bring the State's treatment of Judges, for whom, statutorily, it did not and could not authorize any officer to even potentially make a lump sum payment, in line with its treatment of M/C employees.

expanded treatment of this issue is baffling for Plaintiffs did not rely upon the lump sum payment provision to support the arguments in their moving papers.

POINT IV

BECAUSE SECTION 167.8 IS UNCONSTITUTIONAL AS APPLIED TO JUDGES, ALL REGULATIONS ADOPTED PURSUANT TO THAT SECTION WITH REGARD TO JUDGES ARE ALSO INVALID

The State's misdirected notion that so long as neither law nor implementing regulations on their face treat Judge's differently, they are permissible, inexplicably leads the State to also argue that Plaintiffs' motion should be dismissed for failure to specifically challenge the implementing regulations, rather than the authorizing statute itself. This new, contrived argument cannot absolve the State of its unconstitutional acts. The State admits that the structure of Section 167.8 was to authorize implementing regulations. Opp. Br. At 3. Thus, to the extent this Court finds, as it and the First Department have already done, that Section 167.8 may not constitutionally be applied to Judges, any implementing regulations adopted under its authority are likewise invalid as applied to Judges. An agency may not adopt regulations that are beyond the scope of its authorizing statute. Greater New York Taxi Ass'n v. New York City Taxi and Limousine Com'n, 121 A.D.3d 21, 28, (1st Dep't 2014) (holding that "[a]n administrative agency… derives its authority from the express dictates of the legislative body that creates it. Of course, it may not act or promulgate rules in contravention of its enabling statute or charter.) (internal citations omitted). Thus, Plaintiffs' claim implicitly encompasses any regulations adopted for the purpose of applying Section 167.8 to Judges. Moreover, the constitutional deprivation is ongoing. Thus, should the Court believe it necessary, it could either deem the challenge to extend to the implementing regulations or allow Plaintiffs to amend the Complaint to more specifically make such challenge, though Plaintiffs believe such amendment is unnecessary.

CONCLUSION

The State's reduced contribution to Plaintiffs' health care premiums effect a direct diminution in compensation. Additionally, the diminution is discriminatory as compared to all state citizens and all state employees. This Court should therefore grant Plaintiffs' motion for summary judgment and deny Defendant's cross-motion for dismissal.

Dated: New York, New York
March 4, 2015

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD, *Justice* PART 35

BRANSTEN, EILEEN

-v-

STATE OF NEW YORK

INDEX NO. 159160/2012

MOTION DATE ______

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ________ | No(s). ______

Answering Affidavits — Exhibits ________ | No(s). ______

Replying Affidavits ________ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Motion sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiffs' motion for summary judgment on its complaint is granted to the extent that it is hereby

ORDERED, ADJUDGED and DECLARED that L. 2011, c. 491, § 2 and the amended Civil Service Law § 167.8, including the regulations adopted thereunder, are unconstitutional as applied to the Judges and Justices of the Unified Court System because these statutes diminish compensation of all such Judges and Justices; and it is further

ORDERED that defendant's cross motion for summary judgment dismissing the plaintiffs' Complaint is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all plaintiffs within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3-25-2015

______, J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: .... [✓] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: [ ] GRANTED [ ] DENIED [✓] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: .... [ ] SETTLE ORDER [ ] SUBMIT ORDER
   [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

--x

EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, PHYLLIS ORLIKOFF FLUG, Justice of the Supreme Court of the State of New York, MARTIN J. SCHULMAN, Justice of the Supreme Court of the State of New York, F. DANA WINSLOW, Justice of the Supreme Court of the State of New York, BETTY OWEN STINSON, Justice of the Supreme Court of the State of New York, MICHAEL J. BRENNAN, Justice of the Supreme Court of the State of New York, ARTHUR M. SCHACK, Justice of the Supreme Court of the State of New York, BARRY SALMAN, Justice of the Supreme Court of the State of New York, JOHN BARONE, Justice of the Supreme Court of the State of New York, ARTHUR G. PITTS, Justice of the Supreme Court of the State of New York, THOMAS D. RAFFAELE, Justice of the Supreme Court of the State of New York, PAUL A. VICTOR, retired Justice of the Supreme Court of the State of New York, JOSEPH GIAMBOI, retired Justice of the Supreme Court of the State of New York, THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, INC. and JOHN AND MARY DOES 1–2000, current and retired Judges and Justices of the Unified Court System of the State of New York,

Plaintiffs,

-against-

THE STATE OF NEW YORK,

Defendant.

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Index No. 159160/2012
Motion Seq. #002

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs, comprising the Justices of the Supreme Court of the State of New York and current and retired members of the New York State Judiciary, move for summary judgement declaring that the decision by defendant, State of New York ("defendant") to reduce the State's

contribution to the Justices' health insurance benefits pursuant to L. 2011, c. 491, § 2 and the amended Civil Service Law § 167.8 ("Section 167.8"), violates the Compensation Clause of the New York State Constitution (N.Y. Const. art. VI, §25[a] (the "Compensation Clause").

In turn, defendant cross moves for summary judgment dismissing the complaint, arguing that contrary to plaintiffs' claim, Section 167.8 is not unconstitutional as applied to the Judges and Justices (hereinafter, "judges") of the Unified Court System.

Factual Background

In an effort to address the budget crisis facing the State of New York, in 2011 the Legislature negotiated agreements with certain public-sector unions pursuant to which the State agreed to refrain from laying off thousands of State unionized employees, in exchange for a reduction in the percentage of the State's contribution toward employees' health insurance premiums.[1]

Thereafter, in August 2011, the Legislature amended Section 167.8 to allow the Civil Service Department to extend the terms of the union agreement to cover unrepresented State employees and retirees.

Consequently, on September 30, 2011, plaintiffs were notified of the State's plan to reduce its contribution to their health insurance plans, which would require them to pay more per year for their health insurance premiums. The State's contribution rate change took effect on October 1, 2011, resulting in a 6% increase in plaintiffs' contribution to the cost of their health insurance (such as co-payments, deductibles, and prescription drug costs). The premium

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[1] According to the Complaint, this provision includes retirement benefits afforded to retired Judges and Justices.

State's contributions were reduced from 90% to 80% for active employees, and from 90% to 88% for retired employees, thus requiring the employees to pay the difference with their salaries.

contribution rate for retired Justices increased by 2%, and the rate for those Justices retiring on or after January 1, 2012 increased by 6% percent.[2]

Plaintiffs then commenced this action, and sought a preliminary injunction to enjoin defendant from imposing upon plaintiffs the higher premium contribution rates, co-payments, and deductibles for health insurance.[3] Plaintiffs asserted that since "compensation" includes health benefits, the value of their compensation had been diminished by defendant's actions, in violation of the Compensation Clause, which guarantees that plaintiffs' compensation shall not be diminished during their term in office.[4]

In response, defendant moved to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7) arguing that: (1) under caselaw, laws that indirectly reduced the take home pay of judges in a non-discriminatory manner that did not single out judges did not violate the Compensation Clause; (2) the Commission of Judicial Compensation previously considered "non-salary" benefits such as health insurance in its study, and the Judicial salary increase which went into affect six months after the change in contributions cured any violation of the Compensation Clause; and (3) the express language of the Compensation Clause rendered it inapplicable to *retired* justices and judges.

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[2] At the same time, the co-payment for Judges, Justices, and unrepresented Unified Court System employees, and retirees was eliminated for certain preventative care services, and the co-payment for certain prescription drugs was reduced by 50%.

[3] Plaintiffs seek a judgment declaring that "L 2011, c. 491, § 2 and the amended Civil Service Law § 167.8 are unconstitutional as applied to the Judges and Justices of the Unified Court System because these statutes diminish the compensation of all such Judges and Justices and, by so doing, unconstitutionally and adversely impact the public and independence of the Judiciary . . . ."

[4] According to the Complaint, this provision includes retirement benefits afforded to retired Judges and Justices.

In opposition, plaintiffs argued that courts have held that health benefits comprise part of judicial compensation. Defendant's reduction of its contribution to plaintiffs' health care insurance directly increased the cost of plaintiffs' health insurance, and such legislative action has been held by courts in other jurisdictions as a direct reduction in judicial compensation. Further, Section 167.8 did not equally affect all residents of New York State or all State employees. The increased contributions were not borne by all New York State residents, but imposed upon solely New York State employees and retired employees. Defendant's reduction was discriminatory and singled out judges, in that plaintiffs did not receive the same benefits that represented State employees received. Since plaintiffs were unrepresented and ineligible for collective bargaining, they had been discriminated against within their class of State employees. The amendment imposed a new financial obligation on plaintiffs, but bore no relation to the purpose of the amendment, which was to avoid the layoffs of State employees.

This Court denied dismissal of the Complaint, essentially holding that the Complaint stated a cause of action that was not defeated by documentary evidence. The Court reasoned that although the amendment did not single out judges:

> . . . the Compensation Clause singly protects judges from overly broad laws that have the direct effect of diminishing their compensation. Here, the diminishment has a unique impact upon the judiciary . . . by virtue of the fact that it diminishes the compensation the judiciary is guaranteed to receive. . . [C]ontributions to health insurance benefits which are deducted from a judge's paycheck is directly related to the amount of salary paid to a judge. . . .(p. 13).
>
> . . .while the terms of the agreement giving rise to plaintiffs' increase in contributions were negotiated between the State and the union, *plaintiffs are unrepresented, and not eligible for collective bargaining* . . . . (p. 13)
>
> . . . defendant negotiated its reduction in contributions in order to avoid the layoffs of thousands of State employees, *none of which include judges or justices,* because Judges and Justices are not subject to "layoffs." Thus, the increased cost of health insurance borne by plaintiffs bears no relation to the purpose of the State's reduction in its contributions. . . . (p. 16)
>
> (Emphasis in original)

Defendant appealed[5] and the First Department upheld this Court's decision, holding that

> it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits. This Court has recognized that judicial "compensation" under the Compensation Clause includes both "the pay scale and benefits" . . . and the Second Department has expressly found that health insurance benefits are a component of a judge's compensation . . . .
>
> As applied to New York judges, the amended Section 167.8 subjects them to discriminatory treatment also in violation of the state Compensation Clause. In its implementation, the amended statute affects judges differently from virtually all other State employees, who either consented to the State's reduced contribution in exchange for immunity from layoffs or were otherwise compensated by the State's promise of job security. Unlike other State employees, judges were forced to make increased contributions to their health care insurance premiums, without receiving any benefits in exchange. The judiciary had no power to negotiate with the State with respect to the decrease in compensation, and received no benefit from the no-layoffs promise, because their terms of office were either statutorily or constitutionally mandated. Thus, Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they received no compensatory benefit.
>
> (P. 57).

The parties proceeded with discovery and these motions for summary judgment ensued.

In support of summary judgment on their Complaint, plaintiffs reiterate their previous arguments in defending the Complaint against dismissal, and argue that the undisputed factual record warrants a declaration that the reductions are void *ab initio,* and an injunction enjoining further enforcement as to judges and justices active and retired. Relying on the decisions of this Court and the First Department, plaintiffs point out that it has been already concluded that (1) the Compensation Clause protects against the diminution of compensation, which includes health care benefits provided to judges and justices, and any such diminution is unconstitutional *per se*; and (2) the diminution was discriminatory, as applied, even if characterized as "indirect," as it

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[5] As pointed out by the First Department, "On appeal, defendant does not argue that reducing its contribution to insurance premiums did not directly diminish judges' compensation. Instead, the State first argues that its contribution to judges' health insurance premiums are not 'compensation' within the meaning of the Compensation Clause. . . . (P. 56).

does not affect all state employees equally (Court's Decision, p. 16; Appellate Decision, pp. 59-60).

Plaintiffs point out that the State's New York State Health Insurance Plan ("NYSHIP") records, sister-court caselaw, common practice by the New York Public Employment Relations Board ("ERB"), and interpretations of Congressional authority demonstrate that health care premiums are part of plaintiffs' compensation, and any reduction thereof is a direct reduction in judicial "compensation."

Plaintiffs also contend that the amendment has a discriminatory impact on judges. The decrease in the state's contribution does not apply to all state citizens, and moreover, the diminution does not affect all state employees equally. Defendant's amendment imposes a new financial obligation upon plaintiffs, which nearly every other state employee chose to bear through the bargaining process. Plaintiffs received no benefit in exchange for their increased health care premiums. And, defendants assert no sound justification that outweighs the objectives of the Compensation Clause. As judges comprise only 1% of the active state employees, the dollar amount at issue is hardly material in remedying the state budget. And, the Commission recognized the State's ability to pay judges' salaries in determining its recommended salary increases.

In opposition, and in support of dismissal of the Complaint, defendant argues that 12,000 state employees, comprising "managerial" or "confidential" ("M/C") personnel in State agencies (*i.e.*, Assistant Attorneys Generals) and the Legislature, and certain court personnel (*i.e.*, Law Secretaries), are similarly situated to plaintiffs in two respects. These 12,000 constitute more than 6% of the State workforce. First, like plaintiffs, insurance premiums for M/Cs were increased as a result of the amendment, and second, also like plaintiffs, M/Cs are not members of

a union and lacked any power to negotiate for any benefit in exchange of the premium changes. Also, defendant points out that plaintiffs' assertion, at oral argument before the First Department, that M/Cs received a lump sum payment under Part B of § 3(3) of chapter 491 of the Laws of 2011 is untrue. Chapter 491 requires the director of the budget to deliver notice to the comptroller that such lump sum payments may be made prior to payment, and the director has declined to make the lump sum payment. And, in November 2011, the director of the budget issued a bulletin announcing that the State would withhold part of M/C employees' paychecks from December 2011 to April 2013 pursuant its deficit reduction plan and would not begin to repay the amounts withheld until April 2015. In any event, any such payment by the State could not be viewed as an "exchange" for the reduction in employer health premium contribution rates; M/Cs are excluded from collective bargaining, and like judges, had no power to negotiate. And, the Legislature did not mandate any change in employer health premium contribution rates, but instead, left such changes to the discretion of the President of the Civil Service Commission and the Director of the Division of the Budget. Further, the purported lump sum payment specified in section 3(3) of Part B of Chapter 491 of the Law of 2011 was left to the discretion of the Director of the Division of the Budget. Such discretion was exercised to reduce health premium contribution rates for all non-unionized employees, and to not make lump sum payments to M/C employees.

Under caselaw, statutes that merely increase a judge's costs do not violate the Compensation Clause unless they also discriminate against judges. The evidence demonstrates that 12,000 M/C state employees were treated identically to plaintiffs. Since the statute does not mention judges or establish criteria that apply exclusively to judges, the statute is constitutional.

And, the statute does not reduce premium contributions, but gives the Civil Service

Commission, with approval of the Director of the Division of the Budget, the discretion to do so. Since plaintiffs do not challenge the constitutionality of the regulations implementing the statute, plaintiffs' motion should be denied. In any event, the regulations do not discriminate against judges, but distinguish between employees who belong to a union that have yet to ratify a new collective bargaining agreement and all of other state employees. 98% of all state employees enrolled in NYSHIP fall in the latter category, which includes union employees who ratified the agreement and non-union employees. Therefore, there are a vast number of non-judge employees also affected by the reduction in premium contributions.

And, the statute need not apply to all New York citizens to be found constitutional.

Furthermore, the First Department's conclusion that Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they receive no compensatory benefit is not law of the case. The First Department incorrectly relied on the assumption that the State had not contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation. Contrary to the First Department's statement otherwise, defendant did, in fact, argue that reducing its contribution to judges' insurance premiums did not directly diminish judges' compensation. Further, the doctrine of the law of the case does not apply where a summary judgment motion, applying a different scope of review with evidentiary material not previously part of the record, follows a motion to dismiss.[6]

In reply, plaintiffs contend that the First Department decision is controlling precedent as to the legal standard to be applied, and the purported new fact concerning the 12,000 M/Cs does not alter the legal standard articulated by the First Department. Whether the First Department

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[6] Defendant does not ask the Court to revisit the issue of whether employees' compensation includes health benefits, subject to the State's right of further appellate review.

incorrectly assumed that defendant abandoned a certain argument is not subject to this Court's review. And, as defendant concedes (for purposes of this motion), the statute directly reduced a component of judicial compensation, and thus, is *per se* unconstitutional. Irrespective of whether the M/C employees were treated the same as judges, the State's decrease in its premium contributions was not uniformly applied to all state employees, who could negotiate for or decline the state's reduction in premium contributions. Further, M/C employees were also promised additional compensation, an offer not made to judges. And, to the extent the Court finds that the statute may not constitutionally be applied to judges, any implementing regulations adopted under the statute are likewise invalid. While plaintiffs' claim encompasses any regulations adopted under the statute, if the Court deems necessary, plaintiffs seek leave to amend the complaint to include a challenge to any such regulation.

Discussion

It is well established that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 607 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Madeline D'Anthony Enterprises, Inc.*, 101 AD3d at 607). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Carroll v Radoniqi,* 105 AD3d 493 [1st Dept 2013]).

As a threshold matter, the Court notes that the law of the case doctrine does not apply so as to relieve this Court from assessing whether plaintiffs established their entitlement to judgment as a matter of law. "The law of the case doctrine declares that a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case" (*State v Barclays Bank of New York, N.A.*, 151 AD2d 19, 546 NYS2d 479 [3d Dept 1989]). The "doctrine of law of the case is inapplicable 'where . . . a summary judgment motion follows a motion to dismiss' . . ., since the scope of review on the two motions differs; the motion to dismiss examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings" (*Friedman v Connecticut General Life Ins. Co.*, 30 AD3d 349, 818 NYS2d 201 [1st Dept 2006], *citing Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1987] and *Riddick v City of New York*, 4 AD3d 242, 245 [2004]; *see also*, *Moses v Savedoff*, 96 AD3d 466, 947 NYS2d 419 [1st Dept 2012]). The two motions are distinctly different.

However, to the degree the First Department resolved controverted questions of law in determining whether plaintiffs' complaint stated a claim, this Court cannot undermine such determination of law (*see Bolm v Triumph Corp.*, 71 AD2d 429, 422 NYS2d 969 [4th Dept 1979] *citing* 10 Carmody-Wait 2d, NY Prac, §70:453; Siegel, New York Practice, § 448) ("decisions of the Appellate Division made in a case, whether correct or incorrect, are the law of the case until modified or reversed by a higher court")). This court cannot disregard the Appellate Division's pronouncement of the law concerning the Compensation Clause (Article VI, §25) and its reach (*see Gutman v A to Z Holding Corp.*, 38 Misc 3d 1211(A), 966 NYS2d 346 (Table) [Supreme Court, Kings County 2012] *citing Schmitt v City of New York*, 50 AD3d 1010, 1010 [2d Dept 2008] ("This court is prohibited from issuing an order which has the effect of "undermining" an

order of the Appellate Division")).[7]

Thus, to the degree the parties submit additional evidence on this motion, the Court addresses whether such evidence demonstrates that Section 167.8 violates the Compensation Clause as a matter of law, whether an issue of fact exists so as defeat summary judgment, and, as defendant claims, whether the complaint should be dismissed because Section 167.8 does not violate the Compensation Clause.

Applying the summary judgment standard, plaintiffs established their entitlement to judgment as a matter of law.

It is uncontested that Article VI, §25, the Compensation Clause, addresses the compensation of the plaintiffs and certain other judicial classifications, whose salaries are specified in Judiciary Law article 7-B (§ 220 *et seq.*). Particularly, Article VI, §25 [a] thereof provides that

> "The compensation of a judge . . . or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed. . . ."

As this Court and the First Department previously indicated, "compensation" in the context of one's employment includes wages *and benefits*, including health insurance benefits (*see, Roe v Bd. of Trustees of Village of Bellport*, 65 AD3d 1211, 886 NYS2d 707 [2d Dept 2009] (including as "compensation," "wages *and benefits*" in the context of the protection afforded by the New York State Constitution's separation of powers clause prohibiting a legislative body from reducing the compensation of a judge or justice serving in a constitutional

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[7] It is noted that as to defendant's claim that the First Department incorrectly assumed that defendant had not contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation, the First Department subsequently noted that it could, nonetheless, address issues of law, and later found, on the merits after discussion of various caselaw, that the reduction of defendant's contribution "diminishes compensation."

court, and remitting the matter for a declaration that a Village resolution "terminating the plaintiff's paid health care benefits is null and void as to the plaintiff during his current term in [judicial] office"); *see also, Syracuse Teachers Ass'n v Board of Ed.*, Syracuse City School Dist., Syracuse, 42 AD2d 73, 75, 345 NYS2d 239 [4th Dept 1973], *affd.* 35 NY2d 743, 361 NYS2d 912, 320 NE2d 646 [1974] ["compensation may take the form both of cash wages and 'fringe benefits'"]; *Aeneas McDonald Police Benev Ass'n, Inc. v City of Geneva*, 92 NY2d 326, 703 NE2d 745 [1998] (stating, in the context of mandatory arbitration, that "[h]ealth benefits for current employees can be a form of compensation . . . " and that "health benefits are a form of compensation and a term of employment"); *Walek v Walek*, 193 Misc2d 241, 749 NYS2d 383 [Supreme Court, Erie County 2002] (finding, in the context of determining assets subject to equitable distribution, that the health care benefits component of defendant's retirement plan "represent compensation for past employment services rendered by defendant"); *Kahmann v Reno,* 928 F Supp 1209 [NDNY 1996] (considering, in the context of gross backpay, "wages, bonuses, vacation pay, *and all other elements of reimbursement and fringe benefits such as pension and health insurance,*" as "forms of compensation"); *District of Columbia v Greater Washington Bd. of Trade*, 506 US 125, 113 SCt 580 [Dist. Col. 1992] (noting, in the context of workers' compensation benefits, the corresponding reduction in one's weekly wage as a result of the health insurance benefits one receives)).

As this Court stated previously, the case, *DePascale v State of New Jersey* (211 NJ 40, 47 A3d 690 [2012]), also supports this conclusion. In *DePascale,* the plaintiff, also a judge, challenged on constitutional grounds the State of New Jersey's enactment of the Pension and Health Care Benefits Act ("Chapter 78"), that required all state employees, including judges, to contribute more towards their state-administered health benefits program. The constitutional

provision at issue, similar to the one herein, provided, in Article VI, Section 6, Paragraph 6 of the New Jersey Constitution, that justices and judges "shall receive for their services such salaries as may be provided by law, which shall not be diminished during the term of their appointment" (the "No–Diminution Clause"). Notably, notwithstanding the phrase "salaries" found in New Jersey's No–Diminution Clause, the New Jersey Supreme Court held that Chapter 78 violated the New Jersey Constitution by diminishing the salaries of justices and judges during the terms of their appointments. After pointing out that "[n]o court of last resort—including the United States Supreme Court—has upheld the constitutionality of legislation of this kind," the Court explained that even though Chapter 78 did not discriminate between justices and judges and other public employees, "*the State Constitution did*" (*id.* at 43). "However artfully the State describes the effect of Chapter 78—as either a direct or indirect diminution in salary—it remains, regardless of the wordplay, an unconstitutional diminution." (*id.* at 44).

Defendant failed to raise an issue of fact as on this issue, or establish that Section 167.8 does not violate the Compensation Clause as applied to judges. The undisputed facts demonstrate that the defendant's reduction in its contribution results in an increase of judges' contribution to their health insurance benefits, which directly diminishes their compensation. As such plaintiffs' motion for summary judgment is granted and defendant's motion for summary judgment dismissing the complaint is denied.

Furthermore plaintiffs established their entitlement to summary judgment as a matter of law on the issue of whether the statute is unconstitutional as applied to judges.

The amendment on its face does not single out judges. However, the Compensation Clause singly protects judges from overly broad laws that have the direct *effect* of diminishing their compensation. Here, the diminishment has a unique impact upon the judiciary, given that it

diminishes the compensation the judiciary is guaranteed to receive. Moreover, the evidence now indicates that judges comprise the only category of state employees that have not received any benefit from a negotiated union agreement (or, as in the case of M/Cs, received any promise of potential lump sum payments). Defendant asserts that the director of the budget determined to withhold part of M/C employees' paychecks pursuant its deficit reduction plan and that the repayment of such amounts would not begin until April 2015, and that such M/Cs, like judges, were not part of a bargaining unit. However, unlike judges, such M/Cs were promised a lump sum payment due to the downward change in the state's contribution. While defendant disputes that M/Cs received such a lump-sum, it is uncontested that M/Cs were made a promise that was not likewise made to judges. Notably, Chief Budget Examiner of the New York State Division of the Budget, Robert Brondi, attests that Part B, §3(3) of Chapter 491 of the laws of 2011 (which applies to M/C employees, authorized two lump sum payments (Affidavit, ¶3). Even though the law allows the director of the budget to withhold such payments under certain circumstances, the potential benefit, which is unavailable to judges, exists nonetheless. Thus, the evidence further demonstrates that the statute has the *effect* of diminishing the judges' compensation.

This conclusion is not contradicted by the United States Supreme Court decision in *U.S. v Hatter* (532 US 577, 121 S.Ct. 1782 [2001]).

As this Court noted before, in *Hatter*, the Court addressed whether two federal legislative rules violated the federal Compensation Clause: the Medicare tax and special retroactivity-related Social Security rules (the "Social Security tax").

The Medicare tax, *initially* required American workers (whom Social Security covered), *except for federal employees*, to pay an additional tax as "hospital insurance." Congress,

believing that federal workers should bear their equitable share of the costs of the benefits they also received, then amended the Medicare tax to extend to all currently employed federal employees and newly hired federal employees, and as such, required all federal judges to contribute a percentage of their salaries to Medicare. The Social Security law, on the other hand, was amended such that 96% of the then-currently employed federal employees were given the option to choose not to participate in Social Security, thereby avoiding any increased financial obligation. However, the remaining 4% were required to participate in Social Security while freeing them of any added financial obligation provided they previously participated in other contributory retirement programs. Thus, of those who could not previously participate in other contributory retirement programs, *i.e.*, federal judges, their financial obligations and payroll deductions were increased.

After holding that the federal Compensation Clause did not "forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect," the Medicare tax was held to be constitutional" (*id.* at 571-572).

However, four aspects of the Social Security tax caused the Supreme Court to find that it discriminated against federal judges "in a manner that the Clause forbids" (*id.* at 572). Based on the class of federal employees to which the Social Security tax applied, the fact that it imposed a new financial obligation upon sitting judges but did not impose a new financial obligation upon any other group of federal employees, that the tax imposed a substantial cost on federal judges with little or no expectation of substantial benefit, and the unsound nature of the government's justification, the Social Security law violated the Compensation Clause.

The State's withdrawal of its contributions which comprise compensation, which is

essentially what Section 167.8 as applied to judges accomplishes, stands upon different footing than a nondiscriminatory, generally applied tax imposed *against* the compensation of *all citizens* by the government in its status as a sovereign *(see Robinson v Sullivan*, 905 F 2d 1199 [8th Cir 1990] ("the duty to pay taxes, shared by all citizens, does not diminish judges' compensation *within the meaning of the Compensation Clause*. Likewise, social security retirement insurance benefits are earned and paid as part of a general social welfare plan and not specifically as judicial compensation") (emphasis added).

While the terms of the agreement giving rise to plaintiffs' increase in contributions were negotiated between the State and the union, *plaintiffs are unrepresented, and not eligible for collective bargaining*, and were, like the judges affected by the Social Security tax in *Hatter, left without a choice and required to contribute*. That the Legislature did not single out judges for special treatment in order to influence them is thus irrelevant (*see Hatter*, 532 US at 577).

Further, although the increased contributions required by Section 167.8 applies to judges and other state employees, like M/Cs, who are not members of unions, again, the record indicates that such M/Cs obtained a potential benefit of a lump sum payment. Such benefit does not exist for judges.

These undisputed facts warrant summary judgment in plaintiffs' favor, and dismissal of the complaint is denied on this ground as well.

Finally, defendant's claim that plaintiffs did not specifically challenge the regulations implementing Section 167.8 does not warrant a different result, or require that plaintiffs amend their complaint. The Court's finding that Section 167.8 is unconstitutional as applied to judges, necessarily embodies the regulations adopted thereunder (*see e.g., Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 121 AD3d 21, 988 NYS2d 5 [1st Dept 2014] (an

administrative agency "may not act or promulgate rules in contravention of its enabling statute or charter")).

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment on its complaint is granted to the extent that it is hereby

ORDERED, ADJUDGED and DECLARED that L. 2011, c. 491, § 2 and the amended Civil Service Law § 167.8, including the regulations adopted thereunder, are unconstitutional as applied to the Judges and Justices of the Unified Court System because these statutes diminish compensation of all such Judges and Justices;[8] and it is further

ORDERED that defendant's cross motion for summary judgment dismissing the plaintiffs' Complaint is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all plaintiffs within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 25, 2015

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

[8] The remaining portion of plaintiffs' request for relief which seeks to include a finding that these statutes "unconstitutionally and adversely impact the public and the independence of the Judiciary as established in Article VI, Section 25(a) of the New York Constitution," has not been addressed by this Court.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al. Plaintiffs, - against - STATE OF NEW YORK, Defendant.	Index No. 159160/2012 **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that defendant, the State of New York, hereby appeals to the Court of Appeals, pursuant to CPLR § 5601, from each and every part of the Decision/Order of the Supreme Court, County of New York (Edmead, J.S.C.), dated and entered March 25, 2015, a copy of which, with notice of entry, is annexed hereto as Exhibit A, which also brings up for review, pursuant to CPLR § 5501, each and every part of the Decision and Order of the Appellate Division, First Department, dated May 6, 2014, a copy of which is annexed hereto as Exhibit B.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 5519(a)(1), service of this notice of appeal automatically "stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal."

Dated: New York, New York
April 24, 2015

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, PHYLLIS ORLIKOFF FLUG, Justice of the Supreme Court of the State of New York, MARTIN J. SCHULMAN, Justice of the Supreme Court of the State of New York, F. DANA WINSLOW, Justice of the Supreme Court of the State of New York, BETTY OWEN STINSON, Justice of the Supreme Court of the State of New York, MICHAEL J. BRENNAN, Justice of the Supreme Court of the State of New York, ARTHUR M. SCHACK, Justice of the Supreme Court of the State of New York, BARRY SALMAN, Justice of the Supreme Court of the State of New York, JOHN BARONE, Justice of the Supreme Court of the State of New York, ARTHUR G. PITTS, Justice of the Supreme Court of the State of New York, THOMAS D. RAFFAELE, Justice of the Supreme Court of the State of New York, PAUL A. VICTOR, retired Justice of the Supreme Court of the State of New York, JOSEPH GIAMBOI, retired Justice of the Supreme Court of the State of New York, THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, INC. AND JOHN AND MARY DOES 1-2,000, current and retired Judges and Justices Of the Unified Court System of the State Of New York,

Plaintiffs,

-against-

STATE OF NEW YORK,

Defendant.

Index No. 159160/2012

Justice C. Edmead

NOTICE OF ENTRY

PLEASE TAKE NOTICE THAT the within is a true copy of a Decision/Order duly entered and filed in the office of the clerk of the within named Court on March 25, 2015.

Dated: New York, New York
March 27, 2015

STROOCK & STROOCK & LAVAN LLP

By: /s/ Alan M. Klinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD, Justice

PART 35

BRANSTEN, EILEEN

-v-

STATE OF NEW YORK

INDEX NO. 159160/2012

MOTION DATE ____________

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____________ No(s). ____________

Answering Affidavits — Exhibits ____________ No(s). ____________

Replying Affidavits ____________ No(s). ____________

FILED
MAY - 1 2015
entered as a judgment
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiffs' motion for summary judgment on its complaint is granted to the extent that it is hereby

ORDERED, ADJUDGED and DECLARED that L. 2011, c. 491, § 2 and the amended Civil Service Law § 167.8, including the regulations adopted thereunder, are unconstitutional as applied to the Judges and Justices of the Unified Court System because these statutes diminish compensation of all such Judges and Justices; and it is further

ORDERED that defendant's cross motion for summary judgment dismissing the plaintiffs' Complaint is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all plaintiffs within 20 days of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____________
FOR THE FOLLOWING REASON(S): ____________

Dated: 3·25·2015

[signature], J.S.C.

HON. CAROL EDMEAD

1. CHECK ONE: .... [✓] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: [ ] GRANTED [ ] DENIED [✓] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: .... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, PHYLLIS ORLIKOFF FLUG, Justice of the Supreme Court of the State of New York, MARTIN J. SCHULMAN, Justice of the Supreme Court of the State of New York, F. DANA WINSLOW, Justice of the Supreme Court of the State of New York, BETTY OWEN STINSON, Justice of the Supreme Court of the State of New York, MICHAEL J. BRENNAN, Justice of the Supreme Court of the State of New York, ARTHUR M. SCHACK, Justice of the Supreme Court of the State of New York, BARRY SALMAN, Justice of the Supreme Court of the State of New York, JOHN BARONE, Justice of the Supreme Court of the State of New York, ARTHUR G. PITTS, Justice of the Supreme Court of the State of New York, THOMAS D. RAFFAELE, Justice of the Supreme Court of the State of New York, PAUL A. VICTOR, retired Justice of the Supreme Court of the State of New York, JOSEPH GIAMBOI, retired Justice of the Supreme Court of the State of New York, THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, INC. and JOHN AND MARY DOES 1-2000, current and retired Judges and Justices of the Unified Court System of the State of New York,

Plaintiffs,

Index No. 159160/2012
Motion Seq. #002

DECISION/ORDER

-against-

THE STATE OF NEW YORK,

Defendant.

---x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs, comprising the Justices of the Supreme Court of the State of New York and current and retired members of the New York State Judiciary, move for summary judgement declaring that the decision by defendant, State of New York ("defendant") to reduce the State's

contribution to the Justices' health insurance benefits pursuant to L. 2011, c. 491, § 2 and the amended Civil Service Law § 167.8 ("Section 167.8"), violates the Compensation Clause of the New York State Constitution (N.Y. Const. art. VI, §25[a] (the "Compensation Clause").

In turn, defendant cross moves for summary judgment dismissing the complaint, arguing that contrary to plaintiffs' claim, Section 167.8 is not unconstitutional as applied to the Judges and Justices (hereinafter, "judges") of the Unified Court System.

Factual Background

In an effort to address the budget crisis facing the State of New York, in 2011 the Legislature negotiated agreements with certain public-sector unions pursuant to which the State agreed to refrain from laying off thousands of State unionized employees, in exchange for a reduction in the percentage of the State's contribution toward employees' health insurance premiums.[1]

Thereafter, in August 2011, the Legislature amended Section 167.8 to allow the Civil Service Department to extend the terms of the union agreement to cover unrepresented State employees and retirees.

Consequently, on September 30, 2011, plaintiffs were notified of the State's plan to reduce its contribution to their health insurance plans, which would require them to pay more per year for their health insurance premiums. The State's contribution rate change took effect on October 1, 2011, resulting in a 6% increase in plaintiffs' contribution to the cost of their health insurance (such as co-payments, deductibles, and prescription drug costs). The premium

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[1] According to the Complaint, this provision includes retirement benefits afforded to retired Judges and Justices.

State's contributions were reduced from 90% to 80% for active employees, and from 90% to 88% for retired employees, thus requiring the employees to pay the difference with their salaries.

contribution rate for retired Justices increased by 2%, and the rate for those Justices retiring on or after January 1, 2012 increased by 6% percent.[2]

Plaintiffs then commenced this action, and sought a preliminary injunction to enjoin defendant from imposing upon plaintiffs the higher premium contribution rates, co-payments, and deductibles for health insurance.[3] Plaintiffs asserted that since "compensation" includes health benefits, the value of their compensation had been diminished by defendant's actions, in violation of the Compensation Clause, which guarantees that plaintiffs' compensation shall not be diminished during their term in office.[4]

In response, defendant moved to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7) arguing that: (1) under caselaw, laws that indirectly reduced the take home pay of judges in a non-discriminatory manner that did not single out judges did not violate the Compensation Clause; (2) the Commission of Judicial Compensation previously considered "non-salary" benefits such as health insurance in its study, and the Judicial salary increase which went into affect six months after the change in contributions cured any violation of the Compensation Clause; and (3) the express language of the Compensation Clause rendered it inapplicable to *retired* justices and judges.

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[2] At the same time, the co-payment for Judges, Justices, and unrepresented Unified Court System employees, and retirees was eliminated for certain preventative care services, and the co-payment for certain prescription drugs was reduced by 50%.

[3] Plaintiffs seek a judgment declaring that "L 2011, c. 491, § 2 and the amended Civil Service Law § 167.8 are unconstitutional as applied to the Judges and Justices of the Unified Court System because these statutes diminish the compensation of all such Judges and Justices and, by so doing, unconstitutionally and adversely impact the public and independence of the Judiciary . . . ."

[4] According to the Complaint, this provision includes retirement benefits afforded to retired Judges and Justices.

In opposition, plaintiffs argued that courts have held that health benefits comprise part of judicial compensation. Defendant's reduction of its contribution to plaintiffs' health care insurance directly increased the cost of plaintiffs' health insurance, and such legislative action has been held by courts in other jurisdictions as a direct reduction in judicial compensation. Further, Section 167.8 did not equally affect all residents of New York State or all State employees. The increased contributions were not borne by all New York State residents, but imposed upon solely New York State employees and retired employees. Defendant's reduction was discriminatory and singled out judges, in that plaintiffs did not receive the same benefits that represented State employees received. Since plaintiffs were unrepresented and ineligible for collective bargaining, they had been discriminated against within their class of State employees. The amendment imposed a new financial obligation on plaintiffs, but bore no relation to the purpose of the amendment, which was to avoid the layoffs of State employees.

This Court denied dismissal of the Complaint, essentially holding that the Complaint stated a cause of action that was not defeated by documentary evidence. The Court reasoned that although the amendment did not single out judges:

> . . . the Compensation Clause singly protects judges from overly broad laws that have the direct effect of diminishing their compensation. Here, the diminishment has a unique impact upon the judiciary . . . by virtue of the fact that it diminishes the compensation the judiciary is guaranteed to receive. . . [C]ontributions to health insurance benefits which are deducted from a judge's paycheck is directly related to the amount of salary paid to a judge. . . .(p. 13).
>
> . . .while the terms of the agreement giving rise to plaintiffs' increase in contributions were negotiated between the State and the union, *plaintiffs are unrepresented, and not eligible for collective bargaining* . . . . (p. 13)
>
> . . . defendant negotiated its reduction in contributions in order to avoid the layoffs of thousands of State employees, *none of which include judges or justices,* because Judges and Justices are not subject to "layoffs." Thus, the increased cost of health insurance borne by plaintiffs bears no relation to the purpose of the State's reduction in its contributions. . . . (p. 16)
>
> (Emphasis in original)

Defendant appealed[5] and the First Department upheld this Court's decision, holding that

> it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits. This Court has recognized that judicial "compensation" under the Compensation Clause includes both "the pay scale and benefits" . . . and the Second Department has expressly found that health insurance benefits are a component of a judge's compensation . . . .
>
> As applied to New York judges, the amended Section 167.8 subjects them to discriminatory treatment also in violation of the state Compensation Clause. In its implementation, the amended statute affects judges differently from virtually all other State employees, who either consented to the State's reduced contribution in exchange for immunity from layoffs or were otherwise compensated by the State's promise of job security. Unlike other State employees, judges were forced to make increased contributions to their health care insurance premiums, without receiving any benefits in exchange. The judiciary had no power to negotiate with the State with respect to the decrease in compensation, and received no benefit from the no-layoffs promise, because their terms of office were either statutorily or constitutionally mandated. Thus, Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they received no compensatory benefit.
>
> (P. 57).

The parties proceeded with discovery and these motions for summary judgment ensued.

In support of summary judgment on their Complaint, plaintiffs reiterate their previous arguments in defending the Complaint against dismissal, and argue that the undisputed factual record warrants a declaration that the reductions are void *ab initio,* and an injunction enjoining further enforcement as to judges and justices active and retired. Relying on the decisions of this Court and the First Department, plaintiffs point out that it has been already concluded that (1) the Compensation Clause protects against the diminution of compensation, which includes health care benefits provided to judges and justices, and any such diminution is unconstitutional *per se*; and (2) the diminution was discriminatory, as applied, even if characterized as "indirect," as it

[5] As pointed out by the First Department, "On appeal, defendant does not argue that reducing its contribution to insurance premiums did not directly diminish judges' compensation. Instead, the State first argues that its contribution to judges' health insurance premiums are not 'compensation' within the meaning of the Compensation Clause. . . . (P. 56).

does not affect all state employees equally (Court's Decision, p. 16; Appellate Decision, pp. 59-60).

Plaintiffs point out that the State's New York State Health Insurance Plan ("NYSHIP") records, sister-court caselaw, common practice by the New York Public Employment Relations Board ("ERB"), and interpretations of Congressional authority demonstrate that health care premiums are part of plaintiffs' compensation, and any reduction thereof is a direct reduction in judicial "compensation."

Plaintiffs also contend that the amendment has a discriminatory impact on judges. The decrease in the state's contribution does not apply to all state citizens, and moreover, the diminution does not affect all state employees equally. Defendant's amendment imposes a new financial obligation upon plaintiffs, which nearly every other state employee chose to bear through the bargaining process. Plaintiffs received no benefit in exchange for their increased health care premiums. And, defendants assert no sound justification that outweighs the objectives of the Compensation Clause. As judges comprise only 1% of the active state employees, the dollar amount at issue is hardly material in remedying the state budget. And, the Commission recognized the State's ability to pay judges' salaries in determining its recommended salary increases.

In opposition, and in support of dismissal of the Complaint, defendant argues that 12,000 state employees, comprising "managerial" or "confidential" ("M/C") personnel in State agencies (*i.e.*, Assistant Attorneys Generals) and the Legislature, and certain court personnel (*i.e.*, Law Secretaries), are similarly situated to plaintiffs in two respects. These 12,000 constitute more than 6% of the State workforce. First, like plaintiffs, insurance premiums for M/Cs were increased as a result of the amendment, and second, also like plaintiffs, M/Cs are not members of

a union and lacked any power to negotiate for any benefit in exchange of the premium changes. Also, defendant points out that plaintiffs' assertion, at oral argument before the First Department, that M/Cs received a lump sum payment under Part B of § 3(3) of chapter 491 of the Laws of 2011 is untrue. Chapter 491 requires the director of the budget to deliver notice to the comptroller that such lump sum payments may be made prior to payment, and the director has declined to make the lump sum payment. And, in November 2011, the director of the budget issued a bulletin announcing that the State would withhold part of M/C employees' paychecks from December 2011 to April 2013 pursuant its deficit reduction plan and would not begin to repay the amounts withheld until April 2015. In any event, any such payment by the State could not be viewed as an "exchange" for the reduction in employer health premium contribution rates; M/Cs are excluded from collective bargaining, and like judges, had no power to negotiate. And, the Legislature did not mandate any change in employer health premium contribution rates, but instead, left such changes to the discretion of the President of the Civil Service Commission and the Director of the Division of the Budget. Further, the purported lump sum payment specified in section 3(3) of Part B of Chapter 491 of the Law of 2011 was left to the discretion of the Director of the Division of the Budget. Such discretion was exercised to reduce health premium contribution rates for all non-unionized employees, and to not make lump sum payments to M/C employees.

Under caselaw, statutes that merely increase a judge's costs do not violate the Compensation Clause unless they also discriminate against judges. The evidence demonstrates that 12,000 M/C state employees were treated identically to plaintiffs. Since the statute does not mention judges or establish criteria that apply exclusively to judges, the statute is constitutional.

And, the statute does not reduce premium contributions, but gives the Civil Service

Commission, with approval of the Director of the Division of the Budget, the discretion to do so. Since plaintiffs do not challenge the constitutionality of the regulations implementing the statute, plaintiffs' motion should be denied. In any event, the regulations do not discriminate against judges, but distinguish between employees who belong to a union that have yet to ratify a new collective bargaining agreement and all of other state employees. 98% of all state employees enrolled in NYSHIP fall in the latter category, which includes union employees who ratified the agreement and non-union employees. Therefore, there are a vast number of non-judge employees also affected by the reduction in premium contributions.

And, the statute need not apply to all New York citizens to be found constitutional.

Furthermore, the First Department's conclusion that Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they receive no compensatory benefit is not law of the case. The First Department incorrectly relied on the assumption that the State had not contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation. Contrary to the First Department's statement otherwise, defendant did, in fact, argue that reducing its contribution to judges' insurance premiums did not directly diminish judges' compensation. Further, the doctrine of the law of the case does not apply where a summary judgment motion, applying a different scope of review with evidentiary material not previously part of the record, follows a motion to dismiss.[6]

In reply, plaintiffs contend that the First Department decision is controlling precedent as to the legal standard to be applied, and the purported new fact concerning the 12,000 M/Cs does not alter the legal standard articulated by the First Department. Whether the First Department

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[6] Defendant does not ask the Court to revisit the issue of whether employees' compensation includes health benefits, subject to the State's right of further appellate review.

incorrectly assumed that defendant abandoned a certain argument is not subject to this Court's review. And, as defendant concedes (for purposes of this motion), the statute directly reduced a component of judicial compensation, and thus, is *per se* unconstitutional. Irrespective of whether the M/C employees were treated the same as judges, the State's decrease in its premium contributions was not uniformly applied to all state employees, who could negotiate for or decline the state's reduction in premium contributions. Further, M/C employees were also promised additional compensation, an offer not made to judges. And, to the extent the Court finds that the statute may not constitutionally be applied to judges, any implementing regulations adopted under the statute are likewise invalid. While plaintiffs' claim encompasses any regulations adopted under the statute, if the Court deems necessary, plaintiffs seek leave to amend the complaint to include a challenge to any such regulation.

Discussion

It is well established that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 607 [1st Dept 2012] *citing Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Madeline D'Anthony Enterprises, Inc.*, 101 AD3d at 607). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Carroll v Radoniqi,* 105 AD3d 493 [1st Dept 2013]).

As a threshold matter, the Court notes that the law of the case doctrine does not apply so as to relieve this Court from assessing whether plaintiffs established their entitlement to judgment as a matter of law. "The law of the case doctrine declares that a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case" (*State v Barclays Bank of New York, N.A.*, 151 AD2d 19, 546 NYS2d 479 [3d Dept 1989]). The "doctrine of law of the case is inapplicable 'where . . . a summary judgment motion follows a motion to dismiss' . . ., since the scope of review on the two motions differs; the motion to dismiss examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings" (*Friedman v Connecticut General Life Ins. Co.*, 30 AD3d 349, 818 NYS2d 201 [1st Dept 2006], *citing Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1987] and *Riddick v City of New York*, 4 AD3d 242, 245 [2004]; *see also*, *Moses v Savedoff*, 96 AD3d 466, 947 NYS2d 419 [1st Dept 2012]). The two motions are distinctly different.

However, to the degree the First Department resolved controverted questions of law in determining whether plaintiffs' complaint stated a claim, this Court cannot undermine such determination of law (*see Bolm v Triumph Corp.*, 71 AD2d 429, 422 NYS2d 969 [4th Dept 1979] *citing* 10 Carmody-Wait 2d, NY Prac, §70:453; Siegel, New York Practice, § 448) ("decisions of the Appellate Division made in a case, whether correct or incorrect, are the law of the case until modified or reversed by a higher court")). This court cannot disregard the Appellate Division's pronouncement of the law concerning the Compensation Clause (Article VI, §25) and its reach (*see Gutman v A to Z Holding Corp.*, 38 Misc 3d 1211(A), 966 NYS2d 346 (Table) [Supreme Court, Kings County 2012] *citing Schmitt v City of New York*, 50 AD3d 1010, 1010 [2d Dept 2008] ("This court is prohibited from issuing an order which has the effect of "undermining" an

order of the Appellate Division")).[7]

Thus, to the degree the parties submit additional evidence on this motion, the Court addresses whether such evidence demonstrates that Section 167.8 violates the Compensation Clause as a matter of law, whether an issue of fact exists so as defeat summary judgment, and, as defendant claims, whether the complaint should be dismissed because Section 167.8 does not violate the Compensation Clause.

Applying the summary judgment standard, plaintiffs established their entitlement to judgment as a matter of law.

It is uncontested that Article VI, §25, the Compensation Clause, addresses the compensation of the plaintiffs and certain other judicial classifications, whose salaries are specified in Judiciary Law article 7-B (§ 220 *et seq.*). Particularly, Article VI, §25 [a] thereof provides that

> "The compensation of a judge . . . or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed. . . ."

As this Court and the First Department previously indicated, "compensation" in the context of one's employment includes wages *and benefits*, including health insurance benefits (*see, Roe v Bd. of Trustees of Village of Bellport*, 65 AD3d 1211, 886 NYS2d 707 [2d Dept 2009] (including as "compensation," "wages *and benefits*" in the context of the protection afforded by the New York State Constitution's separation of powers clause prohibiting a legislative body from reducing the compensation of a judge or justice serving in a constitutional

[7] It is noted that as to defendant's claim that the First Department incorrectly assumed that defendant had not contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation, the First Department subsequently noted that it could, nonetheless, address issues of law, and later found, on the merits after discussion of various caselaw, that the reduction of defendant's contribution "diminishes compensation."

court, and remitting the matter for a declaration that a Village resolution "terminating the plaintiff's paid health care benefits is null and void as to the plaintiff during his current term in [judicial] office"); *see also, Syracuse Teachers Ass'n v Board of Ed.*, Syracuse City School Dist., Syracuse, 42 AD2d 73, 75, 345 NYS2d 239 [4th Dept 1973], *affd.* 35 NY2d 743, 361 NYS2d 912, 320 NE2d 646 [1974] ["compensation may take the form both of cash wages and 'fringe benefits'"]; *Aeneas McDonald Police Benev Ass'n, Inc. v City of Geneva*, 92 NY2d 326, 703 NE2d 745 [1998] (stating, in the context of mandatory arbitration, that "[h]ealth benefits for current employees can be a form of compensation . . . " and that "health benefits are a form of compensation and a term of employment"); *Walek v Walek*, 193 Misc2d 241, 749 NYS2d 383 [Supreme Court, Erie County 2002] (finding, in the context of determining assets subject to equitable distribution, that the health care benefits component of defendant's retirement plan "represent compensation for past employment services rendered by defendant"); *Kahmann v Reno,* 928 F Supp 1209 [NDNY 1996] (considering, in the context of gross backpay, "wages, bonuses, vacation pay, *and all other elements of reimbursement and fringe benefits such as pension and health insurance,*" as "forms of compensation"); *District of Columbia v Greater Washington Bd. of Trade*, 506 US 125, 113 SCt 580 [Dist. Col. 1992] (noting, in the context of workers' compensation benefits, the corresponding reduction in one's weekly wage as a result of the health insurance benefits one receives)).

As this Court stated previously, the case, *DePascale v State of New Jersey* (211 NJ 40, 47 A3d 690 [2012]), also supports this conclusion. In *DePascale,* the plaintiff, also a judge, challenged on constitutional grounds the State of New Jersey's enactment of the Pension and Health Care Benefits Act ("Chapter 78"), that required all state employees, including judges, to contribute more towards their state-administered health benefits program. The constitutional

provision at issue, similar to the one herein, provided, in Article VI, Section 6, Paragraph 6 of the New Jersey Constitution, that justices and judges "shall receive for their services such salaries as may be provided by law, which shall not be diminished during the term of their appointment" (the "No–Diminution Clause"). Notably, notwithstanding the phrase "salaries" found in New Jersey's No–Diminution Clause, the New Jersey Supreme Court held that Chapter 78 violated the New Jersey Constitution by diminishing the salaries of justices and judges during the terms of their appointments. After pointing out that "[n]o court of last resort—including the United States Supreme Court—has upheld the constitutionality of legislation of this kind," the Court explained that even though Chapter 78 did not discriminate between justices and judges and other public employees, "*the State Constitution did*" (*id.* at 43). "However artfully the State describes the effect of Chapter 78—as either a direct or indirect diminution in salary—it remains, regardless of the wordplay, an unconstitutional diminution." (*id.* at 44).

Defendant failed to raise an issue of fact as on this issue, or establish that Section 167.8 does not violate the Compensation Clause as applied to judges. The undisputed facts demonstrate that the defendant's reduction in its contribution results in an increase of judges' contribution to their health insurance benefits, which directly diminishes their compensation. As such plaintiffs' motion for summary judgment is granted and defendant's motion for summary judgment dismissing the complaint is denied.

Furthermore plaintiffs established their entitlement to summary judgment as a matter of law on the issue of whether the statute is unconstitutional as applied to judges.

The amendment on its face does not single out judges. However, the Compensation Clause singly protects judges from overly broad laws that have the direct *effect* of diminishing their compensation. Here, the diminishment has a unique impact upon the judiciary, given that it

diminishes the compensation the judiciary is guaranteed to receive. Moreover, the evidence now indicates that judges comprise the only category of state employees that have not received any benefit from a negotiated union agreement (or, as in the case of M/Cs, received any promise of potential lump sum payments). Defendant asserts that the director of the budget determined to withhold part of M/C employees' paychecks pursuant its deficit reduction plan and that the repayment of such amounts would not begin until April 2015, and that such M/Cs, like judges, were not part of a bargaining unit. However, unlike judges, such M/Cs were promised a lump sum payment due to the downward change in the state's contribution. While defendant disputes that M/Cs received such a lump-sum, it is uncontested that M/Cs were made a promise that was not likewise made to judges. Notably, Chief Budget Examiner of the New York State Division of the Budget, Robert Brondi, attests that Part B, §3(3) of Chapter 491 of the laws of 2011 (which applies to M/C employees, authorized two lump sum payments (Affidavit, ¶3). Even though the law allows the director of the budget to withhold such payments under certain circumstances, the potential benefit, which is unavailable to judges, exists nonetheless. Thus, the evidence further demonstrates that the statute has the *effect* of diminishing the judges' compensation.

This conclusion is not contradicted by the United States Supreme Court decision in *U.S. v Hatter* (532 US 577, 121 S.Ct. 1782 [2001]).

As this Court noted before, in *Hatter*, the Court addressed whether two federal legislative rules violated the federal Compensation Clause: the Medicare tax and special retroactivity-related Social Security rules (the "Social Security tax").

The Medicare tax, *initially* required American workers (whom Social Security covered), *except for federal employees*, to pay an additional tax as "hospital insurance." Congress,

believing that federal workers should bear their equitable share of the costs of the benefits they also received, then amended the Medicare tax to extend to all currently employed federal employees and newly hired federal employees, and as such, required all federal judges to contribute a percentage of their salaries to Medicare. The Social Security law, on the other hand, was amended such that 96% of the then-currently employed federal employees were given the option to choose not to participate in Social Security, thereby avoiding any increased financial obligation. However, the remaining 4% were required to participate in Social Security while freeing them of any added financial obligation provided they previously participated in other contributory retirement programs. Thus, of those who could not previously participate in other contributory retirement programs, *i.e.*, federal judges, their financial obligations and payroll deductions were increased.

After holding that the federal Compensation Clause did not "forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect," the Medicare tax was held to be constitutional" (*id.* at 571-572).

However, four aspects of the Social Security tax caused the Supreme Court to find that it discriminated against federal judges "in a manner that the Clause forbids" (*id.* at 572). Based on the class of federal employees to which the Social Security tax applied, the fact that it imposed a new financial obligation upon sitting judges but did not impose a new financial obligation upon any other group of federal employees, that the tax imposed a substantial cost on federal judges with little or no expectation of substantial benefit, and the unsound nature of the government's justification, the Social Security law violated the Compensation Clause.

The State's withdrawal of its contributions which comprise compensation, which is

essentially what Section 167.8 as applied to judges accomplishes, stands upon different footing than a nondiscriminatory, generally applied tax imposed *against* the compensation of *all citizens* by the government in its status as a sovereign *(see Robinson v Sullivan*, 905 F 2d 1199 [8th Cir 1990] ("the duty to pay taxes, shared by all citizens, does not diminish judges' compensation *within the meaning of the Compensation Clause*. Likewise, social security retirement insurance benefits are earned and paid as part of a general social welfare plan and not specifically as judicial compensation") (emphasis added).

While the terms of the agreement giving rise to plaintiffs' increase in contributions were negotiated between the State and the union, *plaintiffs are unrepresented, and not eligible for collective bargaining*, and were, like the judges affected by the Social Security tax in *Hatter, left without a choice and required to contribute*. That the Legislature did not single out judges for special treatment in order to influence them is thus irrelevant (*see Hatter*, 532 US at 577).

Further, although the increased contributions required by Section 167.8 applies to judges and other state employees, like M/Cs, who are not members of unions, again, the record indicates that such M/Cs obtained a potential benefit of a lump sum payment. Such benefit does not exist for judges.

These undisputed facts warrant summary judgment in plaintiffs' favor, and dismissal of the complaint is denied on this ground as well.

Finally, defendant's claim that plaintiffs did not specifically challenge the regulations implementing Section 167.8 does not warrant a different result, or require that plaintiffs amend their complaint. The Court's finding that Section 167.8 is unconstitutional as applied to judges, necessarily embodies the regulations adopted thereunder (*see e.g., Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 121 AD3d 21, 988 NYS2d 5 [1st Dept 2014] (an

administrative agency "may not act or promulgate rules in contravention of its enabling statute or charter")).

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment on its complaint is granted to the extent that it is hereby

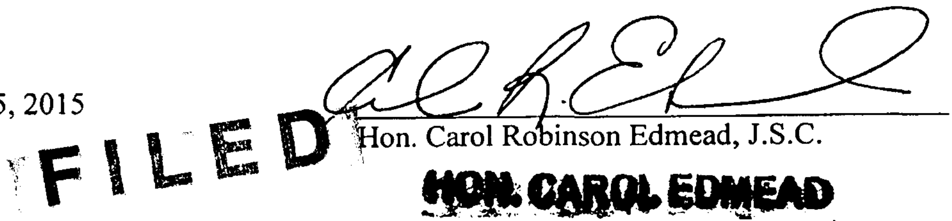
ORDERED, ADJUDGED and DECLARED that L. 2011, c. 491, § 2 and the amended Civil Service Law § 167.8, including the regulations adopted thereunder, are unconstitutional as applied to the Judges and Justices of the Unified Court System because these statutes diminish compensation of all such Judges and Justices;[8] and it is further

ORDERED that defendant's cross motion for summary judgment dismissing the plaintiffs' Complaint is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all plaintiffs within 20 days of entry.

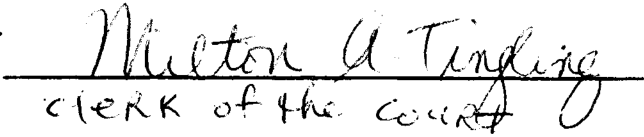
This constitutes the decision and order of the Court.

Dated: March 25, 2015



Hon. Carol Robinson Edmead, J.S.C.

MAY - 1 2015
entered as a judgment
COUNTY CLERK'S OFFICE
NEW YORK



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[8] The remaining portion of plaintiffs' request for relief which seeks to include a finding that these statutes "unconstitutionally and adversely impact the public and the independence of the Judiciary as established in Article VI, Section 25(a) of the New York Constitution," has not been addressed by this Court.

Index No.: 159160/2012 (Hon. Carol Edmead, J.S.C.)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al.,

Plaintiffs,

- against -

STATE OF NEW YORK,

Defendant.

JUDGMENT

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Fax No.: 212-416-6009 (Not for Service of Papers)

Due Service of a copy of the within is admitted this
________ Day of ____________ 2015

FILED
MAY - 1 2015
AT 11:40 AM
N.Y., CO. CLK'S OFFICE
entered as a judgment

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EILEEN BRANSTEN, et al.	:	Index No. 159160/2012
Plaintiffs,	:	
- against -	:	**NOTICE OF APPEAL**
STATE OF NEW YORK,	:	
Defendant.	:	

PLEASE TAKE NOTICE that defendant, the State of New York, hereby appeals to the Court of Appeals, pursuant to CPLR § 5601(b)(2), from each and every part of the Order/Judgment of the Supreme Court, County of New York, dated and entered May 1, 2015, a copy of which is annexed hereto as Exhibit A, which also brings up for review, pursuant to CPLR § 5501, each and every part of the Decision and Order of the Appellate Division, First Department, dated May 6, 2014, a copy of which is annexed hereto as Exhibit B.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 5519(a)(1), service of this notice of appeal automatically "stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal."

Dated: New York, New York
May 4, 2015

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Attorney for Defendant

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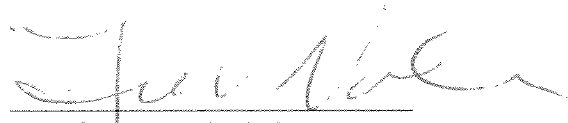
FURTHER CERTIFICATION PURSUANT TO C.P.L.R. 2105

I, Judith N. Vale, an attorney in the Office of Eric T. Schneiderman, Attorney General of the State of New York, attorney for the Appellant herein, hereby certify, pursuant to C.P.L.R. 2105, that I have compared the foregoing papers with the originals on file in the Courts Electronic Filing System under the County Clerk, New York County, and have found them to be a true and complete copy thereof.

Dated: New York, New York
November 16, 2015



JUDITH N. VALE
Assistant Soiicitor General