SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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EMILY PINES, DAVID DEMAREST, JEFFREY D. LEBOWITZ, STEPHEN FERRADINO, RALPH A. BONIELLO, III and JOSEPH CALABRESE,

Index No. 10-13518

Plaintiffs,

-against-

STATE OF NEW YORK

Defendant.

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PLAINTIFFS' MEMORANDUM IN REPLY AND IN SUPPORT AND IN FURTHER SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

Plaintiffs respectfully submit this memorandum in reply to the defendant's opposition, and in further support of plaintiffs' motion for summary judgment for a declaration that the salary of the Judges and Justices of the State of New York has been increased under Laws of 2009, Chapter 51, §3 ("Chapter 51") as of April 1, 2009, and that the State of New York is obligated to pay the Judges and Justices of the State of New York in accordance with Chapter 51 and Article VI, §25(a) of the New York State Constitution.

POINT

THE APPROPRIATION OF JUDICIAL SALARY ADJUSTMENT WAS COMPLETE UPON PASSAGE AND MUST BE DECLARED TO BE IMMEDIATELY PAYABLE

Preliminarily, the State disputes whether the plaintiffs are entitled to cross-move for summary judgment. Whether plaintiffs or defendant have correctly characterized the procedural basis on which this matter is before this Court, the State has voiced no objection to a final ruling on the merits at this juncture.

A. *Court of Appeals Precedent Supports the Plaintiffs' Position*

In its opposition to the plaintiffs' cross-motion for summary judgment, the State attempts to persuade this Court to limit the principles enunciated by relevant Court of Appeals precedent strictly to the facts of those particular cases and ignore them as irrelevant. In so doing, it seeks not only to deprive the Judiciary of its concededly merited and fully-enacted compensation adjustment, but also to overturn the established principles of law which constitute *stare decisis*, and which compel the granting of the relief sought.

The correct analysis of the holdings in *Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004) ("*Pataki*"), *People v. Tremaine*, 252 N.Y. 27 (1929) ("*Tremaine*") and *Saxton v. Carey*, 44 N.Y.2d 545 (1978) ("*Saxton*"), as well as the Court of Appeals

decision in *Maron v. Silver*, 14 N.Y.3d 230, 249-250 (2010)("*Maron*"), establishes that judicial compensation was, in fact, adjusted by Chapter 51 of the 2009-2010 Budget. No compelling basis for any other conclusion has been suggested by the State.

The State mischaracterizes the Court of Appeals holding in *Maron* as well as its significant impact on the issues presented herein. The State's reliance on the *Maron* Court's finding to the effect that, for the budget year at issue (2006-2007), the Legislature's failure to amend Judiciary Law article 7-B was "further evidence" that additional legislation was required to adjust judicial compensation in that budget year (*Maron* at 250) is misplaced. The Court of Appeals did not hold that an amendment of Judiciary Law Article 7-B is necessary or constitutionally required in order to adjust judicial compensation.

The historical practice of adjusting judicial compensation by amending a particular statute does not mean that the amendment of that statute is required. (*Pataki* at 96, 98 ["Nothing in the Constitution says or implies that, once it becomes customary to deal with a particular subject either in appropriation bills or other legislation, the custom must be immutable."]). The State cites no contrary authority.

In a statute on the books for decades, the Legislature has made it clear that a legislative appropriation of salary for a state officer or employee is controlling *notwithstanding* any existing law that fixes it at a different amount. See, State Finance Law § 44(2), which provides:

> Any appropriation for salary, compensation or expenses shall be the salary, compensation or expenses for one year of the officer, employee, office, board, department, commission, or bureau for whom or which the same is appropriated, **notwithstanding existing provisions of any other statute fixing the annual salary, compensation or expenses of such officer or employee or the expenses of such office, board, department, commission, or bureau at a different amount.** [Emphasis added.]

See also, *Pataki*, where the Court of Appeals held that a provision of an appropriation statute prevails over an inconsistent provision in an earlier non-appropriation statute. Thus, no further legislative action is necessary to make Chapter 51 fully enforceable.

The Court of Appeals in *Pataki*, in rejecting the contention of the Legislature that an earlier non-appropriation statute was controlling, held:

> [T]he Legislature notes, and the dissent emphasizes heavily, that the Governor's 2001 school funding proposal altered existing statutory provisions for the distribution of school aid. But the Legislature does not even argue, and could not successfully argue, that it is forbidden

> for an appropriation bill --whose effect is limited to two years by the Constitution (art VII, § 7)--to supersede existing law for that time. The Governor points out that appropriation bills superseded other legislation long before executive budgeting was adopted, and have continued to do so since … **An appropriation that is effective notwithstanding other law to the contrary is still a legitimate appropriation.** (Emphasis added.)

(*Pataki* at 98-99).

It has long been recognized that there is more than one way to skin the budgetary cat. Without a factual or legal basis, the State attempts to limit *Pataki* to its facts, thereby avoiding its impact in this case. This assault on clear precedent must be rejected by this Court. In that way, the final, unconditional passage and enactment of the 2009-2010 Judiciary Budget can be given vitality.

The State's assertion that the 2009-2010 Judiciary Budget cannot be effective because the Constitution requires that judicial compensation be "established by law" can be given no credence. The State cites to no cases concerning the meaning of this provision. Nor can it find support for its claim that "established by law" requires specific amendment of the Judiciary Law. The reason is simple. Precedent holds the other way. Indeed, in an analogous situation, the passage of an appropriation without itemization, is "established by law" and

is neither constitutionally infirm nor unenforceable (*Tremaine* at 43 [the Legislature may appropriate a lump sum for a general purpose without providing any specific allocation in the statute]; *Pataki* at 96 [historical practice of amending a particular substantive statute is not a basis for invalidating an appropriation statute which does not do so]; *see also* State Finance Law §44[2]).

While the Constitution requires that a budget be "itemized" in order to be constitutional under New York Constitution Article VII §§1-7, itemization is an amorphous term which is established by the manner in which the Legislature sees fit to pass a budgetary matter (*Saxton* at 549-550). The plaintiffs in the *Saxton* case sued to invalidate the budget, claiming that the budget as proposed by the Governor and passed by the Legislature was insufficiently itemized to satisfy the requirements of the constitution. The Court of Appeals responded that the meaning of "itemization" was not fixed; rather, it was for the Legislature to determine whether a budget was sufficiently itemized within the meaning of the Constitution (*Saxton* at 550). Were the Legislature to determine that the budget was insufficiently "itemized" to satisfy constitutional requirements, its option was to decline to pass that budget. It was not the function of the Courts to review the Legislature's

determination of what was sufficiently "itemized" (*Saxton* at 551).

Similarly, in regard to judicial compensation, as adopted in Chapter 51, it was for the Legislature to determine what form of appropriation would be sufficient to "establish" judicial compensation. The Legislature made that determination by enacting Chapter 51. Here, the Executive Summary (Cohn aff. Exhibit C)- - the basis of the Judiciary's budget request - - clearly established the salary of a Supreme Court Justice, and the formula for the compensation of all of the other judges and justices in New York State, as percentages of the compensation of a Supreme Court Justice. The Executive Summary contained a lump sum appropriation for the payment of judicial compensation and for other uses as determined by the Office of Court Administration. If the Legislature had determined that the judiciary budget request was insufficient, incomplete or lacking in itemization to "establish" judicial compensation under the Constitution, it could well have amended or eliminated the appropriation. It did neither. Instead, the Legislature passed the appropriation. Having done so, it "established" judicial compensation.

In *Tremaine*, the Court of Appeals held that the precondition of legislative participation in disbursement of

funds appropriated by budget legislation for a coordinate branch of state government was unconstitutional and void (*Tremaine* at 52). It held:

> The Legislature may not attach void conditions to an appropriation bill. If it attempts to do so, the attempt and not the appropriation fails. *Matter of Brennan v. Board of Educ.*, 250 NY 570.

(*Tremaine* at 45).

The *Tremaine* Court struck that portion of the statute which allowed the Legislature to participate in the actual allocation of the lump sum appropriated, finding the appropriation to be final, complete and effective legislation when signed by the Governor (*Tremaine* at 44 ["The (lump sum) legislation is complete when the appropriation is made."]). Accordingly, the head of the coordinate branch of government is empowered to allocate and disburse the appropriated sum in accordance with the legislation (*Tremaine* at 52). Ignoring this decades old precedent, the State mistakenly urges that further legislative action is necessary so as to avoid the plain meaning and direction of Chapter 51. Under *Tremaine*, the State's interpretation of Chapter 51 must, thus, be rejected as contrary to controlling authority.

Finally, the State contends that Chapter 51 cannot be effective because the same appropriation that establishes

judicial compensation also funds "other expenses". This contention again ignores the holding in *Tremaine*. The lesson of *Tremaine* is that the appropriation of a lump sum by the Legislature effectively allocates that sum to the department for which it was passed. The actual details of the expenditure of the appropriated lump sum is exclusively an administrative function. Thus, the Judiciary will use the lump sum contained in the budget to pay the adjusted judicial compensation, and any additional money will be used for any other expenses in the manner in which the Judicial branch sees fit to use it. Certainly, the ability to administratively allocate funding is not fatal to the effectiveness of the appropriation (*Tremaine* at 44-45).

Thus, under the controlling Court of Appeals precedent, it is beyond cavil that Chapter 51 was, and is, effective to adjust judicial compensation, and the Court should so declare.

B. *Statutory Construction of Chapter 51 Renders It Final and Enforceable*

Having attempted to cause this Court to ignore the principle of *stare decisis* to prevent the expenditure of money clearly appropriated by the Legislature, the State then seeks to corrupt the principles of statutory construction by convoluting the plain meaning of Chapter 51, and thereby prevent it from

being enforced. The Court should certainly reject this assault on the unambiguous expression of legislative intent.

The State reasons that, had the Legislature wanted to adjust judicial compensation, it would have passed the Judiciary's version of the appropriation, rather than excising certain language. It is pointless to speculate upon the Legislature's motives. Rather, the Court should examine Chapter 51 which, as shown above, was effective, as passed, to adjust judicial compensation.

In its attempt to divert the Court from applying the rules of statutory construction, the State relies upon statements made by only two Senators and one Assembly member as evidence that, despite the clear statutory language, the entire 212 members of the Legislature did not intend to adjust judicial compensation as it unambiguously did (Defendant's aff. Exhibits D and E). To the contrary, statements by a few legislators are not relevant to a determination of legislative intent (*People v. Newman*, 32 N.Y.2d 379, 390 [1973]; *Woollcott v. Schubert*, 217 N.Y. 212, 221 [1916] ["opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes]; *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 [1897] ["Those (legislators)]] who did not speak may not have agreed with those who did;…."]). No contrary case

law has been offered by the State. Thus, the Court must disregard and reject the isolated remarks quoted by the State.

There is, however, a larger and far more troubling issue regarding the debate, and the State's characterization of the meaning of the statue based upon it. The Court of Appeals, in *Maron*, directed the Legislature to consider judicial compensation ***on the merits***, without linking it to extraneous issues. The Legislature passed identically-worded appropriation in 2009-2010 - - prior to the *Maron* decision, and 2010-2011 - - after the *Maron* decision. Clearly, both of the appropriations must be interpreted in the same way, as they have identical language.

Under the State's contorted interpretation of Chapter 51 the Legislature did not consider judicial compensation adjustments in either budgetary year, passing simply a form of words rather than a real appropriation, as it did pre-*Maron*. Accepting the State's position, and ignoring the clear, unambiguous language of Chapter 51, constitutes nothing short of an admission of violation of the Court of Appeals direct mandate in *Maron* to address judicial compensation independent of other issues. That is, the State's interpretation of Chapter 51 can only be read to establish that the Legislature is in ***contempt*** of explicit mandate of the *Maron* Court when adopting the 2010-2011

budget. Where there are two possible interpretations of a statute, the Court must choose the one that avoids "injustice, hardship, constitutional doubts, or other objectionable results" (*Matter of Jacobs*, 86 N.Y.2d 651, 668 [1995]; *F. Kauffman & Sons Saddelry Co. v. Miller*, 298 N.Y. 38, 44 [1948]).

This Court, thus, is left with only the option of interpreting Chapter 51, as urged by the plaintiffs herein, in such a way so as to avoid the otherwise inescapable finding that the Legislature is in contempt of the Court of Appeals direction set forth in its *Maron* decision.

By granting summary judgment, this Court will interpret Chapter 51 in such a way as to determine that the Legislature not only considered, but also passed, a judicial compensation adjustment in 2009 and, thereafter, in 2010, so as to avoid contempt.

Additionally, it must be remembered that the "subject to" or "pursuant to" language identified by the *Maron* Court with regard to the 2006-2007 appropriation requiring additional legislative action and which formed the basis of its rejection of enforcement of the appropriation is not present in Chapter 51[1]. Such language, even though it can be found in the original

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[1] Indeed, the State prevailed in that argument in *Maron*. Thus, it should be judicially estopped from contending that an appropriation

version of the budget bill, was expressly omitted in the final, enacted version (Cohn aff. Exhibit B).

The Latin maxim *expressio unius est exlusio alterius* (the expression of one thing implies the exclusion of others) is a "standard canon of [statutory] construction" (*Morales v. County of Nassau*, 94 NY2d 218, 224 [1999]). Accordingly, "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded" (Statutes §240; see, *Morales v. County of Nassau, supra; Matter of Town of Eastchester v. New York State Bd. of Real Prop. Serv.*, 23 AD3d 484, 485 [2nd Dept. 2005]). Since the 2006-2007 appropriation and the earlier versions of Chapter 51 contained the limiting language which the final version did not, the inescapable conclusion is that the Legislature intended to omit the absent provision (Statutes §240). As a result, Chapter 51 is, and has been since passage of the 2009-2010 Budget, fully and finally enforceable. The plaintiffs are entitled an order so declaring.

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devoid of such language renders it unenforceable (*Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 AD2d 435,436 [2nd Dept. 1995]). By such logic, no judicial compensation enactment could ever be enforceable.

CONCLUSION

Under the principles of *stare decisis* and the principles of statutory construction, the 2009-2010 budget granted the judges and justices of the State of New York an adjustment to their compensation. This Court should so declare.

Accordingly, the State's motion to dismiss should be denied, and the cross-motion for summary judgment for a declaration that the compensation of the Judges and Justices of the State of New York has been increased pursuant to the Laws of 2009, Chapter 51, §3 as of April 1, 2009, and that the State of New York is obligated to pay the Judges and Justices of the State of New York in accordance with Chapter 51 and Article VI, §25(a) of the New York State Constitution.

Dated: Carle Place, New York
November 23, 2010

Respectfully submitted,
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SUPREME COURT OF THE STATE OF NEW YORK
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EMILY PINES,
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Index # 10-15318

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant State of New York respectfully submits this memorandum of law in support of its motion to dismiss this action for failure to state a cause of action pursuant to CPLR 3211(a)(7), or in the alternative, for appropriate declaratory relief.

INTRODUCTION

At the outset, the State does not dispute that State judicial officers should be granted a raise in their compensation. The State whole-heartedly agrees with the Court of Appeals' recent statement that "article VI justices and judges have earned and

deserve a salary increase" (*Matter of Maron v. Silver*, 14 NY3d 230, 244 [2010]). The State also notes that the Court of Appeals has also held that "whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature" (*Id.*, 14 NY3d at 263). The State's position is, simply, that the Legislature has not yet acted.

In this declaratory judgment action, plaintiffs rely exclusively on one provision of the State's 2009-2010 enacted budget (enacted into law in April 2009 as L. 2009, ch. 51). More specifically, they contend that § 3 of chapter 51 entitles them to pay raises, without the need for any further action to be taken by the Governor or the Legislature. Plaintiffs do not cite to any other legal authority.

The heart of plaintiffs' amended complaint is ¶ 10, which quotes from a portion of the 2009-2010 New York State Budget [L. 2009, ch. 51 § 3], which amended and re-appropriated funds from the 2008-2009 budget in this respect. Plaintiffs expressly refer to the $51,006,759 amount that is stated in this portion of § 3. Set forth below is the relevant portion of § 3 from L. 2009, ch. 51 § 3;

the material that was deleted from the 2008-2009 budget is indicated by ~~strike-throughs~~ and the material that was added in 2009 indicated by **boldface**:

JUDICIARY-WIDE MAINTENANCE UNDISTRIBUTED

General Fund / State Operations
State Purposes Account - 003

The appropriation made by chapter 51, section 2, of the laws of 2008, is hereby amended and reappropriated to read:

For expenses necessary to fund adjustments in the compensation of state-paid judges and justices of the unified court system and of housing judges of the New York city civil court, ~~pursuant to a subsequent chapter of law specifying such salary levels~~ **and for such other services and expenses specified in section 2 of this act.**

When the original version of this appropriation appeared in the fiscal year 2008-2009 budget, the funds could be used only for compensation adjustments. However, when the funds were re-appropriated in the 2009-2010 budget, the Legislature authorized their use for any services and expenses permitted under § 2 of Chapter 51. Section 2 of Chapter 51 provides appropriations for all expenditures of the Judiciary anticipated for fiscal year 2009-

2010. Thus, the reappropriation relied upon by plaintiffs nay be spent on any of the numerous categories provided for in § 2, as well as on judicial compensation increases, if authorized.

The sole provision of the budget bill relied upon by plaintiffs does not direct adjustments to judicial compensation, nor specify how any adjustments are to be calculated. It describes only a bottom-line amount ($51,006,759), but with no direction as to how that amount is to be allocated among either the various judicial officers for pay raises as opposed to the "other services and expenses," or as among the judicial officers. Moreover, the Legislature has not amended the provisions of the Judiciary Law that specify the dollar amount of annual compensation for judicial officers, in which any pay raise would have to be reflected.

ARGUMENT

1. Constitutional provisions

The New York State Constitution requires (Art. 7 § 1, second paragraph):

> Itemized estimates of the financial needs . . . of the judiciary, approved by the court of appeals and certified by the chief judge of the court of appeals, shall be transmitted to the governor not later than the first day of December in each year for inclusion in the budget without revision but with such recommendations as the governor may deem proper. Copies of the itemized estimates of the financial needs of the judiciary also shall forthwith be transmitted to the appropriate committees of the legislature.

This information is then used by the Governor to fulfill his or her constitutional authority (Art. 7 § 2), to:

> submit to the legislature a budget containing a complete plan of expenditures **proposed** to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the basis of such estimates and recommendations as to proposed legislation, if any, which the governor may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures. It shall also contain such other recommendations and information as the governor may deem proper and such additional information as may be required by law.

This is all that the provision in the budget bill relied upon by plaintiffs requires. By analogy, it is as if in anticipation of a hurricane hitting the State during the budget year in question, the Legislature recognized that State monies might have to be expended to repair the damage, and appropriated $40,000,000 to be used for that particular purpose by the State Office of Emergency Management. Even if this amount is appropriated for OEM in a budget bill and the bill is signed into law by the Governor, this does not mean that a payment of $40,000,000 (or any other amount) is paid to OEM, merely that up to such amount is allocated to OEM if needed. If no hurricane hits the State that year, however, OEM does not receive any portion of such $40,000,000.

2. **Statutory provisions**

a. **The Judiciary Law**

The State Constitution does not set forth any specific amount of compensation for any judicial officer. Instead, it provides that judicial compensation shall be "established by law"

[Art. VI § 25(a)]. Judicial compensation is set forth in several sections of the Judiciary Law.

The current annual compensation for Supreme Court Justices and for Court of Claims Judges is $136,700 [Judiciary Law § 221-b and § 221-c]; four of the six plaintiffs are Supreme Court Justices, and one plaintiff is a Court of Claims Judge [Complaint ¶¶ 1-5]. [1] There is no single specific amount for a County Court Judge's annual compensation, which varies (depending upon the County from which the judge has been elected) between $119,800 and $136,700; since the one plaintiff who is a County Court Judge was elected from Nassau County [Complaint ¶ 6], his annual compensation is $136,700 [Judiciary Law § 221-d].

In enacting the provision of L. 2009, ch. 51 § 3 relied upon by plaintiffs, the Legislature provided spending authority for the Judiciary that could be used for abroad range of purposes,

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[1] These amounts do not reflect that Supreme Court Justices who have been designated to serve on the Appellate Term receive an addition $3,000 per year [Judiciary Law § 221-bb]. In addition, the annual compensation of the Court of Claims' presiding judge is $144,000, not $136,700 [Judiciary Law § 221-c].

including potential adjustments to judicial compensation. It did not require such adjustments to be made, nor did it specify the amount(s) of such adjustments; such a specification would have also required amendments to the various provisions of Judiciary Law § 221 cited above.

b. The budget bill

The 2009-2010 budget bill with respect to the Judiciary was submitted to the Legislature in January 2009, and introduced as A.151 (*see* Exhibit A to accompanying affirmation). An amended version of that bill (A.151-A) was ultimately enacted into law as L. 2009, ch. 51 (*see* Exhibit B to accompanying affirmation). The amended version made several material changes to A.151.

As here relevant, § 2 of A.151 proposed several things. First, it "appropriated and authorized" specific annual compensation amounts for each of the judicial positions in the Unified Court System (§ 2(b)(1) through § 2(b)(6) [Exhibit A, pages 11-12]). Second, it also provided that "[n]otwithstanding any other provision of law," judicial compensation "shall be adjusted in

accordance with the following and such adjustments shall be funded from available appropriations named in this act . . ." (§ 2(b)(1) [Exhibit A, page 11]). Finally, it expressly specified that the annual compensation was to be retroactive [Exhibit A, pages 11-12]. 2/

c. The budget law as enacted

The original version of the Judiciary budget bill (A.151) was not enacted. Instead, the amended version was passed by the Legislature and signed by the Governor in April 2009, thereby making it a law (L. 2009, ch. 51). This law – *see* Exhibit B to accompanying affirmation – differed materially from A.151, in

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[2] For example, § 2(b)(1) stated that Supreme Court Justices were to receive an annual salary of $162,100 effective April 1, 2005; this would increase to $165,200 effective April 1, 2006, then increase to $169,300 effective April 1, 2008. (These amounts were identical to the annual salaries for United States District Judges during the same periods, which are governed by a built-in statutory pay raise structure. *See* 28 U.S.C. § 461, and schedule of federal judicial salaries on the Federal Judicial Center's web-site (http://www.fjc.gov).)

Under § 2(b)(1), effective April 1, 2009, salaries for Supreme Court Justices were expressly stated to be equal to the annual salary of a United States District Judge.

that the three provisions related to judicial compensation described above were not included in the version that became law.

First, although the reappropriation relied upon by plaintiffs was included in Chapter 51 § 3, that provision does not specify any amount for either a pay raise or for annual compensation (after taking a pay raise into account) for any single judicial position. For example, nowhere in Chapter 51 § 3 [Exhibit B] does it say what the annual compensation of a Supreme Court Justice will be. Second, it effectively preserves the requirement that the specific amounts for annual compensation for judicial officers must be reflected in Judiciary Law § 221 (i.e., cannot take effect unless those provisions of the Judiciary Law are amended), because Chapter 51 § 3 does not include the override phrase ("notwithstanding any other provision of law"). Finally, Chapter 51 § 3 does not provide any specific amount by which anyone's compensation is to be raised, nor is any specification as to what portion of the reappropriated amount is to be expended on "other services and expenses."

Plaintiffs' claim is simply that because Chapter 51 § 3

re-appropriated $51,006,759 [Exhibit B, page 24] and also referred to adjustments in judicial compensation, each of them has a present legal right to some (unspecified) amount of money that would reflect their compensation, with a pay raise. How their respective amounts are to be calculated is unclear; also unclear is how the rest of the $51,006,759 is to be distributed. It remains the case that, other than the provisions of Judiciary Law §§ 221-b, 221-c, and 221-d – which set forth the current compensation of judicial officers – there is still no statute that satisfies the requirement of Article VI § 25(a) of the State Constitution that the amount of judicial compensation must be "established by law . . ."

In summary, Chapter 51 § 3 – the sole legal authority relied upon by plaintiffs – does not support the relief they seek from this Court.

3. Plaintiffs' declaratory judgment action should be dismissed, or in the alternative, this Court should declare that L. 2009, ch. 51 § 3 has neither increased judicial compensation, nor obligated the State to pay judicial officers the pay raises sought by plaintiffs

Plaintiffs contend that the statute (L. 2009, ch. 51 § 3) – in and of itself – creates a legal right to increased judicial

compensation. This contention must fail. In essence, they argue that without more, the statute gives them a clear legal right to an immediate pay raise (how it should be computed is not clarified), which closely resembles a writ of mandamus to compel. But mandamus is an "extraordinary remedy" that is awarded "only in limited circumstances" (*Klosterman* v. *Cuomo*, 61 NY2d 525, 553 [1984]), and "does not lie to compel the [respondent] to act in a particular manner substantively favorable to the applicant" (*Kupersmith* v. *Public Health Council*, 63 NY2d 904, *affg on op below* 101 AD2d 819 [3d Dept 1984]).

These principles do not change because this is a declaratory judgment action, in which, if the Court agrees with the defendant's position, the Court should declare the law to be what the defendant asserts it to be (as opposed to dismissing the proceeding). *See Lanza* v. *Wagner* (11 NY2d 317, 324, *app dsmd* 371 US 74, *cert dnd* 371 US 901 [1962]).

A general declaration that judicial officers are legally entitled to some kind of immediate pay raise is not what plaintiffs seek. Rather, they contend that L. 2009, ch. 51 § 3 confers a

present legal right to a pay raise for each of them, even though: [a] § 3 is an appropriations provision; [b] § 3 covers items other than judicial compensation or judicial pay raises; [c] there has been no amendment to the Judiciary Law provisions that set forth the annual compensation for judicial officers; [d] § 3 does not identify the amount of any pay raise or how such raise must be computed; and [e] provisions that would have explicitly provided for adjustments to judicial compensation on a retroactive basis were removed from the budget bill for the Judiciary before it was enacted.

CONCLUSION

Accordingly, the State respectfully submits that plaintiffs have not shown that L. 2009, ch. 51 § 3 provides them with a clear legal right, without further action by the Governor and the Legislature, to a pay raise. Thus, the State respectfully submits that this Court should not grant plaintiffs the declaratory relief they seek, and instead either dismiss this action or in the alternative, grant declaratory relief consistent with the State's position set forth above.

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August 23, 2010

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SUPREME COURT OF THE STATE OF NEW YORK
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Index # 10-13518

Murphy, J.S.C.

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS, AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION

Defendant State of New York respectfully submits this reply memorandum of law: [a] in further support of its motion to dismiss; and [b] in opposition to plaintiffs' cross-motion for summary judgment. [1]

At the outset, defendant notes that there was no need for plaintiffs to have cross-moved for summary judgment. This is a

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[1] The following abbreviations are used:

- D/M refers to defendant's August 23, 2010 memorandum of law;
- D.Exh. refers to exhibits included in defendant's initial motion papers;
- P/M refers to plaintiffs' undated memorandum of law; and
- P.Exh. refers to the exhibits attached to the September 27, 2010 affirmation of Steven Cohn, Esq.

declaratory judgment action, in which the only issue is whether any further action must be taken for plaintiffs to receive the specific pay raise they seek. Plaintiffs' position is that L.2009, ch. 51 § 3 is self-executing and that no further action is required, while the State contends that the cited statute is not self-executing and that in the absence of further action, a pay raise cannot be lawfully implemented. If the Court agrees with the State, it will issue a declaratory judgment stating (this is the "wherefore" clause of the amended verified complaint, with the word "not" added in two places):

> the compensation of the judges and justices of the Unified Court System of the State of New York has **not** been duly increased pursuant to the Laws of 2009, Chapter 51, § 3, and that the Defendant State of New York is **not** obligated to pay the judges and justices of the Unified Court System of the State of New York in accordance therewith retroactive to April 1, 2009 . . .

On the other hand, if the Court agrees with plaintiffs, the declaratory judgment will track the "wherefore" clause verbatim (deleting the word "not" in the above example), and the Court will

not need a cross-motion to do so. [2/] Plaintiffs are essentially contending that if a Court agrees with the plaintiff in a declaratory judgment action, it is powerless to issue a declaratory judgment in the absence of a plaintiff cross-moving for such relief. But in such circumstances, all that a cross-motion would accomplish is that it would enable plaintiffs to serve an improper sur-reply in yet additional opposition to defendant's motion (to which defendant cannot respond), under the guise of calling their sur-reply a "reply in further support of plaintiffs' cross-motion."

We will not use this reply memorandum of law to repeat defendant's arguments, but rather to focus on plaintiffs' opposing arguments and to show that they do not counter defendant's position. The State reiterates that it does not dispute that members of the judiciary should receive a pay raise. What is in dispute in our case, however, is whether that goal has already been lawfully accomplished, consistently with the Constitution

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[2] Declaratory judgment procedure is to be flexible, since "in a proper case, a court has the fullest liberty in molding its decree to the necessities of the situation" (*First Nat. Stores* v. *Yellowstone Shop. Ctr.*, 21 NY2d 630, 637 [1968]).

and the Judiciary Law, even though additional measures (further legislative and executive action) have not been taken.

Plaintiffs' position should be rejected by this Court

Plaintiffs' erroneous position is based upon several Court of Appeals decisions – *Matter of Maron* v. *Silver* (14 NY3d 230 [2010]); *Pataki* v. *New York State Assembly* (4 NY3d 75 [2005]); *People* v. *Tremaine* (252 NY 27 [1929]); and *Saxton* v. *Carey* (44 NY2d 545 [1978]) – and general rules of statutory construction. As will be shown below, plaintiffs' reliance on the decisions is unfounded, because these decisions are either inapplicable or the language plaintiffs rely upon has been taken out of context. [3]

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[3] "No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association" (*Matter of Staber* v. *Fidler*, 65 NY2d 529, 535 [1985]) [quoting earlier case]). *See also*, *People ex rel. Met. St. Ry. Co.* v. *Tax Comrs.*, (174 NY 417, 447 [1903]); *Andersen* v. *Long Island R. R.* (88 AD2d 328, 341 [2d Dept. 1982] ["The railroad and plaintiff both refer to two of our decisions in support of their arguments. Neither of those cases is controlling, since in neither one was the precise issue presently before us addressed" (citations omitted)], *affd* 59 NY2d 657 [1983]). It is disingenuous to seize upon matters described in a decision that did not form the basis for the Court's ruling. As the Supreme Court stated in *Webster* v. *Fall* (266 US 507, 511 [1925] [citations omitted]):

> The most that can be said is that the point was in the cases if any one had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Plaintiffs' resort to statutory construction rules is unavailing, because such rules address situations where a statute is not clear and unambiguous, and plaintiffs state that the enacted budget bill (L. 2009, ch. 51 § 3) is clear and unambiguous. [4]

1. The *Maron* decision (14 NY3d 230 [2010])

The only aspect of *Maron* that plaintiffs in our action rely upon arises from the fact that the 2006-07 enacted budget (at issue in that case) had contained qualifying language that the Court of Appeals held to preclude pay raises for 2006-07 from being "self-executing" [5], while by contrast, the 2009-10 enacted budget at issue in our case did not contain qualifying language.

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[4] Plaintiffs describe the enacted budget bill as containing "clear language" and that its appropriation is "unambiguous"[P/M at 3]. In addition, plaintiffs also refer to the "undeniable clarity" and "clear language "of the appropriation [P/M at 13 and 14].

[5] We understand "self-executing" to be shorthand for "without the necessity of any further action being taken by the Legislature and the Governor."

More specifically, in *Maron*, the Court of Appeals found that the pay raise sought by the plaintiffs in that case could not be "self-executing" because the 2006-07 enacted budget's provision for the pay raise took the form of a non-itemized $69.5 million budget item "[f]or expenses necessary to fund adjustments in the compensation of state-paid judges and justices of the unified court system *pursuant to a chapter of the laws of 2006*" (*Maron*, 14 NY3d at 249 (emphasis added)]. This clearly showed that additional action was necessary to authorize the pay raise.

Maron held that the 2006-07 enacted budget was not "self-executing" with respect to judicial pay raises, for two independent reasons (one of which is simply ignored by plaintiff). Plaintiffs ignore that the enacted budgets for both 2006-07 and for 2009-10 contained no language that modified the provisions of Judiciary Law Article 7-B (§§ 220-224), which expressly spell out the amounts of compensation for the various judicial positions. The Court of Appeals in *Maron* observed (14 NY3d at 250) that the 2006-07 enacted budget's

> provision calling for a lump-sum payment of $69.5 million without repeal or revision of the Judiciary Law article 7-B judicial salary schedules is further evidence that additional legislation was required before the funds could be disbursed.

The 2009-10 enacted budget is identical to the 2006-07 enacted budget in this respect; as defendants previously noted, in enacting the 2009-10 budget, "the Legislature has not amended the provisions of the Judiciary Law that specify the dollar amount of annual compensation for judicial officers, in which any pay raise would have to be reflected" [D/M at 4; *see also* D/M at 10-

11]. Plaintiffs utterly disregard this aspect of the *Maron* decision, and with good reason: it is devastating to their position. An enacted budget's failure to include provisions that either expressly modify Judiciary Law Article 7-B, or provide that the enacted budget will supersede any other law to the contrary, means that further action towards a pay raise will be required, negating any claim that the pay raise is "self-executing."

Instead, the sole portion of *Maron* upon which plaintiffs rely involves the Court of Appeals' reference to qualifying language in the 2006-07 enacted budget ("pursuant to a chapter of the laws of 2006"). The Court of Appeals explained (14 NY3d at 249-250):

> Had the Legislature intended that the judicial compensation appropriation be self-executing, as petitioners claim, there would have been no need for the qualifying language.

From this circumstance, plaintiffs construct the illogical contention that the *absence* of similar qualifying language in the 2009-10 enacted budget necessarily and unavoidably means that the Legislature intended a pay raise for 2009-10 to be "self-executing." However, absence of qualifying language does not unavoidably mean "self-executing." This is particularly true here,

since the 2009-10 enacted budget appropriation at issue – unlike the 2006-07 enacted budget referred to in *Maron* – was for *both* judicial compensation and unrelated "services and expenses"; not only were both categories lumped together, but also, the 2009-10 enacted budget did not specify how much of the appropriation was for judicial compensation and how much was for the other "services and expenses." And the State notes that plaintiffs disregard that after the language actually used by the Court of Appeals quoted above, the Court of Appeals immediately continued (14 NY3d at 250):

> Moreover, a mere provision calling for a lump-sum payment of $69.5 million without repeal or revision of the Judiciary Law article 7-B judicial salary schedules is further evidence that additional legislation was required before the funds could be disbursed.

Moreover, asking what the Legislature intended is not the correct question. Even if a statute clearly and unambiguously shows legislative intent, such intent is irrelevant to whether the

statute complies with constitutional and statutory requirements and limitations. [6]

The portion of *Maron* that plaintiffs rely upon dealt with whether further governmental action was intended to be necessary to implement an immediate judicial pay raise. By contrast, our case deals with whether all Constitutional and statutory requirements have been complied with, so as to render lawful the judicial pay raise sought by plaintiffs. *Maron*'s discussion of the 2006-07 enacted budget did not examine or involve whether its enactment complied with applicable Constitutional or statutory requirements. In relying upon *Maron* in this respect, plaintiffs obliterate the substantial distinction between the intent of a statute's authors, and the legality of the statute's enactment.

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[6] For example, the Virginia Legislature clearly set forth its intent when it enacted clear and unambiguous anti-miscegenation statutes, but this clarity did not save these statutes from being unconstitutional. *See Loving v. Virginia* (388 US 1, 4-5 at notes 3-4 [1967]), which quoted these outrageous statutes verbatim, such as the following:

> Punishment for marriage. If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

2. The *Pataki* decision (4 NY3d 75 [2004])

Plaintiffs rely on the *Pataki* decision to support their contention that the 2009-10 enacted budget bill for the judiciary is self-executing [P/M at 5-6]. Their reliance is mistaken, for two reasons.

Pataki involved Article VII § 4 of the State Constitution, which addresses whether appropriation bills proposed by the Governor could be altered by the Legislature. Plaintiffs appear to have overlooked the fact that budget bills for the judiciary are expressly exempt from the "no-alteration" provisions of Article VII § 4: "None of the restrictions of this section, however, shall apply to appropriations for the legislature or judiciary." (Article VII § 4 is quoted in full in the accompanying footnote. [7])

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[7] Article VII § 4 reads in full as follows (emphasis added):

> The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. *None of the restrictions of this section, however, shall apply to appropriations for the legislature or judiciary.*
>
> Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that appropriations for the legislature and judiciary and

Furthermore, whether or not a budget bill is self-executing was not at issue in *Pataki*. The issue in that case was whether certain changes that the Legislature had made to budget bills proposed by the Governor were to be characterized as alterations or as additions, an important distinction because these two categories carry different consequences under Article VII § 4. But Article VII § 4 makes this characterization irrelevant to budget bills for the judiciary. [8] To the contrary, Article VII § 4 requires *all* budget bills for the judiciary to be both approved by the Legislature and signed by the Governor, regardless whether the Legislature made any changes, alterations etc. to it. [9]

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separate items added to the governor's bills by the legislature shall be subject to approval of the governor as provided in section 7 of article IV.

[8] The original appropriations bill for the judiciary, as proposed for 2009-10 by the Governor, set forth specific amounts for judicial pay raises, made them retroactive, and further provided that these raises be made "[n]otwithstanding any other provision of law" [D.Exh. A, page 11]). Each of these provisions was omitted when the bill was ultimately enacted into law [D.Exh. B, pages 23-24].

[9] That the *Pataki* case is irrelevant to our case is further shown by the fact that there were no changes or alterations to the judiciary appropriations bill at issue in *Pataki*. The lower court decision in that case reflects that in January 2001, the Governor had proposed several appropriations bills, including S 900, which was the Legislative and Judiciary Budget Bill. "On March 29, 2001, the Legislature passed S 900 and the bill was approved by

Finally, plaintiffs inappropriately claim that *Pataki* supports their contention that "[t]he fact that judicial salaries are 'usually' adjusted by an amendment to the Judiciary Law is irrelevant, because that practice is not 'immutable' or constitutionally required" [P/M at 11]. Read in context, however, the full quotation from *Pataki* shows that the Court was reluctant to use *historical* practice as the basis for imposing a *Constitutional* requirement for the format of an appropriations bill. Even if the Constitution does not render "immutable" the format of such a bill, this does not mean that the Legislature is free to disregard *statutory* requirements for such a bill's format (i.e., the failure to modify the provisions of the Judiciary Law that spell out precisely the amounts of judicial compensation). Indeed, *Pataki* did not involve statutory requirements at all. *See* the full quotation from *Pataki* (4 NY3d at 98):

> Secondly, the Legislature and the dissent point out that, until 2001, the details of distribution of school aid had usually not been the subject of appropriation bills, but of other legislation submitted with the Governor's

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the Governor on March 30, 2001. On July 30, 2001, both Houses made substantial amendments and alterations to the Governor's *remaining* nine budget bills" (190 Misc2d 716, 728 [SupCt 2002 (emphasis added), *affd* 7 AD3d 74 [3d Dept], *affd* 4 NY3d 75 [2004]).

> budget. We decline, however, to adopt a narrow historical test of what is an "appropriation bill"—to require, in effect, that the Governor may never use an appropriation bill to deal with subject matters addressed by other types of legislation in the past. *Nothing in the Constitution says or implies that, once it becomes customary to deal with a particular subject either in appropriation bills or in other legislation, the custom must be immutable.* On the contrary, it was an important part of the purpose of executive budgeting to enable budgets to be adjusted to the changing needs of an increasingly complex society. Also, it would involve courts in endless difficulties if they had to determine, every time the validity of an appropriation bill was challenged, whether the particular subject of the bill was being dealt with in accordance with historical practice.

To be sure, the Constitution itself does not mandate a specific format for judicial salaries. However, it does require the salaries to be "established by law." The law that implements this consists of various sections of the Judiciary Law (§§ 220-224); as the Court of Appeals held in *Maron* (several years after *Pataki*), these provisions not only establish the amounts of judicial compensation, but also must be amended in order for changes in such amounts to be lawful [*see* above at page 8].

In short, the specific constitutional provision in the *Pataki* case, relied upon by plaintiffs, expressly omits the judiciary

budget from its coverage. Furthermore, even though the Court used the word "immutable," this was in a different context, since the Court was referring solely to the State Constitution rather than to other (i.e., statutory) requirements.

3. The *Tremaine* decision (252 NY 27 [1929])

Plaintiffs' quotation from *People* v. *Tremaine* (252 NY at 44) is similarly out of context, and irrelevant. Plaintiffs state [P/M at 7]:

> The Court of Appeals . . . held that the power to allocate the sums appropriated by the legislature is administrative, not legislative, stating: "The head of the department does not legislate when he segregates a lump sum appropriation. *The legislation is complete when the appropriation is made.*" *Id.* at 44 (Emphasis added).

Whether a statute was self-executing was not at issue in *Tremaine*. Rather, the issue there involved how to characterize – as administrative or legislative – the capacity in which certain State legislators were to be deemed to function (a characterization that is important in light of the Constitution's prohibitions against legislators also holding "civil appointments"). Properly read, *Tremaine* was speaking about when a person's legislative *function*

began. No issue was presented in *Tremaine* as to when a statute is deemed to become effective, let alone whether a statute is "self-executing." As shown above (at page 4 note 3), lifting language from a judicial decision for a proposition other than with respect to the precise issue before the Court is simply inappropriate.

4. The *Saxton* decision (44 NY2d 565 [1987])

In *Saxton*, several citizen-taxpayers challenged the entire 1978-1979 State budget and accompanying appropriations bills, on the sole ground that they were not sufficiently itemized to the degree allegedly required by the Article VII §§ 1-7 of the Constitution. Our case, by contrast, does not involve whether the 2009-10 enacted budget for the judiciary complies with Constitutional itemization requirements, which was the sole matter at issue in *Saxton*. Thus, it is not surprising that *Saxton* has nothing to do with whether a statute is "self-executing."

In addition, and unlike our case, there is no suggestion in *Saxton* that the budget and appropriations bills that were ultimately enacted differed in any way from what the Governor had originally proposed. Nor is there any suggestion that in

Saxton, there was any Constitutional requirement that, as here, required salaries to be "established by law" (Constitution Art. VI § 25(a). The following quotations from *Saxton* reflect that the issues in that case were wholly unrelated to those in the present case:

> [Plaintiffs] would have us conclude that it is a proper function of the courts to police the degree of itemization necessary in the State budget. We cannot agree with this conclusion, for it would require the courts to assume a role for which they are neither constituted, suited, nor, indeed, designed.
>
> * * * * *
>
> Appellants urge us to review the extent of that itemization, and to determine whether it accords with the intent of the Constitution. The Constitution, however, does not prescribe any particular degree of itemization. . . . (44 NY2d at 549)
>
> We hold only that the degree of itemization and the extent of transfer allowable are matters which are to be determined by the Governor and the Legislature, not by judicial fiat. (44 NY2d at 551).

Plaintiffs' *Saxton*-based argument is the following: [a] first, the enacted 2009-10 judiciary budget contains a "lump sum" appropriation of a specific amount ($51,006,759); [b] second, such specific amount was "based upon the calculations in the Executive Summary presented to it by the Judicial Branch"; and [c] the Legislature "must be seen to have been satisfied with the

'itemization' therein presented" [P/M at 8]. Admittedly, the $51,006,759 "lump sum" is set forth in the enacted budget. However, the Executive Summary relied upon by plaintiffs [P.Exh. C] does not contain an itemization of separate items that, when added, yields the lump sum of $51,006,759. [10] The only place in the Executive Summary where this specific amount appears is the lump sum total on the next-to-the-last page of

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[10] For example, nowhere in the Executive Summary is there a formula that can be used to calculate any judicial pay raise. There is nothing to reflect that the $51,006,759 lump sum could have been or actually was determined by using amounts in the Executive Summary for 2005 and subsequent years as follows (the example reflects 2005; similar calculations would be required for the subsequent years, and then added to the 2005 total to reach the $51,006,759 amount):

Number of judges Statewide	2005 Compensation (including raises)	Totals
X (Supreme Court Justices)	$162,100	
Y (Court of Claims Judges)	$162,100	
Z (County Court	$153,995 (95% of Supreme Court Justices)	
		X + Y, multiplied by $162,100, plus Z multiplied by $153,005

The source for the above table is the ninth page of P.Exh.C, which reflects the amounts in the proposed but not enacted 2009-10 Judiciary Appropriation Bill.

P.Exh. C, with no indication as to how that specific amount was arrived at.

An independent reason why the presence of the $51,006,759 lump sum in the 2009-10 enacted budget does not support plaintiffs' argument is that such amount is not earmarked exclusively for judicial salaries. This amount is described in the enacted budget as being for not only "compensation of state-paid judges [and for other enumerated judicial positions]," but also includes non-compensation items as well: "and for such other services and expenses specified in section two of this act" (The 2009-10 enacted budget is set forth in D.Exh. B; the quoted language is at pages 23-24, and section two is set forth at pages 10-21 of this exhibit.)

Indeed, the Executive Summary does not reflect (on either a dollar or percentage basis) how much of the $51,006,759 is allocated for judicial compensation, and how much of that lump sum amount is for the "other services and expenses . . ." Plaintiffs' conclusory statement that the lump sum of $51,006,759 "was

based upon the calculations in the Executive Summary" [P/M at 8] is unsupported by the document they cite.

Thus, even if the $51,006,759 "lump sum" appropriation was a sufficient itemization under the Constitutional provisions at issue in *Saxton*, it is inappropriate for plaintiffs to conclude that the Legislature "must have" intended this specific amount to be not only "self-executing," but also to be used solely for judicial salaries with pay raises. Simply put, you can't get there ($51,006,759) from here (Executive Summary).

5. Statutory construction

It is significant that the enacted budget bill differs materially from the proposed budget bill

Finally, plaintiffs' Point II [P/M at 13-15] refers to several principles and decisions relating to general rules of statutory construction. In the first place, these rules apply where a statute is not clear and is ambiguous, yet plaintiffs have stated that the statute in question is clear and unambiguous (*see* page 5 and note 4 above). In addition, as the Statutes volume of McKinney's Consolidated Laws of the State of New York observes (Statutes § 91, page 174 [footnotes omitted]):

> [t]he object of these rules is not to lay down inflexible principles which are obligatory on the courts when it is possible to apply them, but to render assistance in determining the legislative intent, which is the primary consideration in the construction of all statutes.
>
> Resort is had to the rules for the interpretation of statutes only when it is necessary to apply them to ascertain the meaning of a statute. When the meaning of a statute is clear, construction is unnecessary. . . .

Plaintiffs' argument begs the question: if the enacted budget bill is "self-executing," then why was the proposed budget bill not enacted? The proposed budget bill [beginning on the ninth page of P.Exh. C] is a far more satisfactory candidate for being viewed as "self-executing," for several reasons. First, it appears to comply with the Constitutional requirement that judicial salaries be "established by law," because it stated that it was to apply "[n]otwithstanding any other provision of law . . ." This clause, which could only refer to Judiciary Law §§ 220-224, was not used in the enacted bill. Second, the proposed budget bill spells out the exact annual salaries for the various judicial positions (which the enacted bill does not). Finally, the proposed budget bill stated that the time period covered by such salaries would begin in 2005

(clearly retroactive), but the enacted bill does not identify any such beginning date. Significantly, had the proposed budget bill been approved without change as the enacted budget bill and signed into law by the Governor, there would be no need to divine legislative intent by quoting from court decisions (applicable or otherwise) or by relying upon general rules of statutory construction.

Since the 2009-10 budget bill's actual legislative history shows that a "self-executing" pay raise was rejected, general rules of statutory construction cannot trump or be substituted for what was actually intended

The actual discussion in both houses of the Legislature during consideration of the judiciary budget negates "self-executing," and this legislative history renders futile any effort to rely upon general rules of statutory construction. *See* Statutes § 124, page 251:

> In ascertaining the purpose and applicability of a statute, it is proper to consider the legislative history of the act, the circumstances surrounding the act's passage, and the history of the times.

This legislative history – as evidenced by the debate transcripts of both the Assembly and the Senate (appended as

Exhibits D and E to the accompanying reply affirmation) – clearly reflects that the Legislature rejected the position that the judicial pay raise was to be "self-executing." This Court can take judicial notice of the legislative history. [11]

The Assembly considered the budget bill for the judiciary on March 31, 2009, passed it that day, and forwarded it to the Senate, which passed it on April 3, 2009. Both houses of the Legislature having passed the budget bill, it was submitted to the Governor, who signed it into law on April 7, 2009. *See* the State Assembly's website (http://public.leginfo.state.ny.us/menuf.cgi) for evidence of these events, as set forth in greater detail in Exhibit F to the accompanying reply affirmation.

In the Assembly, Herman D. Farrell, Jr. (the chairman of the Assembly Ways and Means Committee) was the "point person" for the enacted budget bill. His statements clearly reflect that the

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[11] *See* Prince, Richardson on Evidence, § 2-210 (11th ed 1995), at 46:

> . . . the court is not asked to [take judicial] notice [of] the truthfulness of the factual material; rather it is asked to notice that such factual material was available to informed legislators who might reasonably have believed its truthfulness.

To the same effect, *see e.g.*, *Matter of Siwek v. Mahoney* (39 NY2d 159, 163 note 2 [1976] ["Data culled from public records is, of course, a proper subject of judicial notice"]).

budget bill (if enacted) would require further action in order to lawfully provide for judicial pay raises, or in other words, the Legislature was clearly informed that this was not a "self-executing" situation. Chairman Farrell's statements on March 31, 2009 [Exhibit D, page 378] show that the Legislature was expressly reminded not only that the Constitution requires judicial salaries to be set by law, but also that:

> [a] reappropriation of potentially available monies cannot and does not change that law and *what it certainly does not [do is] authorize any salary increases.* . . . No New York State court in any case, and there have been several, has ever determined that judicial salaries could be adjusted without amendments to Article VII(B) [sic] of the Judiciary Law.

The Assembly voted on and passed the budget bill that same day [Exhibit D, page 384], and it was sent to the Senate [Exhibit F].

The Senate debate on April 3, 2009 further confirmed that the pay raise was not "self-executing." *See* the following colloquy between Senator John Sampson (chair of the Judiciary Committee) and Senator DeFrancisco [Exhibit E, pages 3402-3404]:

Senator DeFrancisco:

Senator Sampson, in the Governor's proposed budget there was a pot of money designated for judicial salaries. And the understanding was out of the judiciary budget that was submitted by the judiciary and submitted by the Governor, that out of that money there was enough money available for a salary increase for the judiciary.

I understand that the language authorizing such an increase is not in the final budget; is that correct?

Senator Sampson:

That's correct. . . .

Senator DeFrancisco:

In order for the judiciary to receive a salary increase from this budget, is it correct that there would have to be a separate bill authorizing budget?

Senator Sampson:

That's correct, Senator. . . .

Senator DeFrancisco:

Stated another way, the only mechanism for a judicial salary increase would be through a separate piece of legislation. And just because the same money is in the budget, that would not authorize, for example, the head of the Office of Court Administration or the Chief Judge of the Court of Appeals to simply grant an increase?

Senator Sampson:

> Through you, Mr. President, you are correct, Senator DeFrancisco.

At this point, a slow roll call was held, the Senate passed the bill [Exhibit E, last page], and it was forwarded to the Governor, who signed it into law on April 7, 2009 [Exhibit F].

In light of the legislative history, this Court need not determine what the Legislature "must have" intended, what it should be "deemed" to have determined, what must be "presumed" that the Legislature intended, etc. Plaintiffs' reliance upon general rules of statutory construction is misplaced: the 2009-10 enacted budget was not "self-executing" with respect to judicial pay raises.

6. Final point – the 2010-2011 budget bill

As shown above, the proposed 2009-10 budget bill contained specific judicial salary amounts that were to be implemented "[n]otwithstanding any other provision of law," but these provisions were not adopted in the 2009-10 budget bill that was actually enacted. The State's initial motion papers contained both the proposed 2009-10 budget bill and the enacted 2009-10 budget

bill [D.Exh. A and D.Exh. B respectively]. Plaintiffs contend that the enacted [12] budget bill for the next budget year (2010-11) contained the same provisions that had been contained in the proposed – but not enacted – 2009-10 budget bill [P/M at 15]. This assertion is not correct.

The document that plaintiffs claim to be the enacted 2010-11 budget bill [P.Exh. D] is actually that year's proposed budget bill (which was not enacted). Contrary to plaintiffs' assertion, the enacted 2010-11 budget bill for the judiciary differs materially from the proposed budget bill for 2010-11, in that the enacted bill does not contain the proposed budget bill's detailed specific amounts for judicial compensation. Nor does the enacted 2010-11 budget bill include the "notwithstanding any other provision of law . . ." that had appeared in the proposed bill. The enacted 2010-11 budget bill for the judiciary was enacted as L. 2010, ch. 51 and became a law on July 2, 2010. *See* Exhibit C to the accompanying reply affirmation. The following table identifies the bills, as proposed and as ultimately enacted, for both periods:

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[12] Plaintiffs refer to the budget as having been "passed" [P/M at 15] to mean the enacted budget bill (as opposed to the proposed budget bill).

Budget year	Proposed budget bill	Enacted budget bill
2009-10	D.Exh. A (also P.Exh. B and pages 9 *et seq.* of P.Exh. C)	D.Exh. B (L. 2009, ch. 51)
2010-11	P.Exh. D	Exhibit C to defendants' reply affirmation (L. 2010, ch. 51) [13]

Indeed, plaintiffs' reliance upon the enacted 2010-11 budget is unfounded, for two reasons. First, they incorrectly treat the proposed bill as having been enacted. Second, the 2010-11 budget bill was enacted after the *Maron* decision (February 2010) which, as shown above, highlighted certain factors that would prevent a budget bill from being considered as "self-executing." Even though *Maron* dictated several ways in which a judicial pay raise would not be "self-executing," such ways were not adopted in the enacted 2010-11 budget bill. Thus, the post-*Maron* enactment of

[13] One can readily determine whether a bill has been enacted, because only an enacted bill will include the Laws and Chapter references.

Conclusion

For the reasons set forth by the State on this motion, plaintiffs' contention that the enacted 2009-10 budget bill (L. 2009, ch. 51) is "self-executing" – i.e., they have a present right to the pay raise they seek – must be rejected. That the judiciary should receive some pay raise is not in dispute, but any pay raise must be made pursuant to Constitutional and statutory requirements. The State respectfully submits that this Court should resolve this declaratory judgment action by issuing a declaratory judgment stating (as set forth above at page 2) that:

> the compensation of the judges and justices of the Unified Court System of the State of New York has not been duly increased pursuant to the Laws of 2009, Chapter 51, § 3, and that the Defendant State of New York is not obligated to pay the judges and justices of the Unified Court System of the State of New York in accordance therewith retroactive to April 1, 2009.

Respectfully submitted,

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Attorney for defendant

October 12, 2010

By: _____

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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EMILY PINES, DAVID DEMAREST, JEFFREY D. LEBOWITZ, STEPHEN FERRADINO, RALPH A. BONIELLO, III and JOSEPH CALABRESE,

Index No. 10-13518

Plaintiffs,

-against-

STATE OF NEW YORK

Defendant.

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

Plaintiffs respectfully submit this memorandum in opposition to Defendant's motion to dismiss, and in support of plaintiffs' motion for summary judgment for a declaration that the salary of the Judges and Justices of the State of New York has been increased under Laws of 2009, Chapter 51, §3 ("Chapter 51") as of April 1, 2009, and that the State of New York is obligated to pay the Judges and Justices of the State of New York in accordance with Chapter 51 and Article VI, §25(a) of the New York State Constitution.

FACTS

As the State has conceded, the failure to raise the salary of the judges and justices of New York for more than a dozen years is a continuing scandal in this State. In recognition of the fact that a raise is merited and long overdue, the Legislature has passed a judiciary budget, containing a judicial salary adjustment, every year since 2005. The 2006 budget, retroactive to 2005, expressly made the allocation of funds contingent upon the passage of "a chapter of the Laws of 2006." No such "chapter" was passed and, therefore, no raise was effectuated. *See Maron v. Silver,* 14 N.Y.3d 230, 249-250 (2010).

For the 2009-2010 fiscal year, $51,006,759 was appropriated for judicial salary adjustments without any language making it contingent on further legislative actions (Cohn Aff. Exhibit B). As explained in the Executive Summary § 2(b)(1) to the Judiciary Budget (Cohn Aff. Exhibit C), upon which the amount appropriated was based, the base salary of a Justice of the Supreme Court would be $162,100 effective April 1, 2005; $165,200, effective April 1, 2006; $169,300 effective April 1, 2008; and an annual salary equaling that of a judge of the United States District Court effective April 1, 2009. The Executive Summary, in §§2(b)(2)-(6) then set forth the percentages to adjust the

salaries of all of the other judges and justices of the New York State Unified Court System[1].

Apparently satisfied with the amounts set forth, the Legislature passed, and the Governor signed, the 2009-2010 judiciary appropriation at the stated 2005 salary level (Cohn Aff. Exhibit B). However, notwithstanding the clear language of the statute, the Judiciary continues to be paid at pre-2005 levels. Therefore, the plaintiffs commenced this action, seeking a declaration that the salaries of the Justices and Judges have been adjusted in accordance with the unambiguous, unconditional appropriation enacted into law as Chapter 51 of the Laws of 2009.

[1] It should be noted that the proportional salary differences among the Judges and Justices set forth in the Executive Summary are derived exactly from the Judiciary Law.

POINT I

THE APPROPRIATION OF JUDICIAL SALARY ADJUSTMENTS WAS COMPLETE UPON PASSAGE AND MUST BE DECLARED TO BE IMMEDIATELY PAYABLE

In the 2006 Budget, the allocation for judicial salary increases was expressly made contingent upon the passage of "a chapter of the laws of 2006." In contrast, the budget passed for the 2009-2010 fiscal year appropriated a lump sum of $51,006,759 for judicial raises, *without* making this amount contingent upon any additional enabling legislation[2] (Cohn Aff. Exhibit B). This crucial distinction makes the allocation for judicial salary adjustments effective immediately. This Court should thus declare that judicial compensation has been finally adjusted, and declare that the plaintiffs, and all other Judges and Justices in the New York State Unified Court System, are entitled to be paid at the newly established rates[3].

In the recent case of *Maron v. Silver*, 14 N.Y.3d 230 (2010), the Court of Appeals stated that the language of the 2006-2007 budget regarding judicial salary adjustment was not

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[2] The State concedes this by arguing that such monies are available for judicial compensation or "other services or expenses specified in section 2 of this act." In so doing, the Legislature retained no authority or control over these funds once the act was signed into law.

[3] The State makes much ado about the absence of an amendment to the Judiciary Law. As is more fully set forth hereinafter, such amendment is not necessary to effectuate the salary adjustment. The percentages of salaries of the various Judges and Justices are easily calculable, albeit that is not an issue in this declaratory judgment action. (Cohn Aff. Exhibit C).

self-executing, and did not grant the judges an immediate pay increase, because:

> The $69.5 million referenced in the judicial budget was explicitly made contingent upon the adoption of additional legislation, i.e., a chapter of the laws of 2006. **Had the legislature intended that the judicial compensation appropriation be self-executing, as petitioners claim, there would have been no need for the qualifying language.** *Id.* at 249-250. (Emphasis added).

The 2009-2010 budget indeed omits any and all qualifying language. This leads irresistibly to the conclusion that the 2009-2010 budget is self-executing, in keeping with the holding in *Maron, supra*. Thus, judicial salaries were unconditionally adjusted upon the passage of the budget.

This conclusion can also be reached by an analysis of the holding of the Court of Appeals in *Pataki v. New York State Assembly,* 4 N.Y.3d 75 (2004) ("*Pataki*"). In *Pataki,* the Governor and the Legislature disputed, *inter alia,* whether the Governor had the authority to propose an allocation for school aid that differed from the previous allocations in that it was significantly more detailed. In previous years, budget bills allocated a lump sum for school aid, and the distribution formula was contained in the provisions of the Education Law. Such an allocation gave the Legislature more control over the allocation of school aid among school systems. The formula put forth by the Governor favored New York City schools. The

Legislature passed the allocation, but deleted the allocation formula proposed by the Governor, alleging it to be unconstitutional.

The Court found the Legislature's actions to be unconstitutional. It held that the degree of itemization required in a budget bill was whatever detail was necessary for the Legislature to decide if the expenditure is warranted. If the Legislature believes that the proposed budget is so lacking in specificity as to preclude it from exercising its constitutional function to review the proposed expenditure, its remedy is to refuse to pass it. If it does not like the way the money is allocated, its remedy is similarly to refuse to pass it. *Pataki* at 96. Thus, the Legislature had no right to change the Governor's allocation.

Similarly, in *People v. Tremaine*, 252 N.Y. 27 (1929) ("*Tremaine*"), the Governor proposed a budget making lump sum appropriations for certain departments, and giving the Governor the power to create an itemized list of the positions and salaries covered by the lump sum appropriation, after the Legislature passed the appropriation. The Legislature passed the appropriations, but deleted the power of the Governor to allocate the funds, instead adding a clause calling for the participation of the legislative finance committee in the allocation of the money. The Governor signed the bill, but

stated that the provision mandating the legislature's participation in the allocation was unconstitutional.

The Court of Appeals agreed with the Governor's position. It held that the power to allocate the sums appropriated by the legislature is administrative, not legislative, stating: "The head of the department does not legislate when he segregates a lump sum appropriation. *The legislation is complete when the appropriation is made.*" *Id.* at 44. (Emphasis added).[4]

Another claim by the Legislature in *Pataki* was that the "usual" form of an educational aid allocation was to briefly specify the dollars and recipients, and leave the formula to other legislation. The Legislature stated that this was the only way in which such allocations could be made. The Court of Appeals has responded that the manner in which money is allocated for schools, whether in an appropriation bill or in other budget legislation is a political choice, as nothing in the constitution requires any particular form of a budget bill. *Pataki*.

The *Pataki* Court held that there was nothing in the New York State Constitution requiring that, once the Governor or the

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[4] At p. 6 of its Memorandum of Law, the State likens the Chapter 51 appropriation to contingency funding for a hurricane that never occurs. The analogy is inapt. Unlike the situation posited by the State, Chapter 51 contains neither an actual nor an implied contingency - the judges and justices of the State of New York actually exist, and their salary was actually adjusted by the budget as passed. All that remains is for this Court to declare that fact.

Legislature elected to deal with the appropriation of funds in one manner, that practice becomes immutable. Thus, it was unnecessary, in *Pataki*, to amend the Education Law in order to allocate school funding, as had been done in the past (*Pataki* at 97-98; *see also Tremaine*), just as it is unnecessary to amend the Judiciary law to render Chapter 51 final and enforceable (*see Maron, supra*).

The *Pataki* Court, in its decision, relied upon a prior Court of Appeals case, *Saxton v. Carey*, 44 N.Y.2d 545 (1978) ("*Saxton*"). In that case, the plaintiffs, citizen taxpayers, brought an action alleging that the budget proposed by the Governor and passed by the Legislature was insufficiently "itemized." Therefore, they argued, the Legislature was not able to properly perform its function in reviewing the budget. In rejecting this argument, the Court held that, while "itemization" was required for a budget bill, the amount of itemization necessary was for the Legislature, and not the Court, to determine. Thus, here, in adopting of the lump sum of $51,006,759, which number was based upon the calculations in the Executive Summary presented to it by the Judicial Branch (*see* Cohn Aff. Exhibit C), the Legislature must be seen to have been satisfied with the "itemization" therein presented. It eschewed the need for further legislative action, as had been previously required in the 2006-2007 appropriation. *See, Maron, supra.*

Contrary to the allegation of the State in this case, there was no need to have amended the Judiciary Law, once the Legislature determined to adopt the lump sum appropriation without retaining the ability to control the manner in which the money was spent[5].

The *Saxton* Court, in its decision, adopted the dissenting opinion of Judge (later Chief Judge) Breitel in *Hidley v. Rockefeller,* 28 N.Y.2d 439, 440-446 (1971). The *Saxton* Court held that the constitution does not prescribe any particular degree of itemization for a budget bill. There is no inflexible definition of the word "itemize." The only question is whether the Legislature deems the itemization sufficient for it to perform its constitutional review function. This, in turn, is not a question to be answered by the Court. It is, rather, a question for the political process. If the Legislature finds the allocation insufficiently itemized, it should refuse to pass it. If the Legislature is satisfied with the itemization and passes the budget, it is not for the Court to question that choice. *See, Saxton* at 550-551.

Another item objected to by the *Saxton* plaintiffs was the fact that certain items in the budget allowed the

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[5] The State's suggestion that the language adopted by the Legislature in Chapter 51 gives the Office of Court Administration the power to determine how the allocated money is spent (Defendant's Memorandum of Law, pp. 7-8) further supports plaintiffs' position that the Legislature is no longer involved in this process - nor can it constitutionally be - rendering the adjustment to judicial compensation final and complete. *Tremaine, supra.*

interdepartmental transfer of funds, without the necessity for the Legislature to pass upon such transfers, as suggested by the State herein. Again, the Court soundly rejected that contention, and held such transfer to be within the constitutional powers of the Governor and the Legislature.

Once the Legislature passes the Governor's proposed budget, it must be presumed that the Legislature found it to be sufficiently itemized for it to accomplish the stated purpose. *Saxton, supra* at 550-551. Thus, there is no necessity for the Court to intervene in the equation, and the Budget is effective as passed. *Id.* In this case, all that remains is for Office of Court Administration ("OCA") to allocate the appropriated funds in accordance with the formula announced in the Executive Summary (Cohn Aff. Exhibit C). However, the funds have not been paid to the OCA for allocation, and apparently will not be without this Court's affirmative declaration of the finality of Chapter 51. *Id.*

Neither the *Pataki* Court nor the *Saxton* Court held that a Court cannot be involved in the budget process. Indeed, in fulfilling its constitutional role, the Court must always be available to resolve disputes about the scope of the budget function, as it passes on the validity of all challenged legislation. Thus, in *Pataki*, the Court affirmed the validity of the budget as originally passed, and struck down the

Legislature's attempt to alter it beyond the limit of its constitutional power. In *Saxton,* the Court held that the budget, as passed, was proper and enforceable. In *Tremaine, supra,* the Court upheld the enacted budget, striking the provision that allowed legislators to participate in the allocation process after the budget was enacted into law.

Under the holdings of the Court of Appeals in *Pataki, Tremaine* and *Saxton,* the lump sum proposed by the Chief Judge for the Unified Court System, presented by the Governor, and enacted by the Legislature - without change or limitation, for judicial salary adjustments was sufficient, standing alone, once signed into law by the Governor, to cause the adjustment of judicial salaries. The fact that judicial salaries are "usually" adjusted by an amendment to the Judiciary Law is irrelevant, because that practice is not "immutable" or constitutionally required. *Pataki, supra* at 98. The Executive Summary (Cohn Aff. Exhibit C) contained the proposed salaries of each of the Judges and Justices of the State of New York for each year in which the adjustment was to be effective. The Legislature must be presumed to have reviewed the summary, and to have been satisfied with both the level of itemization and the allocations contained therein, because it passed that provision of the budget without amendment. This legislative intent is plainly demonstrated by Chapter 51, as it was enacted

into law. The clause which stated "pursuant to a subsequent Chapter of the law specifying such salary levels" was specifricaqlly **stricken** in the final version of the enacted appropriation, leaving the lump sum appropriation final and effective (Cohn Aff. Exhibit B).

POINT II

THE LEGISLATURE INTENDED TO MAKE CHAPTER 51 UNCONDITIONAL AND FINAL

The undeniable clarity of the unconditional appropriation set forth in Chapter 51 renders it final and effective. The State's contention that Chapter 51 requires further legislative action to be effective is contrary to all recognized rules of statutory construction. The argument presumes that the specific, intentional omission of the language requiring the passage of another chapter of the laws of 2009 to effectuate the judicial salary adjustment was a hollow exercise. To the contrary, the intentional omission of the "subject to" language can only mean that the appropriation was immediately effective.

As a general rule, the court's role in interpreting a statute is to ascertain the legislative intent from the words and language that are used. *People v. Finnegan,* 85 N.Y.2d 53, 58 (1995). The Court must construe a statute according to its natural and most obvious sense, without resorting to an artificial or forced construction. Statutes §94.

Where the Legislature fails to include a significant provision in a statute, there is a strong presumption that it

was intentionally omitted[6]. Statutes §74. Where a prior act includes a specific, limiting provision and, upon reenactment, the new statute excludes that provision, the inference is irresistible that the Legislature intended to omit the absent provision. Statutes §240. If the Legislature had intended to include language mandating an additional law to effectuate adjustments to judicial compensation, it could easily have done so; as it did in 2006, 2007 and 2008. Moreover, where, as here, there is a statute purporting to re-authorize salary adjustments, any matter omitted is deemed to be intentionally omitted. Statutes §194. Thus, the failure to include language requiring an additional appropriation, together with the striking of the necessity for the amendment of the judiciary law or any other legislative action from the final appropriation, must be construed to make the appropriation immediately effective.

Here, the State contends that the clear language of the appropriation is not sufficient to adjust judicial salaries, because the Legislature did not amend the judiciary law. The effect of this argument is to negate the language adjusting judicial salaries, and make the appropriation meaningless. A Court cannot interpret a statute in such a way as to make its

[6] This is especially true where such language was in the original bill and was then purposely removed.

essential provisions meaningless and ineffective. *Ivey v. State*, 80 N.Y.2d 474, 481 (1992). In any event, under *Tremaine, supra*, and *Pataki, supra*, the lump-sum appropriation for judicial salary adjustments supersedes the specific provisions of the judiciary law.

Moreover, the legislative intent to pass an immediate judicial salary adjustment can be presumed from the passage of an identical provision for the 2010-2011 budget year (Cohn Aff. Exhibit D), after the Court of Appeals decision in *Maron, supra* was handed down. It must be presumed that, in re-enacting the same unconditional lump sum appropriation as it enacted in 2009, the Legislature was aware of the holding of the *Maron* Court, rendering the salary adjustment immediately effective. *Guardian Life Ins. Co. of America v. Joseph*, 272 A.D. 481 (1st Dept. 1947); *State v. Boar's Head Provisions, Co.*, 46 Misc.2d 418 (Sup. Ct., N.Y. Co. 1965).

The appropriation for judicial salary adjustments does not contain the proviso that an additional legislative enactment is necessary. Therefore, the budget, as passed, was immediately effective to adjust judicial compensation. The State's motion to dismiss should, therefore, be denied, and the plaintiff's cross-motion for summary judgment.

CONCLUSION

The motion to dismiss should be denied, and the cross motion for summary judgment for a declaration that the salary of the Judges and Justices of the State of New York has been increased under Laws of 2009, Chapter 51, §3 ("Chapter 51") as of April 1, 2009, and that the State of New York is obligated to pay the Judges and Justices of the State of New York in accordance with Chapter 51 and Article VI, §25(a) of the New York State Constitution, together with such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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