

# *Exhibit*

# *1*

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

10-106685-0

NEW YORK INSURANCE ASSOCIATION, INC., AMERICAN  
TRANSIT INSURANCE COMPANY, EVEREADY INSURANCE  
COMPANY, GREATER NEW YORK MUTUAL INSURANCE  
COMPANY, KINGSTONE INSURANCE COMPANY,  
MERCHANTS MUTUAL INSURANCE COMPANY and UTICA  
MUTUAL INSURANCE COMPANY,

Albany County Clerk  
Document Number 10569589  
Rcvd 01/13/2010 2:57:50 PM



Plaintiffs,

**SUMMONS**

-against-

Index No. **264-10**

STATE OF NEW YORK, DAVID A. PATERSON, Governor of the  
State of New York, JAMES J. WRYNN, Superintendent of the New  
York State Insurance Department, and ROBERT L. MEGNA, as  
Director of Budget,

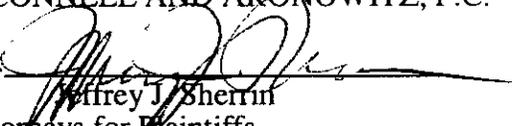
Defendants.

**To the above named Defendants:**

**You are hereby summoned** to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiffs' Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: January 13, 2010

O'CONNELL AND ARONOWITZ, P.C.

By: 

Jeffrey J. Sherrin  
Attorneys for Plaintiffs  
Office and P.O. Address  
54 State Street  
Albany NY 12207-2501  
Tel. (518) 462-5601

**TO: HON. ANDREW CUOMO**  
Office of the Attorney General  
The Capitol  
Albany, NY 12224-0341

**NYS DEPARTMENT OF LAW**  
RECEIVED BY PERSONAL SERVICE  
AT 4:00 O'CLOCK P M. 1/13 2010

SIGNED:   
OFFICE OF LEGAL RECORDS

**HON. JAMES J. WRYNN**  
**Superintendent of Insurance of the State of New York**  
**One Commerce Plaza, 20<sup>th</sup> Floor**  
**Albany, NY 12257**

**HON. ROBERT L. MEGNA**  
**Director of Budget of the State of New York**  
**State Capitol, Room 113**  
**Albany, NY 12224-0341**

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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NEW YORK INSURANCE ASSOCIATION, INC., AMERICAN  
TRANSIT INSURANCE COMPANY, EVEREADY INSURANCE  
COMPANY, GREATER NEW YORK MUTUAL INSURANCE  
COMPANY, KINGSTONE INSURANCE COMPANY,  
MERCHANTS MUTUAL INSURANCE COMPANY and UTICA  
MUTUAL INSURANCE COMPANY,

Plaintiffs,

**COMPLAINT**

-against-

**Index No.**

STATE OF NEW YORK, DAVID A. PATERSON, Governor of the  
State of New York, JAMES J. WRYNN, Superintendent of the New  
York State Insurance Department, and ROBERT L. MEGNA, as  
Director of Budget,

Defendants.

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Plaintiffs, by their attorneys, O'Connell and Aronowitz, for their Complaint  
herein, state as follows:

**Parties**

1. Plaintiff, New York Insurance Association, Inc. (hereinafter "NYIA"), is a non-profit trade association incorporated in the State of New York, with a principal place of business in Albany, New York. NYIA's members consist of property and casualty insurance companies, both domestic and non-domestic, which issue insurance policies throughout the State of New York. NYIA currently has thirty-seven domestic property/casualty insurers as members, all of which are responsible for paying the annual New York State Insurance Law section 332 assessment. NYIA brings this action on behalf of those members who are adversely affected by the acts that are the subject matter

of this action.

2. American Transit Insurance Company ("American Transit"), is a duly licensed insurance company domesticated in the State of New York, with its principal place of business located in New York, New York. American Transit primarily provides commercial liability insurance to taxicabs and company fleets in New York City.

3. Eveready Insurance Company ("Eveready"), is a duly licensed insurance company domesticated in the State of New York, with its principal place of business located in New York, New York. Eveready primarily provides personal and commercial vehicle liability insurance in the greater New York City area.

4. The Greater New York Mutual Insurance Company ("GNY"), is a duly licensed insurance company domesticated in the State of New York, with its principal place of business located in New York, New York. GNY primarily provides commercial property and liability insurance for most business classes.

5. Kingstone Insurance Company ("Kingstone"), is a duly licensed insurance company domesticated in the State of New York, with its principal place of business located in Kingston, New York. Kingstone provides a variety of personal and commercial insurance throughout most of the State of New York.

6. Merchants Mutual Insurance Company and its wholly-owned subsidiary, Merchants Preferred Insurance Company (collectively "Merchants"), each with their principal place of business located in Buffalo, New York, are duly licensed insurance companies domesticated in the State of New York. Through these two companies Merchants offers a wide variety of personal and commercial insurance.

7. Utica Mutual Insurance Company ("Utica Mutual"), is a duly licensed

insurance company domesticated in the State of New York and is a member of Utica National Insurance Group, with its principal place of business located in New Hartford, New York. Utica Mutual provides a wide variety of personal and commercial insurance throughout the State of New York.

8. The State of New York is named a defendant because this action challenges primarily legislative actions, and because it involves expenditures of or suballocations of appropriations to many state agencies.

9. Defendant David A. Paterson is the Governor of the State of New York, charged with the responsibility of executing the laws of the State.

10. Defendant James J. Wrynn is the Superintendent of the New York State Insurance Department, and has responsibility for proper implementation of Insurance Law § 332.

11. Defendant Robert L. Megna is Director of Budget, and has responsibility for approving Department budgets and expenditure plans, as well as responsibilities in the proper implementation of Insurance Law § 332 and the State Finance Law.

#### **Nature of the Case**

12. This is an action for declaratory, injunctive and ancillary monetary relief resulting from the Defendants' systematic and intentional abuse of Insurance Law § 332, to create a slush fund through which expenses of other state agencies and general state expenditures are funneled so that they are passed on to Plaintiff NYIA's members and other insurance companies, rather than being obligations of the State's General Fund, or other funding sources, where they properly belong.

13. As originally enacted, Insurance Law § 332's predecessor statute

established a minor source of supplemental funds for the operating expenses of the Insurance Department. Eventually the statute was amended in 1989 to make it a greater source of funding for the expenses of the Insurance Department.

14. In fiscal years 2008-2009 and 2009-2010 Defendants or their predecessors enacted or implemented appropriations for the New York State Insurance Department that included items with absolutely no connection to the direct and indirect expenses of the Department or the regulation of insurance. The payment for these items was imposed on insurance companies, primarily those domiciled in this State, by way of the Insurance Law § 332 assessments, despite the fact that they clearly exceed the statutory mandate that only certain expenses of the Insurance Department be passed onto the regulated insurance companies.

15. The items that do not constitute expenses of the Department, most if not all of which benefit other private parties, represented 70% of the assessments for the 2009-2010 budget year. Such unbridled allocation of non-operating expense items to the Insurance Department budget not only impacts the fiscal integrity of New York insurance companies, raising the specter of job losses, but dramatically increases the premiums paid by New York consumers and, perversely, incentivizes companies to relocate to other states.

**Statutory Background of Insurance Law § 332**

16. Chapter 824 of the Laws of 1940 enacted New York State Insurance Law § 32-a, provided in relevant part:

Assessments to defray operating expenses of department.

If the expenses of the department ... shall exceed the amount of fees and refunds (excluding taxes) collected under this chapter and paid

into the state treasury, the excess of such expenses shall be annually assessed by the superintendent pro rata upon all domestic insurers in proportion to the net premiums or other considerations for insurance collected by them in this state during the fiscal year for which the assessment is made; and the superintendent shall levy and collect such assessments and pay the same into the state treasury, subject to the provisions of section thirty-seven of the state finance law.

17. Chapter 641 of the Laws of 1941 amended Insurance Law 332-a to, *inter alia*, add "all licensed United States branches of alien insurers domiciled in this state" to those subject to the assessment.

18. Chapter 944 of the Laws of 1972 amended Insurance Law 32-a to, *inter alia*, provide for the assessment of all direct and indirect costs of the insurance department, as approved by the director of the budget and audited by the comptroller, and to add subdivision 2, which provided for quarterly payments of the assessment.

19. Chapter 367 of the Laws of 1984 implemented the recodification of the Insurance Law, including the enacted Insurance Law § 332, still entitled "Assessments to defray operating expenses of department."

20. The final amendment of Insurance Law § 332 was enacted as part of Chapter 61 of the Laws of 1989, deleting the language of subsection (a) which previously made the assessment supplemental to fees and refunds collected under other provisions of the Insurance Law. As a result, the Insurance Law § 332 assessments became a source of revenue to fund the actual operating expenses of the Insurance Department. These assessments are in addition to fees, e.g. Insurance Law § 313, to recoup in part the actual expenses of the Insurance Department.

21. Insurance Law § 332 presently provides:

**Assessments to defray operating expenses of department**

(a) **The expenses of the department**, excluding the expenses of the supervision of employee welfare funds, for any fiscal year, **including all direct and indirect costs**, as approved by the director of the budget and audited by the comptroller, except as otherwise provided by sections one hundred fifty-one and two hundred twenty-eight of the workers' compensation law and by section sixty of the volunteer firefighters' benefit law, **shall be assessed by the superintendent pro rata upon all domestic insurers and all licensed United States branches of alien insurers domiciled in this state** within the meaning of paragraph four of subsection (b) of section seven thousand four hundred eight of this chapter, in proportion to the gross direct premiums and other considerations, written or received by them in this state during the calendar year ending December thirty-first immediately preceding the end of the fiscal year for which the assessment is made (less return premiums and considerations thereon) for policies or contracts of insurance covering property or risks resident or located in this state the issuance of which policies or contracts requires a license from the superintendent; and the superintendent shall levy and collect such assessments and pay the same into the state treasury, subject to the provisions of section one hundred twenty-one of the state finance law and subsection (b) hereof.

(b) For each fiscal year commencing on or after April first, nineteen hundred eighty-three, a partial payment shall be made by each insurer subject to this section in a sum equal to twenty-five per centum of the annual expenses assessed upon it for the fiscal year as estimated by the superintendent. Such payment shall be made on March tenth of the preceding fiscal year and on June tenth, September tenth and December tenth of each year, or at such other dates as the director of the budget may prescribe. Provided, however, that the payment due March tenth, nineteen hundred eighty-three for the fiscal year beginning April first, nineteen hundred eighty-three shall not be required to be paid until June tenth, nineteen hundred eighty-three. The balance of assessments for the fiscal year shall be paid upon determination of the actual amount due in accordance with the provisions of this section. **Any overpayment of annual assessment resulting from complying with the requirements of this subsection shall be refunded or at the option of the assessed applied as a credit against the assessment for the succeeding fiscal year.** The partial payment schedule provided for herein shall not be applicable to any insurer whose annual assessment pursuant to this section for the fiscal year is estimated to be less than one hundred dollars and such insurers shall make a single annual payment on or before September thirtieth of the fiscal year. [emphasis added]

22. All domestic insurance companies and licensed United States branches of alien insurers domiciled in this state are required to pay the Insurance Law § 332 assessment.

23. Non-domestic insurance companies domiciled in other states, but authorized to do business in New York State, are not required to pay the Insurance Law § 332 assessment.

#### **Budget Impact of § 332 Assessments**

24. At all relevant times the Superintendent of Insurance has calculated the direct and indirect costs representing the expenses of the Department for purposes of the Insurance Law § 332 assessment to be the total amount of appropriations allocated to Insurance Department "SR-Other" [special revenue - other] funds in the state budget approved by the Legislature.

25. At all relevant times the Insurance Department SR-Other appropriations have included funds specifically appropriated to the Insurance Department for its direct and indirect expenses.

26. At all relevant times the SR-Other appropriations have also included suballocations for other departments, agencies, offices and divisions which were not for the expenses of the Insurance Department, but masqueraded as such and were included in the amounts assessed against Plaintiff insurance companies.

27. For budget year 2003-2004, the enacted appropriations for the Insurance Department included \$98,009,000 allocated for the expenses of the Insurance Department and \$49,389,000 directed to 16 suballocations in various amounts to the Banking

Department, Department of State, Department of Health, Offices of the Inspector General and Department of Law.

28. For budget years 2004-2005 through 2007-2008, the enacted appropriations for the expenses of the Insurance Department and suballocations to other agencies continued to increase.

29. The Defendants rampant exploitation of Insurance Law § 332, however, began with budget year 2008-2009. For budget year 2008-2009, the enacted appropriations for the Insurance Department included \$128,904,000 allocated for the expenses of the Insurance Department and \$111,504,000 directed to 24 suballocations in various amounts to the Banking Department, Department of State, Department of Health, Offices of the Inspector General, Department of Law and Division of Criminal Justice Services. These suballocations represented a \$41,226,000 increase in the assessment over the previous fiscal year.

30. Defendants' dramatic increase of the assessment in the 2008-2009 budget was just the beginning of their intentional strategy to create a slush fund out of the section 332 assessments to fund the operations of other state agencies and programs. As part of the Deficit Reduction Plan passed into law by Chapter 1 of the Laws of 2009, the Insurance Law § 332 assessment for budget year 2008-2009 was increased by another \$180,633,600, bringing the total to \$421,041,600 or more than double the previous budget year's assessment. This was done by moving into the Insurance Department budget \$139,473,600 for the Healthy NY program, \$39,200,000 for the HMO direct pay program and \$1,960,000 for the entertainment industry pilot program, all of which may be desirable programs, but they have nothing whatsoever to do with the expenses of the

Insurance Department. These programs are provided for the benefit of other private individuals.

31. The Defendants' raiding the funds of Plaintiff insurance companies for the general state fund did not stop there. Chapter 2 of the Laws of 2009, Part H, provided:

Notwithstanding any law to the contrary, the insurance department shall finance the annual expenses related to its activities and operations through assessments on all regulated entities of the department. For state fiscal year 2008-09, the total value of the annual assessment will be equal to the total value of the department's enacted appropriations. **In such instances where the total value of the annual industry assessment exceeds the actual annual expenses of the department's operations and activities, in accordance with section 4 of the state finance law, the comptroller is hereby authorized and directed to transfer, at the request of the director of the budget, up to \$4.5 million from the unencumbered balance of the insurance department account (339.B6) to the general fund in state fiscal year 2008-09.** [emphasis added]

32. For budget year 2009-2010, Defendants demonstrated that there is no limit to the abuse of Insurance Law § 332 by increasing the enacted appropriations for the Insurance Department to include \$138,146,000 allocated for the expenses of the Insurance Department, \$115,039,000 directed to 24 suballocations in various amounts to the Banking Department, Department of State, Department of Health, Offices of the Inspector General, Department of Law and Division of Criminal Justice Services, \$161,040,000 for the Healthy NY program, \$39,200,000 for the HMO direct pay market program and \$1,960,000 for the pilot program for entertainment industry employees. The amount of the Insurance Law § 332 assessment rose to a staggering \$455,385,000.

33. Defendants have blatantly misused Insurance Law § 332, which only provides a mechanism for the payment of the expenses of the Insurance Department by

most, but not all, of the insurance companies it regulates, to create an unlimited and illegitimate slush fund at the expense of Plaintiff insurance companies.

### **Basis of Complaint**

34. New York Tax Law Article 33, entitled “Franchise Taxes on Insurance Corporations,” governs the amount of taxes paid by insurance companies in the State of New York.

35. Under Tax Law § 1502-a “... every domestic insurance corporation, every foreign insurance corporation and every alien insurance corporation, other than such corporations transacting the business of life insurance ...” is required to pay a franchise tax equal to 1.75% of premiums paid for accident and health insurance companies and 2% of premiums paid for all other insurance companies.

36. From 1940 to 1989 Insurance Law § 332(a) and its predecessor statute (§ 32-A) provided for an assessment to cover the operating costs of the Insurance Department, but only to the extent such costs were not met by other fees and refunds collected under other provisions of the Insurance Law.

37. In 1989 the fees and refunds formerly allocated to the operating costs of the Insurance Department were redirected to general state expenditures.

38. In explaining the 1989 amendment, the Governor’s Bill Jacket stated:

The various revenues affected by this bill represent fees for the privilege of conducting certain types of business in New York State, fines or penalties against individuals or entities who have violated State laws or related regulations, or miscellaneous revenues unrelated to the primary purposes of the affected laws. As such, it is appropriate that these revenues inure to the benefit of the people of the State by being deposited in the State Treasury rather than to the benefit of the regulated entities evolved [*sic*] who are otherwise assessed for the costs of administering these laws.

39. Insurance Law § 332 is entitled “Assessments to defray operating expenses of department.”

40. Insurance Law § 332(a) reinforces the purpose of the assessment, specifically providing that “[t]he expenses of the department ... shall be assessed by the superintendent pro rata upon all domestic insurers and all licensed United States branches of alien insurers domiciled in this state ...”

41. Pursuant to Insurance Law § 332(b) the Superintendent of Insurance estimates the expenses for the next fiscal year and issues a demand for payment of 25% of the estimated assessment by March 10<sup>th</sup> of the fiscal year in which the estimate is calculated.

42. The remaining estimated quarterly payments are required to be remitted by June 10<sup>th</sup>, September 10<sup>th</sup> and December 10<sup>th</sup> of the next fiscal year.

43. While the funds appropriated for the actual expenses of the Insurance Department increased at a modest rate between the 2003-2004 and 2009-2010 budget years, *i.e.* from \$98,009,000 to \$138,146,000, the suballocations and other program expenses funneled through the Insurance Department budget to other agencies and programs have skyrocketed from \$49,389,000 to \$317,239,000, an increase of approximately 642%, during that same time period.

44. The costs of these suballocations and other programs that do not constitute expenses of the Insurance Department represent an improper and unlawful attempt to charge costs not reasonable and necessary for the regulation of insurers to the insurance companies subject to the provisions of Insurance Law § 332.

45. For example, former Governor Pataki created the Holocaust Claims Processing Office ("HCPO") of the New York State Banking Department on June 25, 1997. One of the tasks of this office is to assist persons to recover monies never paid in connection with insurance policies issued by European insurers.

46. Not only do the HCPO's efforts relate to insurers outside the United States, but its efforts are not even focused on citizens of the State of New York. In its January 15, 2009 annual report, the HCPO noted that from its inception it has assisted with insurance claims made by individuals from 42 states and 24 countries.

47. For budget years 2003-2004 through 2005-2006 the Insurance Law § 332 assessment included \$447,000 annually to support the HCPO. In budget years 2006-2007 through 2009-2010 the annual amount assessed pursuant to Insurance Law § 332 increased to \$465,000 annually. The three annual reports made public by the HCPO state the amount it received from Insurance Department suballocations for 2006, 2007 and 2008 to be \$354,424, \$353,067 and \$335,877 respectively.

48. The HCPO annual reports identify the majority of insurance claims it assisted individuals with were with the International Commission on Holocaust Era Insurance Claims, which officially closed on March 30, 2007. Despite this closure, the HCPO maintained its nine full-time staff and the suballocations of \$465,000 per year assessed to Plaintiffs under Insurance Law § 332 have continued.

49. While the HCPO has a laudable mission, it clearly has no connection to the regulation of insurers in the State of New York or the expenses of the Insurance Department.

50. Insurance Law § 332(b) provides that “[a]ny overpayment of annual assessment resulting from complying with the requirements of this subsection shall be refunded or at the option of the assessed applied as a credit against the assessment for the succeeding fiscal year.”

51. Part H of Chapter 2 of the Laws of 2009 authorized the comptroller to transfer up to \$4.5 million from the Insurance Department assessment account to the General Fund in state fiscal year 2008-09.

52. Part H of Chapter 2 of the Laws of 2009 is an improper and unlawful attempt to withhold monies that are required to be refunded to insurance companies subject to the provisions of Insurance Law § 332, including Plaintiff insurance companies.

#### **FIRST CAUSE OF ACTION**

53. The express purpose of the assessment provided under Insurance Law § 332 is to defray the direct and indirect operating expenses of the Insurance Department.

54. The actual assessments imposed by the Superintendent of Insurance, approved by the Director of Budget, on Plaintiff insurance companies are excessive and have no reasonable connection with the regulatory purposes of the Insurance Department or the benefits conferred on Plaintiff insurance companies.

55. By calculating the assessments to include items that do not properly constitute expenses of the Insurance Department, the Superintendent of Insurance has unlawfully exceeded the authority delegated to him under Insurance Law § 332, and has otherwise acted arbitrarily, capriciously, and irrationally in the implementation of Insurance Law § 332.

56. By approving the assessments to include items that do not properly constitute expenses of the Insurance Department, the Director of Budget has unlawfully exceeded the authority delegated to him under Insurance Law § 332, and has otherwise acted arbitrarily, capriciously, and irrationally in the implementation of Insurance Law § 332.

57. Such conduct of the Superintendent of Insurance and Director of Budget has resulted in an overpayment each year since 2008 by Plaintiff insurance companies.

### **SECOND CAUSE OF ACTION**

58. In New York State, the exclusive power to tax is vested in the New York State Legislature by New York Constitution, Art. III, § 1.

59. The Superintendent of Insurance has implemented Insurance Law § 332 to include costs that do not constitute expenses of the Insurance Department and without relation to any benefit conferred on Plaintiff insurance companies.

60. To the extent Insurance Law § 332 is determined to be a delegation of authority to the Superintendent to fix license fees beyond that necessary for the expenses of the Insurance Department, *i.e.* to implement a tax, it is an unconstitutional delegation of legislative power.

61. Such unconstitutional delegation of power has resulted in an overpayment each year since 2008 by Plaintiff insurance companies.

### **THIRD CAUSE OF ACTION**

62. Article III, § 22 of the New York State Constitution requires that “[e]very law which imposes, continues or revives a tax shall distinctly state the tax and the object

to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.”

63. From budget year 2008-2009 through 2009-2010 the budget appropriations for the Department of Insurance have included suballocations and funding for programs that do not constitute expenses of the Department of Insurance.

64. Charges for such suballocations and programs represent taxes levied for the general purposes of the State.

65. The budget appropriations have not amended Insurance Law § 332, nor do they distinctly state a tax to be imposed nor identify any object for an existing tax.

66. To the extent Insurance Law § 332 is determined to provide the authority to impose assessments for suballocations and programs that do not constitute an expense of the Insurance Department, it is an unconstitutional tax in derogation of the requirements of Article III, § 22 of the New York State Constitution.

67. Such unconstitutional tax has resulted in an overpayment each year since 2008 by Plaintiff insurance companies.

#### **FOURTH CAUSE OF ACTION**

68. Article XVI, § 3 of the New York State Constitution provides that “Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally.”

69. At all relevant times Defendants have imposed franchise taxes on Plaintiffs pursuant to Article 33 of the Tax Law.

70. From budget year 2008-2009 through 2009-2010 Defendants have assessed a separate tax on Plaintiffs under Insurance Law § 332, based upon the proportional value of the premiums and other consideration received by Plaintiffs, which constitute intangible property.

71. The tax assessed under Insurance Law § 332 is not required for the privilege of underwriting property and casualty insurance in the State of New York, as Insurance Law § 332 by its terms does not apply to non-domestic insurance companies domiciled in other states, but authorized to do business in New York State.

72. To the extent the Section 332 assessments exceed the direct and indirect operational expenses of the Insurance Department, they are an unconstitutional ad valorem tax in derogation of the requirements of Article XVI, § 3 of the New York State Constitution.

73. Such unconstitutional tax has resulted in an overpayment each year since 2003 by Plaintiff insurance companies.

#### **FIFTH CAUSE OF ACTION**

74. Article I, § 6 of the New York State Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.

75. The Fourteenth Amendment to the United States Constitution provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

76. Both Constitutional provisions provide substantive and procedural due process protections to persons, including Plaintiffs.

77. The Insurance Law § 332 assessment is being used to take the funds of one class, *i.e.* insurance companies, for the private benefit of other classes of persons with no reasonable relationship between the intended beneficiaries of the assessment and the insurers on whom the assessment is imposed.

78. To the extent the Section 332 assessments exceed the direct and indirect operational expenses of the Insurance Department and are used for programs that benefit other private individuals or entities, they constitute a violation of the substantive due process rights of Plaintiffs.

79. Such unconstitutional tax in violation of Plaintiffs' substantive due process rights has resulted in an overpayment each year since 2008 by Plaintiff insurance companies.

#### **SIXTH CAUSE OF ACTION**

80. Article I, § 7(a) of the New York State Constitution provides that "[p]rivate property shall not be taken for public use without just compensation."

81. The Fifth Amendment to the United States Constitution, as applied to the State by the Fourteenth Amendment, provides that "... private property [shall not] be taken for public use, without just compensation."

82. Insurance Law § 332(b) provides that overpayments of annual assessments will be refunded to Plaintiff insurance companies.

83. The Insurance Law § 332 assessment is being used to take several hundred million dollars from insurance companies, previously paid from the General Fund, for the private benefit of other classes of persons.

84. Part H of Chapter 2 of the Laws of 2009 authorized the comptroller to transfer money that Insurance Law § 332 requires be refunded to Plaintiff Insurance Companies to the General Fund in state fiscal year 2008-09. This constitutes an unconstitutional taking of Plaintiffs' property without just compensation.

85. Defendants' attempts to balance the State's budget by funneling programs that do not constitute expenses of the Insurance Department through Insurance Law § 332 is an unconstitutional confiscation of Plaintiffs' property without just compensation.

#### **SEVENTH CAUSE OF ACTION**

86. Article I, § 11 of the New York State Constitution provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof."

87. The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

88. The suballocations and programs that do not constitute direct or indirect expenses of the Insurance Department are for the benefit of the general public and are not rationally related to a legitimate government interest in the regulation of Plaintiff insurers.

89. There is no rational basis for singling out Plaintiff insurance companies, as opposed to the general public or other industries, to fund hundreds of millions of dollars

in suballocations and programs that do not constitute expenses for the regulation of insurers generally and/or the regulation of property and casualty insurance specifically. The imposition of assessments under Insurance Law § 332 for such programs is a violation of Plaintiffs insurance companies' constitutional right to equal protection.

90. Such violation of Plaintiffs' constitutional right to equal protection has resulted in an overpayment each year since 2008 by Plaintiff insurance companies.

**WHEREFORE**, Plaintiffs demand judgment as follows:

1. On the First Cause of Action, declaring the Defendants' implementation of Insurance Law § 332 for budget years 2008-2009 through 2009-2010 to be arbitrary, capricious, irrational and illegal;

2. On the Second Cause of Action, declaring Insurance Law § 332 as implemented for budget years 2008-2009 through 2009-2010 to be in violation of the New York State Constitution;

3. On the Third Cause of Action, declaring Insurance Law § 332 as implemented for budget years 2008-2009 through 2009-2010 to be in violation of the New York State Constitution;

4. On the Fourth Cause of Action, declaring Insurance Law § 332 as implemented for budget years 2008-2009 through 2009-2010 to be in violation of the New York State Constitution;

5. On the Fifth Cause of Action, declaring Insurance Law § 332 as implemented for budget years 2008-2009 through 2009-2010 to be in violation of the New York State and United States Constitutions;

6. On the Sixth Cause of Action, declaring Insurance Law § 332 as

implemented for budget years 2008-2009 through 2009-2010 to be in violation of the New York State and United States Constitutions;

7. On the Seventh Cause of Action, declaring Insurance Law § 332 as implemented for budget years 2008-2009 through 2009-2010 to be in violation of the New York State and United States Constitutions;

8. Permanently enjoining and restraining Defendants from continuing to include costs that do not represent the actual direct and indirect operating expenses of the Insurance Department in the assessments under Insurance Law § 332;

9. Ordering Defendants to refund to Plaintiff insurance companies, including all insurance companies represented at any time since 2003 by NYIA, all assessments imposed upon them from 2008-2009 to the present, and continuing through final judgment, that exceed the actual direct and indirect operating expenses of the Insurance Department;

10. Awarding interest on all such refunds from the date of payment;

11. Granting costs, disbursements, attorneys' fees and such other and further relief as to this Court may seem just and proper.

DATED: January 13, 2010  
Albany, New York

O'CONNELL AND ARONOWITZ

By:   
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