

# *Exhibit*

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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 INSURANCE GROUP and UTICA MUTUAL INSURANCE COMPANY,

*Plaintiffs,*

-against-

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.*

THE NEW YORK HEALTH PLAN ASSOCIATION, INC.; AETNA HEALTH INC.; AETNA HEALTH INSURANCE COMPANY OF NEW YORK; CDPHP UNIVERSAL BENEFITS, INC.; CAPITAL DISTRICT PHYSICIANS' HEALTH PLAN, INC.; HEALTH NET OF NEW YORK, INC.; HEALTH NET INSURANCE OF NEW YORK, INC.; HEALTHNOW NEW YORK INC.; INDEPENDENT HEALTH ASSOCIATION, INC.; INDEPENDENT HEALTH BENEFITS CORPORATION; MVP HEALTH PLAN, INC.; MVP HEALTH INSURANCE COMPANY; MVP HEALTH SERVICES CORP.; PREFERRED ASSURANCE COMPANY; OXFORD HEALTH INSURANCE, INC.; OXFORD HEALTH PLANS (NY), INC.; UNITEDHEALTHCARE INSURANCE COMPANY OF NEW YORK; and UNITEDHEALTHCARE OF NEW YORK, INC.

*Intervenor-Plaintiffs,*

-against-

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

*Defendants.*

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**COMPLAINT**

Intervenor-Plaintiffs, The New York Health Plan Association (“HPA”); Aetna Health Inc.; Aetna Health Insurance Company of New York; CDPHP Universal Benefits, Inc.; Capital District Physicians’ Health Plan, Inc.; Health Net of New York, Inc.; Health Net Insurance of New York, Inc.; Healthnow New York Inc.; Independent Health Association, Inc.; Independent Health Benefits Corporation; MVP Health Plan, Inc.; MVP Health Insurance Company; MVP Health Services Corp; Preferred Assurance Company; Oxford Health Insurance, Inc.; Oxford Health Plans (NY), Inc.; UnitedHealthcare Insurance Company of New York and Unitedhealthcare of New York, Inc.; (collectively, the “HPA Plaintiffs” or “Intervenor-Plaintiffs”), by and through their attorneys, Greenberg Traurig, LLP, as and for their Complaint, allege as follows:

### **INTRODUCTION**

1. This case presents the question of whether Section 332 of the New York State Insurance Law (“Section 332”), which authorizes assessments upon New York-licensed insurers to defray the operating expenses of the New York State Insurance Department (the “Insurance Department” or the “Department”), may be used to force these insurers to pay for expenses unrelated to the operation of the Insurance Department.

2. Section 332 provides a mechanism to fund the operating expenses of the New York State Insurance Department through an assessment on domestic insurance companies<sup>1</sup> (the “Section 332 Assessment”).

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<sup>1</sup> For the purposes of this Complaint, all references to the term “insurers” or “insurance companies,” shall include health maintenance organizations (“HMO”) established under Article 44 of the New York Public Health Law, because all such HMOs are subject to Section 332 Assessments.

3. Under the plain language of the statute, the assessment is explicitly limited to funding “the expenses of the [Insurance] [D]epartment.”

4. Since the statute was first enacted in 1940, the phrase “expenses of the [D]epartment” has been understood to include only employee salaries, office supplies, travel, leases, and similar types of expenses.

5. Beginning in 2003, however, the Department has increasingly treated the Section 332 Assessments as general revenue to fund programs unrelated to the operating expenses of the Department.

6. For example, the 2009-10 Insurance Department budget included appropriations totaling \$317,239,000 for expenses unrelated to the operation of the Department. Of the Department’s \$555,596,000 budget, approximately \$138,146,000 represented actual operating expenses. Thus, approximately 57% of the Department’s total budget in State Fiscal Year 2009-10 represented funding for programs unrelated to the operating expenses of the Insurance Department.

7. Intervenor-Plaintiffs do not question the legislative judgment underlying the programs funded by the assessment. Rather, Intervenor-Plaintiffs argue that such programs should be funded from the General Fund, as an obligation of all taxpayers, rather than through the Section 332 Assessment, which was never intended to fund anything other than the operating expenses of the Department.

8. This back-door tax is particularly perverse because, as applied to health insurers and HMOs, it has the effect of increasing health insurance premiums at a time when the nation and State are focused on making health insurance more affordable.

## **THE UNDERLYING ACTION**

9. Plaintiffs New York Insurance Association, Inc. (“NYIA”); American Transit Insurance Company; Eveready Insurance Company; Greater New York Mutual Insurance Company; Kingstone Insurance Company; Merchants Insurance Group; and Utica Mutual Insurance Company (collectively, the “NYIA Plaintiffs”) filed their Complaint challenging New York State Insurance Law Section 332 Assessments on January 13, 2010.

10. The NYIA Plaintiffs’ complaint alleges that Defendants’ implementation of the Section 332 Assessments exceeds Defendants’ authority and violates various provisions of the New York State and United States Constitutions.

11. The NYIA Plaintiffs’ complaint seeks declaratory, injunctive, and ancillary monetary relief.

12. As set forth below, the issues raised in the NYIA Plaintiffs’ complaint and by this complaint filed by the Intervenor-Plaintiffs are identical in that both challenge the same governmental actions.

13. Intervenor-Plaintiffs seek to enjoin Defendants from assessing and collecting increased assessments from the Intervenor-Plaintiffs pursuant to Section 332 to the extent such assessments are used to fund programs unrelated to the operating expenses of the New York State Insurance Department.

## **PARTIES**

14. HPA is an association representing health insurers and health maintenance organizations in New York State.

15. Aetna Health Inc. is a health maintenance organization that has been issued a certificate of authority pursuant to Article 44 of the New York State Public Health Law.

16. Aetna Health Insurance Company of New York is a corporation that is licensed under the New York Insurance Law.

17. CDPHP Universal Benefits, Inc. is a corporation that is licensed as a non-profit health services corporation under Article 43 of the New York State Insurance Law.

18. Capital District Physicians' Health Plan, Inc. is a not-for-profit health maintenance organization that has been issued a certificate of authority pursuant to Article 44 of the New York State Public Health Law.

19. Health Net of New York, Inc. is a health maintenance organization that has been issued a certificate of authority pursuant to Article 44 of the New York State Public Health Law.

20. Health Net Insurance of New York, Inc. is a corporation that is licensed as an accident and health insurer pursuant to Article 42 of the New York State Insurance Law.

21. Healthnow New York Inc. is a corporation that is licensed as a non-profit health services corporation under Article 43 of the New York State Insurance Law.

22. Independent Health Association, Inc. is a not-for-profit health maintenance organization that has been issued a certificate of authority pursuant to Article 44 of the New York State Public Health Law.

23. Independent Health Benefits Corporation is a corporation that is licensed as an accident and health insurer pursuant to Article 43 of the New York State Insurance Law.

24. MVP Health Plan, Inc. is a not-for-profit health maintenance organization that has been issued a certificate of authority pursuant to Article 44 of the New York State Public Health Law.

25. MVP Health Insurance Company is a corporation that is licensed as an accident and health insurer pursuant to Article 42 of the New York State Insurance Law.

26. MVP Health Services Corp. is a corporation that is licensed as a non-profit health services corporation under Article 43 of the New York State Insurance Law.

27. Preferred Assurance Company is a corporation that is licensed as a non-profit health services corporation under Article 43 of the New York State Insurance Law.

28. Oxford Health Insurance, Inc. is a corporation that is licensed under the New York Insurance Law.

29. Oxford Health Plans (NY), Inc. is a health maintenance organization that has been issued a certificate of authority pursuant to Article 44 of the New York State Public Health Law.

30. UnitedHealthcare Insurance Company of New York is a corporation that is licensed under the New York Insurance Law.

31. Unitedhealthcare of New York, Inc. is a health maintenance organization that has been issued a certificate of authority pursuant to Article 44 of the New York State Public Health Law.

32. The State of New York is named as a defendant because this action challenges legislative and administrative actions, and because it involves expenditures of appropriations to a number of state agencies.

33. Defendant David A. Paterson is the Governor of the State of New York and has authority over the executive agencies of the State of New York. He is sued in his official capacity.

34. Defendant James J. Wrynn is the Superintendent of the New York State Insurance Department and has responsibility for proper implementation of Insurance Law Section 332. He is sued in his official capacity.

35. Defendant Robert L. Megna is the Director of the Budget for the State of New York and has responsibility for approving State department budgets and expenditure plans, as well as the proper implementation of Insurance Law Section 332 and the New York State Finance Law. He is sued in his official capacity.

### STANDING

36. The individual Intervenor-Plaintiffs have standing to bring this action because they have been injured and/or are threatened with injury by the enactment, implementation, application, and enforcement of Section 332 and related assessments.

37. HPA has standing to bring its claims because its members would otherwise have standing to sue in their own right, the interests HPA seeks to protect are germane to HPA's purpose, and neither the claims asserted nor the relief requested requires the participation of individual HPA members.

### GENERAL ALLEGATIONS

#### **History of Insurance Law Section 332**

38. Chapter 824 of the Laws of 1940 enacted New York State Insurance Law Section 32-a, which 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.

39. Chapter 641 of the Laws of 1941, *inter alia*, amended Insurance Law Section 32-a to add “all licensed United States branches of alien insurers domiciled in this state” to those subject to the assessment.

40. Chapter 944 of the Laws of 1972, *inter alia*, amended Insurance Law Section 32-a to 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 assessments.

41. Chapter 367 of the Laws of 1984 implemented the recodification of the Insurance Law, including the enacted Insurance Law Section 32-a (renumbered Section 332), still entitled “Assessments to defray operating expenses of department.”

42. The final amendment of Insurance Law Section 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. 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.

43. This legislative language confirms that while other amounts paid by insurers were intended to “inure to the benefit of the people of the State by being deposited in the State

Treasury,” the Section 332 Assessments were intended to fund the operating expenses of the Insurance Department.

44. Insurance Law Section 332 currently 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].

45. Although the assessment has existed since the 1940s, until State Fiscal Year 2003-04, the “expenses of the department” only included items such as employee salaries, office supplies, travel, leases, and similar types of expenses. Section 332 Assessments thus paid only for the actual operational expenses of the Department.

46. All domestic insurance companies -- i.e., New York-licensed insurers -- and licensed United States branches of alien insurers domiciled in this state are required to pay the Section 332 Assessment.

47. Non-domestic insurance companies domiciled in other states, but authorized to do business in New York State, are not required to pay a Section 332 Assessment.

#### **Recent Use of Section 332 Assessments in the State Budget Process**

48. As part of the State budgeting process, the Governor proposes and the Legislature approves certain appropriations to each State department, including the Insurance Department.

49. Each such appropriation represents the Department’s spending authority for a given year. Each line item set forth in the budget specifically limits the amount that may be spent on that item.

50. At all times relevant to this action, the Department’s appropriations have included non-operating expenses of the Insurance Department.

51. These non-operating expenses of the Insurance Department have been charged back to insurance companies through inclusion in Section 332 Assessments, despite the fact that such inclusion clearly exceeds the statutory mandate that only the operating costs of the Insurance Department may be passed on to insurance companies. Specifically, the Superintendent included the Department’s entire non-General Fund appropriation in

calculating the Section 332 Assessments, even though the majority of these funds are clearly not operational expenses of the Department.

### **Impact of the Improper Section 332 Assessments**

52. While the inclusion of items unrelated to the operating expenses of the Department as part of the Section 332 Assessments has always been unlawful, the amount of such unrelated expenses has substantially increased, both in absolute terms and as compared with the portion of the Section 332 Assessments actually related to the operating expenses of the Insurance Department.

53. The funds appropriated for the actual operation of the Insurance Department increased from \$98,009,000 in State Fiscal Year 2003-2004 to approximately \$138,146,000 for State Fiscal Year 2009-2010.

54. During the same time period, however, the non-operating expenses of the Insurance Department increased from \$49,389,000 to approximately \$317,239,000.

55. Hence, in Fiscal Year 2003-04, non-operating expense items constituted only 33% of the total Insurance Department budget.

56. By State Fiscal Year 2009-10, non-operating expense items constituted 57% of the total Insurance Department budget.

57. The non-operating expenses of the Department thus have increased by more than 640% during a period of six years, while the actual operating expenses increased by approximately 140%.

58. The Governor's proposed budget for Fiscal Year 2010-11 allocates approximately \$301,263,289 in non-operating expense items to the Insurance Department budget, which constitutes approximately 60% of the Department's budget.

59. The allocation of such expenses to the Insurance Department budget undermines the fiscal integrity of New York insurance companies and increases the premiums paid by New York employers and consumers for health insurance.

#### **Failed Amendment of Section 332**

60. Recognizing the limitations imposed by Section 332, Governor Paterson's initial Deficit Reduction Plan ("DRP") proposal for State Fiscal Year 2008-2009 included an amendment to Section 332.

61. The Governor's proposal would have amended the Insurance Law in order to change the intent of the assessment and authority of the Superintendent.

62. Specifically, the title's reference to the word "operating" would have been deleted, and the text of the statute would have been amended to state that the phrase "expenses of the department" includes "all appropriations whether administered by the department or suballocated to another state department, board, or agency."

63. The Governor thus recognized that under current law the Superintendent lacked authority to assess insurance companies for programs that are sub-allocated to other departments or otherwise do not relate specifically to the Department's operation.

64. After negotiations with the Legislature, however, these proposed amendments were deleted from the DRP, and Section 332 continues to limit the use of assessments to defray only the actual operating expenses of the Department.

65. Significantly, the Governor's 2010-11 budget does not include a proposal to amend the language of Section 332.

### **Recent Legislation Related to Section 332**

66. Pursuant to Insurance Law Section 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.

67. The remaining three quarterly estimated 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.

68. Pursuant to Section 332(b), after the final amount of the assessment is calculated, insurers are required to pay any balance due, while “[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.”

69. 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. Specifically, Chapter 2 of the Laws of 2009, Part H, provided:

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.

70. As made clear by this most recent legislation, the State now simply views Section 332 Assessments as general revenue, even though the assessments are paid by domestic insurers, and ultimately, consumers and employers.

## FIRST CAUSE OF ACTION

### **The Superintendent Exceeded the Authority Delegated to Him by Section 332**

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

72. The actual assessments imposed on HPA Plaintiffs by the Superintendent of Insurance, and approved by the Director of Budget, are excessive and do not constitute payment of the operating expenses of the Insurance Department.

73. By forcing insurers to pay for programs unrelated to the operating expenses of the Insurance Department, the Superintendent of Insurance has unlawfully exceeded the authority delegated to him under Section 332.

74. By approving the assessments to include items unrelated to the operating expenses of the Insurance Department, the Director of Budget has unlawfully exceeded the authority delegated to him under Section 332.

75. Such conduct by the Superintendent of Insurance and Director of Budget has resulted in overpayments by the HPA Plaintiffs, and similarly situated entities, for State Fiscal Years 2008-09 and 2009-10 of more than \$500,000,000.

## SECOND CAUSE OF ACTION

### **The Misuse of the 332 Assessments Described Herein is an Unconstitutional Delegation of Legislative Power to the Superintendent**

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

77. The Superintendent of Insurance has implemented Section 332 to include expenses unrelated to the operation of the Insurance Department and without relation to any benefit conferred on the HPA Plaintiffs.

78. To the extent Section 332 is determined to be a delegation of authority to the Superintendent to fix assessments beyond that necessary for the operation of the Insurance Department, *i.e.* to implement a tax, it is an unconstitutional delegation of legislative power.

79. Such unconstitutional delegation of the power to tax has resulted in overpayments by the HPA Plaintiffs.

### **THIRD CAUSE OF ACTION**

#### **The Misuse of the 332 Assessments Described Herein is an Unconstitutional Tax in Violation of Article III, Section 22 of the New York State Constitution**

80. Article III, Section 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.”

81. For State Fiscal Years 2003-2004 through 2009-2010, the budget appropriations for the Department of Insurance have included sub-allocations and funding for programs unrelated to the operation of the Department of Insurance.

82. Charges for such sub-allocations and unrelated programs represent taxes levied for the general purposes of the State.

83. The Article VII bills have not amended Section 332, nor do the budget bills distinctly state a tax to be imposed nor identify any object for an existing tax.

84. To the extent Section 332 is determined to provide authority to impose assessments for sub-allocations and programs unrelated to the operating expenses of the Insurance Department, it is an unconstitutional tax in derogation of the requirements of Article III, Section 22 of the New York State Constitution.

85. Such unconstitutional tax has resulted in overpayments by the HPA Plaintiffs.

## FOURTH CAUSE OF ACTION

### **The Misuse of the 332 Assessments Described Herein Violates the Equal Protection Clause of the New York and United States Constitutions**

86. Article I, Section 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 no “State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

88. The United States Supreme Court has repeatedly held that the Fourteenth Amendment limits state legislatures, when dealing with social or economic policy, from imposing statutory classifications unless “there is . . . [some] reasonably conceivable state of facts that could provide a rational basis for the classification.”

89. Fees levied pursuant to Section 332 are collected only from domestic insurance companies, while insurers domiciled outside of New York State are not subject to this expense.

90. As described above, these increased Section 332 Assessments are tantamount to a tax, and there is no rational basis to discriminate against New York insurance companies by taxing only domestic insurers.

91. The imposition of increased assessments under Section 332 thus violates the HPA Plaintiffs’ constitutional right to equal protection.

92. Such violation of the constitutional right to equal protection has resulted in overpayments by the HPA Plaintiffs.

## FIFTH CAUSE OF ACTION

### **The Misuse of the 332 Assessments Described Herein Violates the Equal Protection Clause of the New York and United States Constitutions**

93. Article I, Section 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.”

94. 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.”

95. The sub-allocations and programs unrelated to the direct and indirect operating 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 insurance.

96. There is no rational basis for singling out the HPA Plaintiffs, as opposed to the general public or other industries, to fund hundreds of millions of dollars in sub-allocations and programs unrelated to the regulation of insurers generally and/or unrelated to the regulation of health insurance specifically.

97. The imposition of assessments under Section 332 for such programs is a violation of the HPA Plaintiffs’ constitutional right to equal protection.

98. Such violation of the constitutional right to equal protection has resulted in overpayments by the HPA Plaintiffs.

## SIXTH CAUSE OF ACTION

### **The Misuse of the 332 Assessments Described Herein Violates Plaintiffs' Rights to Substantive Due Process**

99. Article I, Section 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.”

100. 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.

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

102. The Section 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.

103. 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 are unreasonable, arbitrary and capricious, and a violation of the substantive due process rights of the HPA Plaintiffs.

104. Such violation of substantive due process rights has resulted in overpayments by the HPA Plaintiffs.

## SEVENTH CAUSE OF ACTION

### **The Misuse of the 332 Assessments Described Herein Constitutes an Unconstitutional Taking of Plaintiffs' Property without Due Process of Law**

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

106. 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.”

107. Insurance Law Section 332(b) provides that overpayments of annual assessments will be refunded to the HPA Plaintiffs.

108. The Section 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.

109. In addition, Part H of Chapter 2 of the Laws of 2009 authorized the comptroller to transfer money to the General Fund in State Fiscal Year 2008-2009 that Section 332 requires be refunded to insurers. This constitutes an unconstitutional taking of the HPA Plaintiffs' property without just compensation.

110. Similarly, Defendants' diversion of Section 332 Assessments to pay for the cost of programs unrelated to the operating expenses of the Insurance Department constitute an unconstitutional confiscation of the HPA Plaintiffs' property without just compensation.

111. Such violation of due process rights has resulted in overpayments by the HPA Plaintiffs.

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

1. On the First Cause of Action, declaring the Defendants' implementation of Section 332 for State Fiscal Years 2008-2009 and 2009-2010 to be illegal, and contrary to such statute;

2. On the Second Cause of Action, declaring Section 332 as implemented for State Fiscal Years 2008-2009 and 2009-2010 to be in violation of the New York State Constitution;

3. On the Third Cause of Action, declaring Section 332 as implemented for State Fiscal Years 2008-2009 and 2009-2010 to be in violation of the New York State Constitution;

4. On the Fourth Cause of Action, declaring Section 332 as implemented for State Fiscal Years 2008-2009 and 2009-2010 to be in violation of the United States Constitution;

5. On the Fifth Cause of Action, declaring Section 332 as implemented for State Fiscal Years 2008-2009 and 2009-2010 to be in violation of the New York State and United States Constitutions;

6. On the Sixth Cause of Action, declaring Section 332 as implemented for State Fiscal Years 2008-2009 and 2009-2010 to be in violation of the New York State and United States Constitutions;

7. On the Seventh Cause of Action, declaring Section 332 as implemented for State Fiscal Years 2008-2009 and 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 unrelated to the direct and indirect operational expenses of the Insurance Department in the Section 332 Assessments;

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

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

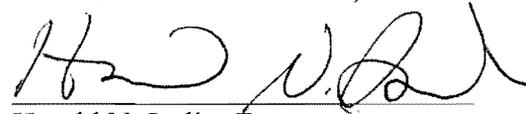
11. Granting costs, disbursements, and attorney's fees, along with such other and further relief as to this Court may seem just and proper.

Dated: Albany, New York  
January 21, 2010

Respectfully submitted,

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By:



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