18-3193

United States Court of Appeals
for the Second Circuit

Danny Donohue, as Pres. of the Civil Serv. Empl. Assoc., Inc., Local 1000, AFSCME, AFL-CIO, Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO, Milo Barlow, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Thomas Jefferson, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Cornelius Kennedy, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Judy Richards, on behalf of herself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Henry Wagoner, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units,

Plaintiffs-Appellants,

v.

Andrew M. Cuomo, in his official capacity as Governor of the State of New York, Patricia A. Hite, individually and in her official capacity as Acting Commissioner, New York State Civil Service Department, Caroline W. Ahl, in her official capacity as Commissioner of the New York State Civil Service Commission, J. Dennis Hanrahan, in his official capacity as Commissioner of the New York State Civil Service Commission, Robert L. Megna, individually and in his official capacity as Director of the New York State Division of the Budget, Thomas P. DiNapoli, in his official capacity as Comptroller of the State of New York, Jonathan Lippman, in his official capacity as Chief Judge of the New York State Unified Court System,

Defendants-Appellees,

The State of New York, New York State Civil Service Department, New York State and Local Retirement System, New York State Unified Court System,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
(1:11-cv-01530-MAD-CFH)

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

DAREN J. RYLEWICZ
Jennifer C. Zegarelli, of Counsel
Eric E. Wilke, of Counsel
Attorneys for Plaintiffs-Appellants
Civil Service Employees Association, Inc.
Box 7125, Capitol Station
143 Washington Avenue
Albany, New York 12224
(518) 257-1443
eric.wilke@cseainc.org
jennifer.zegarelli@cseainc.org

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 26.1 of the Rules of Appellate Procedure, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO ("CSEA") is a local of the American Federation of State, County and Municipal Employees ("AFSCME") through which CSEA is affiliated with the American Federation of Labor-Council of Industrial Organizations ("AFL-CIO"). CSEA is a labor organization arranged as a not-for-profit corporation. There is no publicly held corporation that owns any stock in CSEA.

JURISDICTIONAL STATEMENT

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331, as Plaintiffs claims arise under the Contracts Clause of the United States Constitution, the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291 because, by a Memorandum-Decision and Order, dated and filed September 24, 2018 ("Memorandum and Order"), the District Court for the Northern District of New York granted summary judgment for Defendants-Appellees and Defendants ("Defendants") and denied Plaintiffs-Appellants' ("Plaintiffs") cross motion for summary judgment. On September 24, 2018, the District Court for the Northern District of New York entered a judgment in Defendants' favor and ordered that the case be closed. On October 22, 2018, Plaintiffs timely filed a Notice of Appeal of the Memorandum-Decision and Order and the Judgment, which are final and dispose of all parties' claims.

ISSUES PRESENTED

1. Did the District Court err in granting Defendants-Appellees' motion for summary judgment and err in denying Plaintiffs-Appellants' cross motion for partial summary judgment with respect to Plaintiffs-Appellants' contract impairment claim that the underlying collective bargaining agreements contain language intended to provide vested, lifetime rights to a fixed health insurance contribution rate in retirement?

2. Did the District Court err in granting Defendants-Appellees' motion for summary judgment and err in denying Plaintiffs-Appellants' cross motion for partial summary judgment with respect to Plaintiffs-Appellants' New York State law breach of contract claim that the underlying collective bargaining agreements contain language intended to provide vested, lifetime rights to a fixed health insurance contribution rate in retirement?

3. Did the District Court err in finding that the declarations of Dominic Colafati and Darryl Decker were admissible when reviewing Defendants-Appellees' motion for summary judgment?

STATEMENT OF THE CASE

A. Preliminary Statement.

Plaintiffs, a group of approximately 71,000 retired New York State employees and their dependents represented by CSEA in five different collective bargaining units, brought this class action challenging Defendants' unilateral increase in health insurance contribution rates, which was made effective October 1, 2011. These plaintiffs retired from State service between January 1, 1983 and October 1, 2011. Prior to October 1, 2011, Plaintiffs' contribution rates for retiree health insurance coverage remained fixed at ten percent for individual coverage and 25 percent for family or dependent coverage. Effective October 1, 2011, the State increased such health insurance contribution rates for Plaintiffs to 12 percent for individual coverage and 27 percent for family or dependent coverage.

The various collective bargaining agreements made between CSEA and the State, which were in effect from January 1, 1983 through October 1, 2011, govern Defendants' obligations to Plaintiffs and their right to continued health insurance coverage at a fixed contribution rate. Plaintiffs assert that these contractual obligations provide the basis for its claims that Defendants breached its promise to afford a certain level of retiree health insurance.

Besides impacting this group of CSEA Plaintiffs, Defendants' actions also impacted all State employees who retired during the same time period and who are

covered by other collective bargaining agreements and represented by other labor agents. Similar lawsuits were filed by 10 other labor representatives on behalf of other State retirees and their dependents. These parallel lawsuits involve the same individual Defendants and all relate to the increase in contribution rates for retiree health insurance coverage. The District Court consolidated all matters for purposes of discovery. As part of the summary judgment decisions issued by the District Court in these matters, it was determined that this appeal would be considered to be the "Lead Case."

In the Memorandum-Decision and Order appealed from, the Honorable Mae A. D'Agostino, Northern District of New York, granted Defendants-Appellees' motion for summary judgment and denied Plaintiffs-Appellants' cross motion for summary judgment. (Joint Appendex ("J.A.") 1519-1571; Special Appendix ("S.A.") 1-53; *Donohue v. State of New York*, 2018 WL 4565765 (N.D.N.Y. Sept. 24, 2018)). In ruling, the District Court erroneously found that Plaintiffs have no right to the continuation of health insurance into retirement at a certain contribution rate. Specifically, the District Court failed to find that CSEA and Defendants negotiated the issue of retiree health insurance into its labor contracts and agreed that this group of retirees have a vested right to a specific contribution rate for the rest of their lives. Plaintiffs respectfully submit that this Court: (1) reverse the District Court's decision granting Defendants' motion for summary judgment; (2) reverse the

District Court's decision denying Plaintiffs' cross motion for summary judgment; (3) or, in the alternative, remand the matter to the District Court for a new determination, including but not limited to, a trial to determine any questions of material fact.

B. The CSEA/State Collective Bargaining Agreements.

Prior to 1983 to the present, CSEA is and has been the exclusive bargaining representative for the following bargaining units of certain employees employed by the State of New York: Administrative Services Unit ("ASU"), Operational Services Unit ("OSU"), Institutional Services Unit ("ISU"), and the Unified Court System Unit ("UCS"). (J.A. 1118 ¶3) From 1985 to the present, CSEA has been the exclusive bargaining representative for certain employees employed by the State of New York in the Division of Military and Naval Affairs Unit ("DMNA"). (J.A. 1118 ¶4).

Prior to January 1, 1983, State employees who were covered by the collective bargaining agreements between CSEA and the State who retired with ten or more years of service received individual retiree health insurance coverage in retirement at no cost to the retiree; the premiums for the individual coverage were fully paid by the State. (J.A. 1088-1098). Also prior to January 1, 1983, such retirees had the option of receiving family health insurance coverage by contributing 25 percent toward the cost of the premiums while the State paid 75 percent. (J.A. 1088-1098).

The CSEA/State collective bargaining agreements in effect on January 1, 1983, had a duration of April 1, 1982 – March 30, 1985. Those Agreements stated in Article 9, Section 1(b):

> The State agrees to continue to pay 100 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage provided under the Statewide Plan …

They further stated in Article 9 Section 8(a):

> The unremarried spouse of an employee, who retires after April 1, 1979 with ten or more years of active State service and subsequently dies, shall be permitted to continue coverage in the Health Insurance Program with payment at the same contribution rates as required of active employees.

Finally, Article 9, Section 9 provided:

> Employees added to the payroll and covered by the State Health Insurance Plan have the right to retain health insurance coverage after retirement, upon the completion of 10 years of State service.

(J.A. 1056-1064, 1066-1068).

In November 1982, CSEA, together with other unions representing employees of the State, entered into a Memorandum of Understanding (hereinafter "MOU") with the State in which the parties agreed to implement a ten percent contribution rate for individual health insurance coverage effective January 1, 1983. (J.A. 1449-1455).

The collective bargaining agreements between CSEA and the State in effect from January 1, 1983 through October 1, 2011, contained provisions that the State

shall contribute toward health insurance at the rate of ten percent for individual coverage and 25 percent for family coverage; those same agreements also provided that employees shall "retain health insurance coverage after retirement." (J.A. 1056-1064, 1066-1067, 1125 ¶37, 1261, 1269, 1289, 1293, 1309, 1313, 1337, 1345, 1458, 1460)[1].

The requirement that retirees pay ten percent toward the cost of individual coverage was enacted into law by Chapter 14 of the Laws of 1983, amending Civil Service Law §167(1), "in relations to implementing agreements between the state and employee organizations." (J.A. 1089-1098). The Governor's Memorandum in Support of Chapter 14 of the Laws of 1983 stated that the purpose of the statute was to "effectuate provisions of various memoranda of understanding executed pursuant to the collectively-negotiated agreements between the State and the employee organizations … dealing with health insurance." (J.A. 1091).

C. The State's Contract Proposals Seeking to Modify Retiree Health Insurance Contributions during the 1991, 2003, and 2007 Negotiations.

Ross Hanna was employed by CSEA for thirty-six (36) years until his retirement in October of 2016. (J.A. 1118 ¶1). At the time of his retirement from CSEA, he held the position of Director of Contract Administration, which is a position he held for twenty-seven (27) years. (J.A. 1118 ¶2). Prior to serving as the

[1] The collective bargaining agreements between CSEA and UCS provide that CSEA members "shall receive health insurance benefits… at the same contribution level…that Executive Branch employees represented by CSEA" receive. (J.A. 1421, 1424-1425, 1428, 1432-1433, 1436, 1441).

Director of Contract Administration at CSEA, he held the position of Deputy Director of Contract Administration for approximately two years. (J.A. 1118 ¶2).

During Mr. Hanna's tenure with CSEA, the Contract Administration Department was responsible for overseeing the administration of the ASU, OSU, ISU, DMNA, and UCS collective bargaining agreements between CSEA and the State of New York on behalf of CSEA. (J.A. 1118 ¶5). As part of his duties as Director of Contract Administration for CSEA, he was directly involved in preparing and attending collective bargaining negotiation sessions for successor agreements between CSEA and the State of New York. (J.A. 1118 ¶6). Specifically, he participated in the drafting of proposals on behalf of the CSEA bargaining units and reviewed proposals submitted to CSEA by the State of New York. (J.A. 1118-1119 ¶ 6). In fact, from approximately 1989 to October, 2016, Mr. Hanna served as CSEA's chief negotiator for all of CSEA's State bargaining units, including the ASU, OSU, ISU and DMNA and provided oversight for the UCS bargaining unit.[2] (J.A. 1119 ¶7).

During Mr. Hanna's tenure at CSEA, the collective bargaining negotiations for each of the four CSEA bargaining units had been performed jointly, except for separate unit negotiations which are held to discuss and negotiate specific topics and

[2] At or around 2003, the UCS collective bargaining unit agreed to follow the health insurance provisions within the collective bargaining agreements for CSEA executive branch bargaining units.

issues within each of the separate bargaining units. (J.A. 1119 ¶9). The topic of health insurance is a subject matter which is negotiated jointly. (J.A. 1119 ¶9).

1. CSEA Collective Bargaining Agreements and Retiree Health Insurance.

As a negotiator on behalf of CSEA, Ross Hanna, Director of State Operations negotiated prospective deferred benefits and coverage for active employees that would retire in the future. (J.A. 1119 ¶10). However, changes to benefits and/or coverage for employees who are already retired at the time of the negotiations are not permitted. (J.A. 1119 ¶10). Furthermore, prospective retiree health insurance is a mandatory subject of negotiation and a topic that has been negotiated and discussed between CSEA and the State for decades. (J.A. 1119 ¶11).

Prospective retiree health insurance for then current CSEA bargaining unit members was a topic of negotiation as set forth in the 1991-1995 CSEA collective bargaining agreements. (J.A. 1120 ¶12). The 1991-1995 collective bargaining agreements between CSEA and the State included the following language under Article 9.12(a) of the health insurance provisions:

> Employees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service. However, in recognition of the forthcoming changes to the Government Accounting Standards Board (GASB) requirements, both the State and CSEA recognize the need to address the inequity of providing employees who serve the minimum amount of time necessary for health insurance in retirement with the same benefits as career employees. Prior to the expiration of this contract CSEA and the State shall,

> through the Joint Committee process, develop a proposal to modify the manner in which employer contributions to retiree premiums are calculated.

(J.A. 1141).

The other CSEA bargaining units, including the OSU, ISU and DMNA units, had similar language in their collective bargaining agreements. (J.A. 1120 ¶13). This language continued to remain in the CSEA collective bargaining agreements with the State until being removed by the parties in 2004 and with the 2003-2007 labor contracts. (J.A. 1120 ¶14).

The Government Accounting Standards Board ("GASB") language pertained to the requirement that the State needed to demonstrate how it funded post-retirement benefits. (J.A. 1120 ¶15). In 2004, CSEA and the State discussed removing this language from the collective bargaining agreements. (J.A. 1120 ¶16). Due to the concern by CSEA that it did not want to diminish retiree health insurance benefits by agreeing to some sort of sliding scale related to the health insurance contribution levels for retirees, the above language was removed from the 2003-2007 collective bargaining agreements. (J.A. 1120 ¶17).

In or around June, 2004, the State, through Priscilla E. Feinberg, contacted CSEA to discuss reinserting the language into the health insurance provisions of the contract. (J.A. 1121 ¶18) Ms. Feinberg, then Director of Employee Benefits for the Governor's Office of Employee Relations, provided Laura Balogh, who at the time

served as the Director of Health Benefits for CSEA, with an internal State memorandum setting forth the State's position on retiree health insurance contribution rates. (J.A. 1121 ¶18). That internal State memorandum, which was sent by Ms. Feinberg to John V. Currier, then Executive Deputy Director of the Governor's Office of Employee Relations, outlined language from certain labor contracts, including CSEA, which provided that the parties would "develop a proposal to modify the manner in which employer contributions to retiree premiums are calculated." (J.A. 1121 ¶18, 1148-1150).

The internal memorandum from the State was forwarded to Ms. Balogh in an effort to have CSEA reconsider putting some kind of language regarding the GASB requirements back into the collective bargaining agreements. (J.A. 1121 ¶19, 1148-1150). CSEA chose not to agree to reinsert such language into the contracts as it did not want to decrease retiree health insurance benefits. (J.A. 1121 ¶19).

2. 2003 and 2007 Contract Proposals

During the negotiations between CSEA and the State of New York for the 2003-2007 ASU, OSU, ISU, DMNA, and UCS collective bargaining agreements, the State made a proposal to change the health insurance benefits for future retirees so that such benefits were based upon a sliding scale. (J.A. 1121 ¶20, 1152-1154). Specifically, the State proposed changing the premium contribution rate for "employees retiring on or after a date to be determined" to reflect the employee's

length of service. (J.A. 1121 ¶20, 1152-1154). This proposal was provided to CSEA on September 24, 2003. (J.A. 1121 ¶20, 1152).

The State's 2003 collective bargaining proposal sought to "modify" the retiree health insurance premium contribution rate, with the State contributing the following percent: (1) 10 years of service = 50% individual / 35% dependent; (2) 15 years of service = 58.75% individual / 43.75% dependent; (3) 20 years of service = 67.5% individual / 52.5% dependent; (4) 25 years of service = 76.25% individual / 61.25% dependent; (5) 30 years of service = 85% individual / 70% dependent. (J.A. 1122 ¶21, 1154). In 2003 to 2004, the percentage of premium health insurance contribution for retirees was 10% for individuals and 25% for dependent. (J.A. 1122 ¶22). The State's 2003 proposal decreased the employer contribution towards retiree health insurance premiums from 90% for individual coverage to 85%, based upon 30 years of service, and from 75% for dependent coverage to 70%, based, again, on 30 years of service. (J.A. 1122 ¶22, 1154).

In 2003 to 2004, CSEA was not interested in agreeing to decrease such contribution rates for future retirees, as proposed by the State. (J.A. 1122 ¶23). As a result, during the 2003 to 2004 negotiations between CSEA and the State, CSEA never agreed to the State's proposal to change the health insurance contributions for retirees. (J.A. 1122 ¶23). Thereafter, on March 2, 2004, at approximately 2:20 p.m., the State withdrew its proposal, in its entirety, to change the retiree health insurance

premium contribution. (J.A. 1122 ¶24, 1156-1158). This proposal was withdrawn by the State at the very cusp of the parties coming to an agreement on the overall contract as such negotiations were settled between CSEA and the State at or around midnight on March 2, 2004. (J.A. 1122 ¶24).

As part of the next round of collective bargaining negotiations for the 2007-2011 contracts for the CSEA bargaining units, the State, again, proposed to change the retiree health insurance contribution rates, such that benefits would reflect a sliding scale based upon years of State service. (J.A. 1122-1123 ¶25). Since the parties had not agreed to change the contribution rates for future retirees during the previous round of contract negotiations, the contribution rates for retiree health insurance at that time remained the same at 10% for individual coverage and 25% for dependent coverage. (J.A. 1123 ¶25). The State's proposal was presented to CSEA on August 20, 2007, at 10:25 a.m. (J.A. 1123 ¶26, 1160-1170).

The State's 2007 collective bargaining proposal sought to change the retiree health insurance premium contribution rate, with the State's contribution starting at 10 years of service, with a percent of contribution from the State at 50% for individual coverage and 35% for dependent coverage. (J.A. 1123 ¶27, 1160). The proposal further indexed retiree health insurance contributions by increasing the State's contribution rate incrementally in 5-year steps until the State's percentage of contribution rates is the same as the State's percentage contribution rates for active

employees, with the maximum contribution rates being applied to an individual with at least 30 years of service. (J.A. 1123 ¶27, 1160). This proposal was never agreed to by CSEA as it would have decreased the contribution rates paid by the State towards retiree health insurance coverage for future retirees. (J.A. 1123 ¶28). On September 11, 2007, at 10:20 a.m., the State withdrew its proposal to change retiree health insurance contribution rates. (J.A. 1123 ¶29, 1168).

As the chief negotiator for CSEA, it was Mr. Hanna's position and understanding that, since health insurance was a mandatory subject of bargaining, the contribution rates would continue unless otherwise negotiated. (J.A. 1123 ¶30). Since the parties never agreed to change the contribution rates for future retirees during the 2007 contract negotiations, the health insurance premiums for retirees remained at 10% individual coverage and 25% dependent coverage. (J.A. 1123 ¶30).

Based upon Mr. Hanna's experience as CSEA's chief negotiator for 29 years, once a CSEA member has completed 10 years of service with the State, that member is entitled to health insurance in retirement. (J.A. 1124 ¶38). Indeed, the language providing the State's percentage of premium payment does not specifically apply to active employees or retirees since it applies to all individuals that are entitled to participate in the State Health Insurance Plan. (J.A. 1124 ¶38).

Therefore, according to Mr. Hanna and his understanding during the almost three decade long position as CSEA's chief negotiator, these two provisions of the

CSEA labor contracts mean that a post-1983 retiree is entitled to health insurance coverage with the State paying 90% of the cost of individual coverage and 75% of the cost of dependent coverage upon completion of 10 years of State service. (J.A. 1124 ¶39).

3. Dependent Survivors of Retirees.

Prior to October 1, 2011, retirees, dependent survivors of retirees and active employees were paying 10% of the individual premium cost and 25% of the dependent premium cost for health insurance coverage. (J.A. 1126 ¶44). Despite the State unilaterally increasing the premium contribution rates for retirees on October 1, 2011, the contribution rates for a dependent survivor of a bargaining unit retiree has remained at the contribution rate of 10% for individual coverage and 25% for dependent coverage. (J.A. 1127 ¶45). Therefore, since January 1, 1983, the State has not changed the premium contribution rates for a dependent survivor of a retiree from 10% for individual coverage and 25% for dependent coverage. (J.A. 1127 ¶46).

D. Unilateral Implementation of Increased Rates in 2011.

In April 2011, CSEA and the State entered into a new collective bargaining agreement covering 2011-2016 that included a provision to increase the contribution rates that *employees* pay toward health insurance premiums effective October 1, 2011; however, the parties did *not* agree to increase retiree contribution rates retroactively. (J.A. 1124 ¶¶34-36). In fact, the negotiations concerning the 2011 –

2016 ASU, OSU, ISU, DMNA, and UCS collective bargaining agreements, there were no changes negotiated or even proposed by the State to the contribution rates for health insurance premiums paid by future retirees. (J.A. 1123-1124 ¶31). Therefore, the State's contribution towards retiree health insurance further continued at the rates of 10% for individual coverage and 25% for dependent coverage. (J.A. 1124 ¶31).

The legislation implementing the 2011-2016 CSEA/State agreement, Chapter 491 of the Laws of 2011, stated in part: "The president [of the Civil Service Commission], with the approval of the director of the budget, may extend the modified state cost of premium or subscription charges for … retirees not subject to an agreement … and shall promulgate the necessary rules or regulations to implement this provision." (J.A. 1216).

At the time that this legislation was enacted, the office of the President of the Civil Service Commission was vacant. (J.A. 1357-1358). Defendant Patricia Hite, as purportedly "acting" President, acted outside the authority conferred by Chapter 491 of the Laws of 2011 to implement "emergency regulations" increasing the contribution rates for individual coverage for Plaintiffs-retirees from 10% to 12% and for family coverage from 25% to 27% effective October 1, 2011. (J.A. 1405).

The legislature has not issued a declaration or any other kind of finding, as part of the 2011-2012 State budget, or separate from the State budget, stating that it

was necessary to raise the rates that retirees contribute toward the cost of their health insurance to serve the purpose of closing the State budget deficit, or to serve any other public purpose. Chapter 491 of the Laws of 2011 did not expressly authorize the impairment of the collective bargaining agreements between CSEA and the State covering the period of January 1, 1983 to October 1, 2011. (J.A. 1188-1238). In addition, the memoranda contained in the bill jacket, including the memo from the Executive Chamber, Division of the Budget, Department of Civil Service, and the memo from the Governor's Office of Employee Relations, do not mention raising the percentage of premium contribution towards health insurance for people who had already retired. (J.A. 1188-1212).

The State's witness, Joseph Bress, was hired by the Cuomo administration in 2010, through Howard Glaser, Director of State Operations, to negotiate the collective bargaining agreements between the State and the different employee unions. (J.A. 1389-1390, 1401-1403). According to Mr. Bress, there were no written proposals and/or directives from the Governor's Office to advance, other than to save $450 million. (J.A. 1393-1394). Furthermore, Mr. Bress testified that the way in which they were to achieve those savings was left up to them. (J.A. 1394). Mr. Bress claimed that he alone "raised the issue" to increase the premium contribution levels paid by individuals that were already retired. (J.A. 1395). Individuals within the Cuomo administration with whom Mr. Bress broached the

issue informally concurred. (J.A. 1396). Mr. Glaser apparently did not object or consent to advancing the idea of raising contribution levels for health insurance premiums for retirees. (J.A. 1396). Furthermore, Mr. Bress did not have any discussions regarding savings to the State budget if insurance premium contribution rates for retirees were increased, since that was not the basis for his recommendation. (J.A. 1397).

Priscilla Feinberg was the Director of Employee Benefits for the Governor's Office of Employee Relations from 1996 until she retired in 2012. (J.A. 1381). She explained that during her tenure, she worked with Robert Brondi from the Division of Budget. (J.A. 1383). According to Ms. Feinberg, Mr. Brondi made claims during every negotiation with the employee unions that the State was facing a fiscal crisis and that 2011 was no different than any other year. (J.A. 1384-1385).

Ms. Feinberg's testimony is consistent with Mr. Hanna's account during the 29 years that he was involved in collective bargaining negotiations with the State, the State has claimed in each round of negotiations for successor agreements of the need to cut costs as it was facing a budget deficit that needed to be closed. (J.A. 1126 ¶42). Mr. Hanna explained that the State has repeatedly made assertions throughout those 29 years, that it needed to balance its budget and was looking to decrease its labor costs to achieve such savings. (J.A. 1126 ¶42). Routinely, health insurance costs were one of the main subject areas where changes were proposed by the State or

have been negotiated by the parties. (J.A. 1126 ¶42). Much like Ms. Feinberg's experience, during the 2011 round of negotiations, the State again made the claim to Mr. Hanna that it was facing a financial crisis and needed to implement cost-saving measures to achieve a balanced budget. (J.A. 1384-1385, 1126 ¶43). However, both Ms. Feinberg and Mr. Hanna did not view the stated financial condition of the State in 2011 as being fundamentally different from statements made in prior years. (J.A. 1384-1385, 1126 ¶43).

SUMMARY OF THE ARGUMENT

The District Court erred when it granted the Defendants' motion for summary judgment and denied Plaintiffs' cross motion for summary judgment since the plain language in the underlying collective bargaining agreements provides for retiree health insurance at a set premium contribution rate of 10% for individual coverage and 25% for the cost of a family plan. The Supreme Court, in *Tackett v. M & G Polymers USA, LLC*, 135 S.Ct. 926 (2015), declined to adopt an explicit language requirement in favor of employers when examining contractual retirement benefits. In applying the principles and holding of *M & G Polymers*, the District Court failed to recognize that the parties intended that the retiree health insurance provisions of Article 9 of the collective bargaining agreements were to continue past the expiration of the agreements.

Parties to a collective bargaining agreement, like parties to any contract, are free to agree, and often do agree, to promises that will continue in force after the contract has expired by its terms. Here, CSEA and the State have been parties to collective bargaining agreements for CSEA's five bargaining units for decades and the language and the parties' actions underscore the parties' intent: that health insurance with a set premium contribution rate is what CSEA and the State intended.

The provisions contained within Article 9 of the collective bargaining agreements illustrate that CSEA and the State contemplated the percentage of

premium contribution that active employees, retired active employees, and retired active employees' dependents would be required to pay once the CSEA member working for the State of New York retired. When taken together, Sections 9.14(a), 9.26(a) and 9.27(a) of the underlying collective bargaining agreements provide an affirmance that the State negotiated with CSEA to provide its employees upon retirement with certain health insurance benefits, including a fixed contribution rate. In this case, where the language is not silent as to duration, Plaintiffs can establish that they vested with certain health insurance rights under the labor contracts when they retired.

Even if the Court is to find that the language of the agreements is ambiguous, extrinsic evidence confirms that the parties intended to provide a vested right to retiree health insurance benefits to Plaintiffs, which included a certain contribution rate. On the record, it is clear and undisputed that the State, for nearly three decades, provided the same health benefits to retirees as were in effect when they retired. This fact is consistent with the parties' understanding that the promises to provide those vested benefits remained enforceable after the expiration of the agreement which was the same agreement in effect when such employee retired. Finally, CSEA introduced evidence from its chief negotiator, Ross Hanna, who served in such capacity for approximately 29 years, that the State contemplated changing retiree health insurance contributions but CSEA never agreed to such proposals. Therefore,

the State knew it was obligated to provide these benefits, otherwise it would never have sought any amendments to retiree health insurance provisions as it did during the collective bargaining negotiations between the parties in 1991, 2003 and 2007. The information provided by Mr. Hanna also proves that, by not changing the premium contribution rates to surviving spouses and dependents of retirees, like it did with all retired employees in 2011, the State has breached its obligations.

Further, the District Court erred by accepting and considering the declarations of Dominic Colafati and Daryl Decker that were in support of Defendants' motion for summary judgment, since neither individual was disclosed as a witness throughout this protracted litigation. Indeed, the contents of Mr. Colafati's declaration clearly illustrates that the State was utilizing Mr. Colafati as an expert witness. This severely prejudiced the Plaintiffs, not only because they did not have the ability to depose Mr. Colafati, but Plaintiffs did not have an opportunity to question him regarding his credentials to provide expert testimony, nor did plaintiffs anticipate the need to retain their own expert. As with Mr. Colafati, plaintiffs should have been afforded the opportunity to depose Mr. Decker to question how he concluded the meaning of contract language that was negotiated years prior to his employment at the Governor's Office of Employee Relations. Both Mr. Colafati and Mr. Decker were employed by the State and under their control throughout this entire litigation. There was no excuse as to why these two individuals were not disclosed.

The mere fact that others echoed the contents of their declarations does not resolve any prejudice. FRCP 26(a)(1)(A), requires parties to disclose "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses." Plaintiffs are at a disadvantage by Defendants' failure to disclose these two individuals, since it is unknown whether they possess any information that was properly discoverable and would have been favorable to Plaintiffs. Therefore, the District Court erred by its acceptance and consideration of both of these declarations.

Plaintiffs have clearly demonstrated that the District Court erred in granting Defendants' motion for summary judgment, while denying Plaintiffs' cross motion for summary judgment.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT THE COLLECTIVE BARGAINING AGREEMENTS DO NOT PROVIDE PLAINTIFFS WITH A VESTED RIGHT TO A FIXED HEALTH INSURANCE CONTRIBUTION RATE IN RETIREMENT.

A. Standard of Review

In rendering its Memorandum and Order, the District Court improperly granted Defendants' motion for summary judgment while denying Plaintiffs' cross motion for partial summary judgment. This decision is subject to *de novo* review.

Roe v. City of Waterbury, 542 F.3d 31, 35 (2d Cir. 2008); *Lyn v. Inc. Village of Hempstead*, 308 Fed. Appx. 461, 464 (2d Cir. 2009).

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court will not accept as fact, allegations lacking evidentiary support. Fed. R. Civ. P. 56(e). A disputed fact is "material," however, only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Furthermore, "[a]n issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001).

Here, as discussed more specifically below, none of the disputed facts are material or genuine to Plaintiffs' ability to establish that Defendants have impaired the underlying collective bargaining agreements and breached such labor contracts. Accordingly, Plaintiffs respectfully submit that the District Court failed to find there is no genuine dispute between the parties on the material facts underlying Plaintiffs' cross motion on its contract impairment and breach of contract claims. For the reasons set forth below, Plaintiffs' motion for partial summary judgment on these two causes of action should have been granted as a matter of law, and Defendants' motion for summary judgment should have been denied.

B. Plaintiffs Should Have Been Awarded Summary Judgment on Their Contract Impairment Claim

Under Article 1, §10 of the United States Constitution, commonly referred to as the Contract Clause, states are prohibited from passing laws that impair the obligation of contracts. *See,* U.S. Const., Art. 1, §10. The Supreme Court has held that courts are to apply a three part test to determine if a state law violates the Contract Clause, namely: (1) whether a contract exists; (2) if so, whether the law in question impairs an obligation under the contract; and (3) whether the impairment is substantial. *See, General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). Where there is a substantial impairment, the court may further inquire as to whether such an impairment is reasonable and necessary to fulfill an important public purpose. *See, Energy Reserves Group v. Kansas Power & Light,* 459 U.S. 400, 411-12 (1983); *see, also, Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978).

1. There is No Dispute that the Underlying Collective Bargaining Agreements Create a Contractual Relationship.

Plaintiffs' contractual claims lie primarily with the health insurance provisions of the negotiated collective bargaining agreements. These provisions have been in place for decades and provide for the continuation of health insurance benefits for bargaining unit retirees. In analyzing whether the parties entered into an agreement concerning retiree health insurance contribution rates, the District Court correctly pointed to Article 9 of the underlying labor contracts. In rendering its opinion,

however, the District Court inappropriately determined that Defendants' contractual obligations ceased upon termination of each respective collective bargaining agreement. (J.A. 1519-1571; S.A. 1-53).

Contrary to the District Court's findings, Article 9 of the underlying collective bargaining agreements do specify a vested right to retiree health insurance at a fixed contribution rate. Where a written agreement is "complete, clear and unambiguous on its face[,] [it] must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). Accordingly, "[t]he best evidence of what parties to a written agreement intend is what they say in their writing." *Slamow v. Del Col,* 79 N.Y.2d 1016, 1018 (1992). Therefore, where a written agreement is complete, clear and unambiguous it must be enforced according to the plain meaning of its terms.

In its Memorandum and Order, the Court looked to ordinary principles of federal and New York state contract law for determining Plaintiffs' rights under these agreements. (J.A. 1540; S.A. 22). Under *Tackett v. M & G Polymers USA, LLC*, 135 S.Ct. 926 (2015) the Supreme Court rejected the *Yard-Man* inference, which previously found in favor of vested retiree benefits in all collective bargaining agreements, but it also declined to adopt an explicit language requirement in favor of employers. *M & G Polymers*, 135 S.Ct. at 937, 938, *citing to*, *International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW) v. Yard-*

Man, Inc., 716 F.2d 1476 (6th Cir. 1983); *see also*, *Litton Fin. Printing Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 207 (1991) (holding that obligations to provide certain benefits after the expiration of an agreement may arise from the express or implied terms of the expired agreement itself). The Supreme Court specifically stated that the *Yard-Man* inference should not be applied "when a contract is ***silent*** as to the duration of retiree benefits." *M & G Polymers*, 135 S. Ct. at 937. In her concurring opinion, Justice Ginsburg further explained that the court "should examine the entire agreement to determine whether the parties intended retiree health-care benefits to vest" and "[i]f, after considering all relevant contractual language in light of industry practices, [the court] concludes that the contract is ambiguous, it may turn to extrinsic evidence- for example, the parties' bargaining history." *Id.* at 938.[3]

In applying the principles outlined in *Tackett v. M & G Polymers USA, LLC*, the District Court failed to recognize that the terms of Article 9 of the collective bargaining agreements, along with extrinsic evidence involving the parties' intent

[3] Besides *M & G Polymers*, this contract interpretation issue should be reviewed under the New York Court of Appeals decision in *Kolbe v. Tibbetts*, 22 N.Y.3d 344 (2013). The Court of Appeals in *Kolbe v. Tibbetts*, 22 N.Y.3d 344 (2013), expressly determined the appropriate review of contractual language when considering the vesting of retiree health insurance coverage. In *Kolbe*, the court held that "[r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. . . and we must look to well established principles of contract interpretation to determine whether the parties intended that the contract give rise to a vested right." *Id.* at 353. In concluding that the language in the contract provided for a vested right to retiree health insurance, the Court of Appeals stated that it was "logical to assume that the bargaining unit intended to insulate retirees from losing important insurance rights during subsequent negotiations by using language in each and every contract which fixed their rights to coverage as of the time they retired." *Id.* at 354-55, *citing*, *Della Rocco v. City of Schenectady,* 252 A.D.2d 82, 84 (3d Dep't 1998) (finding that the subject contract provision entitled retirees to the same or equivalent coverage as the coverage in effect at the time they retired).

and bargaining history, do provide a basis for concluding that Plaintiffs are entitled to vest with lifetime retiree benefits. The contracts impaired by the 2011 amendment concern collective bargaining agreements entered into between CSEA and the State. It is undisputed that the contract language at-issue herein has been included in such agreements since the 1982-1985 collective bargaining agreements. (J.A. 1125 ¶37). Furthermore, such collective bargaining agreements specifically reference retiree health insurance coverage. (J.A. 1125-1126 ¶¶37-41).

As set forth in the 2011-2016 collective bargaining agreements between the State of New York and CSEA, Sections 9.14(a), 9.26(a) and 9.27(a) collectively provide for retiree health insurance coverage, including contribution rates. (J.A. 1125-1126 ¶¶37-41, 1175, 1177). When read together, these health insurance provisions provide for the same health insurance coverage during retirement as that in effect at the time of Plaintiffs' retirement.

Specifically, Section 9.27(a) provides that, "[e]mployees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service." (J.A. 1125 ¶37). Furthermore, Section 9.14(a) provides that "[t]he State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan." (J.A. 1125 ¶37). The language contained in both clauses within Section 9, has been in the

CSEA / State collective bargaining agreements since the 1982-1985 labor contracts. (J.A. 1125 ¶37).

Furthermore, there is language contained in the 2011-2016 collective bargaining agreements, in Section 9.26, that provides, "[t]he unremarried spouse and otherwise eligible dependent children of an employee, who retires after April 1, 1979, with ten or more years of active State service and subsequently dies, shall be permitted to continue coverage in the health insurance program with payment at the same contribution rates as required of active employees for the same coverage." (J.A. 1126-1127 ¶¶44-46, 1268-1269, 1293, 1313, 1344). This language has remained in the collective bargaining agreements between CSEA and the State of New York substantially unchanged since prior to January 1, 1983, to the present. (J.A. 1126-1127 ¶46).

Prior to October 1, 2011, retirees, dependent survivors of retirees and active employees were paying 10% of the individual premium cost and 25% of the dependent premium cost for health insurance coverage. (J.A. 1126 ¶44). Despite the State unilaterally increasing the premium contribution rates for those people that retired between January 1, 2011 to October 1, 2011, the contribution rates for a dependent survivor of a bargaining unit retiree that retired during the same period has remained at the contribution rate of 10% for individual coverage and 25% for dependent coverage. (J.A. 1127 ¶45). Therefore, since January 1, 1983, the State

has not changed the premium contribution rates for a dependent survivor of a retiree from 10% for individual coverage and 25% for dependent coverage. (J.A. 1127 ¶46).

This benefit for dependent survivors of retirees has clearly been interpreted as the percentage of premium contribution required within the various collective bargaining agreements from January 1, 1983 to October 1, 2011. Certainly, Defendants' argument runs afoul when looking at such evidence that a surviving spouse is receiving a better contribution rate than the actual retiree. The fact that these individuals have not seen an increase in their health insurance premium contributions is evidence that the parties intended to lock in the premium contribution rates contained within each collective bargaining agreement between 1983 and 2011.

It is important to note that, at the time the health insurance contribution rates were increased in 2011, the next collective bargaining agreements added language in Section 9.14(a) identifying the increase to only employees. The supplemental language was included to effectuate the parties' agreement to increase health insurance contribution rates for current employees only and provides:

> Effective October 1, 2011 *for employees* in a title Salary Grade 9 or below or an employee equated to a position title Salary Grade 9 or below, the State agrees to pay 88 percent of the cost of individual coverage and 73 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan. Effective October 1, 2011 for employees in a title Salary Grade 10

> and above the State agrees to pay 84 percent of the cost of individual coverage and 69 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan.

(J.A. 1261, 1289, 1309, 1337).

This addition did not specify or include retirees, whereas other provisions of this article identify and relate explicitly to retirees. As further evidence that this increase was to pertain to only current employees, the supplemental language identified the increases to certain salary grades, again, without mention of retirees. Certainly, if the parties intended to include retirees in this group, they would have identified them in this language, as included in other retiree provisions. In addition, if the at-issue increases to the contribution rates were to apply to retirees, as well as active employees, it begs the question as to why the first sentence of Section 9.14(a), identifying the rates of 90 percent and 75 percent, remained in the labor contracts if, as Defendants allege, such rates do not apply to retirees and the 2011 increases applied to current employees. (J.A. 1261, 1289, 1309, 1337).

The assertions of Ross Hanna, CSEA's chief negotiator for twenty-seven (27) years, from 1989 until 2016, provides further evidence of the parties' intent governing the 2011 increases in contributions rates. According to Mr. Hanna, his understanding of the aforementioned provisions of the CSEA labor contracts is that a post-1983 retiree is entitled to health insurance coverage with the State paying 90%

of the cost of individual coverage and 75% of the cost of dependent coverage upon completion of 10 years of State service. (J.A. 1125-1126 ¶¶37-41). Mr. Hanna asserts that the agreed upon language of Section 9.14(a) does not identify that the contribution rates of 90 percent and 75 percent only apply to current or active employees. (J.A. 1125 ¶38).

Further evidence of the parties understanding of this language is the fact that the State's proposals during the negotiations in 1991, 2003, and 2007, to change the eligibility and contribution rates for retiree health insurance from the above language. (J.A. 1120-1124 ¶¶12, 16-33). It is important to note, that during the period in question, although the State sought to increase the retirees' contribution percentage for decades, CSEA never agreed to change or modify this language and the practice of providing retiree health insurance contribution rates for retirees at 90% for individual coverage and 75% for dependent coverage remained unchanged until October 1, 2011. (J.A. 1124 ¶36).

It should be further noted that the declarations submitted by Defendants in support of its position, and motion for summary judgment, on this issue are made by individuals who have little to no experience or knowledge regarding the past history of collective bargaining negotiations between the parties. In fact, all of these declarations make the bald assertion as to the meaning behind such language without any proof that such individual(s) have any knowledge or information concerning the

parties' intent or understanding concerning the health insurance provisions of Article 9. At most, these declarants were involved in the 2016-2021 collective bargaining negotiations between the State and CSEA (*see,* J.A. 833 ¶6), or "maintained familiarity with the provisions of the CBAs relating to benefits." (*See,* J.A. 837 ¶6). Whereas Plaintiffs have provided information from Ross Hanna, CSEA's chief negotiator since 1989, to explain the meaning of the labor contracts as it relates to retiree health insurance, Defendants have provided no evidence concerning past negotiating history between the parties concerning the intent or meaning of Article 9. The State's argument in construing Section 9.1(a) is nothing more than a red herring and should be completely disregarded by the Court.

Contrary to the State's assertions, the plain meaning of these provisions unambiguously establishes that Plaintiffs have a vested right to retiree health insurance contribution rates paid by the State at 90% for individual coverage and 75% for dependent coverage. Therefore, as explained below, the record shows that there is a "substantial" impairment of the retiree health insurance provisions of the contracts and the impairment is not reasonable and necessary to accomplish an important public purpose.

2. The Contract Impairments Are "Substantial."

Contrary to the District Court's finding on this point, Plaintiffs had a very reasonable expectation that when they retired from State service, their premium

contribution rate for health insurance would not increase. The Second Circuit has held that the substantiality of contract impairment may be determined by examining "the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recycling Indus. v. City of N.Y.*, 107 F.3d 985, 993 (2d Cir. 1997). The Eighth Circuit has specifically held that the failure to continue contractually negotiated premium payments or to fund benefit provisions is a "substantial" impairment. *AFSCME v. City of Benton, Arkansas*, 513 F.3d 874 (8th Cir. 2008). Indeed, the State's own witness, James Dewan, confirmed that the increase to retirees is tens of millions of dollars on an ongoing basis annually. (J.A. 1375).

In *Ass'n of Surrogates v. State (Surrogates I),* 940 F.2d 766, 774 (2d Cir. 1991); *Ass'n of Surrogates v. State (Surrogates II)*, 79 N.Y.2d 39 (1992); and *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993), the Second Circuit struck down a *delay* in payment of employees' salaries, finding that it was a substantial impairment. The permanent deprivation of the guaranteed contribution rates toward retirees' health insurance imposed here at a cost of tens of millions of dollars per year is undeniably an even greater impairment. *See also*, *Sonoma County Org. of Public Employees v. City of Long Beach*, 23 Cal. 3d 296, 313 (1979); *Chiles v. United Faculty of Florida*, 615 So.2d 671, 673 (1993).

Here, Plaintiffs and other individuals that retired between January 1, 1983 and October 1, 2011, had well-established expectations that this longstanding benefit would continue as it had for twenty-eight (28) years. Furthermore, Plaintiffs' expectation that such contribution rates would continue is supported by the fact that "once employees retire, they are no longer represented by the union in collective bargaining negotiations." *Kolbe v. Tibbetts,* 22 N.Y. 3d 344, 354 (2013).

To find, as the District Court did, that "any expectation of a perpetually fixed contribution rate in retirement was unreasonable based on the plain language of the CBAs," is inappropriate given the provisions of these labor contracts. (J.A. 1545; S.A. 27). As discussed above, the provisions of Article 9 of the collective bargaining agreement provide a basis for Plaintiffs to reasonably expect and believe that their contribution rates towards health insurance would not change once they retired. Significantly, the language governing the retention of health insurance into retirement, along with the contribution rates for that of surviving spouses and dependents, lends a retiree to conclude and believe that he/she will not have a change to their contribution rate.

The District Court's conclusion on this point is also flawed when it found that the contribution rates for employees and retirees did not change between 1983 and 2011 because "the need did not arise to make changes to the premium contribution rates." (J.A. 1546; S.A. 28). Certainly, the assertions of Mr. Hanna, along with the

State's contract proposals in 1991, 2003 and 2007, provide further evidence that the reason for not changing retiree health insurance contributions was due to the fact that such change could not have been done unilaterally and without negotiation with CSEA. In addition, any changes to health insurance contributions for retirees could not have been done retroactively. Accordingly, as the courts have held, when an employer unilaterally takes away a bargained-for right that is obtained through union contract negotiations, it is a "substantial" impairment.

Based on the foregoing, Plaintiffs have satisfied the prong of the test for an unconstitutional impairment that requires the impairment to be "substantial."

3. The Means Are Not "Reasonable and Necessary to Achieve an Important Public Purpose."

The Supreme Court has mandated that the impairment of a contract is constitutional only if it is "reasonable and necessary" for a governmental body to achieve "an important public purpose." *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977). In *Surrogates I, supra,* 940 F.2d at 774, the Second Circuit held that, although the alternatives to impairing contracts may not be "popular among politician-legislatures, [] that is precisely the reason that the contract clause exists." And as stated in *Opinion of Justices,* 135 N.H. 625 (1992), "the State cannot resort to contract violations to solve its fiscal problems." *Id.* at 634.

Defendants' claim that increasing the health insurance contribution premiums for individuals that retired between January 1, 1983 and October 1, 2011, was

reasonable and necessary is belied by the record in this matter. First, according to the State's witness James Dewan, the annual savings to the State to increase the contribution levels for those individuals that retired was between $20 million and $30 million annually. (J.A. 1364). While that is a significant amount of money to a class of individuals on a fixed income, the State's overall budget for the 2011-2012 fiscal year was $131.7 billion. (J.A. 1186). Based upon the State's estimated savings, it was at most .023% of the overall $131.7 billion State budget and at the least .015% of the budget, which cannot be truly be deemed as reasonable and necessary. Second, the State's chief negotiator in 2011, Joseph Bress, testified that there were no written proposals and/or directives from the Governor's Office to advance other than to save $450 million, but rather he was given *carte blanche* to achieve those savings in whatever way he was able to. (J.A. 1393, 1394). According to Mr. Bress, within the confines of that general directive, he alone "raised the issue" to increase the premium contribution levels paid by individuals that already retired. (J.A. 1395). While Mr. Bress discussed the idea of raising premium contribution rates for retirees with individuals within the Cuomo administration, those discussions were informal and, other than Mr. Glaser who did not object or consent to Mr. Bress' advancing the idea, the individuals with whom he discussed the idea simply concurred. (J.A. 1396). Finally, the State cannot legitimately claim that the increases in premium contributions were reasonable and necessary, since their chief

negotiator, Mr. Bress, testified that he did not have any discussions regarding savings to the State budget if insurance premium contribution rates for retirees were increased, since that was not the basis for his recommendation. (J.A. 1397).

Further evidence that increasing the premium contributions for retirees was not reasonable and necessary to achieve a legitimate public purpose is the testimony of the State's witness Priscilla Feinberg. Ms. Feinberg explained that during her tenure, she worked with Robert Brondi from the Division of Budget. (J.A. 1383). According to Ms. Feinberg, Mr. Brondi made claims during every negotiation with the employee unions that the State was facing a fiscal crisis and that 2011 was no different than any other year. (J.A. 1384-1385).

Where a governmental body is attempting to impair its *own* contracts, the Supreme Court requires particularly careful consideration because, the Court cautioned in *U.S. Trust Co., supra,* 431 U.S. at 30-31, that the governmental body may be tempted to act based on sheer "self-interest." *See also, Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Surrogates I, supra*, 940 F.2d 766, 774; *Condell v. Bress*, *supra,* 983 F.2d 415.

What is clear from Mr. Bress' and Ms. Feinberg's testimony is that the increase in the percentage for premium contributions by retirees was not based upon careful analysis or part of an overall carefully considered strategy or plan; rather, it was the brainchild of the State's negotiator who "raised the issue" on his own and

then received informal "concurrence" on the matter from those with whom he raised the issue. (J.A. 1395, 1396).

Here, Defendants claim the Recession that began in December of 2007 was rationale for their ability to raise health insurance contribution premiums for retirees on October 1, 2011. While the Legislature approved the 2011-2012 Executive budget, there is no evidence in the record that an "emergency" had been declared or any specific findings by the Legislature that it was necessary to impair these contracts. If saving money to reduce a budget deficit was a legitimate basis for a governmental body to violate its contractual obligations, no government contracts would ever be safe. *See*, *U.S. Trust Co., supra,* 431 U.S. at 30-31; *Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. at 245; *Fraternal Order of Police v. Prince George's County,* 645 F.Supp.2d 492, 508 (D. Md. 2009), *overturned on other grounds*, 608 F.3d 183 (2010).

Where a governmental body seeks to solve a budget shortfall by impairing its own contracts, the courts will not uphold the impairment unless the governmental action is "narrowly tailored" to meet specific budgetary needs, and "less drastic" alternatives were shown to be unavailable. *Prince George's County, supra,* 645 F.Supp.2d at 511. For examples of narrow, tailored, measures that have been found reasonable and appropriate, *compare, Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 369 (2d Cir. 2006) (where the court said it was reasonable and necessary to impose

temporary wage freezes as part of a careful overall plan and where alternatives had been exhausted) and *Subway-Surface Supervisors Ass'n v. N.Y. City Transit Auth.*, 44 N.Y.2d 101 (1981) (where a temporary wage freeze was found to be proper where it was part of a careful structured effort to deal with a financial crisis and alternatives were considered but not feasible).

It has further been held that, as here, "[b]road reference to an economic problem does not speak to the policy consideration and tailoring that is required to pass scrutiny under the plaintiffs' Contract Clause challenge. Defendants cannot rest such a substantial impairment of its contracts on such a minute basis." *Donohue, et al. v. Paterson, et al.,* 715 F.Supp.2d 306 (N.D.N.Y. 2010).

Here, Chapter 491 of the Laws of 2011 did not expressly authorize the impairment of the collective bargaining agreements between CSEA and the State covering the period of January 1, 1983 to October 1, 2011. (J.A. 1189-1238). Of significance, none of the memoranda contained in the bill jacket, including the memo from the Executive Chamber, Division of the Budget, Department of Civil Service, and the memo from the Governor's Office of Employee Relations, even mentions raising the percentage of premium contribution towards health insurance for people who had already retired. (J.A. 1193-1212).

Impairing the aforementioned contracts in an amount that would at most save .023% of the overall $131.7 billion State budget and at the least .015% of the budget,

clearly does not constitute reasonable and necessary means to serve an important public purpose.

POINT II

PLAINTIFFS HAVE DEMONSTRATED THAT DEFENDANTS BREACHED PLAINTIFFS' VESTED RIGHTS TO RETIREE HEALTH INSURANCE CONTRIBUTION RATES AS SET FORTH IN THE PARTIES' COLLECTIVE BARGAINING AGREEMENTS.

With respect to Plaintiffs' state law claim for breach of contract, the District Court improperly granted Defendants' motion for summary while denying Plaintiffs' cross motion for partial summary judgment. This decision is subject to *de novo* review. *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008); *Lyn v. Inc. Village of Hempstead*, 308 Fed. Appx. 461, 464 (2d Cir. 2009).

As the District Court properly referenced, "[t]he essential elements of a breach of contract cause of action are 'the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach.'" *Canzona v. Atanasio*, 118 A.D.3d 837, 838-839 (2d Dep't 2014). (J.A. 1552, S.A. 34) However, Plaintiffs respectfully submit that the District Court misapplied the contract language at issue.

As set forth above, the parties entered into a valid agreement concerning vested rights for fixed retiree health insurance contributions which was perpetual and which should have continued uninterrupted for the life of the retiree. New York

State courts have consistently found that the parties to a collective bargaining agreement can create vested, lifetime rights to unchanged health insurance benefits for retirees. *See, Kolbe v. Tibbetts*, 22 N.Y.3d 344 (2013); *Agor v. Board of Educ.*, 115 A.D.3d 1047 (3d Dep't 2014); *Warner v. Board of Educ.,* 108 A.D.3d 835 (3d Dep't 2013); *Hudock v. Village of Endicott*, 28 A.D.3d 923 (3d Dep't 2006); *Della Rocco v. City of Schenectady*, 252 A.D.2d 82 (3d Dep't 1998); *Meyers v. City of Schenectady*, 244 A.D.2d 845 (3d Dep't 1997), *leave to appeal denied*, 91 N.Y.2d 812 (1998).

Any claim by Defendants that Plaintiffs have failed to support the first essential element of a breach of contract claim, namely the existence of a contract, is without merit. There is no question that CSEA and the State entered into an agreement, specifically the collective bargaining agreements which, collectively, cover decades of agreements concerning the terms and conditions of employment and deferred compensation to be received in retirement. As previously argued, in Point I, supra, the subject of health insurance benefits is a matter plainly addressed in the collective bargaining agreements and is specifically provided for under Article 9. Defendants' argument is fatally flawed because it fails to consider the retiree health insurance provisions that collectively created a vested right to fixed contribution rates. Mistakenly, the State and the District Court focused on a provision of Article 9, namely Section 9.1(a), in an effort to disclaim any vested right to retiree health

insurance. However, this argument is misplaced given the underlying provisions of Sections 9.14, 9.26 and 9.27, which clearly and specifically address retiree health insurance. Therefore, and as set forth above, the State has breached its contractual obligation to provide Plaintiffs with retiree health insurance coverage at fixed contribution rates by the State of 90% for individual coverage and 75% for dependent coverage. And the District Court erred in failing to so find.

POINT III

THE DISTRICT COURT'S CONSIDERATION OF AND RELIANCE UPON THE COLAFATI AND DECKER DECLARATIONS WAS AN ABUSE OF ITS DISCRETION SINCE PRECLUSION OF THEIR DECLARATIONS WAS REQUIRED DUE TO DEFENDANTS' FAILURE TO DISCLOSE THEM AS WITNESSES THROUGHOUT THIS LENGTHY LITIGATION.

A. The Standard for Exclusion.

Federal Rule 26 requires parties to disclose the identity of individuals "likely to have discoverable information …that the disclosing party may use to support its claims or defense." Fed. R. Civ. P. 26(a). Parties are also required to update and supplement their disclosures and other discovery responses in "a timely manner." Fed. R. Civ. P. 26(e). Furthermore, Rule 26(a)(2)(A) requires a party to disclose "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26(a)(2)(A). Indeed, "the identity of any witness who may be used to provide expert testimony, whether specifically

retained for that purpose or not, must be disclosed." *DVL, Inc. v. General Electric. Co.*, 811 F. Supp.2d 579, 588 (N.D.N.Y. 2010) *citing to Lamere v. New York State Office for the Aging*, No. 03-CV-0356, 2004 WL 1592669 at *1 (N.D.N.Y. July 14, 2004). In addition, Rule 26(a)(2)(B) requires the additional disclosure of "a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). Disclosures made pursuant to Rule 26(a)(2) must be provided "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D); *DVL, Inc. v. General Electric. Co.*, supra. "The purpose of Rule 26(a)(1)(A) is to 'alert an opposing party of the need to take discovery of the named witness.'" *Harris v. Donohue*, 2017 WL 3638452, at *2 (N.D.N.Y. Aug. 23, 2017) *citing Badolato v. Long Island R.R.*, 2016 WL 6236311, at *4 (E.D.N.Y. Oct. 25, 2016).

"If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). As one Court stated,

> A failure to disclose is substantially justified when 'there is justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request, or if there exists a genuine dispute concerning compliance.' Harmlessness under Rule 37(c)(1) requires an 'absence of prejudice to the defendant.' *Wu*

v. Metro-North Commuter Railroad Commuter Railroad Co., No. 14-CV-7015, 2016 WL 5793971 at *9 (S.D.N.Y. August 4, 2016) (internal quotations and citation omitted).

In determining whether preclusion is appropriate, a court must consider "(1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance." *DVL, Inc. v. General Electric. Co.*, supra, (citation omitted); *see also, Zelaya v. Tutor Perini Corporation*, slip copy, No. 16-CV-272, 2017 WL 4712421 at *3-4, (S.D.N.Y. Sept. 28, 2017). Furthermore, where the "witness' testimony is based on scientific, technical or other specialized knowledge, see Fed. R. Evid. 702, the interplay between Rule 26(a)(2)'s mandatory disclosure and Rule 37(c)(1)'s prohibition on the use of untimely expert testimony, prevents the unfair 'sandbagging' of adverse parties with new evidence." *DVL, Inc. v. General Electric. Co.*, supra.

In the instant matter, Defendants' December 9, 2013, witness disclosure pursuant to Rule 26, included the names of sixteen (16) individuals. (J.A. 1240-1242). Defendants did not disclose Dominic Colafati or Darryl Decker and made no subsequent disclosure of witnesses. (J.A. 1182 ¶4). Plaintiffs went through the time and expense to depose the sixteen (16) witnesses that were disclosed by Defendants,

but did not have the opportunity to depose Mr. Colafati or Mr. Decker since they were never disclosed by Defendants. (J.A. 1182 ¶4).

B. Dominic Colafati's Declaration.

Mr. Colafati's sworn statement explains that he has been employed by the New York State Division of the Budget ("DOB") in various capacities since 1994, and more particularly, as the Chief Budget Examiner for DOB's Expenditure Debt Unit ("ETU") from February 2008 to January 2015 and January 2016 to the present. (J.A. 823 ¶1). Mr. Colafati states further that he is responsible for all aspects of the ETU's operations which includes overseeing the State's Financial Plan. (J.A. 823 ¶1). Although he indicates that his employment at DOB may have exposed him to aspects of the State's finances and the processes of developing the annual budget, a review of Mr. Colafati's Declaration reveals that the Defendants are attempting to use Mr. Colafati's expertise and analysis of the DOB financial records and documents, rather than as a fact witness based upon his own personal observations and experiences.

The District Court incorrectly determined that Mr. Colafati's declaration does not constitute expert testimony. Indeed, the District Court erred when it determined that Mr. Colafati merely set forth "institutional facts (many of which were publically known), not facts that were personal to him," without identifying what facts the Court considered or identifying how those facts were publicly known. (J.A. 1569

S.A. 51). Contained within Mr. Colafati's Declaration is data and his analysis concerning New York State's finances during all times relevant in this action allegedly based on records maintained by the DOB in the regular course of its business which have not been identified or disclosed to Plaintiffs, including quoted reports from "Standards and Poor's", "Fitch Ratings" and "Moody's Investors Service" (J.A. 823, 829-830 ¶¶ 2, 14, 15, and 16). Mr. Colafati's statement does not relate an account of his own experience concerning the events at issue in this action. Instead, Mr. Colafati's statement essentially purports to convey an analysis of New York State's finances and a supposed "budget gap closing plan" from 2009 to 2012, with monetary facts and figures. It is clear that Mr. Colafati's testimony is being used to demonstrate that the Defendants had a "legitimate public purpose" to excuse Defendants' unconstitutional impairment of Plaintiffs' contract rights and the extension of increases in the health insurance premium contribution rates to Plaintiff retirees. (J.A. 817-820 ¶¶ 66-92). The information from this Declarant was relied upon by Defendants and was submitted to the District Court for consideration without the opportunity for Plaintiffs to question this witness as to his knowledge of any relevant facts, therefore undercutting the very purpose of Rule 26 disclosure.

A plain reading of Mr. Colafati's Declaration reveals that it is expert testimony. Defendants have clearly offered Mr. Colafati's statement to rely upon what is purported to be his own specialized knowledge; thus, Mr. Colafati's

statement is not being offered as lay testimony, but rather expert testimony (*see* Fed. R. Evid. 702). As the Court stated in *Lamere v. New York State Office for the Aging*, supra at 1:

> Whether a report must be prepared is not the *sine qua non* of whether a witness is an expert. Rather, it is the substance of the testimony that controls whether it is considered expert or lay testimony. *See generally* .....Fed.R.Evid. 701, advisory committee notes to 2000 amendments ("The amendment does not distinguish between expert and lay *witnesses,* but rather expert and lay *testimony.* Certainly it is possible for the same witness to provide lay and expert testimony in a single case.... The amendment makes clear that any part of a witnesses' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules").

Therefore, since Defendants did not properly disclose Mr. Colafati as an expert, pursuant to Rule 26, and only provided his Declaration in support of the Defendants' motion for summary judgment, Plaintiffs did not have any opportunity to anticipate, challenge, or counter his statements, assessments or conclusions or to arrange for expert testimony and did not have the opportunity to controvert his statements contained within Defendants' statement of material facts. At a minimum, Plaintiffs should have had the opportunity to examine whether Mr. Colafati is in fact qualified to testify on the subjects for which he is being offered. *See, Wu v. Metro-North Commuter Railroad Commuter Railroad Co.*, supra. As such, the District Court should have excluded Mr. Colafati's testimony on the basis that he is an

undisclosed expert witness since to admit Mr. Colafati's Declaration for the Court's determination of the summary judgment motion would greatly prejudice the Plaintiffs. *See e.g. DVL, Inc. v. General Electric. Co.*, supra, at 590-592, where the court struck the Declarations of a long-term employee of DEC involved in hazardous waste cleanup finding his Declarations about the cleanup constituted expert testimony instead of lay witness testimony.

Even if Mr. Colafati's testimony was lay testimony, under these circumstances, his testimony greatly prejudiced the Plaintiffs. Based on the discovery that was conducted and the depositions that were taken in this action, Plaintiffs had no basis to anticipate Mr. Colafati's testimony in order to challenge it. At a minimum, Plaintiffs should have been afforded the opportunity to depose Mr. Colafati to reveal his qualifications, the sources on which he relies for his testimony, and the basis of his statements and conclusions, not to mention the applicability of such information to the events presented in this action. Further, Defendants' failure to disclose Mr. Colafati as a witness is particularly egregious because he was known to the Defendants throughout this litigation and had been under their control and therefore available to them at all relevant times. There is simply no reasonable justification for Defendants' failure to disclose Mr. Colafati's identity or testimony. Moreover, the Plaintiffs have done nothing to prevent the Defendants from disclosing Mr. Colafati as a witness. Accordingly, whether he is considered an expert

witness or lay witness, the District Court should have striken Mr. Colafati's Declaration since exclusion is the only remedy for the prejudice caused by Defendants' violation of Rule 26 and the Court's order.

Further, the District Court's determination that the inclusion of James Dewan's declaration as part of the State's reply papers was sufficient to avoid prejudice to Plaintiffs, is simply inaccurate. Mr. Dewan's declaration makes it clear by the inclusion of the language, "[a]s stated in the November 1, 2017 declaration of Dominic Colafati," that the State was attempting to correct its error of including Mr. Dewan's declaration in support of its motion for summary judgment. (J.A. 1495 ¶3). With Mr. Dewan's declaration included in the State's reply, Plaintiff's did not have an opportunity to refute the contents contained therein based upon his deposition testimony and therefore the prejudice to Plaintiffs has not been mitigated. Thus, the District Court further erred by concluding that Mr. Dewan's statement absolves any prejudice to Plaintiffs.

C. Darryl Decker's Declaration.

Darryl Decker has been employed by the New York State Governor's Office of Employee Relations ("GOER") since 1996. (J.A. 833 ¶1). Mr. Decker was first an Employee Relations Associate in GOER's Employee Benefits Management Unit ("EBMU") from 1996 to 2004, then Assistant Director of EBMU from 2004 to 2012, and now Director of the EMBU since 2012. (J.A. 833 ¶¶1-3). Based on his positions

and his role as the "lead health benefits negotiator for several CBAs" since 1999, Mr. Decker testifies to the meaning of certain language contained in the Health Insurance Articles of the collective bargaining agreements made between the State and CSEA going back as far as the 1982 to 1985 collective bargaining agreement, long before his employment commenced. (J.A. 833- ¶¶6-11). Clearly, testimony providing the meaning of contract language in an action where a violation of that specific contract language has been alleged is significant testimony.

While Mr. Decker's Declaration is similar to the testimony in the Declaration of Priscilla Feinberg (J.A. 836-839), a witness who Defendants disclosed and who Plaintiffs' had the opportunity to depose, Plaintiffs have not had a reasonable opportunity to examine Mr. Decker's credentials and experience, or the basis for his knowledge and opinions, which as stated concerns the meaning of contract language that was developed years before he became employed at the Governor's Office of Employee Relations. In fact, Defendants deprived Plaintiffs of the ability to obtain any information from him to potentially counter his testimony. Defendants' failure to disclose Mr. Decker as a witness, similar to Mr. Colafati, is similarly egregious because he was known to the Defendants throughout this litigation and had been under their control and therefore available to them at all relevant times. In addition, as with Mr. Colafati, there is simply no reasonable justification for Defendants' failure to disclose Mr. Decker's identity. Finally, Plaintiffs have done nothing to

prevent the Defendants' from disclosing Mr. Decker as a witness either. Therefore it was an abuse of discretion for the District Court to accept and rely upon Mr. Decker's Declaration since again, exclusion was the only remedy for the prejudice caused by Defendants' violation of Rule 26 and the Court's order.

CONCLUSION

The District Court's decision misapplied *M&G Polymers* and controlling New York State case law by finding that the parties did not intend for the obligation of retiree health insurance coverage, at a fixed contribution rate, to continue past the expiration of the collective bargaining agreements. When reviewing Article 9 of the underlying collective bargaining agreements, the clear and unambiguous language of these health insurance provisions provides for an express promise to Plaintiffs of continued coverage at a specific percentage of premium contribution.

For all of the foregoing reasons, Plaintiffs respectfully request that this Court: (1) reverse the District Court's decision granting Defendants' motion for summary judgment; (2) reverse the District Court's decision denying Plaintiffs' cross motion for summary judgment; (3) or, in the alternative, remand the matter to the District Court for a new determination, including but not limited to, a trial to determine any questions of material fact.

Dated: February 4, 2019
Albany, New York

Respectfully submitted,

DAREN J. RYLEWICZ

By: *s/Eric E. Wilke*

Eric E. Wilke, of Counsel
Jennifer C. Zegarelli, of Counsel
Civil Service Employees Association, Inc.
Box 7125, Capitol Station
143 Washington Avenue
Albany, New York 12224
(518) 257-1443

PL/18-1085/JCZ/mv/ Brief Body and Cover (ECF format) #673904

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because this brief contains 12,080 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 14 point Times New Roman font.

Dated: February 4, 2019
Albany, New York

Respectfully submitted,

DAREN J. RYLEWICZ
Attorney for Plaintiffs-Appellants

By: *s/Eric E. Wilke*
Eric E. Wilke, of counsel
Jennifer C. Zegarelli, of counsel
Civil Service Employees Association, Inc.
143 Washington Avenue
Albany, New York 12210
(518) 257-1443
eric.wilke@cseainc.org
jennifer.zegarelli@cseainc.org

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DANNY DONOHUE, as President of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, and CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, and MILO BARLOW, THOMAS JEFFERSON, CORNELIUS KENNEDY, JUDY RICHARDS, and HENRY WAGONER, on behalf of themselves and certain other RETIREES of the STATE OF NEW YORK formerly in the CSEA BARGAINING UNITS,

Plaintiffs,

vs. **1:11-CV-1530 (MAD/CFH)**

THE STATE OF NEW YORK, ANDREW M. CUOMO, as Governor of the State of New York, NEW YORK STATE CIVIL SERVICE DEPARTMENT, PATRICIA A. HITE as Acting Commissioner, New York State Civil Service Department, NEW YORK STATE CIVIL SERVICE COMMISSION, CAROLINE W. AHL and J. DENNIS HANRAHAN, as Commissioners of the New York State Civil Service Commission, ROBERT L. MEGNA, as Director of the New York State Division of the Budget, THOMAS P. DiNAPOLI as Comptroller of the State of New York, NEW YORK STATE AND LOCAL RETIREMENT SYSTEM; JONATHAN LIPPMAN as Chief Judge of the New York State Unified Court System, and the NEW YORK STATE UNIFIED COURT SYSTEM,

Defendants.

APPEARANCES: **OF COUNSEL:**

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.
143 Washington Avenue
P.O. Box 7125, Capitol Station
Albany, New York 12224
Attorneys for Plaintiffs

DAREN J. RYLEWICZ, ESQ.
ERIC E. WILKE, ESQ.
JENNIFER C. ZEGARELLI, ESQ.

OFFICE OF THE NEW YORK **HELENA LYNCH, AAG**

STATE ATTORNEY GENERAL **RICHARD LOMBARDO, AAG**
The Capitol
Albany, New York 12224
Attorneys for Defendants

Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

In their second amended complaint dated July 29, 2014, Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, and money damages, to redress Defendants' alleged deprivation of Plaintiffs' rights secured pursuant to the Contracts Clause of the United States Constitution, the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, Article I, § 6 of the New York State Constitution, and for breach of contract, and violation of New York State Civil Service Law § 167, resulting from Defendants' unilateral action effective October 1, 2011, increasing the contribution rates that Plaintiffs pay for their retiree health insurance. *See* Dkt. No. 55 at ¶ 1. Plaintiffs further seek an order declaring Chapter 491 of the Laws of 2011, amending Civil Service Law § 167(8), unconstitutional, as applied, and enjoining Defendants' implementation thereof, to the extent that said law and any regulations adopted thereunder impermissibly impair the obligation of the contract between the State and individual Plaintiffs, and the class they represent, by increasing the contribution rates that such retirees are required to pay for health insurance benefits in retirement. *See id.* at ¶ 2.

Currently before the Court are the parties' cross motions for summary judgment. *See* Dkt. Nos. 93 & 98.[1]

II. BACKGROUND

[1] To avoid confusion, anytime the Court references a specific page number for an entry on the docket, it will cite to the page number assigned by the Court's electronic filing system.

A. The Parties

Plaintiff Danny Donohue is the statewide president of the Civil Service Employees Association, Inc. ("CSEA"). *See* Dkt. No. 98 at ¶ 1. Plaintiff CSEA is the collective negotiating representative for New York State employees in the Administrative Service Unit ("ASU"), Institutional Services Unit ("ISU"), Operational Services Unit ("OSU"), and Division of Military and Naval Affairs Unit ("DMNA"), as well as one unit of employees of the New York State Unified Court System. *See id.* at ¶ 2. Plaintiff Milo Barlow is a retired former member of the OSU and is receiving individual health insurance coverage. *See id.* at ¶ 3. Plaintiff Thomas Jefferson is a retired former employee of the Unified Court System who receives dependent coverage. *See id.* at ¶ 4. Plaintiff Cornelius Kennedy is a retired former member of the DMNA unit and receives dependent health insurance coverage. *See id.* at ¶ 5. Plaintiff Judy Richards is a retired former ASU member and receives dependent health insurance benefits. *See id.* at ¶ 6. Plaintiff Henry Wagoner is a retired former member of the ASU unit and receives individual health insurance benefits. *See id.* at ¶ 7.

Defendant Andrew Cuomo is Governor of the State of New York. *See id.* at ¶ 8. Defendant Patricia A. Hite was, in 2011, Acting Commissioner of the New York State Department of Civil Service. *See id.* at ¶ 9.[2] Defendants Caroline W. Ahl and Dennis Hanrahan

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[2] Throughout their response to Defendants' Statement of Material Facts, Plaintiffs "[d]eny that Defendant Patricia A. Hite was the Acting Commissioner of the New York State Department of Civil Service as she failed to file, with the Department of State, a Public Officer Oath/Affirmation for such capacity." *See, e.g.*, Dkt. No. 98 at ¶¶ 9, 47, 50 (citing Dkt. No. 93-24). In support of this position, Plaintiffs cite to a form entitled "DESIGNATION OF DEPUTY" in which the outgoing Commissioner of the New York State Department of Civil Service, Nancy Groenwegen, designated Patricia Hite to serve as Acting Commissioner upon her departure. *See* Dkt. No. 93-24 at 2. The following page is a document entitled "PUBLIC OFFICER OATH/AFFIRMATION" signed by Patricia Hite. *See id.* at 3. Both documents were filed with the New York Department of State on December 22, 2010. *See id.* at 2-3. Aside from citing to

(continued...)

were, in 2011, the members of the Civil Service Commission. *See id.* at ¶ 10. Defendant Robert Megna was, in 2011, the Director of the New York State Division of Budget. *See id.* at ¶ 11. Defendant Thomas P. DiNapoli is the Comptroller of the State of New York. *See id.* at ¶ 12. Finally, Defendant Jonathan Lippman was at the relevant time the Chief Judge of the Unified Court System. *See id.* at ¶ 13.

B. Collective Bargaining Agreement Negotiated Between the State and CSEA in 2011

On June 22, 2011, the Governor issued a press release announcing that the State had reached a five-year labor agreement (the "2011-16 CBA") with the CSEA. *See* Dkt. No. 98 at ¶ 14. The press release announced a two percent increase in the premium contribution rate for Grade 9 employees and below, and a six percent increase for Grade 10 and above. *See id.*

The 2011-16 CBA between CSEA and the State was signed on August 15, 2011, and covered the periods between April 2, 2011 and April 1, 2016. *See id.* at ¶ 15. Section 9.14 of the 2011-16 CBA provides as follows:

> The State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan. Effective October 1, 2011 for employees in a title Salary Grade 9 or below, the State agrees to pay 88 percent of the cost of individual coverage and 73 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan. Effective October 1, 2011 for employees in a title Salary Grade 10 and above or an employee equated to a position title Salary Grade 10 and above the State agrees to pay 84 percent of the cost of individual coverage and 69 percent of the cost of dependent

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[2](...continued)
this document, Plaintiffs fail to provide any coherent argument why Plaintiff Hite was not actually the Acting Commissioner upon Nancy Groenwegen's departure. In fact, the designation of Defendant Hite as acting commissioner appears to have occurred in compliance with the relevant state procedures. *See* N.Y. Pub. Off. Law § 9.

> coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan.

Id. at ¶ 16.[3] Section 9.1(a) of the 2011-16 CBA further states that "[t]he State shall continue to provide all the forms and extent of coverage as defined by the contracts in force on March 31, 2011 with the State's health insurance carriers unless specifically modified by this Agreement." *Id.* at ¶ 17. The parties agree that the "contracts in force on March 31, 2011 with the State's health insurance carriers" refers to the contracts between the State and the health and dental insurance carriers. *See id.* at ¶ 18. According to Defendants, none of the contracts between the State and any insurance carriers, including those in force on March 31, 2011, contained any provisions setting forth the respective premium contribution rates for the State and its employees. *See* Dkt. No. 93-2 at ¶ 19; Dkt. No. 98 at ¶ 19.

Section 9.26 of the 2011-16 CBA provides that "[t]he unremarried spouse and otherwise eligible dependent children of an employee, who retires after April 1, 1979, with ten or more years of active State service and subsequently dies, shall be permitted to continue coverage in the health insurance program with payment at the same contribution rates as required of active employees for the same coverage." Dkt. No. 98 at ¶ 20. Article 50 of the 2011-16 CBA, entitled "Conclusion of Collective Negotiations," provides that

> [t]his Agreement is the entire agreement between the State and CSEA, terminates all prior agreements and understandings and concludes all collective negotiations during its term. During the term of this Agreement, neither party will unilaterally seek to modify its terms through legislation or other means. The parties

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[3] Plaintiffs deny this statement "to the extent that there is a reference to a single collective bargaining agreement" but then acknowledge that the "CSEA and the State are parties to the ASU, OSU, ISU and DMNA collective bargaining agreements that contain the identical provision in Section 9.14 of each respective agreement." Dkt. No. 98 at ¶ 16. Plaintiffs make the same objection each time Defendants provide a citation to a single CBA, yet always acknowledge that identical language is contained in each of the omitted CBAs. *See, e.g., id.* at ¶¶ 17, 20-21.

> agree to support jointly any legislation or administrative action necessary to implement the provisions of this Agreement. The parties acknowledge that, except as otherwise expressly provided herein, they have fully negotiated with respect to the terms and conditions of employment and have settled them for the term of this Agreement in accordance with the provisions thereof.

Id. at ¶ 21.[4]

C. 2011 Legislation to Implement Contribution Rate Changes for Health Insurance Premiums

Prior to 2011, section 167(8) of the Civil Service Law provided, in relevant part, that the "state cost of premium or subscription charges for eligible employees" covered by a CBA "may be increased to the terms of such agreement." Dkt. No. 98 at ¶ 22 (citing Senate Bill 5846, Assembly Bill 8513). On August 17, 2011, section 167(8) was amended to read as follows:

> Notwithstanding any inconsistent provision of law, where and to the extent that an agreement between the state and an employee organization entered into pursuant to article fourteen of this chapter so provides, the state cost of premium or subscription charges for eligible employees covered by such agreement may be modified pursuant to the terms of such agreement. The president, with the approval of the director of the budget, may extend the modified state cost of premium or subscription charges for employees or retirees not subject to an agreement referenced above and shall promulgate the necessary rules or regulations to implement this provision.

Id. at ¶ 23. Defendants contend that "[s]ection 167(8) was amended to implement the collectively bargained provisions of the CSEA 2011-16 CBA relating to health insurance contributions." Dkt. No. 93-2 at ¶ 24. Plaintiffs, however, assert that "the parties never agreed to change retiree health insurance contributions as part of collective bargaining, despite the State's proposals to change the

[4] The Court notes that this language is contained in Article 50 of the ASU agreement, Article 54 of the OSU agreement, Article 55 of the ISU agreement, and Article 43 of the DMNA agreement. *See* Dkt. No. 98 at ¶ 21.

level of premium contribution rates to a sliding scale based upon number of years of employment during the 1991-1995, 2003-2007 and 2007-2011 rounds of negotiations." Dkt. No. 98 at ¶ 24.

D. Collective Bargaining Agreements Between the State and CSEA from 1982 to 2011

Section 9.1(a) of the CBA in effect from 2007 to 2011 (the "2007-11 CBA") stated that "[t]he State shall continue to provide all the forms and extent of coverage as defined by the contracts in force on March 31, 2007, with the State's health insurance carriers unless specifically modified by this Agreement." Dkt. No. 98 at ¶ 25. As with the 2007-11 CBA, the 2003-07 CBA, 1999-03 CBA, 1995-99 CBA, 1991-95 CBA, 1988-91 CBA, 1985-88 CBA, and 1982-85 CBA all contained this language regarding the forms and extent of coverage. *See id.* at ¶¶ 27-39. None of the contracts between the State and health and dental insurance carriers, including those in force between 1982 and 2011, contains or contained any provision setting forth the respective premium contribution rates of the State and employees. *See id.* at ¶ 41.

The 2007-11 CBA, 2003-07 CBA, 1999-03 CBA, 1995-99 CBA, 1991-95 CBA, 1988-91 CBA, and 1985-88 CBA all provided that the State paid 90 percent of the cost of the premium for individual coverage and 75 percent of the cost of the premium for dependent coverage for the Empire Plan and HMOs. *See* Dkt. No. 98 at ¶ 42. The 1982-85 CBA provided that the State paid 100% of employee premiums and 75 % of the cost of dependent coverage. *See id.* at ¶ 43. The 2007-11 CBA, 2003-07 CBA, 1999-03 CBA, 1995-99 CBA, 1991-95 CBA, 1988-91 CBA, 1985-88 CBA, and 1982-85 CBA provided that "[t]he unremarried spouse of an employee, who retires after April 1, 1979, with ten or more years of active State service and subsequently dies, shall be permitted to continue coverage in the health insurance program with payment at the same contribution rates as required of active employees." *Id.* at ¶ 44.

E. Administrative Measures in 2011 Regarding Contribution Rates for Employee Health Insurance Premiums

By letter dated September 21, 2011, Defendant Hite notified Defendant Megna that she was extending, as authorized by Civil Service Law § 167(8), and subject to his approval, the modified State premium contribution rates set forth in Article 9 of the 2011-16 CSEA CBA, to unrepresented employees and retirees. *See* Dkt. No. 98 at ¶ 45.[5] The letter was signed by Defendant Megna on September 22, 2011. *See id.* at ¶ 46.

On September 27, 2011, Defendant Hite adopted a Resolution, citing to the authority vested in her in Civil Service Law sections 160(1), 161-a, and 167(8), which amended section 73.3(b) of Title 4 of the New York Code of Rules and Regulations. *See* Dkt. No. 93-2 at ¶ 47 (citing Dkt. No. 93-21); *see also* Dkt. No. 98 at ¶ 47. The Resolution contained the following provisions applicable to retirees:

> (i) for retirees who retired on or after January 1, 1983, and employees retiring prior to January 1, 2012, New York State shall contribute 88 percent of the charge on account of individual coverage and 73 percent of the charge on account of dependent coverage, provided, however, that for hospital/medical/mental health and substance abuse coverage provided under a Health Maintenance Organization, the State's rate of contribution shall not exceed 100 percent of its dollar contribution for such coverage under the Empire Plan;
>
> (ii) for employees retiring on or after January 1, 2012, from a title allocated or equated to salary grade 9 or below, New York State shall contribute 88 percent of the charge on account of individual coverage and 73 percent of the charge on account of dependent coverage, provided, however, that for hospital/medical/mental health and substance abuse coverage provided under a Health Maintenance Organization, the State's rate of contribution shall not exceed 100 percent of its dollar contribution for such coverage under the Empire Plan;

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[5] While Plaintiffs generally admit the content of Defendant Hite's September 21, 2011 letter, they deny that the State was authorized to modify the premium contribution rates for retirees. *See* Dkt. No. 98 at ¶ 45.

> (iii) for employees retiring on or after January 1, 2012, from a title allocated or equated to salary grade 10 or above, New York State shall contribute 84 percent of the charge on account of individual coverage and 69 percent of the charge on account of dependent coverage, provided, however, that for hospital/medical/mental health and substance abuse coverage provided under a Health Maintenance Organization, the State's rate of contribution shall not exceed 100 percent of its dollar contribution for such coverage under the Empire Plan.

Dkt. No. 98 at ¶ 48; *see also* Dkt. No. 93-21 at 2-3 (emphasis omitted). The foregoing provisions were made effective October 1, 2011. *See id.* at ¶ 49. Defendant Hite also certified the necessity of adopting the proposed amendments on an emergency basis. *See id.* at ¶ 50.

F. Chapter 14 of the Laws of 1983

In 1983, Civil Service Law § 167(8) was modified to provide that the full cost of health insurance premiums would be paid by the State for those who retired prior to January 1, 1983. *See* Dkt. No. 98 at ¶ 51; *see also* Dkt. No. 93-23. The 1983 law further provided that nine-tenths of the premium charge for health insurance would be paid by the State for current employees and those who retire on or after January 1, 1983. *See id.* at ¶ 52. The 1983 law was enacted to implement agreements reached through collectively bargaining, including an express agreement that the State would continue to pay 100% of the health insurance premium contributions for those who retired prior to January 1, 1983. *See id.* at ¶ 53.

G. Fiscal Crisis Facing the State in 2010-2011

As a result of the Great Recession that began in December 2007 according to the National Bureau of Economic Research, the State faced General Fund budget gaps for Fiscal Year 2009-2010, 2010-2011, and 2011-2012 in the amounts of $17.9 billion (2 percent of estimated spending), $9.2 billion (15 percent of estimated spending), and $10 billion (15 percent of estimated spending), respectively. *See* Dkt. No. 98 at ¶ 54. A General Fund budget gap means

the difference between planning spending commitments and the receipts available to pay them. *See id.* at ¶ 55. State law requires the Governor to submit and the Legislature to enact an annual General Fund budget that is balanced. *See id.* at ¶ 56. The State balances the General Fund budget using the cash basis of accounting. *See id.*

In Fiscal Years 2009-10, 2010-11, and 2011-12, the State was required to adopt a range of measures to close the large budget gaps and achieve a balanced budget. *See id.* at ¶ 57. The measures adopted in these years touched on a range of State activities, including: reductions in State payments for public schools, health care providers, local governments, social services and other services; imposition of cost controls on the operations of State agencies; increases in tax revenues, including personal income taxes, sales taxes, and other taxes; the deferral of required payments to the State pension system; and the use of non-recurring resources. *See id.* In Fiscal Year 2011-12, which is the Fiscal Year during which the changes to cost-sharing for health insurance premiums were approved, the State enacted a gap-closing plan to eliminate the $10 billion budget gap. *See id.* at ¶ 58. The Fiscal Year 2011-12 gap-closing plan consisted of a range of measures to moderate spending growth and increase receipts. *See id.* at ¶ 59. The gap closing plan for Fiscal Year 2011-12 authorized actions to lower spending by approximately $8.5 billion, which represented 85% of the gap-closing plan. *See id.* at ¶ 60. Actions to lower spending included reductions of: $2.8 billion for education aid; $2.7 billion for Medicaid; $1.5 billion for State agency operations; and $1.6 billion for various other programs and activities. *See id.* at ¶ 61. The gap-closing plan also included approximately $860 million in actions that the New York State Division of the Budget ("DOB") characterized as non-recurring, including the use of certain fund balances and resources made available from state public authorities, as well as $324 million in increased revenues. *See id.* at ¶ 62.

The development of the annual budget follows a methodical process. *See id.* at ¶ 63. DOB evaluates the anticipated fiscal position of the State for the upcoming Fiscal Year and establishes savings targets for each area of the budget that it estimates must be achieved for the State to enact a balanced budget. *See id.* In setting savings targets, the many factors that DOB considers and weighs include service needs and trends, fiscal and policy priorities, legal and administrative constraints, economic effects, and feasibility of enactment. *See id.* at ¶ 64. DOB analysts develop specific proposals intended to achieve the fiscal targets. *See id.* at ¶ 65. Those proposals are researched and documented for discussion with senior management. *See id.* The budget proposals are then reviewed by the Director of the Budget. *See id.* A package of recommended proposals is then submitted to the Governor for consideration. *See id.* The final package of proposals approved by the Governor is embodied in the Executive Budget. *See id.*

The gap-closing plan that was proposed in the 2011-12 Executive Budget was approved by the Legislature with relatively few modifications. *See id.* at ¶ 66. The plan struck a balance among the constituencies that rely on the State and allocated savings across a range of activities. *See id.* at ¶ 67. The savings from the redesign of State agency operations came from several sources, including facility closures, operational efficiencies, and wage and benefit changes. *See id.* at ¶ 68. The reductions from State agency operations were expected to provide savings of $1.5 billion compared with the then current forecast. *See id.* at ¶ 69. Some of the savings from agency operations were expected to be achieved by negotiated changes, and if negotiations were not successful, significant layoffs would have been necessary. *See id.* at ¶ 70.

In balancing the budget for a given year, the State weighs the impact of gap-closing actions on its long-term operating position. *See* Dkt. No. 98 at ¶ 71. DOB typically develops the Financial Plan with a goal of achieving a reasonably close relationship between receipts and

disbursements over multi-year period. *See id.* It is more difficult to maintain year-to-year spending levels and commitments in an environment of persistent large budget gaps. *See id.* The out-year budget gaps (*i.e.*, the budget gaps projected for the three subsequent fiscal years) are a measure of fiscal stress taken into account by the credit rating agencies. *See id.* at ¶ 72. In Fiscal Year 2011-12, the out-year budget gaps, before accounting for the gap-closing measures approved in the 2011-12 Enacted Budget, were projected at $14.9 billion for Fiscal Year 2012-13; $17.4 billion for Fiscal Year 2013-14; and $20.9 billion for Fiscal Year 2014-15. *See id.* at ¶ 73. The Enacted Budget for Fiscal Year 2011-12 reduced those projections to $2.4 billion, $2.8 billion, and $4.6 billion, respectively. *See id.* at ¶ 74. The 2011-12 gap-closing plan affected a wide range of State activities, including agency operations, to bring the projected receipts and disbursements into closer alignment over the multi-year Financial Plan. *See id.* at ¶ 75.

The State's credit rating depends in part on its ability to maintain budget balance in the current year and to keep budget gaps projected for future years within a manageable range. *See id.* at ¶ 76. A lower credit rating may make it more costly for the State to borrow money. *See id.* The ratings agencies cited the reduced out-year budget gaps when they upgraded the State's general obligation credit rating in 2014. *See id.* at ¶ 77.

As part of the response to the Great Recession, all State agencies were asked by the Governor's Office to advance proposals designed to achieve workforce savings. *See id.* at ¶ 78. Accordingly, the Department of Civil Service (the "Department") was asked to provide proposals. *See id.* At the Department, many proposals were discussed, including changes to NYSHIP. *See id.* One proposal to reduce the costs of NYSHIP, while avoiding reductions in plan benefits for State employees and retirees, was to decrease the State's contribution to health insurance

premiums. *See id.* at ¶ 79.[6] This proposal allowed for savings to be achieved within NYSHIP, while allowing for the overall design and generous benefits of the plan to be maintained, at a minimal additional cost to employees and retirees. *See id.* at ¶ 80.

H. Defendant Hite Acting as Head of the Department of Civil Service

By the document entitled "Designation of Deputy," dated December 22, 2010, Nancy Groenwegen, then the Commissioner and head of the New York State Department of Civil Service, designated certain persons as deputies, who would act in her absence as the head of the New York State Department of Civil Service. *See* Dkt. No. 98 at ¶ 81. Defendant Hite was the first deputy so designated by Nancy Groenwegen. *See id.* at ¶ 83. The designation was filed with the Department of State on December 22, 2010 and Nancy Groenwegen resigned her position that same day. *See id.* at ¶¶ 82, 84.

According to Defendants, upon Ms. Groenwegen's resignation, Defendant Hite became the Acting Commissioner of the Department of Civil Service. *See* Dkt. No. 93-2 at ¶ 85. Plaintiffs, however, contend that "Defendant Hite was designated as a Deputy so long as she held the position of Director Division of Classification and Compensation. . . . Further, Defendant Hite was never appointed as Acting Commissioner by Governor Cuomo and never filed a Public Officer Oath/Affirmation in the position of Acting Commissioner." Dkt. No. 98 at ¶ 85 (citing

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[6] The Court notes that, while Plaintiffs admit this statement, they "assert that the change to health insurance premium contribution levels for current employees represented by CSEA was negotiated, while there were no such negotiations on behalf of retirees entitled to the premium contribution levels pursuant to the collective bargaining agreements in effect between January 1, 1983 and October 1, 2011." Dkt. No. 98 at ¶ 79 (citing Hanna Decl., ¶¶ 37-41). Plaintiff further "assert that the State's chief negotiator did not consider cost savings when he advanced the issue to raise the premium contribution rates of individuals already retired." *Id.* (citing Bress Depo. pp. 79-80, 82).

Hite Depo. pp. 21-22; Lynch Decl., Exh. 16).[7] As Acting Commissioner of the Department, Defendant Hite was not a member of the Civil Service Commission. *See id.* at ¶ 86. Defendants claim that Hite served as Acting Commissioner until Ms. Groenwegen's successor was appointed in September 2012. *See* Dkt. No. 93-2 at ¶ 87.

Defendants claim that, as Acting Commissioner, Defendant Hite ran the Department, making all executive decisions on behalf of the agency, including those related to the NYSHIP, and overseeing all Department Divisions, including the Division of Employee Benefits, which is responsible for the administration of the NYSHIP. *See id.* at ¶ 88. During her tenure as Acting Commissioner, in response to a request by the Governor's office for proposals to achieve workforce savings, the Department considered many proposals, and eventually proposed reducing the State's contribution to the NYSHIP health insurance premiums. *See id.* at ¶ 89. Defendants claim that the purpose of the proposal was to allow for savings, while maintaining the overall design and rich benefits of the NYSHIP at a minimal cost to employees and retirees. *See* Dkt. No. 93-2 at ¶ 90.

By letter dated September 21, 2011, Defendant Hite notified Defendant Megna that she would extend, as authorized by Civil Service Law § 167(8), and subject to his approval, the modified State premium contribution rates set forth in Article 9 of the 2011-16 CBA to unrepresented employees and retirees. *See id.* at ¶ 91; *see also* Dkt. No. 98 at ¶ 91. Moreover, Defendants claim that Defendant Hite also adopted, pursuant to the authority vested in her by Civil Service Law §§ 160(1), 161-a, and 167(8), a Resolution dated September 27, 2011,

[7] The Court notes that Plaintiffs object to any statement of fact regarding Defendant Hite on these same grounds.

amending Section 73.3(b) of Title 4 of the New York Code of Rules and Regulations, as set forth in more detail above. *See id.* at ¶ 92.

I. The Complaint and Pending Motions for Summary Judgment

In their first cause of action, Plaintiffs allege that the increase in the percentage of the health insurance premium contribution paid by retirees violated the Contracts Clause of Article I, § 10 of the United States Constitution. *See* Dkt. No. 55 at ¶¶ 79-95. Defendants contend that the Court should dismiss this cause of action because the collective bargaining agreements do not establish a contractual right to a perpetually fixed health insurance premium contribution rates. *See* Dkt. No. 93-1 at 11-16. Further, Defendants argue that, even if Plaintiffs do have a vested right to a perpetually fixed premium contribution rate, they failed to demonstrate a substantial impairment of that right. *See id.* at 16-19. Moreover, Defendants contend that they are entitled to summary judgment on this claim because the law at issue served a legitimate public purpose and the means chosen to accomplish that purpose were reasonable and necessary. *See id.* at 19-23.

In their second cause of action, Plaintiffs allege that the increase in the percentage of the health insurance premium contribution paid by retirees breached Plaintiffs' contractual rights under the 2007-11 CBA. *See* Dkt. No. 55 at ¶¶ 96-105. Defendants contend that the Court should decline to exercise supplemental jurisdiction over this claim since there is no viable federal claim and that this claim should otherwise be dismissed because it lacks merit. *See* Dkt. No. 93-1 at 23-25.

The third and fifth causes of action allege that the retirees' premium contribution increase violated Plaintiffs' right to due process under the Federal and State Constitutions. *See* Dkt. No. 55 at ¶¶ 106-15, 132-40. Defendants argue that these claims fail because Plaintiffs do not have a property interest in a perpetually fixed premium contribution rate and the New York State

Constitution does not provide for the cause of action Plaintiffs assert. *See* Dkt. No. 93-1 at 26-29, 32-34. Additionally, Defendants contend that, even if Plaintiffs had a property interest, the claim still fails because they had an adequate state-court remedy of which they failed to avail themselves. *See id.* at 30-32.

The fourth cause of action alleges that Defendant Hite lacked the authority to administratively extend the premium shift. *See* Dkt. No. 55 at ¶¶ 116-31. Defendants claim that this cause of action "appears to have been brought pursuant to Article 78 of the New York Civil Practice Law and Rules and has been dismissed." Dkt. No. 93-1 at 9 (citing Dkt. No. 19 at 19-22).

In their sixth cause of action, Plaintiffs allege that Defendants Hite and Megna violated Article III, § 1 of the New York State Constitution. *See* Dkt. No. 55 at ¶¶ 141-45. Defendants argue that the Court should decline to exercise supplemental jurisdiction over this state law claim which, in any event, has no merit because Defendants Hite and Megna acted in accordance with the express terms of Civil Service Law § 167(8). *See* Dkt. No. 93-1 at 34-35.

The seventh cause of action purports to be a separate cause of action under 42 U.S.C. § 1983.[8] *See* Dkt. No. 55 at ¶¶ 146-49. Defendants contend that this claim is duplicative of the Contracts Clause and federal Due Process causes of action and must be dismissed. *See* Dkt. No. 93-1 at 36.

Finally, the eighth cause of action alleges that the retirees' premium contribution increase violated Plaintiffs' contract rights established by statute and longstanding practice. *See* Dkt. No. 55 at ¶¶ 150-55. Defendants argue that they are entitled to summary judgment as to this claim

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[8] In the caption of this cause of action, Plaintiffs cite to 42 U.S.C. § 1981. In the body of this cause of action, however, Plaintiffs cite to 42 U.S.C. § 1983.

because (1) it is well established that Civil Service Law § 167(1) did not bestow any contractual rights on Plaintiffs; (2) the claimed past practice did not exist; and (3) a past practice is merely a form of parol evidence and does not independently establish a contractual right. *See* Dkt. No. 93-1 at 37-39.

III. DISCUSSION

A. Standard of review

A court may grant a motion for summary judgment only if it determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the movant as a matter of law. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994) (citations omitted). When analyzing a summary judgment motion, the court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Id.* at 36-37 (quotation and other citation omitted). Moreover, it is well-settled that a party opposing a motion for summary judgment may not simply rely on the assertions in its pleading. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(c), (e)).

In assessing the record to determine whether any such issues of material fact exist, the court is required to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *See Chambers*, 43 F.3d at 36 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) (other citations omitted). Where the non-movant either does not respond to the motion or fails to dispute the movant's statement of material facts, the court must be satisfied that the citations to evidence in the record support the movant's assertions. *See Giannullo v. City of New York*, 322 F.3d 139, 143 n.5 (2d Cir. 2003) (holding that not verifying in the record the assertions in the motion for summary judgment "would derogate the truth-finding functions of the judicial process by substituting convenience for facts").

B. First Cause of Action: Contracts Clause of the United States Constitution

1. Legal Framework

"The Contracts Clause restricts the power of States to disrupt contractual arrangements. It provides that '[n]o state shall ... pass any ... Law impairing the Obligation of Contracts.'" *Sveen v. Melin*, ___ U.S. ___, 138 S. Ct. 1815, 1821 (2018) (quoting U.S. Const., Art. I, § 10, cl. 1). While the origins of the Clause lie in legislation enacted after the Revolutionary War to relieve debtors of their obligations to creditors, it applies to any kind of contract. *See id.* (citations omitted).

"At the same time, not all laws affecting pre-existing contracts violate the Clause." *Sveen*, 138 S. Ct. at 1822 (citing *El Paso v. Simmons*, 379 U.S. 497, 506-507, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965)). To determine when such a law crosses the constitutional line, the Supreme Court has long applied a two-step test. *See id.* "The threshold issue is whether the state law has 'operated as a substantial impairment of a contractual relationship.'" *Id.* at 1821-22 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978)). "In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Id.* at 1822 (citations omitted). "If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)).

2. Contractual Relationship

In their motion, Defendants contend that no contractual relationship exists as to the allegedly impaired term because there is no contractual term promising the perpetual continuation of premium contribution rates at a specific level. *See* Dkt. No. 93-1 at 12-16. Plaintiffs, however, argue that they are entitled to summary judgment as to this claim because there is no dispute that the collective bargaining agreements at issue entitled retirees to health insurance "with the State paying 90% of the cost of individual coverage and 75% of the cost of dependent coverage upon the completion of 10 years of State service." *See* Dkt. No. 97-33 at 16. Plaintiffs rely primarily on two provisions of the CBAs at issue. *See id.* at 16-18. The first provision provides that "[e]mployees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service." *Id.* The second provision provides that "[t]he State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan." *Id.* at 16. Plaintiffs assert that this language has been contained in both clause within Section 9 of the CBAs from the 1982-85 CBA through the 2007-11 CBA. *See id.*

Generally, "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Litton Financial Printing Div. v. N.L.R.B.*, 501 U.S. 190, 207 (1991) (citation omitted). "That principle does not preclude the conclusion that the parties intended to vest lifetime benefits for retirees." *M&G Polymers USA, LLC v. Tackett*, ___ U.S.___, 135 S. Ct. 926, 937 (2015). The Supreme Court has specifically "recognized that 'a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration.'" *Id.* (quotation omitted). "But when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Id.* The

court "must look to well established principles of contract interpretation to determine whether the parties intended that the contract give rise to a vested right." *Kolbe v. Tibbetts*, 22 N.Y.3d 344, 353 (2013); *see also Litton*, 501 U.S. at 207.

Central to the Court's analysis here is the United States Supreme Court's decision in *M & G Polymers USA, LLC v. Hobert Freel Tackett*, ___U.S.___, 135 S. Ct. 926 (2015). *Tackett* involved an open-ended CBA provision for retiree insurance benefits that the Sixth Circuit found ambiguous as to duration. *See id. at* 934. The appellate court applied the reasoning of an earlier Sixth Circuit decision, *International Union, United Auto., Aerospace & Agricultural Implement Workers of America v. Yard–Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), drawing inferences from the "context" of labor negotiations to resolve the contractual ambiguity. *Id.* at 932 (citing *Tackett v. M & G Polymers, USA, LLC (Tackett I)*, 561 F.3d 478, 490 (6th Cir. 2009)). Although the CBA contained a general durational clause, the Sixth Circuit found it "unlikely" that the employees' union would have agreed to CBA language that ensured a full company contribution if the employer could have unilaterally changed those terms. *See id.* (citing *Tackett I*, 561 F.3d at 490)). The Sixth Circuit therefore found the existence of a question of fact as to whether the retiree benefits vested for life. *See id.*

The Supreme Court disagreed. Writing for the majority, Justice Thomas stated that contractual provisions in CBAs are to be enforced as written and interpreted in accordance with "ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *Id.* at 933. As with any contract, "the parties' intentions control." *Id.* (citing *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)). Where the terms of the contract are unambiguous, it is to be construed "in accordance with its plainly expressed intent." *Id.* (quoting 11 R. Lord, Williston on Contracts §

30:6, p. 108 (4th ed. 2012) (Williston)). Courts may not speculate as to the intentions of employees, unions, and employers in negotiating retiree benefits, but must ground their assessments on record evidence. *See id.* at 935. Thus, courts may consider certain known customs or industry usages to construe a contract, but "the parties must prove those customs or usages using affirmative evidentiary support in a given case." *Id.* (citing 12 Williston § 34:3).

When faced with ambiguous language, the Supreme Court advised that courts "should not construe ambiguous writings to create lifetime promises." *Id.* at 936 (citing 3 A. Corbin, Corbin on Contracts § 533, p. 216 (1960)). Rather, courts should be guided by the "traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Id.* at 937 (quoting *Litton Fin. Printing Div., Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 207, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991)). While a CBA may explicitly provide that certain terms continue after the agreement's expiration, when a contract fails to address the duration of retiree benefits, "a court may not infer that the parties intended those benefits to vest for life." *Id.*

In her concurring opinion, Justice Ginsburg expounded upon Justice Thomas' adherence to fundamental principles of contract law, stating that when the parties' intent is unambiguously expressed in the contract, that intent controls, and the court's analysis should go no further. *See id.* at 938 (Ginsburg, J., concurring) (citing 11 R. Lord, Williston on Contracts § 30:2, p. 98–104) (4th ed. 2012) (Williston)). When faced with ambiguity, however, courts may consider extrinsic evidence to determine the parties' intentions. *See id.* (citing 11 Williston § 30:7, at 116–24). Justice Ginsburg further observed that there is no rule requiring "clear and express" language in order to demonstrate that the parties intended healthcare benefits to vest. *Id.* Rather, "'constraints upon the employer after the expiration date of a collective-bargaining agreement,' we have

observed, may be derived from the agreement's "explicit terms," but they 'may arise as well from ... implied terms of the expired agreement.'" *Id.* (alterations in original) (quoting *Litton*, 501 U.S. at 203, 207, 111 S. Ct. 2215).[9]

"Although a contract's general-durational clause does not say everything about the parties' intent to vest a benefit, *Tackett v. M & G Polymers USA, LLC*, 811 F.3d 204, 209 (6th Cir. 2016) (*Tackett III*), it certainly says a lot." *Serafino v. City of Hamtramck*, 707 Fed. Appx. 345, 352 (6th Cir. 2017). "So, '[w]hen a specific provision of the CBA does not include an end date, [the court] refer[s] to the general durational clause to determine that provision's termination.'" *Id.* (quoting *Gallo v. Moen, Inc.*, 813 F.3d 265, 269 (6th Cir. 2016)). "Absent some strong indication within the four corners of the agreement itself — perhaps, a specific-durational clause that applied to certain provisions but not others — the contractual rights and obligations under a CBA terminate along with the CBA." *Id.* (citing *Tackett*, 135 S. Ct. at 937).

With these principles in mind, in the present matter, the Court finds that the unambiguous terms of the CBAs at issue did not create a vested interest in the perpetual continuation of premium contribution rates at a specific level. Plaintiffs rely on Article 9 of CSEA's 2007-11 CBA, and substantially similar provisions of prior CBAs going back to 1983, to support their

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[9] Of course, *Tackett* arose in a different context than the claims presented here. Specifically, those cases were brought under *ERISA*, which governs relationships and agreements between private employees and their employees but excludes public employers and employees, like Plaintiffs here. *See* 29 U.S.C. § 1003(b)(1). Thus, what rights exist under the CBAs at issue here is determined by New York contract law. Yet, despite the different setting, courts have endorsed *Tackett*'s reasoning in both the private and public-sector context. *See Serafino*, 707 Fed. Appx. at 352 (citing cases); *Baltimore City Lodge No. 3 of Fraternal Order of Police, Inc. v. Baltimore Police Dept.*, No. 1:16-cv-3309, 2017 WL 3216775 (D. Md. July 28, 2017); *Kendzierski v. Macomb County*, 901 N.W.2d 111, 114-15 (Mich. 2017); *Township of Toms River v. Fraternal Order of Police Lodge No. 156*, 2016 WL 1313174 (N.J. Sup. Ct. Mar. 16, 2016); *Harper Woods Retirees Ass'n v. City of Harper Woods*, 879 N.W.2d 897 (Mich. Ct. of App. 2015).

argument that they have a vested right to a perpetually fixed premium contribution rate for their health insurance coverage. *See, e.g.,* Dkt. No. 55 at ¶¶ 36, 43, 45, 70-71, 84, 109.

Section 9.1 of the 2007-11 CBA between CSEA and the State provides that "[t]he State shall continue to provide all the forms and extent of coverage as defined by the contracts and in force on March 31, 2007 with the State's health insurance carriers unless specifically modified by this Agreement." Dkt. No. 93-12 at 4. This language clearly indicates that the State is promising the continuation of coverage. The introductory language simply establishes that the coverage in the previous CBA, to the extent that it is defined in the contracts between the State and the insurance carriers, will continue unless altered through negotiations. Therefore, what is continued are the benefits defined in the contracts with the insurance carriers.

Additionally, to the extent that "continue" is read to mean continuation after the expiration of the CBA, the term "coverage" can only naturally be referring to the coverage that is defined in the "contracts" with "the State health and dental insurance carriers." The State promised to continue to provide "coverage," not as defined in the prior CBA, but in the State's contracts with the insurance carriers that provide coverage to State employees. As Defendants correctly note, premium contribution rates are not considered "forms and extent of coverage" under the State's Health Insurance Plan. Rather, the "forms and extent of coverage" are defined in the contracts with the health insurance carriers and those contracts do not define or set the premium contribution rates paid by the State and retirees. *See* Dkt. No. 93-2 at ¶¶ 18, 26, 28, 30, 32, 34, 36, 40-41. As such, the term "forms and extent of coverage" does not include within its scope premium contribution rates.

Also, to the extent that Plaintiffs claim that the word "contracts" in Section 9.1 refers to the CBA that was in effect on March 31, 2007, the argument must fail. First, as Defendants

correctly note, Section 9.1 plainly refers to "contracts," not a single contract. Second, the 2007-11 CBA and its predecessors refer to themselves as the "Agreement," not the "contract." Dkt. No. 93-2 at ¶¶ 25, 27, 29, 31, 33, 35, 37, 39. There is no plausible reason why Section 9.1 of the 2007-11 CBA would diverge from the language that had been used for decades and refer to a prior CBA as the "the contracts" rather than the "Agreement."

Defendants also correctly note that the sections of the 2007-11 CBAs that set forth the specific premium contribution rates further support the interpretation that the CBAs do not guarantee a perpetual specific premium contribution rate. Specifically, Section 9.23(a) provides that "[t]he unremarried spouse and otherwise eligible dependent children of an employee, who retires after April 1, 1979, with ten or more years of active State service and subsequently dies, shall be permitted to continue coverage in the health insurance program with payment at the same contribution rates as required of active employees for the same coverage." Dkt. No. 93-12 at 21. This provision demonstrates that, when a specific contribution rate is meant to be guaranteed into retirement, it is set forth expressly in the contract.

Plaintiffs argue that two provisions read together support their position. Section 9.27(a) provides that "[e]mployees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service." Dkt. No. 97-33 at 16. Further, Section 9.14(a) provides that "[t]he State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward hospital/medical/mental health and substance abuse components provided under the Empire Plan." *Id.*; *see also* Dkt. No. 93-12 at 16. Relying on the declaration of Ross Hanna, who has been CSEA's chief negotiator for the past twenty-nine years, Plaintiffs argue that these provisions entitle a post-1983 retiree to health insurance coverage with the State paying 90% of the cost of

individual coverage and 75% of the cost of dependent coverage upon completion of 10 years of State service. *See id.* at 16-17. Plaintiffs, through Mr. Hanna, contend that further evidence of the parties' understanding of this language is the fact that the State proposed during the negotiations in 1991, 2003, and 2007, to change the eligibility and contribution rates for retiree health insurance from the above language. *See id.*; *see also* Dkt. No. 97-2 at ¶¶ 12, 16-33.

Contrary to Plaintiffs assertions, these provisions do not provide for a vested right to a perpetually fixed premium contribution rate and Mr. Hanna's declaration does not alter this conclusion. Section 9.27(a) simply provides that employees have the right to retain health insurance in retirement upon completion of ten years of service, but is silent as to contribution rates. Section 9.14(a) does not contain any reference to benefits in retirement. As such, while the CBAs guarantee health insurance in retirement to those with ten years of service, they do not guarantee any specific contribution rate in retirement. *See Cup v. Ampco Pittsburgh Corp.*, ___ F.3d ___, 2018 WL 4101049, *3 (3d Cir. 2018) (holding that a provision of a CBA guaranteeing health benefits for "employees" did not apply to former employees who retired before the date that the CBA went into effect).

Additionally, all of the CBAs at issue have durational limits. For example, Article 53 of the 2011-16 CBA provides that "[t]he term of this Agreement shall be from April 2, 2011 to April 1, 2016." Dkt. No. 93-10 at 18. Similarly, the 2007-11 CBA provides that "[t]he term of this Agreement shall be from April 2, 2007 to April 1, 2011." Dkt. No. 93-12 at 29. The sections of this CBAs, and all previous CBAs, providing for health insurance in retirement and setting forth the State's premium contribution rate do not contain any language pertaining to duration. As the Supreme Court has made clear that "'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement,'" *CNH Indus. N.V.*, 138 S. Ct. at 763 (quotations

omitted), and that "when an agreement does not specify a duration for health care benefits in particular," courts should "simply apply the general durational clause." *Id.* at 766 (citations omitted).

The only reasonable interpretation of the unambiguous language of the CBAs is that the premium contribution rates are subject to the general durational clauses and that this obligation ceased upon the termination of each respective CBA. *See Gallo*, 813 F.3d at 269-70 (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991)); *see also Serafino*, 707 Fed. Appx. at 352-53 ("Looking to the four corners of the agreements, there is no indication that the City intended to provide *any* healthcare benefit to retirees for life, let alone a right to deductible-free, low-co-pay, forever-unalterable healthcare insurance") (emphasis in original). This conclusion is further supported by the legislation passed in 1983 providing that the State would continue to pay the full premium for pre-January 1, 1983 retirees. If retirees had a contractually vested perpetual right to the same contribution rates in effect at the time of their retirement, there would have been no need for an affirmative legislative carve-out specifically applicable to them.

Based on the foregoing, the Court finds that there was no contractual agreement regarding premium contribution rates continuing past the expiration of the CBA. As such, the Court grants Defendants' motion for summary judgment as to Plaintiffs' Contract Clause claim. In an excess of caution, however, the Court will address whether Defendants' actions impaired any such agreement and, if so, whether it was a reasonable and necessary means to serve a legitimate public purpose.

3. Substantial Impairment

In their cross motion, Plaintiffs contend the individuals that retired between January 1, 1983 and October 1, 2011, had well-established expectations that this longstanding benefit would

continue as it had for twenty-eight (28) years. *See* Dkt. No. 97-33 at 19-20. Plaintiffs claim that this long-standing practice and the language of the relevant CBAs rendered their expectations reasonable. *See id.*

"'Total destruction' or repudiation of the contract is not necessary for an impairment to be substantial." *Donahue v. Paterson*, 715 F. Supp. 2d 306, 318 (N.D.N.Y. 2010) (quoting *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26-27 (1977)). "Rather, [the Second] Circuit has stated that 'the primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted.'" *Id.* (quoting *Sanitation & Recycling*, 107 F.3d at 993). That is, substantial impairments are those that "go to the heart of the contract," affect [the] terms upon which the parties have reasonably relied," or "significantly alter the duties of the parties." *Id.*

As discussed above, any expectation of a perpetually fixed contribution rate in retirement was unreasonable based on the plain language of the CBAs. The CBAs clearly provide that Plaintiffs would receive the health insurance coverage that was in effect at the time of their retirement. Nothing in the CBAs prevented the State from raising retirees' contribution rates upon the termination of the CBA.

Moreover, even if the Court were to consider the past practices, Defendants are correct that there is no basis for Plaintiffs' assertion that, "since the enactment of Chapter 14 of the Laws of 1983, the State's longstanding practice and established course of conduct further establishes the parties' intent and the State's contractual obligation to provide for the contribution of health insurance benefits for retired State employees, including a continuation of the State contribution rates in effect at the time a State employee retires[.]" Dkt. No. 55 at ¶ 152. The provision in the law guaranteeing that those who retired before January 1, 1983 would pay no contribution was

specifically negotiated on an occasion twenty-eight years before this action was commenced. While it is true that, between 1983 and 2011, there was no change in the contribution rate paid by retirees, the State also made no change to the contribution rate paid by employees as well. As such, all that this pattern establishes is that, during the period in question, the need did not arise to make changes to the premium contribution rates.

Based on the foregoing, the Court finds that Defendants are entitled to summary judgment on this claim because the undisputed facts demonstrate that there was no substantial impairment of any contractual right.

4. Legitimate Public Purpose That is Reasonable and Necessary

"When a state law constitutes substantial impairment, the state must show a significant and legitimate public purpose behind the law." *Buffalo Teachers Fed'n*, 464 F.3d at 368 (citing *Energy Reserves Group*, 459 U.S. at 411-12, 103 S. Ct. 697; *Sanitation & Recycling Indus.*, 107 F.3d at 993). "A legitimate public purpose is one 'aimed at remedying an important general social or economic problem rather than providing a benefit to special interests.'" *Id.* (quoting *Sanitation & Recycling Indus.*, 107 F.3d at 993). The legitimate public purpose "need not be addressed to an emergency or temporary situation." *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983). "[C]ourts have often held that the legislative interest in addressing a fiscal emergency is a legitimate public interest." *Buffalo Teachers Fed'n*, 464 F.3d at 369 (citations omitted).

An impairment is reasonable only if it is "specifically tailored to meet the societal ill it is supposedly designed to ameliorate." *Sanitation & Recycling Indus.*, 107 F.3d at 993 (citing *Allied Structural Steel*, 438 U.S. at 243, 98 S. Ct. at 2721-22). Where the "state's legislation was self-serving to the state, [courts] are less deferential to the state's assessment of reasonableness and

necessity than [they] would be in a situation involving purely private contracts[.]" *Buffalo Teachers Fed'n*, 464 F.3d at 370. But "less deference does not imply no deference." *Id.* (citation omitted). "Ultimately, for impairment to be reasonable and necessary under *less deference scrutiny*, it must be shown that the state did not (1) 'consider impairing the ... contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances[.]'" *Id.* (quoting *U.S. Trust Co.*, 431 U.S. at 30-31, 97 S. Ct. 1505) (emphasis in original).

In the present matter, the Court finds that the undisputed facts demonstrate that Chapter 491 of the Laws of 2011 served a significant and legitimate purpose that was reasonable and necessary. The law was enacted in an effort to close a multi-billion dollar budget gap caused by the Great Recession. *See* Dkt. No. 98 at ¶¶ 54-57. Therefore, it is beyond dispute that the Legislature's public purpose in enacting the law was legitimate. *See Buffalo Teachers Fed'n*, 464 F.3d at 371; *Kirshner v. United States*, 603 F.2d 234, 239 (2d Cir. 1978); *Ambrose v. City of White Plains*, No. 10-cv-4946, 2018 WL 1635498, *19 (S.D.N.Y. Apr. 2, 2018) (holding that the "[f]iscal problems brought on by the so-called Great Recession that began in 2009 have been held" to qualify as a significant and legitimate public purpose) (citing cases); *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Gov't of the Virgin Islands*, 842 F.3d 201, 211 (3d Cir. 2016) (holding that the government had a legitimate public purpose in implementing salary cuts to unionized workforce in wake of fiscal problems brought on by economic recession in 2009).

Plaintiffs argue that Defendants' claim that increasing the health insurance premiums for individuals that retired between January 1, 1983 and October 1, 2011, was reasonable and

necessary is belied by the record. *See* Dkt. No. 97-33 at 21. "First, according to the State's witness James Dewan, the annual savings to the State to increase the contribution levels for those individuals that retired was between $20 million and $30 million annually. . . . While that is a significant amount of money to a class of individuals on a fixed income, the State's overall budget for the 2011-2012 fiscal year was $131.7 billion. . . . Based on the State's estimated savings, it was at most .023% of the overall $131.7 billion State budget and at the least .015% of the budget, which cannot be truly be [sic] deemed as reasonable and necessary." *Id.* Second, Plaintiffs contend that the State's chief negotiator in 2011, Joseph Bress, testified that there were no written proposals or directives from the Governor's Office regarding how they were to achieve the $450 million in savings. *See id.* Rather, Mr. Bress "was given *carte blanche* to achieve those savings in whatever way he was able to." *Id.* at 21-22. Finally, in an attempt to downplay the financial crisis the State was facing in 2011, Plaintiffs point to the testimony of Priscilla Feinberg, in which she testified that, at every negotiation with the employee unions, Robert Brondi from the Division of Budget made claims that the State "was facing a fiscal crisis and that 2011 was no different than any other year." *Id.* at 22.

First, as set forth in detail above, in the Fiscal Year 2011-12, the State was facing a $10 billion budget gap. Plaintiffs' attempts to downplay the State's dire fiscal situation for Fiscal Year 2011-12 is entirely without merit.

Second, the undisputed facts demonstrate that the action taken by Defendants were narrowly tailored. In Fiscal Years 2009-10, 2010-11, and 2011-12, the State was required to adopt a range of measures to close the large budget gaps and achieve a balanced budget. The measures adopted in these years touched on a range of State activities, including: reductions in State payments for public schools, healthcare providers, local governments, social services and

other services; imposition of cost controls on the operations of State agencies; increases in tax revenues, including personal income taxes, sales taxes, and other taxes; the deferral of required payments to the State pension system; and the use of non-recurring resources. *See* Dkt. No. 98 at ¶ 57. The Fiscal Year 2011-12 gap-closing plan consisted of a range of measures to moderate spending growth and increase receipts. *See id.* at ¶ 59. This plan, which lowered spending by approximately $8.5 billion, included the following reductions: $2.8 billion in education aid; $2.7 billion for Medicaid; $1.5 billion for State agency operations; and $1.6 billion for various other programs and activities. *See id.* at ¶¶ 60-61. The gap-closing plan also included approximately $860 million in actions that the Division of Budget characterized as non-recurring, including the use of certain fund balances and resources made available from state public authorities, as well as $324 million in increased revenues. *See id.* at ¶ 62. These are but a few of the actions that were taken to close the budget gap. In light of the considerable cuts made across all aspects of the State's spending, Plaintiff's argument that the extremely modest percentage increase in contribution rate is not narrowly tailored must be rejected. *See Ambrose*, 2018 WL 1635498, at *21 (finding that an increase in the health insurance contribution rate was reasonable and necessary, especially when considering the many measures taken before enacting the ordinance to address the city's fiscal crisis) (citations omitted); *see also Buffalo Teachers Fed'n*, 464 F.3d at 371 (holding that a wage freeze was reasonable and necessary because the city took "more drastic measures" to alleviate financial stress before turning to freeze).

Additionally, the Court rejects Plaintiffs' argument that the increase in the retirees' health insurance contribution rate was not fiscally motivated. The State was required to identify $450 million in savings from workforce cost reductions. James Dewan indicated that the savings from the administrative extension of the increased contribution rates to retirees were projected to be

$20 to $30 million. *See* Dkt. No. 101-1 at ¶ 6. To achieve the $450 million in workforce cost reductions, other proposals were implemented, including a temporary reduction in employee salary levels and certain changes to health insurance benefits, including increases to prescription drug copayments and deductibles for non-network physician visits. *See id.* at ¶ 7. Additionally, several other proposals were considered but ultimately rejected. Examples of such rejected cost savings proposals include: changing the methodology used to calculate overtime compensation, location pay, and hazardous duty pay; eliminating longevity payments and performance advance increases; reducing workers' compensation benefits; increasing State employees' parking fees; increasing copayments due for certain medical services; increasing the coinsurance paid by enrollees for non-network medical services; changing the methodology used to reimburse claims incurred at non-network hospitals; eliminating Medicare Part B premium reimbursements for newly eligible retirees; and increasing the health insurance premium contributions paid by employees and retirees by one, three, four, five, six, or ten percentage points. *See id.* at ¶ 8. According to Mr. Dewan, these proposals were rejected for various reasons, including that they would fail to yield significant enough savings; they were rejected, or likely would be rejected, by public employee unions; and the availability of other more moderate cost-reduction options. *See id.* at ¶ 9.

The undisputed facts establish that Chapter 491 of the Laws of 2011 and the administrative extension of the premium shift to retirees was a matter of exigency that addressed a societal and economic interest and was appropriately tailored, and that other measures were considered and implemented before this measure was resorted to. Bearing in mind that whether legislation violates the Contracts Clause does not turn on "[w]hether [it] is wise or unwise as a matter of policy," *Home Bldg. & Loan Ass'n*, 290 U.S. at 447-48, a rational factfinder would have

to conclude that Chapter 491 and the administrative extension were reasonable and necessary to address the State's fiscal distress, which was a legitimate public purpose. As such, even if there was a contractual obligation to Plaintiffs, Defendants are still entitled to summary judgment as to the Contract Clause claim.

C. Second Cause of Action: Breach of Contract[10]

In their second cause of action, Plaintiffs allege that the increase in the percentage of the health insurance premium contribution paid by retirees breached Plaintiffs' contractual rights under the 2007-11 CBA. *See* Dkt. No. 55 at ¶¶ 96-105. Defendants contend that the Court should grant them summary judgment as to this claim because there is no contractual term guaranteeing a perpetual premium contribution rate. *See* Dkt. No. 93-1 at 25.

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[10] District courts have supplemental jurisdiction over state-law claims that "form part of the same case or controversy" as other claims over which the court has original jurisdiction. 28 U.S.C. § 1367(a). "A court 'may decline to exercise supplemental jurisdiction,' however, if, among other factors, 'the claim raises a novel or complex issue of State law,' or 'the district court has dismissed all claims over which it has original jurisdiction.'" *Kroshnyi v. U.S. Pack Courier Servs., Inc.*, 771 F.3d 93, 102 (2d Cir. 2014) (quoting 28 U.S.C. § 1367(c)). "Courts must consider 'the values of judicial economy, convenience, fairness, and comity' when deciding whether to exercise supplemental jurisdiction." *Id.* (quoting *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)).

In the present matter, considering the advanced stage of the litigation and the Court's familiarity with the issues in this case, combined with the likely hardship to both parties should Plaintiffs re-file in state court, the factors clearly weigh in favor of exercising supplemental jurisdiction. *See id.* The hardship to the parties would be further compounded by the fact that there are eleven cases related to the present matter that have all been through the same extensive litigation. Additionally, considering that most of Plaintiffs' state law claims are effectively resolved through the Court's disposition of the federal claims, exercising supplemental jurisdiction in the present matter is particularly appropriate. *See Fletcher v. ABM Building Value*, No. 14 Civ. 4712, 2018 WL 1801310, *24 (S.D.N.Y. Mar. 28, 2018) (exercising supplemental jurisdiction over state law claims that were "effectively resolved" through the dismissal of similar federal claims but declining to exercise supplemental jurisdiction over state claims that involved application of different standards). Finally, the Court notes that Plaintiffs specifically request that the Court exercise supplemental jurisdiction in the event that the Court grants Defendants' motion for summary judgment as to the federal causes of action.

"The essential elements of a breach of contract cause of action are 'the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach.'" *Canzona v. Atanasio*, 118 A.D.3d 837, 838-39 (2d Dep't 2014) (quotation and other citations omitted). "Generally, a party alleging a breach of contract must 'demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement.'" *Id.* at 839 (quotations omitted). "Moreover, 'the plaintiff's allegations must identify the provisions of the contract that were breached.'" *Id.* (quotation and other citation omitted).

In the present matter, in dismissing Plaintiffs' Contracts Clause cause of action, the Court held that there was no impairment of contract, *i.e.*, that the CBAs at issue did not promise Plaintiffs a perpetual premium contribution rate. It necessarily follows that Defendants did not breach this nonexistent contract term.

Based on the foregoing, the Court grants Defendants' motion for summary judgment as to Plaintiffs' second cause of action.

D. Third and Fifth Causes of Action: Due Process

The third and fifth causes of action allege that the retirees' premium contribution increase violated Plaintiffs' right to due process under the Federal and State Constitutions. *See* Dkt. No. 55 at ¶¶ 106-15, 132-40. Defendants argue that these claims fail because Plaintiffs do not have a property interest in a perpetually fixed premium contribution rate and the New York State Constitution does not provide for the cause of action Plaintiffs assert. *See* Dkt. No. 93-1 at 26-29, 32-34. Additionally, Defendants contend that, even if Plaintiffs had a property interest, the claim still fails because they had an adequate state-court remedy of which they failed to avail themselves. *See id.* at 30-32.

The Fourteenth Amendment provides, in relevant part, that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In order to demonstrate a violation of either substantive or procedural due process rights, the plaintiff must first demonstrate the possession of a federally protected property right to the relief sought. *See Puckett v. City of Glen Cove*, 631 F. Supp. 2d 226, 236 (E.D.N.Y. 2009) (citing *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16 (2d Cir. 1999)). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972) (holding that the plaintiff must have more than a unilateral expectation; the plaintiff must have a legitimate claim of entitlement to the benefit). The Second Circuit has held that, "[i]n order for a person to have a property interest in a benefit such as the right to payment under a contract, [h]e must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Local 342, Long Island Pub. Serv. Emp., UMD, ILA, AFLCIO v. Town Bd. of the Town of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994) (citations omitted). "When determining whether a plaintiff has a claim of entitlement, we focus on the applicable statute, contract or regulation that purports to establish the benefit." *Martz v. Vill. of Valley Stream*, 22 F.3d 26, 30 (2d Cir.1994).

"Courts have determined that in appropriate circumstances, contractual rights arising from collective bargaining agreement give rise to constitutional property right." *Jackson v. Roslyn Bd. of Educ.*, 652 F. Supp. 2d 332, 341 (E.D.N.Y. 2009) (citing *Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 314 (2d Cir. 2002). A "property interest in employment can be created by ordinance or state law." *Winston v. City of New York*, 759 F.2d 242, 247 (2d Cir. 1985) (holding that the

plaintiffs' benefits were found in the New York State Constitution and vested in the plaintiffs by the terms of a statutory scheme). The Second Circuit has held that, "[i]n determining whether a given benefits regime creates a property interest protected by the Due Process Clause, we look to the statutes and regulations governing the distribution of benefits." *Kapps v. Wing*, 404 F.3d 105, 113 (2d Cir. 2005) (citation omitted). "Where those statutes or regulations meaningfully channel official discretion by mandating a defined administrative outcome, a property interest will be found to exist." *Id.* (citation omitted). Courts in this circuit have held that statutory framework may create a property interest. *See Kapps*, 404 F.3d at 104; *see also Basciano v. Herkimer*, 605 F.2d 605 (2d Cir. 1978) (holding that the city administrative code created a property right in receipt of accident disability retirement benefits, where the code required officials to give benefits to applicants who met specified criteria); *see also Winston*, 759 F.2d at 242; *Sparveri v. Town of Rocky Hill*, 396 F. Supp. 2d 214, 218 (D. Conn. 2005) (noting that the plaintiff claimed that her entitlement to the level of pension and healthcare benefits was rooted in the statutory pension scheme established by the Town Charter and Plan ordinance).

"The Due Process Clause does not protect against all deprivations of constitutionally protected interests in life, liberty, or property, 'only against deprivations without due process of law.'" *Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 464-65 (2d Cir. 2006) (quoting *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (internal quotation marks omitted), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)). "The commonsense principle at the heart of the due process guarantees in the United States and New York Constitutions is that when the State seeks to take life, liberty or property from an individual, the State must provide effective procedures that guard against an erroneous deprivation." *People v. David W.*, 95 N.Y.2d 130, 136

(2000) (citing U.S. Const., Amend. XIV, § 1; N.Y. Const., art. I, § 6; *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 96 S. Ct. 893, 47 L. Ed. 2d 18; *Wisconsin v. Constantineau*, 400 U.S. 433, 436, 91 S. Ct. 507, 27 L. Ed. 2d 515). A state may satisfy due process with either pre-deprivation remedies or post-deprivation remedies. *See Rivera-Powell*, 470 F.3d at 465 (citation omitted).

In the present matter, the Court finds that Defendants are entitled to summary judgment as to Plaintiffs' due process claims because Plaintiffs had an adequate state court remedy available to them. Through the passage of the amendments to section 167(8) of the Civil Service Law and the Resolution passed by Defendant Hite amending section 73.3(b) of Title 4 of the New York Code of Rules and Regulations, Plaintiffs had notice of the changes to their health insurance contribution rates about to take effect. *See* Dkt. No. 93-2 at ¶ 47 (citing Dkt. No. 93-21). It is well settled that an Article 78 proceeding generally provides constitutionally adequate post-deprivation process. *See Campo v. N.Y.C. Emps. Ret. Sys.*, 843 F.2d 96, 102 (2d Cir. 1988); *Minima v. N.Y.C. Emps. Ret. Sys.*, No. 11-cv-2191, 2012 WL 4049822, *6 (E.D.N.Y. Aug. 17, 2012).[11]

Even assuming that the availability of an Article 78 proceeding did not preclude Plaintiffs' due process claims, they are nevertheless still subject to dismissal. While it is true that collective bargaining agreements can be the source of a property right entitled to due process protection, "not every contractual benefit rises to the level of a constitutionally protected property interest." *Ezekwo v. N.Y.C. Health & Hosps. Corp.*, 940 F.2d 775, 782 (2d Cir. 1991). It has been observed that "when federal courts find that a CBA or other nonstatutory source has created a protectable property interest, 'typically it is because the CBA, or the employer's explicitly stated policies,

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[11] The Court notes that Plaintiffs' response did not address Defendants' argument that their due process claim is precluded because of the availability of constitutionally adequate post-deprivation process through an Article 78 proceeding. *See* Dkt. No. 97-33 at 28-30.

virtually guaranteed that the employee would enjoy some particular, significant benefit, or that the employee would not be disciplined without cause.'" *Dohrmann-Gallik v. Lakeland Cent. Sch. Dist.*, No. 14-cv-4397, 2015 WL 4557373, *3 (S.D.N.Y. July 27, 2015) (quoting *MacFall v. City of Rochester*, 746 F. Supp. 2d 474, 483 (W.D.N.Y. 2010), *aff'd*, 495 Fed. Appx. 158 (2d Cir. 2012)). "Generally, the types of contractual benefits that are protected by the Due Process Clause are those bearing a quality or character of 'extreme dependence,' as in the case of welfare benefits, or 'permanence,' as in the case of loss of public employment." *Id.* (citing *S & D Maint. Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988); *Danese*, 827 F. Supp. at 191-92).

Here, as discussed above, Plaintiffs have failed to identify a term in any of the CBAs guaranteeing premium contributions at a fixed rate in perpetuity. In their response to Defendants' motion, Plaintiffs also appear to argue that, in addition to the rights created by the CBAs themselves, there was a "mutually explicit understanding" between the parties that created their protected interest in premium contribution rates that would remain fixed in retirement. *See* Dkt. No. 97-3 at 28-29. As Defendants correctly argue, the cases cited by Plaintiffs do not support their claim.

In *Perry v. Sinderman*, 408 U.S. 593 (1972), the Court held that the plaintiff college professor had a property interest in continued employment in the absence of tenure where by reason of rules and understandings promulgated and fostered by state officials, the college had a *de facto* tenure program and the professor had tenure under that program. *See id.* at 600-02. Here, unlike *Perry*, Plaintiffs have failed to cite to anything other than their own subjective belief, primarily based on the testimony of Mr. Hanna, that they had a right to fixed premium contribution rates in retirement. *Perry* made clear, however, that a mere "subjective 'expectancy'" is not protected by procedural due process. *See Perry*, 408 U.S. at 603.

In *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012), the court found that the plaintiff had an interest in continued enrollment in a university that was based on express language in the school board's policy manual and the student code of conduct that provided that a student could not be disciplined until being found guilty of a violation of the code of conduct. *See id.* at 1304. Again, unlike the present matter, *Barnes* involved express language guaranteeing certain rights and protections. No such language exists in the present matter.

In *Basciano v. Herkimer*, 605 F.2d 605 (2d Cir. 1978), a laborer employed by the city applied for accident disability retirement after suffering an injury on the job. *See id.* at 606. The plaintiff's application was denied. *See id.* at 606-07. The Second Circuit concluded that the mandatory language of New York City Administrative Code, which required that the City grant accident disability retirement benefits to those who meet certain criteria, created a property interest protected by the Due Process Clause. *See id.* at 609.

The Second Circuit distinguished *Basciano* in *Costello v. Town of Fairfield*, 811 F.2d 782 (2d Cir.1987). In *Costello*, the plaintiffs' collective bargaining agreement provided for a salary increase of 4.5% at year-end. *See id.* The plaintiffs, however, retired before the increase went into effect, and demanded that the town apply the 4.5% increase to their retirement pay at year-end. *See id.* When the town refused, the plaintiffs filed a section 1983 claim. *See id.* At summary judgment, the district court dismissed the claim and the Second Circuit affirmed, reasoning that the contractual increase in retirement pay was not a protected property interest. *See id.* at 784. The Second Circuit explained that *Basciano* was not controlling because it involved the denial of all disability retirement benefits, as opposed to merely an increase in benefits. *See id.* The Second Circuit further explained that the section 1983 claim was really a contract claim in disguise because the court would have had to interpret the CBA's terms to

resolve whether the claimed increase was due in order to decide whether there was an "entitlement" to the increase. *See id.*

Here, as in *Costello*, Plaintiffs have not suffered a complete loss of benefits. And, unlike *Basciano*, Plaintiffs have failed to cite to any relevant statute, regulation, or otherwise official promulgation that would support their claim of a mutually explicit understanding. Additionally, courts have been reluctant to find a property interest premised on a benefit conferred by a public contract unless that benefit has been denied entirely. *See Jackson v. Roslyn Bd. of Educ.*, 652 F. Supp. 2d 332, 341-43 (E.D.N.Y. 2009); *Lawrence v. Town of Irondequoit*, 246 F. Supp. 2d 150, 156-57 (W.D.N.Y. 2002).

Based on the foregoing, the Court finds that Defendants are entitled to summary judgment as to Plaintiffs' due process causes of action.

E. Fourth Cause of Action: Violation of State Law

Plaintiffs' fourth cause of action alleges that Defendant Hite lacked the authority to administratively extend the premium shift. *See* Dkt. No. 55 at ¶¶ 116-31. Defendants claim that this cause of action "appears to have been brought pursuant to Article 78 of the New York Civil Practice Law and Rules and has been dismissed." Dkt. No. 93-1 at 9 (citing Dkt. No. 19 at 19-22). Plaintiffs have not responded to Defendants' motion insofar as it seeks dismissal of the fourth cause of action.

Having failed to address Defendants' motion as to this claim, the Court finds that Plaintiffs have abandoned this claim. *See Jackson v. Fed. Exp.*, 766 F.3d 189, 196 (2d Cir. 2014) (noting that a counseled response to a motion for summary judgment that makes some – but not all – arguments available generally "reflects a decision by [the] party's attorney to pursue some claims or defenses and to abandon others"); *see also Howard v. City of New York*, 62 F. Supp. 3d 312,

324 (S.D.N.Y. 2014) (citation omitted). Moreover, as Defendants correctly contend, the Court previously dismissed an identical claim that was brought in Plaintiffs' original complaint. *See* Dkt. No. 19 at 19-22. As such, even if Plaintiffs had not abandoned this claim, summary judgment would be appropriate for the reasons previously set forth by the Court. *See id.*

F. Sixth Cause of Action: Violation of Article III, § 1 of New York State Constitution

In their sixth cause of action, Plaintiffs allege that Defendants Hite and Megna violated Article III, § 1 of the New York State Constitution when they extended the premium contribution changes to retirees pursuant to the authority granted in section 167(8) of the Civil Service Law. *See* Dkt. No. 55 at ¶¶ 141-45. Defendants argue that the Court should decline to exercise over this state law claim which, in any event, has no merit because Defendants Hite and Megna acted in accordance with the express terms of section167(8). *See* Dkt. No. 93-1 at 34-35.

Article III, § 1 of the New York State Constitution states that "[t]he legislative power of this state shall be vested in the senate and assembly." "'The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions.'" *Garcia v. N.Y.C. Dep't of Health & Mental Hyg.*, ___ N.Y.3d___, 2018 WL 3147611, *3 (2018) (quotations omitted). "This principle, 'implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies.'" *Id.* (quotation and other citation omitted).

Section 167(8) of the Civil Service Law provides as follows:

> Notwithstanding any inconsistent provision of law, where and to the extent that an agreement between the state and an employee organization entered into pursuant to article fourteen of this chapter so provides, the state cost of premium or subscription charges for

> eligible employees covered by such agreement may be modified pursuant to the terms of such agreement. The president, with the approval of the director of the budget, may extend the modified state cost of premium or subscription charges for employees or retirees not subject to an agreement referenced above and shall promulgate the necessary rules or regulations to implement this provision.

N.Y. Civ. Serv. Law § 167(8). Defendants Hite and Megna cited to this provision in extending the increase in health insurance contribution rates to retirees.

Plaintiffs first contend that Defendants' motion for summary judgment must be denied because, at the time the State changed the cost of retiree contribution rates, effective October 1, 2011, Defendant Hite was serving as the Director of Division of Classification and Compensation and the Deputy Commissioner for the Department of Civil Service. *See* Dkt. No. 97-33 at 32. Plaintiffs argue that, "[i]n order to modify the civil service law to include modification to retiree health insurance, as set forth in Defendant Hite's correspondence to Defendant Megna, dated September 21, 2011, these individuals were required to have been serving in a legislative capacity, which they were not." *Id.* Further, Plaintiffs assert that, even if the Court were to look to "Civil Service Law § 167(8) for Defendants Hite's and Megna's authority to increase the retiree health insurance contributions in 2011, these individuals still lacked the appropriate ability to authorize changes to the retiree contribution rates." *Id.* Plaintiffs argue that, in September 2011, the position of President of the Civil Service Commission was vacant and that, at that time, Defendant Hite had not filed an oath of office as Commissioner of the Department of Civil Service or as President of the Civil Service Commission. *See id.* As such, Plaintiffs argue that Defendant Hite lacked the authority under Civil Service Law § 167(8) to extend the modified health insurance contribution rates to retired employees. *See id.* at 32-33.

To the extent that Plaintiffs are attempting to argue that section 167(8) is an unconstitutional delegation of legislative authority, their argument is unpersuasive. In *Retired Public Employees Assoc., Inc. v. Cuomo*, 123 A.D.3d 92 (3d Dep't 2014), the plaintiffs argued that Civil Service Law § 167(8) constituted an unconstitutional delegation of legislative authority. *See id.* at 97. Rejecting this argument, the Third Department held that

> the power given to the Civil Service Commission, with the approval of the Budget Director, to modify health insurance contribution rates for retirees and non-represented state employees is entirely dependent upon – and limited by the terms of – a negotiated agreement between the state and an employee organization modifying the contribution rates for current employees. . . . Contrary to petitioners' contention, the standard set forth by the Legislature – that any change in the retiree statutory contribution rate must be tied to a collectively bargained rate – provides adequate guidance for the exercise of that discretion, as "there need not be a specific and detailed legislative expression authorizing a particular executive act [where, as here,] the basic policy decisions underlying the [actions authorized] have been made and articulated by the Legislature."

Id. at 97-98 (quotation and other citation omitted). The Third Department also rejected the plaintiffs' claim that section 167 was internally inconsistent to the extent that section 167(1)(a) imposes a fixed contribution rate for retiree health insurance. *See id.* at 95. The court held that, considering the statute as a whole, section 167(8) plainly and unambiguously permits modification of the fixed contribution rates for health insurance premiums set forth in Civil Service Law § 167(1)(a). *See id.* The court noted that section 167(8) "begins with the phrase '[n]otwithstanding any inconsistent provision of law,' which is a 'verbal formulation frequently employed for legislative directives intended to preempt any other potentially conflicting statute, wherever found in the [s]tate's laws.'" *Id.* (quotation and other citation omitted). "Thus, while Civil Service Law § 167(1)(a) provides for a fixed percentage contribution, the explicit command

of the Legislature in Civil Service Law § 167(8) makes clear that the former provision does not apply where it would otherwise conflict with Civil Service Law § 167(8)." *Id.*

Next, the Court finds unpersuasive Plaintiffs' argument that Defendant Hite was not authorized to increase the premium contribution rate for retirees pursuant to section 167(8) because she had not filed an oath of office as President of the Civil Service Commission or Commissioner of the Department of Civil Service. Section 9 of the New York State Public Officers Law provides in relevant part as follows:

> If there is but one deputy, he shall, unless otherwise prescribed by law, possess the powers and perform the duties of his principal during the absence or inability to act of his principal, or during a vacancy in his principal's office. If there be two or more deputies of the same officer, such officer may designate, in writing, the order in which the deputies shall act, in case of his absence from the office or his inability to act, or in case of a vacancy in the office, and if he shall fail to make such designation, the deputy longest in office present shall so act.

N.Y. Pub. Off. Law § 9. Immediately prior to her resignation as Commissioner of the Department of Civil Service, Nancy Groenwegen filed a form entitled "Designation of Deputy" that designated Patricia Hite to possess the Commissioner's powers and perform the Commissioner's duties during the vacancy in the Commissioner's office. *See* Dkt. No. 97-22 at 2. On that same date, Defendant Hite submitted a form entitled "Public Officer Oath/Affirmation" that was filed with the Department of State as required. *See id.* at 3. Upon Nancy Groenwegen's resignation, Defendant Hite was authorized to perform the duties of the Commissioner of the Department of Civil Service and President of the Civil Service Commission until her replacement was appointed by the Governor. *See* N.Y. Pub. Off. Law § 9; N.Y. Civ. Serv. Law §§ 5, 7; *see also* Office of the Attorney General, Formal Opinion No. 250 dated Oct. 15, 1941, 1941 WL 52436 (1941) (finding that, upon a vacancy in the Office of State Comptroller, pending an appointment of a temporary

Comptroller, the duties of the office may be performed by a deputy qualifying under section 9 of the Public Officers Law).

Plaintiffs have provided only conclusory allegations in support of their opposition to Defendants' motion, which the Court finds unpersuasive. Accordingly, the Court grants Defendants' motion for summary judgment as to Plaintiffs' sixth cause of action.

G. Seventh Cause of Action: Civil Rights Violation Under 42 U.S.C. § 1983

The seventh cause of action purports to be a separate cause of action under 42 U.S.C. § 1983. *See* Dkt. No. 55 at ¶¶ 146-49. Defendants contend that this claim is duplicative of the Contracts Clause and federal Due Process causes of action and must be dismissed. *See* Dkt. No. 93-1 at 36. In response, Plaintiffs argue that they "have established continued health insurance premium contributions at the fixed rate of 10% for individual coverage and 25% for dependent coverage. Defendants acting in their official capacity impaired the contracts at issue in violation of Article I, § 10 of the United States Constitution." Dkt. No. 97-33 at 30. As such, Plaintiffs claim that they are entitled to summary judgment on their seventh cause of action. *See id.*

Having already found that Defendants are entitled to summary judgment on Plaintiffs' federal claim and because 42 U.S.C. § 1983 is but a procedural mechanism that itself creates no substantive rights, the Court grants Defendants' motion for summary judgment as to Plaintiffs' seventh cause of action.

H. Eighth Cause of Action: Contract Rights Established by Statute and Practice

In the eighth cause of action, Plaintiffs allege that the retirees' premium contribution increase violated Plaintiffs' contract rights established by statute and longstanding practice. *See* Dkt. No. 55 at ¶¶ 150-55. Defendants argue that they are entitled to summary judgment as to this claim because (1) it is well established that Civil Service Law § 167(1) did not bestow any

contractual rights on Plaintiffs; (2) the claimed past practice did not exist; and (3) a past practice is merely a form of parol evidence and does not independently establish a contractual right. *See* Dkt. No. 93-1 at 37-39. In response, Plaintiffs contend that the 1983 amendment to the Civil Service Law concerning retiree health insurance was an extension of the parties' negotiations and collective bargaining agreements. *See* Dkt. No. 97-33 at 33. In its filings, Defendants assert that "'[t]he 1983 law was enacted to implement agreements reached through collectively bargaining, including an express agreement that the State would continue to pay 100% of the health insurance premium contributions for those who retired prior to January 1, 1983.'" *Id.* Plaintiffs argue that "[c]learly, such an assertion establishes that the changes to health contribution rates for employees retiring on or after January 1, 1983, was negotiated between the parties." *Id.* Additionally, according to Ross Hanna, the parties never negotiated any further changes to retiree health insurance contribution rates. *See id.* Plaintiffs also claim that the past practice of the parties demonstrates the intent of providing retiree health insurance at the contribution rates memorialized in the 1983 civil service statute. *See id.* at 34. "Despite the State's proposals in 2003 and 2007 to change the retiree health insurance contribution rates based on a sliding scale, the parties never agreed to modify such rates from those negotiated between the parties and made effective on January 1, 1983." *Id.*

As Defendants correctly note, courts are hesitant to read contractual rights into statutes because to do so would too easily preclude the State from changing its policies:

> [A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise" ... Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.

National R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985) (quoting *Dodge v. Board of Educ.*, 302 U.S. 74, 79, 58 S. Ct. 98, 82 L. Ed. 57 (1937)). The New York Court of Appeals has explained that "certain types of legislative acts, including those fixing salaries and compensation ... are not presumed to create a contract." *Cook v. Binghamton*, 48 N.Y.2d 323, 330 (1979).

In *Retired Public Employees Assoc., Inc. v. Cuomo*, 123 A.D.3d 92 (3d Dep't 2014), the Third Department specifically rejected these very arguments. The court found "nothing in the language of Civil Service Law § 167(1)(a) to constitute 'clear and irresistible evidence' that the Legislature intended to 'fetter[ ] its power in the future' with respect to retirees' health insurance contributions." *Id.* at 96-97 (quotation and other citation omitted). Significantly, the court noted that "the statute does not contain any 'words of contract' or employ any terms that signal an intent to create a contractual or vested right." *Id.* at 97 (quotation and other citations omitted). Under these circumstances, the court held that "Civil Service Law § 167(1)(a) is more reasonably read as a policy determination regarding the state's contribution rate towards retiree health insurance premiums that is subject to later change at the will of the Legislature." *Id.* (citations omitted).

Contrary to Plaintiffs' arguments, the Court finds that Civil Service Law § 167(1) did nothing more that set forth policy and did not create vested contractual rights. Its terms do not "clearly and unequivocally" express an immutable contractual guarantee. Indeed, all courts to have considered this argument have rejected it. *See Retired Public Emps. Assoc., Inc.*, 123 A.D.3d at 96-97; *New York State Court Officers Assoc. v. Hite*, 851 F. Supp. 2d 575, 582 (S.D.N.Y. 2012) ("Indeed, section 167(8) – both before and after its amendment by Chapter 491 – anticipates that its terms may be altered through negotiation. Reading section 167 as a contract

would improperly impair the ability of the Legislature to change its policies regarding its employees health insurance plans"), *aff'd*, 475 Fed. Appx. 803 (2d Cir. 2012).

Moreover, the alleged "past practice" of providing higher contribution rates prior to 2011 does not change this conclusion. "Courts also may look to the past practice of the parties to give definition and meaning to language in an agreement, including a collective bargaining agreement, which is ambiguous." *Aeneas McDonald Police Benev. Assoc. v. City of Geneva*, 92 N.Y.2d 326, 333 (1998) (citations omitted). "However, past practice, like any other form of parol evidence, is merely an interpretive tool and cannot be used to create a contractual right independent of some express source in the underlying agreement." *Id.* (citations omitted).

First, as discussed above, while it is true that, between 1983 and 2011, there was no change in the contribution rate paid by retirees, the State also made no change to the contribution rate paid by employees as well. As such, all that this pattern establishes is that, during the period in question, the need did not arise to make changes to the premium contribution rates and that individuals who retired after January 1, 1983 paid the same contribution rate as current employees. Second, even if applying the same contribution rates to retirees as to active employees constitutes a past practice, it cannot, as Plaintiffs claim, independently establish a contractual right. *See Aeneas McDonald Police Benev. Assoc.*, 92 N.Y.2d at 333.

Based on the foregoing, the Court grants Defendants' motion for summary judgment as to Plaintiffs' eighth cause of action.

I. Plaintiffs' Motion to Preclude the Declarations of Colafati and Decker

1. Standard

Federal Rule 26 requires parties to disclose the identity of individuals "likely to have discoverable information …that the disclosing party may use to support its claims or defense."

Fed. R. Civ. P. 26(a). Parties are also required to update and supplement their disclosures and other discovery responses in "a timely manner." Fed. R. Civ. P. 26(e). Additionally, Rule 26(a)(2)(A) requires a party to disclose "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26(a)(2)(A). Indeed, "the identity of any witness who may be used to provide expert testimony, whether specifically retained for that purpose or not, must be disclosed." *DVL, Inc. v. General Electric Co.*, 811 F. Supp. 2d 579, 588 (N.D.N.Y. 2010) (citing *Lamere v. New York State Office for the Aging*, No. 03-CV-0356, 2004 WL 1592669, *1 (N.D.N.Y. July 14, 2004)). In addition, Rule 26(a)(2)(B) requires the additional disclosure of "a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). Disclosures made pursuant to Rule 26(a)(2) must be provided "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D); *see also DVL, Inc.*, 811 F. Supp. 2d at 588 (citation omitted). "The purpose of Rule 26(a)(1)(A) is to 'alert an opposing party of the need to take discovery of the named witness.'" *Harris v. Donohue*, No. 1:15-cv-1274, 2017 WL 3638452, *2 (N.D.N.Y. Aug. 23, 2017) (citing *Badolato v. Long Island R.R.*, No. 14-cv-1528, 2016 WL 6236311, at *4 (E.D.N.Y. Oct. 25, 2016)).

If a party fails to disclose a witness under Federal Rule of Civil Procedure 26(a) or (e), a party may not use that witness unless the failure to disclose was substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1). "In determining whether preclusion is appropriate, courts must consider: (1) the reasons for the delay in providing the evidence; (2) the importance of the evidence precluded; (3) the prejudice to the opposing party from having to address the new evidence; and (4) the possibility of a continuance." *In re Bear Stearns Companies, Inc. Sec.,*

Derivative, & ERISA Litig., No. 09 Civ. 8161, 2017 WL 2839638, *5 (S.D.N.Y. June 30, 2017) (citing *Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc.*, 118 F.3d 955, 961 (2d Cir. 1997); *Outley v. City of New York*, 837 F.2d 587, 590-91 (2d Cir. 1988)); *see also Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006) (same).

2. Declaration of Dominic Colafati

In their motion, Plaintiffs note that, "[c]ontained within Mr. Colafati's Declaration is data and analysis concerning New York State's finances during all times relevant in this action allegedly based on records maintained by the DOB in the regular course of its business which have not been identified or disclosed to Plaintiffs, including quoted reports from 'Standards and Poor's', 'Fitch Ratings' and 'Moody's Investors Service.'" Dkt. No. 97-33 at 37. Mr. Colafati states further that he was responsible for all aspects of the Division of Budget's Expenditure Debt Unit's operations, which included overseeing the State's Financial Plan. *See id.* Plaintiffs argue that, "[a]lthough he indicates that his employment at DOB may have exposed him to aspects of the State's finances and the processes of developing the annual budget, a review of Mr. Colafati's Declaration reveals that the Defendants are attempting to use Mr. Colafati's expertise and analysis of the DOB financial records and documents, rather than as a fact witness based upon his own personal observations and experiences." *Id.* Plaintiffs contend that Defendants' motion papers make clear that Mr. Colafati's testimony is being used to demonstrate that Defendants had a "legitimate public purpose" to excuse their unconstitutional impairment of Plaintiffs' contract rights. *See id.* at 37-38. Plaintiffs assert that this declaration must be stricken because Defendants failed to disclose Mr. Colafati as an expert pursuant to Rule 26. *See id.* Further, Plaintiffs contend that, should the Court deem this lay testimony, it should still be precluded

because Defendants failed to disclose him as a witness and Plaintiffs would be prejudiced because they were not permitted to depose him. *See id.* at 39.

Having considered the parties' submissions and the applicable law, the Court denies Plaintiffs' motion to preclude the declaration of Mr. Colafati. Initially, the Court notes that, in their statement of material facts, Defendants relied on Mr. Colafati's declaration in discussing the fiscal crisis facing the State in 2010-2011. *See* Dkt. No. 98 at ¶¶ 54-77. In their response to Defendants' statement of material facts, Plaintiffs admit to every fact established through Mr. Colafati's declaration. *See id.*

Next, the Court finds that Mr. Colafati's declaration does not constitute expert testimony. Rather, Mr. Colafati simply set forth institutional facts (many of which were publically known), not facts that were personal to him. Mr. Colafati's testimony is rationally based on his experience working for the Division of Budget and is not based on specialized knowledge.

Finally, the Court finds that Plaintiffs did not suffer prejudice from Defendants failure to disclose Mr. Colafati. All of the information contained in Mr. Colafati's declaration is contained in the declaration of James DeWan, who was listed in Defendants' Rule 26 disclosure and whom Plaintiffs did depose. *See* Dkt. No. 97-18; Dkt. No. 97-12 at 3.

Accordingly, the Court denies Plaintiffs' motion to preclude the declaration of Dominic Colafati.[12]

3. Declaration of Darryl Decker

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[12] Even if the Court granted Plaintiffs' motion to preclude Mr. Colafati's declaration, Defendants would still be entitled to summary judgment as to all claims because Mr. Colafati's declaration was only relevant in determining whether Defendants had a legitimate public interest in impairing the alleged contract.

Darryl Decker has been employed by the New York State Governor's Office of Employee Relations ("GOER") since 1996. *See* Dkt. No. 91-4 at ¶ 1. According to Plaintiffs, "[b]ased on his positions and his role as the 'lead health benefits negotiator for several CBAs' since 1999, Mr. Decker testifies to the meaning of certain language contained in the Health Insurance Articles of the collective bargaining agreements made between the State and Council 82 going back to as far as the 1982 to 1985 collective bargaining agreement, long before his employment commenced." Dkt. No. 97-33 at 40. Plaintiffs contend that the Court should strike Mr. Decker's declaration due to the prejudice caused by Defendants' Rule 26 violation. *See id.*

Having considered Plaintiffs' arguments, the Court denies the motion to preclude the declaration of Darryl Decker. The information contained in Mr. Decker's declaration is also available through the declaration of Priscilla Feinberg, Mr. Decker's predecessor. *See* Dkt. No. 93-5. Since Plaintiffs were given the opportunity to depose Ms. Feinberg, Plaintiffs have failed to demonstrate that they suffered any prejudice from Defendants' Rule 26 violation.

Based on the foregoing, the Court denies Plaintiffs' motion to preclude the declaration of Darryl Decker.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendants' motion for summary judgment (Dkt. No. 93) is **GRANTED**; and the Court further

ORDERS that Plaintiffs' cross motion for summary judgment (Dkt. No. 97) is **DENIED**; and the Court further

ORDERS that Plaintiffs' motion to preclude the declarations of Dominic Colafati and Darryl Decker is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Defendants' favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance in the Local Rules.

IT IS SO ORDERED.

Dated: September 24, 2018
Albany, New York

Mae A. D'Agostino
U.S. District Judge

United States Code Annotated
Constitution of the United States
Annotated
Article I. The Congress

U.S.C.A. Const. Art. I § 10, cl. 1

Section 10, Clause 1. Treaties, Letters of Marque and Reprisal; Coinage of Money; Bills of Credit; Gold and Silver as Legal Tender; Bills of Attainder; Ex Post Facto Laws; Impairment of Contracts; Title of Nobility

Currentness

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

<This clause is displayed in six separate documents according to subject matter,>

<see USCA Const Art. I § 10, cl. 1-Treaties, Etc.>

<see USCA Const Art. I § 10, cl. 1-Coinage of Money>

<see USCA Const Art. I § 10, cl. 1-Bills of Credit>

<see USCA Const Art. I § 10, cl. 1-Legal Tender>

<see USCA Const Art. I § 10, cl. 1-Bills of Attainder, Etc.>

<see USCA Const Art. I § 10, cl. 1-Impairment of Contracts>

U.S.C.A. Const. Art. I § 10, cl. 1, USCA CONST Art. I § 10, cl. 1
Current through P.L. 115-281. Also includes P.L. 115-283 to 115-333, and 115-335 to 115-338. Title 26 current through P.L. 115-442.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, I electronically filed with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the parties listed below, and served **one (1) true copy of the Joint Appendix and two (2) true copies of the Brief in Support** on behalf of Plaintiffs-Appellants, by UPS/overnight mail, addressed to the last known address of the addressee as indicated below:

Frederick A. Brodie, Esq.
Office of the Attorney General
Appeals and Opinions Bureau
The Capitol
Albany, New York 12224-0341

s/Eric E. Wilke
Eric E. Wilke