SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 10, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12696 The People of the State of New York, Ind. 4081/09
Respondent,

-against-

Jose Palaguachi,
Defendant-Appellant.

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Lombardi & Salerno PLLC, New York (Dino J. Lombardi of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered September 22, 2010, convicting defendant, after a jury trial, of rape in the first degree and sexual abuse in the first degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

Defendant's evidentiary arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The court properly received testimony that came within the permissible

scope of prompt outcry evidence (*see People v McDaniel*, 81 NY2d 10 [1993]), testimony concerning the victim's demeanor after the attack (*see People v Cordero*, 257 AD2d 372, 376 [1st Dept 1999], *lv denied* 93 NY2d 968 [1999], and expert testimony by the emergency room nurse who treated the victim (*see People v Lee*, 96 NY2d 157 [2001]). In any event, any errors regarding these matters were harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his claim that the court violated the procedures set forth in *People v O'Rama* (78 NY2d 270 [1991]), and there was no mode of proceedings error (*see People v Williams*, 21 NY3d 932, 934-935 [2013]). With regard to 9 of the 10 jury notes at issue, although the court did not comply fully with the *O'Rama* procedure, the record establishes that counsel was apprised of the specific contents of the notes and afforded a meaningful opportunity to provide input. As to the final note, the record is inadequate to establish whether counsel received an opportunity to be heard (*see People v McClean*, 15 NY3d 117, 121 [2010]). However, the record does show that defense counsel had notice of the note, which the court read aloud in open court, and failed to object. Moreover, the court's initial response to this note was simply an announcement that a substantive instruction would be forthcoming, which was "essentially the ministerial act

of saying, 'Wait'" (*People v Williams*, 38 AD3d 429, 431 [1st Dept 2007], *lv denied* 9 NY3d 965 [2007]), and the record establishes that counsel had input regarding the substantive response that the court ultimately delivered. Accordingly, none of defendant's *O'Rama* claims are exempt from preservation requirements, and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find no basis for reversal.

Defendant's claim that his counsel rendered ineffective assistance by failing to preserve the issues defendant raises on appeal is unreviewable because it involves matters of strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that his counsel's failure to raise these issues fell below an objective

standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]).

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

ENTERED: JULY 10, 2014

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12697 In re 50 West Realty Company, L.P., Petitioner, Index 102430/12

-against-

Environmental Control Board of the City of New York, et al., Respondents.

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The Abramson Law Group, PLLC, New York (Clifford J. Bond of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

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Determination of respondent, Environmental Control Board of the City of New York (ECB), dated November 17, 2011, which, after a hearing, found that petitioner violated Administrative Code of the City of New York § 28-118.3.2, and imposed a penalty of $500, unanimously annulled, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Manuel J. Mendez, J.], entered on or about January 17, 2013), granted.

Respondent ECB failed to introduce substantial evidence that petitioner violated Administrative Code § 28-118.3.2 by making a change to its building that was inconsistent with the last issued

certificate of occupancy (CO) (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). Indeed, there was no evidence that the building had been changed at all since the October 1992 issuance of the amended CO, or that the general nature of the building's tenancies had changed since petitioner acquired title to the building in 1994 so as to effectuate the kind of alterations contemplated by the Code. At the hearing, petitioner's architectural and professional engineering expert testified that when the certificate was issued in 1992, the custom and practice was to designate only the most intensive occupancy use, which would necessarily include and authorize all less intensive uses, and that the designated "light manufacturing" use permitted the less intensive uses of professional offices and architectural and design studios that were noted at the time of the alleged violation in May of 2010. The Department of Building's inspector who issued the notice of violation did not testify, and besides the notice itself, respondents did not introduce any evidence at the hearing to counter petitioner's expert's testimony, or to

support the inspector's apparent surmise and conjecture that petitioner made impermissible changes to the building (*see Matter of Modiano Realty Inc. v Environmental Control Bd. of the City of N.Y.*, 106 AD3d 541 [1st Dept 2013]).

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

ENTERED: JULY 10, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Freedman, JJ.

11472 Arlene R. Silverman, etc., Index 117058/08
Plaintiff-Appellant,

-against-

Sheldon Silver, etc., et al.,
Defendants-Respondents.

_____

Arlene R. Silverman, New York, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondents.

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Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered September 26, 2012, dismissing the supplemental complaint following the grant of defendants' motion to dismiss, affirmed, without costs.

Tom, J.P. concurs in a separate memorandum, Sweeny and Renwick, JJ. concur in a separate memorandum by Sweeny, J., and Andrias and Freedman, JJ. dissent in a memorandum by Freedman, J. as follows:

TOM, J.P. (concurring)

I respectfully concur for reasons stated in my concurrence in *Larabee v Governor of the State of N.Y.* (__ AD3d __ [Appeal No. 11473, decided herewith]).

SWEENY, J. (concurring)

I respectfully concur for the reasons stated in my concurrence in *Larabee v Governor of the State of N.Y.* (__ AD3d __ [Appeal No. 11473, decided herewith]).

FREEDMAN, J. (dissenting)

I respectfully dissent and would reverse for the reasons I stated in *Larabee v Governor of the State of N.Y.*, (__ AD3d __ [Appeal No. 11473, decided herewith]).

Plaintiff, a retired Justice of the Supreme Court, New York County, alleges that defendants violated the Separation of Powers Doctrine by failing to consider her claim for past judicial compensation on the merits, without regard to unrelated policy considerations, in violation of the Court of Appeals' determination in *Matter of Maron v Silver* (14 NY3d 230 [2010]). In dismissing the action, the motion court found that the legislature had considered the matter of judicial compensation. As in *Larabee,* I believe that the enactment of legislation empowering a judicial compensation commission to consider only prospective increases was inadequate to meet the State defendants' constitutional obligations.

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

ENTERED: JULY 10, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12038 Mayra Duluc, Ind. 302417/10
Plaintiff-Appellant,

-against-

AC & L Food Corp., et al.,
Defendants-Respondents.

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Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

LeClair Ryan, P.C., New York (Michael J. Case of counsel), for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 29, 2013, which, in this slip-and-fall action, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion to strike the answer or for other sanctions for spoliation of surveillance tapes, affirmed, without costs.

One week after plaintiff's August 8, 2009 slip-and-fall accident on defendant's premises, plaintiff's counsel sent a notice to defendant "to preserve any and all video recordings/surveillance tapes/still photos of any nature that depict the subject slip and fall accident" on the date and time in question. This notice was received by Nilka Bermudez, defendant's employee in charge of these recordings. After reviewing the tapes from all of the cameras, Bermudez preserved

an 84-second portion of tape from one camera that depicted plaintiff's accident, starting from one minute preceding her fall. She downloaded this clip onto a CD-ROM and forwarded a copy to defendant's insurance carrier.

Bermudez testified that in August 2009, defendant's standard procedure regarding surveillance tapes was to send a copy of video footage of any accident to its insurance carrier, and that, after a search of all cameras, the 84-second portion of the one camera tape was found to be the only footage depicting the accident. She further stated that the insurance carrier never told her what to send it regarding an accident and never asked her to send anything more than the short clip of the accident. Additionally, she testified that the computer system in use at that time automatically erased all footage every 21 days due to limited storage capacity. She also stated that the system later broke and was replaced. However, she could not remember when the replacement occurred, and stated that the old system had been discarded.

Six weeks after the first request, counsel expanded his demand to six hours of footage leading up to the accident, for all 32 cameras in the store.

After discovery was completed, defendants moved for summary judgment, arguing that they did not create or have actual notice

of the condition that allegedly caused plaintiff to fall. Plaintiff opposed the motion and cross-moved to strike defendants' answer for withholding and destroying relevant video footage, or, in the alternative, for an order directing that the issue of notice be resolved against defendants.

The motion court found that defendants met their prima facie burden to establish that they did not create or have actual notice of the condition upon which plaintiff allegedly fell and that plaintiff failed to raise a triable issue of fact as to constructive notice. Although not required to do so in light of its ruling on the summary judgment motion, the court addressed plaintiff's cross motion to strike defendants' answer for spoilation of evidence. The court found that the destruction of the original surveillance video was not willful or contumacious or in violation of a court order. The court accepted Bermudez's explanation regarding the loss of the tape, finding no reason to attribute bad faith to defendants. It also rejected plaintiff's contention that defendants should have preserved six hours of footage from all 32 store cameras.

On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind," which

may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense (*see VOOM HD Holdings LLC v EchoStar Satellite, L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012] [internal quotation marks omitted]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481 [1st Dept 2010]). In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness (*see Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004]). The burden is on the party requesting sanctions to make the requisite showing (*see Mohammed v Command Sec. Corp.*, 83 AD3d 605 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]).

The motion court properly exercised its discretion in denying plaintiff's motion for spoliation sanctions. Plaintiff's initial demand for preservation of video tapes was limited to those that "depict the subject slip and fall accident that took place on the above referenced date, time and location." The portion of the tape that was preserved complied with this demand.

We take no issue with the dissent's contention that a property owner's receipt of a notice to preserve records triggers certain obligations. The extent of the obligation is where we part company with our colleague.

While it is true that a plaintiff is entitled to inspect tapes to determine whether the area of an accident is depicted and "should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes" (*Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 251 [1st Dept 2011]), this principle does not translate into an obligation on a defendant to preserve hours of tapes indefinitely each time an incident occurs on its premises in anticipation of a plaintiff's request for them. That obligation would impose an unreasonable burden on property owners and lessees.

What is significant here is that plaintiff's counsel's letter to Bermudez is dated August 14, 2009, approximately six days after the accident. The record discloses a letter from defendant's insurance carrier to plaintiff's counsel dated one week later, August 21, acknowledging the claim and requesting further information. In response, on August 27, plaintiff's counsel provided the carrier with some of the requested information and enclosed the August 14 letter demanding preservation of the video tape, reiterating its demand for production of same. There is no indication that, at this point, which was still within the 21-day window before the tapes were overwritten, counsel sought anything beyond what he originally asked for. It was only in a motion to strike defendant's answer

or compel production of discovery, returnable on September 25, that plaintiff asked for the first time for six hours of video preceding the slip and fall. By that point, the tapes either had been reused in the normal course of business and were no longer available, or had been discarded after the system broke down.

The procedures employed by defendants with respect to preserving the tapes and coordinating with the insurance carriers were less than stellar. Nevertheless, they did not rise to the level of sanctionable conduct, and an otherwise sufficient motion to dismiss should not be denied on the basis of sheer speculation that camera tapes from another angle might have revealed a cause for plaintiff's fall.

Nor can plaintiff accomplish by indirection what she failed to do directly in her response to defendant's motion for summary judgment. The court correctly found that plaintiff did not raise a triable issue of fact with respect to defendant's creation or notice of the alleged dangerous condition. The testimony of defendant's employees regarding the practice and procedure of cleaning the store, as well as plaintiff's own testimony that she did not observe the condition of the floor before her fall supports the court's conclusion.

Plaintiff argues that the "sweeping" motion of an employee's foot over the floor in the area where plaintiff fell immediately

after the fall, as shown on the portion of the tape that was preserved, demonstrates that something was on the floor, and the employee pushed it aside. She further argues that, had all the tapes been preserved, this fact would clearly have been demonstrated. However, this argument rests on mere speculation, since the testimony of that employee was unequivocal that she ran her foot over the floor in a sweeping motion after the accident to see if it was wet, and did not observe anything wet or slippery. To argue that the unpreserved tapes might potentially have shown a condition that caused plaintiff's fall does not meet plaintiff's burden to show that defendant improperly destroyed the tape (*see Robertson v New York City Hous. Auth.*, 58 AD3d 535, 536-537 [1st Dept 2009]).

The precedents cited by our dissenting colleague do not require a different result. In those cases, specific items were requested for specific electronic or video recordings of a specific area or regarding a specific incident. Nothing was preserved by those defendants despite being put on notice that this material would be relevant to either potential or pending litigation. That is not the situation here. Counsel requested preservation of video tape recordings "that depict the subject slip and fall accident." That recording was preserved. While it may have been a better practice to preserve any footage of the

area from any camera for a period before and after the accident, that was not the request made to defendants, and it would unfair to defendant to penalize it for not anticipating plaintiff's additional requests.

All concur except Saxe, J. who dissents in a memorandum as follows:

SAXE, J. (dissenting)

I would deny summary judgment and grant plaintiff's cross motion for spoliation sanctions to the extent of directing that an adverse inference charge be given at trial with regard to the destroyed surveillance tapes.

Plaintiff slipped and fell while shopping at defendant's supermarket on August 8, 2009, as she was approaching a cashier's station to pay for some tomatoes. Plaintiff's attorneys sent a notice to defendant just one week after her accident, directing defendant "to preserve any and all video recordings/surveillance tapes/still photos of any nature that depict the subject slip and fall accident that took place on the above referenced date, time, and location[, and] not to reuse, erase and/or destroy the aforesaid video recordings/surveillance tapes/still photos." The notice was received by Nilka Bermudez, the employee in charge of those recordings, who, according to her deposition testimony, reviewed all the recordings made by the store's 32 surveillance cameras that morning. Bermudez did not forward the notice to the store's insurer or attorney, and she preserved only an 84-second recording that, in its last 24 seconds, showed plaintiff, from the back, approaching the cash registers and turning into one cashier's lane, only to immediately slip and fall. The angle of the recording does not show the portion of the floor on which plaintiff slipped.

Except for that 84-second clip, the remainder of the surveillance camera recordings from that day were either recorded over after three weeks or discarded when the system broke down and was replaced.

When defendant moved for summary judgment dismissing the complaint, plaintiff cross-moved to strike defendant's answer, contending that the destruction of the video recordings other than the saved 84 seconds constituted spoliation of relevant evidence. The motion court rejected plaintiff's contention, finding that defendant's conduct as to the surveillance footage was not wilful or contumacious or contrary to a court order, and accordingly was not spoliation. I disagree.

New York's common-law doctrine of spoliation authorizes the imposition of sanctions even when the failure to prevent the automatic overwriting of recordings was negligent rather than willful, as long as the alleged spoliator was on notice that those recordings would be relevant to anticipated litigation (*see Strong v City of New York*, 112 AD3d 15, 22 [2013]). In *Strong*, the plaintiff demonstrated that the City had negligently failed to take active steps to halt the process of automatically deleting audio recordings, despite having notice of impending litigation for which a specific audio recording would be relevant

(*id.*). Similarly, in *Suazo v Linden Plaza Assoc., L.P.* (102 AD3d 570 [1st Dept 2013]), spoliation was found based on the defendant's failure to preserve surveillance video for anticipated litigation despite notice that litigation would probably ensue. And, in *Gogos v Modell's Sporting Goods, Inc.* (87 AD3d 248 [1st Dept 2011]), an adverse inference charge was directed where the defendant destroyed store surveillance tapes despite having been put on notice to preserve and produce them.

While severe sanctions such as striking pleadings or an order of preclusion may be excessive where the spoliation was merely negligent, other, less severe sanctions such as an adverse inference charge may nevertheless be appropriate. The charge allows, but does not require the jury to infer that relevant evidence against the spoliator's interest was present on the erased recording, if the explanation for its destruction is not reasonable (*see Gogos*, 87 AD3d at 255; PJI 1:77.1).

Defendant suggests that based on the phrasing of plaintiff's notice, it was reasonable for it to limit its retrieval and retention to only that portion of the footage that actually showed plaintiff falling. However, defendant's obligation upon receipt of plaintiff's notice was not so narrow.

This Court held in *Gogos* that "[p]laintiffs were entitled to inspect the tapes to determine for themselves whether the area of

the accident was depicted. They should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes" (87 AD3d at 251). This reasonable rule is equally applicable here.

The rule in *Gogos* does not require property owners to "preserve hours of tapes indefinitely each time an incident occurs on its premises in anticipation of a plaintiff's request for them," as the majority protests. It does, however, impose a reasonable preservation obligation. After a person is injured an accident, service of a notice to preserve recordings of that day's events imposes on the property owner an important obligation, and should be handled carefully. People who slip and fall are often too injured or too flustered to carefully examine their surroundings or to determine whether there were eyewitnesses to their accident. The images contained on any video recordings made on that day and around that time by surveillance cameras may well be critical in assisting the injured person in establishing exactly what occurred and why. Since it is often standard procedure for these recordings to be overwritten or recorded over in a matter of weeks or a few months, timely service of a notice on the property owner to preserve any such recordings must create an obligation on the part of that property owner to preserve all potentially relevant

recordings. The property owner is not free to extract from such recordings a short clip depicting that one moment at that one location from only one angle and to assert that nothing else on its recordings is relevant -- especially when the preserved portion of the recording does not even depict the condition of the floor on which the slip and fall occurred.

Nor may a defendant be permitted to avoid the obligations that arise through service of a notice to preserve by the expedient of failing to make its employee familiar with those obligations. The question is not whether defendant's employee, Nilka Bermudez, acted in good faith when she reviewed all the surveillance footage and determined that, in her estimation, only the 84 second clip she saved needed to be preserved. The question is what defendant should have done upon receipt of plaintiff's demand. If defendant, acting through its employee, failed to fulfill its legal obligations, its employee's lack of knowledge renders defendant answerable for that failure.

There was more than one failure here for which defendant is answerable. The first was Bermudez's failure to retrieve and preserve other footage, from other angles, showing the condition of the floor where plaintiff fell, and activities in that area during the time preceding the accident. The seconds of footage Bermudez retrieved for preservation did not even show the spot on

the floor on which plaintiff slipped. Since Bermudez's deposition testimony acknowledged that other cameras, recording from other angles, would have captured any spilled items on the floor of the store, there would have been footage from another surveillance camera that recorded the condition of the floor before and at the time of plaintiff's fall.

The second was the failure of defendant's insurer or its attorney, who are chargeable with the knowledge that the store's legal obligation included not only the preservation of that single 84-second clip, but any recording by any of the store's surveillance cameras from the period leading up to plaintiff's fall showing the area of the floor on which she fell. We would expect counsel to recognize the applicability of the rule of *Gogos* requiring preservation of tapes for inspection, and to ensure that defendant's employee properly fulfilled that obligation. The wording of plaintiff's demand for "any and all video recordings/surveillance tapes/still photos of any nature that depict the subject slip and fall accident" does not justify the employee's reading plaintiff's demand so narrowly as to limit her task to copying only one clip of footage that recorded plaintiff falling.

Given the possibility that the jury could find that the destroyed recordings would have supported plaintiff's claim of a

hazardous condition on the floor that was present long enough to give defendant notice of it, I would deny defendant's motion for summary judgment dismissing the complaint. The evidence defendant relied on to establish that there was no hazardous condition on the area of the floor on which plaintiff slipped did not establish as a matter of law a lack of a hazard or a lack of notice.

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

ENTERED: JULY 10, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12079- Index 652367/10
12079A-
12080 AQ Asset Management, LLC, as
successor to Artist House
Holdings Inc., et al.,
Plaintiffs-Respondents,

-against-

Michael Levine,
Defendant-Respondent,

Habsburg Holdings Ltd., et al.,
Defendants-Appellants.

- - - - -

Michael Levine,
Cross-Claim Plaintiff-Respondent,

-against-

Osvaldo Patrizzi, et al.,
Cross-Claim Defendants,

Kerry Gotlib, et al.,
Cross-Claim Defendants-Appellants.

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Law Offices of Michael A. Haskel, Mineola (Michael A. Haskel of counsel), for Habsburg Holdings Ltd. and Osvaldo Patrizzi, appellants.

Silverson Pareres & Lombardi LLP, New York (Robert M. Silverson of counsel), for Kerry Gotlib and Michael A. Haskel, appellants.

Reitler Kailas & Rosenblatt LLC, New York (Lauren K. Kluger of counsel), for AQ Asset Management, LLC; Antiquorum, S.A.; Antiquorum USA, Inc.; and Evan Zimmermann, respondents.

Levine & Associates, P.C., Scarsdale (Michael Levine of counsel), for Michael Levine, respondent.

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Order, Supreme Court, New York County (Shirley Werner

Kornreich, J.), entered April 1, 2013, which, to the extent appealed from as limited by the briefs, granted in part the motion of plaintiffs AQ Asset Management LLC, Antiquorum S.A., Antiquorum USA, Inc., and Evan Zimmermann to dismiss the counterclaims of defendants Habsburg Holdings Ltd. (Habsburg) and Osvaldo Patrizzi, unanimously modified, on the law, to reinstate the thirteenth counterclaim seeking imposition of a constructive trust against Zimmermann and Antiquorum S.A., and otherwise affirmed, without costs. Order, same court and Justice, entered April 1, 2013, which granted in part defendant Michael Levine's motion to dismiss the fourth-party complaint filed by Habsburg and Patrizzi, and certain of Habsburg's and Patrizzi's counterclaims asserted in their answer to Levine's interpleader counterclaims, unanimously modified, on the law, to reinstate the first through fifth causes of action and the first "third" interpleader counterclaim, alleging breaches of fiduciary duty, and otherwise affirmed, without costs. Order, same court and Justice, entered March 28, 2013, which granted Levine's motion for sanctions to the extent of awarding attorney's fees and costs against cross-claim defendants Kerry Gotlib and Michael Haskel, unanimously modified, on the law, to deny the motion as to Haskel, and otherwise affirmed, without costs.

By an amended stock purchase agreement (SPA) effective

December 9, 2005, defendants Habsburg and Patrizzi (together the Sellers) agreed to sell half of the shares in a group of companies (the Antiquorum entities) to Artist House Holdings, Inc. (Artist House), predecessor to plaintiff AQ Asset Management, LLC (AQ).[1] The Antiquorum entities included plaintiffs Antiquorum, S.A. (ASA) and Antiquorum USA, Inc. (AUSA). Defendant Michael Levine, an attorney, provided legal counsel to the Sellers, drafted the SPA and other transaction documents, and served as the escrow agent for the deal. Plaintiff Evan Zimmermann, also an attorney, helped broker the transaction and is alleged by the Sellers to have been their legal counsel throughout.

The SPA provided that the Sellers would receive $30 million dollars in cash, as well as proceeds from the sale of certain inventory held by the Antiquorum entities. In order to pay the book value of the inventory, the SPA provided that ASA was to execute a promissory note obligating it to pay, to an unspecified third party, the sum of 16 million Swiss Francs (CHF) within six months of the SPA's execution date. The SPA further provided that, "[a]lternatively, Patrizzi may become personally

[1] A more detailed recitation of the facts and procedural history is set forth in this Court's decision on a previous appeal (111 AD3d 245 [1st Dept 2013).

responsible [for payment of the CHF 16 million] to any Stockholder which is entitled thereto."

The parties agreed that the CHF 16 million was to be paid from the sale of inventory on hand and owned by the Antiquorum entities as of the date of the SPA. The SPA also required Patrizzi to put the inventory up for sale before the due date of the promissory note, and provided that any funds received in excess of the CHF 16 million would belong to Patrizzi or his designees. According to the Sellers, Habsburg was entitled to the first CHF 16 million in inventory sale proceeds and Patrizzi was entitled to the remainder. It is undisputed that ASA never executed a promissory note, and the Sellers contend that they received no proceeds from the sale of inventory.

Patrizzi and Zimmermann also entered into a Stock/Sales Proceeds Distribution Agreement (SPDA) in which they agreed that certain shares of the Antiquorum entities, which were held in escrow for Patrizzi's benefit, would be transferred to a new entity that Patrizzi and Zimmermann would equally own. The SPDA also provided that Patrizzi and Zimmermann would equally split Patrizzi's share of the inventory sale proceeds. The SPDA, which was drafted by Levine, disclosed that Levine had a personal economic interest in part of Zimmermann's share of those proceeds. The agreement further stated that the parties had been

advised of Levine's conflict of interest, had elected to have Levine draft the agreement nevertheless, and had been represented by independent counsel.

Patrizzi alleges that Levine and Zimmermann purposely misrepresented the contents of the SPDA to induce him to sign it. According to Patrizzi, because he does not fully comprehend written English, he did not read the document and instead relied on Levine and Zimmermann to inform him of its contents. Patrizzi alleges that Levine and Zimmermann falsely told him that Zimmermann would receive Patrizzi's shares after a period of three years. The SPDA, however, states that the shares would be transferred to an entity jointly owned by Patrizzi and Zimmermann without a three-year delay. Patrizzi further alleges that Levine and Zimmermann did not tell him that the SPDA gave Zimmermann rights to half of Patrizzi's share of the inventory sale proceeds, or that Levine had an economic interest in part of those monies. Finally, Patrizzi claims that he was never told that he should retain independent counsel.

In December 2005 and January 2006, Artist House delivered $30 million into Levine's escrow account, and various sums were subsequently disbursed. According to the Sellers, in May 2006, Levine advised them that the SPA required that the inventory sale proceeds be deposited into his escrow account. In fact, the SPA

did not require this. In December 2006, ASA transferred $2 million into Levine's escrow account, an amount the Sellers contend constitutes a portion of the inventory sale proceeds.

In July 2007, Leo Verhoeven, Habsburg's principal, sent Levine an email requesting that he return the $2 million to ASA. In the email, Verhoeven stated that the $2 million was for other expenses pursuant to the SPA, and thus was not inventory sale proceeds. Levine, however, did not return the $2 million to ASA at that time. It is the Sellers' position in this litigation that the $2 million is in fact inventory sale proceeds to which they are entitled. They admit that Verhoeven's July 2007 email was a ruse, and that he asked for the money back to avoid tax consequences to Habsburg arising from its direct receipt of inventory sale proceeds.

The Sellers contend that after the $2 million was transferred to Levine's escrow account, Artist House, Levine and Zimmermann wrongfully conspired to oust the Sellers from ASA. At a shareholders meeting held in August 2007, Artist House and Zimmermann relied on the SPDA's purported grant to Zimmermann to vote half of Patrizzi's shares. Using this power, Artist House and Zimmermann gained control of the company, Patrizzi and Verhoeven were removed from the board of directors, and Zimmermann ultimately became the new CEO.

In January 2008, Levine wrote to Habsburg, Patrizzi, Zimmermann and Artist House asking whether they consented or objected to his returning the $2 million to ASA. Levine stated that he would not release the funds absent consent of all necessary parties or a judicial direction to do so. Both Patrizzi and Habsburg wrote back to Levine objecting to release of the money. In August 2010, Zimmermann notified Levine that the $2 million had nothing to do with the sale of inventory and requested its return to ASA. In October 2010, Levine released the $2 million to ASA and/or Zimmermann.

Plaintiffs commenced this action asserting various claims against the Sellers and Levine, in his capacity as escrow agent. Levine then served a "summons in interpleader," answered the complaint, and asserted interpleader counterclaims against plaintiffs and the Sellers. The Sellers answered the complaint asserting counterclaims against plaintiffs, and answered Levine's interpleader counterclaims, asserting counterclaims against him. The Sellers also commenced a "fourth-party action" against Levine. This appeal brings up for review the motion court's dismissal of a number of causes of action and counterclaims contained in the Sellers' various pleadings.

The motion court correctly dismissed the second "third"

interpleader counterclaim[2] alleging that Levine breached the SPA by releasing the $2 million in alleged inventory sale proceeds to Zimmermann and/or ASA. Although the SPA requires the $30 million cash component of the purchase price to be placed in escrow and then disbursed by Levine, no similar requirement exists for the inventory sale proceeds. Rather, those proceeds were to be paid directly by either a promissory note executed by ASA or by Patrizzi personally. Since the SPA imposes no obligations on Levine with regard to his receipt of the $2 million, he cannot be liable for breaching the SPA for disbursing those funds.

The Sellers contend that because Levine had previously advised them that the SPA required the inventory sale proceeds to be placed into escrow, he should be equitably estopped from retracting that position. A party seeking to invoke equitable estoppel must demonstrate, inter alia, a lack of knowledge of the true facts (*River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 [1st Dept 2005]). The Sellers cannot establish this element because, as parties to the SPA, they possessed knowledge that the terms of that contract did not require the escrowing of inventory sale proceeds.

The motion court, however, should not have dismissed the

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[2] The pleading contains two counterclaims denominated "third."

fifth cause of action in the fourth-party complaint which alleges that Levine breached his fiduciary duty based on the same $2 million disbursement. The Sellers allege that Levine told them that the SPA required the escrowing of inventory sale proceeds due to them under the agreement, when in fact the SPA contained no such requirement. The Sellers further allege that they transferred $2 million of such proceeds into Levine's escrow account, and that Levine disbursed those funds to Zimmermann and/or ASA over the Sellers' objections. These allegations, especially in light of Levine's personal interest in Zimmermann's share of the inventory sale proceeds, sufficiently state a claim for breach of Levine's fiduciary duty as escrow agent.

The motion court should not have dismissed the thirteenth counterclaim against Zimmermann and ASA seeking the imposition of a constructive trust with respect to the $2 million. The motion court dismissed this claim based on Verhoeven's admission that his request to Levine to return the $2 million to ASA was a ruse to avoid tax liability. Although no right of action arises from an illegal contract (*see Sabia v Mattituck Inlet Mar. & Shipyard, Inc.*, 24 AD3d 178, 179 [1st Dept 2005]), there is no allegation that any of the contracts here advanced any illegal purpose. Nor can it be determined, on this record, that the Sellers' current claim that the $2 million constitutes inventory sale proceeds

advances any tax avoidance scheme.[3]

The motion court properly dismissed the third counterclaim, which alleges that Artist House breached the SPA by failing to remit other inventory sale proceeds to the Sellers, and that AQ is liable as its successor. The SPA imposes no duty on Artist House to disburse these proceeds to the Sellers. Instead, the SPA provides two alternatives — either ASA would execute a promissory note (which did not happen), or Patrizzi would be personally liable. The counterclaim and motion papers insufficiently allege that Artist House so dominated ASA after the August 2007 ouster that it was the "alter ego" of ASA and caused it to breach the SPA. Furthermore, any breach by ASA in failing to execute the promissory note would have taken place long before the alleged domination.

The eighth and twelfth counterclaims assert unjust enrichment in connection with ASA's and Zimmerman's alleged misappropriation of the inventory sale proceeds. These claims were properly dismissed because a valid contract (the SPA) covers

[3] Zimmermann and ASA do not contend on appeal that the elements necessary for imposition of a constructive trust are not satisfied. Nor do they cross appeal from the motion court's sustaining of the constructive trust cause of action related to other alleged inventory sale proceeds.

the subject matter of the claims (*see Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 [1st Dept 2014]). This is so notwithstanding that ASA and Zimmermann were not parties to the SPA (*see id.*). Likewise, because the Sellers' rights to these proceeds stem solely from the SPA, the seventh and eleventh counterclaims for conversion were properly dismissed as being predicated on a mere breach of contract (*see Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008]).

The tenth counterclaim alleges that ASA and Zimmermann tortiously interfered with the SPA and another contract by orchestrating Patrizzi's termination. This claim was properly dismissed as time-barred, having been brought more than three years after the August 2007 ouster (*see* CPLR 214[4]*; Turecamo v Turecamo*, 55 AD3d 455, 455 [1st Dept 2008]). To the extent the claim relates to the sale of inventory proceeds within the limitations period, the Sellers cannot establish that any such sale constitutes a breach of the relevant contracts (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996] [tortious interference with contract requires, inter alia, actual breach of the contract]).

The first through fourth causes of action in the fourth-party complaint and the first "third" interpleader counterclaim, which allege that Levine breached his fiduciary duty as escrow

agent or attorney, should be reinstated. There is no merit to Levine's contention that these claims are barred by the statute of limitations. "[A] cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). Here, the Sellers allege that Levine deceived Patrizzi into signing the SPDA by, inter alia, failing to disclose and/or misrepresenting the full benefits accruing to Zimmermann and Levine under the agreement, including Levine's personal interest in the inventory sale proceeds. These contentions sufficiently allege fraudulent conduct on Levine's part so as to warrant a six-year limitations period.

The seventh interpleader counterclaim and eighth cause of action in the fourth-party complaint seek rescission of the SPDA as against Levine. Dismissal of these claims was appropriate because Levine is not a party to the contract. Nor, as Sellers assert, is Levine a third party beneficiary. Levine's stated economic interest in the inventory sale proceeds is contained in a clause revealing his conflict of interest as drafter of the SPDA, and does not confer any enforceable rights on Levine against Sellers. At most, he is an incidental beneficiary and

thus is not a proper party to any rescission proceeding (*see Alicia v City of New York*, 145 AD2d 315, 317-318 [1st Dept 1988]).

The motion court correctly dismissed the ninth and tenth causes of action in the fourth-party complaint alleging legal malpractice against Levine, and the seventeenth counterclaim alleging legal malpractice against Zimmermann, as barred by the three-year statute of limitations (*see* CPLR 214[6]; *Champlin v Pellegrin*, 111 AD3d 411 [1st Dept 2013]). These claims accrued no later than August 2007, when the Sellers became aware of Levine's and Zimmermann's alleged betrayal and any attorney-client relationship had come to an end. Since the claims were not brought until, at the earliest, December 2010, when this action was commenced, they are untimely.

Contrary to the Sellers' contention, the statute of limitations was not tolled by alleged fraudulent concealment (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). Any improper collaboration between Levine and Zimmermann would have come to light no later than August 2007 and thus, there could be no tolling after that date. Nor was the limitations period tolled by continuous representation (*see Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005]). Communications dated after August 2007 do not demonstrate that Levine and Zimmermann continued to

represent the Sellers. In light of the dismissal of the malpractice claims against Levine, the motion court properly dismissed the eleventh cause of action in the fourth-party complaint seeking forfeiture of Levine's legal fees.

The sixth interpleader counterclaim and seventh cause of action in the fourth-party complaint, which allege that Levine violated Judiciary Law § 487 by bringing his interpleader claims without informing the court of his purported business relationship with Zimmermann, were properly dismissed. The absence of such information in Levine's interpleader pleading does not rise to the level of "withholding of crucial information from a court" or "conceal[ing] from a court . . . a fact . . . required by law to [be] disclose[d]" (*see Melcher v Greenberg Traurig, LLP*, 102 AD3d 497 [1st Dept 2013], *revd on other grounds* __ NY3d __ [2014]).

The sixth counterclaim for fraud against AQ and Zimmermann was properly dismissed because the allegations are insufficiently detailed to satisfy the heightened pleading requirement of CPLR 3016(b) (*see Herencia v Centercut Rest. Corp.*, 92 AD3d 485, 486 [1st Dept 2012]).

The motion court did not improvidently exercise its discretion in awarding attorney's fees and costs against cross-claim defendant Kerry Gotlib, counsel for Habsburg and Patrizzi,

based on an affidavit submitted by Gotlib in support of an earlier motion (*see* 22 NYCRR 130-1.1). However, fees and costs should not have been awarded against co-counsel Michael Haskel because there was no showing that he had any involvement in the drafting or submission of the affidavit.

Finally, we find no error in the motion court's decision to designate all of the Sellers' causes of action and counterclaims against Levine as cross claims in the main action. However, in light of the unusual procedural posture created by the multiple pleadings in this action, we exercise our discretion to direct Levine to serve an answer to those remaining claims that have not been dismissed within twenty days of service of this order upon him with notice of entry (*see* CPLR 2001, 3011).

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: JULY 10, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Gische, JJ.

12569N & Index 22623/06
M-2189 Howard Raymond, etc., et al.,
Plaintiffs,

-against-

The City of New York, et al.,
Defendants.

- - - - -

Morton Buckvar, Esq.,
Nonparty-Appellant,

-against-

Gersowitz, Libo & Korek, P.C.,
Nonparty-Respondent.

_____

Mischel & Horn, PC, New York (Scott T. Horn of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, New York (Brian J. Shoot of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 15, 2013, which apportioned 15% of the contingency fee earned in the underlying personal injury cases to outgoing counsel Morton Buckvar, Esq. and 85% to incoming counsel Gersowitz, Libo & Korek, P.C., unanimously affirmed, without costs.

Having considered "the amount of time spent by the attorneys on the case, the nature and quality of the work performed[,] . . . the relative contributions of counsel toward achieving the

outcome" (*Diakrousis v Maganga,* 61 AD3d 469, 469 [1st Dept 2009]), "the amount recovered" (*Castellanos v CBS Inc.,* 89 AD3d 499, 499 [1st Dept 2011]), and "the experience, ability and reputation of the attorneys" (*Martin v Feltingoff,* 7 AD3d 467, 468 [1st Dept 2004], *lv denied* 3 NY3d 608 [2004]), we find that the allocation of the fee by the trial judge to Buckvar was appropriate.

M-2189 - *Howard Raymond, etc., et al. v The City of New York, et al.*

Motion seeking to correct record on appeal denied.

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

ENTERED: JULY 10, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Freedman, JJ.

11473 Hon. Susan Larabee, et al., Index 112301/07
Plaintiffs-Appellants,

-against-

The Governor of the State of New York, et al.,
Defendants-Respondents.

- - - - -

The Association of Justices of the Supreme Court of the State of New York, The Supreme Court Justices Association of the City of New York, Inc. and The New York State Association of City Court Judges,
Amici Curiae.

_____

Cohen & Gresser LLP, New York (Tom E. Bezanson of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondents.

Stroock & Stroock & Lavan LLP, New York (Joseph L. Forstadt of counsel), for amici curiae.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered September 14, 2012, affirmed, without costs.

Tom, J.P. concurs in a separate Opinion, Sweeny and Renwick, JJ. concur in a separate Opinion by Sweeny J., and Andrias and Freedman, JJ. dissent in an Opinion by Freedman, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Richard T. Andrias
Helen E. Freedman, JJ.

11473
Index 112301/07

_____x

Hon. Susan Larabee, et al.,
Plaintiffs-Appellants,

-against-

The Governor of the State of New York, et al.,
Defendants-Respondents.

- - - - -

The Association of Justices of the Supreme Court of the State of New York, The Supreme Court Justices Association of the City of New York, Inc. and The New York State Association of City Court Judges,
Amici Curiae.

_____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Richard F. Braun, J.), entered September 14, 2012, which, upon renewal of their motion for summary judgment, declined to award them retroactive monetary damages.

Cohen & Gresser LLP, New York (Tom E. Bezanson, Alexandra Wald and Matthew V. Povolny of counsel), and George Bundy Smith & Associates, P.C., New York (George Bundy Smith, Sr. of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan and Richard Dearing of counsel), for respondents.

Stroock & Stroock & Lavan LLP, New York (Joseph L. Forstadt, Alan M. Klinger, Ernst H. Rosenberger, Burton N. Lipshie, Jerry H. Goldfeder and Linda M. Melendres of counsel), for amici curiae.

The order of the Supreme Court, New York County (Richard F. Braun, J.), entered September 14, 2012, which, upon renewal of plaintiffs' motion for summary judgment, declined to award plaintiffs retroactive monetary damages, should be affirmed, without costs.

Tom, J.P. concurs in a separate Opinion, Sweeny and Renwick, JJ. concur in a separate Opinion by Sweeny, J., and Andrias and Freedman, JJ. dissent in an Opinion by Freedman, J.

TOM, J.P. (concurring)

I agree with the concurrence that defendants have not violated the ruling of the Court of Appeals in the consolidated appeals addressed in *Matter of Maron v Silver* (14 NY3d 230 [2010]), although I write to address additional concerns.

The background facts are set forth in the writings of the concurrence and the dissent and, in greater detail, in this Court's prior decision in *Larabee v Governor of State of N.Y.* (65 AD3d 74 [1st Dept 2009]) and the Court of Appeals ruling (14 NY3d at 230). For present purposes, plaintiffs contend, in effect, that the Court of Appeals decision, having found that New York State judges' compensation lagged considerably in recent years, and also that the legislature acted unconstitutionally in how it responded to the growing inadequacy of judicial salaries, implied a basis for complete recovery retroactive to when the legislature initially failed to establish adequate salaries. Plaintiffs seek, in the present actions, an order awarding them as money damages such compensation as they would have received had cost of living increases been imposed for them dating back to January 1, 2000. However, since plaintiffs' reading of the Court of Appeals decision is inconsistent with the actual text, and I conclude that the remedy they seek is not achievable, I would affirm Supreme Court's order dismissing plaintiffs' claims.

There is no lingering question whether the legislature acted properly during the time period when judges' salary remained stagnant for years - it did not - nor was there any serious controversy regarding the merits of an increase in judicial compensation. Now that the legislature has acted, the issue presented is whether the pay increases that were authorized were themselves constitutionally deficient. However, plaintiffs are conflating an understandable lack of satisfaction with the financial outcome with an analysis more properly relegated to the constitutionality of the process. Relatedly, we are constrained by the text of the Court of Appeals decision, in *Maron*, which analyzed the prior process in terms of the conflict between the legislature's constitutional prerogatives, and its budgetary policies that are outside the purview of those boundaries.

In *Maron*, the Court of Appeals, although leaving intact this Court's declaration and its underlying analysis in *Larabee v Governor of State of N.Y.* (65 AD3d 74 [1st Dept 2009], *supra*), that the political linkage which the legislature substituted for an objective consideration of the merits of judicial compensation violated the constitutional doctrine of Separation of Powers, nevertheless modified our decision to the extent of eliminating the remedy wherein this Court directed the legislature to adjust judicial compensation *to reflect the increase in the cost of*

living since 1998 (*id.* at 100). It would appear that the modification of this Court's attempt to devise a particular monetary remedy, retroactively tied to the cost of living, which plaintiffs similarly seek herein, was already rejected by the Court of Appeals.

Although the Court of Appeals discussed the omission of cost of living increases for judicial compensation, it did so in a purely descriptive, rather than prescriptive, context, and the introductory passages in the decision specifically rejected the recent history of inflation as a constitutionally compelling factor. Thus, there is no textual predicate for us to measure any remedy by such a specific economic factor. Therefore, to the extent that the dissent's suggested remand contemplates the employment of COLAs, or inflation, as components of what should be adequate compensation, it appears to be inconsistent with the Court of Appeals decision.

To the contrary, in its discussion of *Larabee*, the Court of Appeals articulated a concern that courts not intrude into the primary domain of the legislature - that of devising budgets and establishing judicial compensation - when fashioning specific remedies for the legislature's constitutional violations. The Court of Appeals underscored the constitutional delicacy of the judiciary intervening in the legislature's budgetary function,

including that of evaluating the merits of particular compensation levels for judges, which should be undertaken only under the "narrowest of instances" (*Matter of Maron*, 14 NY3d at 261 [internal quotation marks omitted]). Although no further elaboration was provided as to which circumstances might warrant judicial intrusion into these core legislative functions, I do not find any basis for courts to fill that gap as the dissent proposes. The Court of Appeals offered as an extreme example the constitutional violation that would gradually arise were judicial salaries to be constricted to a century-old pay scale; that the example utilized was extreme suggests, I think, that the scope for judicial intervention is narrow indeed.

Limiting itself to finding that the chronic postponement after 2000 of a merit-based evaluation for judicial salary increases while unrelated political tactical considerations were advanced by the legislature was itself the constitutional violation, the Court of Appeals found that "we do not believe that it is necessary here to order specific injunctive relief" (*id.* at 261). Yet, directing the legislature to appropriate funds for retroactive compensation seems to be innately injunctive, notwithstanding that plaintiffs and the dissent frame the remedy as one for money damages.

In any event, the decision seemed to carefully circumvent

the question whether a judicial pay increase was required, finding, rather, that the legislative process that avoided such a determination was constitutionally flawed. Hence, the Court of Appeals' decision was clear as to what the legislature must not do, but was equivocal as to what it then must do.

The remedy devised by the Court of Appeals was the declaration itself; the subsequent phrasing, "we presume that the State will act accordingly" (*Maron* at 261), set forth no specific directive. The further phrasing that "[w]e anticipate that our holding today will permit them to consider, in good faith, judicial salary increases on the merits" (*id.* at 262), was itself, also, aspirational rather than directive. Although the holding referenced "the remedy discussed in this opinion" (*id.* at 264), that remedy was declarative, and not injunctive, nor can I find any language in the decision to support an award of money damages. Although reserving to itself the right to determine "whether the [l]egislature has met its constitutional obligations in th[is] regard" (*id.* at 263), that general jurisdictional statement should yield to the specific finding, in the same sentence, that "[o]f course, whether judicial compensation should be adjusted, and by how much, is within the province of the [l]egislature" (*id.* at 263). This latter constitutional self-restraint by the Court of Appeals flows from its recognition in

the *Chief Judge* branch of the holding that the adequacy of judicial salaries, considered apart from why a merit-based evaluation was so long delayed, "is best addressed in the first instance by the [l]egislature" (*id.* at 262), which is "in a far better position than the [j]udiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources" (*id.* at 261, quoting *Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14, 29 [2006]).

Thus, I cannot read the consolidated Court of Appeals decision as directing the legislature to fund judicial compensation, retroactive or otherwise, at a specific level. Yet the dissent, in suggesting a remand, presently seems to countenance imposing retroactive money damages on the legislature correlating with what a court would decide should have been the correct salary levels dating back to 2000. As I noted above, the Court of Appeals ruling is declaratory - that the linkage as employed was unconstitutional - rather than remedial in the sense of directing that a particular methodology be utilized to calculate *damages* dating back to 2000. Implicit in the Court of Appeals ruling was that, if the defective device of linkage was not employed, the legislature enjoyed its historic prerogatives of adjusting judicial compensation levels, should it find an increase to be warranted and if so, by how much, and then

budgeting for the same. This is what the legislature, abandoning linkage, has now done.

The logic of the dissent's suggested relief presents an additional problem. If Supreme Court, on remand, exercises the power to order a retroactive recovery, measured by cost of living increases dating to any particular year, that would necessarily imply that the judiciary enjoys the power to establish judicial pay scales in the first place, using COLAs as a yardstick. The legislature, not the judiciary, has that power. The legislature is only barred from abusing that power by tying judicial compensation to unrelated, essentially political, considerations, including the legislature's attempt to wrest from the Governor his acquiescence in increasing legislators' compensation. That the legislature may act parsimoniously or even unwisely in how it discharges its budgetary responsibility towards judges, however, does not, itself, have constitutional ramifications.

In the final analysis, however, the viability of the remedy which plaintiffs seek is solely governed by the existing Court of Appeals ruling. The decision did not directly define the outer boundaries of judicial power should the legislature not provide for retroactive compensation, but seemingly left the nature and extent of compensation with the legislature. Thus, I do not find that the legislature, having abandoned its constitutionally

offensive policy of linkage when recently increasing judicial salaries, has constitutionally offended by acting only prospectively, nor do I see a basis to conclude that the directives of the Court of Appeals were transgressed.

SWEENY, J. (concurring)

The case involves litigation concerning the appropriate compensation to be paid to members of the New York State Judiciary. Plaintiffs contend that the creation of an independent commission on judicial compensation meeting every four years to recommend judicial compensation only prospectively does not remedy the constitutional violation found by the Court of Appeals in *Matter of Maron v Silver* (14 NY3d 230 [2010]) because the legislation failed to give the commission the authority to consider and award retroactive pay increases. Plaintiffs seek damages in the form of retroactive compensation and ask us to reverse the motion court's determination that declined to order the aforesaid monetary damages. For the reasons stated herein, we now affirm the motion court's order.

The Court of Appeals in *Maron* declared that the legislature had violated the Separation of Powers Doctrine by failing to consider judicial salaries "on the merits" (14 NY3d at 264), i.e., free from political or other considerations. The Court directed the legislature to address this transgression and reserved to the judiciary the right to review "whether the legislature has met its constitutional obligations" (*id.* at 263). Importantly, the Court unequivocally held that, since the issue involves appropriations and funding, matters constitutionally

within the purview of the legislature, that branch of government must fashion the appropriate remedy. We now apply that holding to this case.

The starting point for our analysis must be the clear language of the Court in *Maron*. The petitioners in *Maron* and the other consolidated cases, some of whom are the same plaintiffs here, brought hybrid CPLR article 78/declaratory judgment actions against various state officials and the state legislature. The article 78 proceeding was brought, inter alia, to compel the State Comptroller to disburse all the budgeted raises and retroactive pay amounts allocated, but not disbursed, in the 2006-2007 state budget for the judiciary. This proceeding was dismissed by Supreme Court, and affirmed by the Appellate Division, Third Department (58 AD3d 102 [3d Dept 2008]). In affirming the dismissal, the Court of Appeals specifically made reference to the fact that the appropriation for judicial compensation, including retroactive pay, was "explicitly made contingent upon the adoption of additional legislation" (14 NY3d at 249) and thus, the cause of action seeking mandamus against the Comptroller was properly dismissed. However, the linking of these pay raises to political considerations was revisited in the Court's discussion of the Separation of Powers Doctrine.

The declaratory judgment action alleged various

constitutional violations by the legislature and state officials, including the Compensation Clause of the New York State Constitution (NY Const, art VI, § 25[a]), equal protection and Separation of Powers Doctrine.

The equal protection argument was quickly dispatched, the Court affirming the dismissal for the reasons set forth in the Appellate Division decision (14 NY3d at 250).

The alleged Compensation Clause violation drew more attention. The plaintiffs argued that inflation and rises in the costs of living had unconstitutionally diminished judicial salaries. While recognizing that in an "extreme" case, legislative failure to address judicial salaries over a prolonged period of time might cause salaries to fall below a constitutionally permissible floor, the Court rejected the plaintiffs' arguments. Finding no support in the legislative history of the clause's enactment or subsequent amendments for the "broad interpretation embracing indirect diminishment by neglect," the Court held that "there is no evidence that the State Compensation Clause's 'no diminishment' rule was intended to affirmatively require that judicial salaries be adjusted to keep pace with the cost of living" (*Maron*, 14 NY3d at 252). Hence, "the legislature's failure to address the effects of inflation in this case does not equate to a per se violation of

the Compensation Clause" (*Maron*, 14 NY3d at 254).

The Court found merit to the plaintiffs' argument that, by linking judicial compensation to unrelated legislative objectives and considerations, as opposed to considering this issue on its own merits, the legislature had disregarded the Separation of Powers Doctrine and thus threatened the independence of the Judiciary. The court concluded that by holding judicial compensation considerations "hostage to other legislative objectives" the legislature made the judiciary "unduly dependent" on it and thus violated the Doctrine of the Separation of Powers (*Maron*, 14 NY3d at 259 [internal quotation marks omitted].

Having reached that conclusion, the Court turned its attention to the remedy for this constitutional violation. Showing the proper regard for the Separation of Powers Doctrine, the Court held:

> "[W]hen 'fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government' (*Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14, 28 [2006]). Indeed, deference to the Legislature - which possesses the constitutional authority to budget and appropriate - is necessary because it is 'in a far better position than the judiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources (*id.* at 29)" (*Maron*, 14 NY3d at 261).

The Court declined to order specific relief, stating that "whether judicial compensation should be adjusted, and by how much, is within the province of the legislature" (*Maron*, 14 NY3d at 263).

In response to *Maron*, the legislature and Governor David Paterson established the Commission on Judicial Compensation (L. 2010, ch 567). Meeting every four years, the commission is tasked to make recommendations for future salary adjustments which are to take effect unless specifically rejected by the legislature. In August 2011, the Commission recommended a 27% increase in judicial salaries, phased in over three years commencing in 2012.

Plaintiffs here argue they are entitled to damages for defendants' past constitutional violations because the Commission established by the legislature was not empowered to consider retroactive pay increases and cost of living adjustments that they should have received after January 1, 2000. The dissent agrees that the legislature's creation of a commission empowered to address judicial compensation prospectively did not fulfill its constitutional mandate, since it failed to address the issue of retroactive pay increases. By arguing for the imposition of "damages" against the legislature in the form of retroactive compensation in an unspecified amount to be determined by future

proceedings, the dissent purports to substitute its own remedy for that of the legislature, thus ignoring the holding in *Maron* and, in turn, infringing the very doctrine it seeks to vindicate. By finding the legislature's remedy inadequate, the dissent would expand *Maron* beyond its holding and trespasses upon the constitutional functions of the legislative and executive branches.

Initially, it is a questionable proposition that "damages" can be awarded against a coequal branch of government. My colleague's observation that "it is individual judges, [not the judicial branch of government] who are seeking damages" is a distinction without a difference. By the very nature of their offices, judges are part of the judicial branch. Moreover, this decision will, of course, impact all present and former judges. Indeed, as the dissent notes, "Without a monetary award for past violations, the more than 600 judges and justices who retired between 2006 and April 1, 2012, including Hon. Arlene Silverman, plaintiff in *Silverman v Silver* (__ AD3d __, Appeal No. 11473 [decided simultaneously herewith]) will not obtain any redress whatsoever for the violation of their constitutional rights." The present lawsuit therefore presents the untenable situation of one branch of government seeking damages from a coordinate branch.

By accepting plaintiffs' argument and remanding for further proceedings to determine the amount of damages to be awarded in the form of back pay, we would be effectively arrogating the budgeting power to the judiciary under the guise of remedying a constitutional violation. It would impermissibly direct the legislature, the branch charged with the responsibility of budgeting funds for the entire state, to appropriate a unspecified amount, pursuant to an formula to be determined, for an unknown number of persons. Such a decision would clearly violate the Separation of Powers Doctrine.

There is no provision in the Constitution or statute that enables a court to impose on the legislature any dollar figure, no matter how calculated, since the judiciary, as a coequal branch of government, simply cannot constitutionally tell the legislature to appropriate or pay any amount of money for any specific purpose. The Court of Appeals certainly recognized this when it directed that judicial salaries are to be determined only on the merits and left to the legislature how to remedy its past improper practices. There was no mention of "damages" in *Maron*, present or retroactive. Rather, the Court expressed its confidence in the state's tripartite system of government by stating: "When this Court articulates the constitutional standards governing state action, we presume that the State will

act accordingly" (*Maron*, 14 NY3d at 261). Indeed, in its discussion concerning retroactive pay and cost of living increases with respect to the Compensation Clause, the Court inherently recognized that any mandate to pay those sums would encroach upon the budgeting powers of the Legislature and thus would violate the Separation of Powers Doctrine.

The Court of Appeals merely held that the legislature could not tie salaries to political considerations. When the legislature established the Commission, it was under no obligation to address, or give the Commission the power to address, retroactive pay and cost of living increases. To find, as the dissent urges, that this omission constitutes a constitutional violation giving rise to "damages" is unwarranted. This is particularly so in light of the Court's conclusion that "*whether* judicial compensation should be adjusted, and by how much, is within the province of the legislature" (*Maron*, 14 NY3d at 263 [emphasis added]). There was no direction, or even an implication, that, in order to remedy the constitutional violation, the legislature had to fashion a retroactive remedy. The Court did not indicate that to correct the past violations there *must* be a pay increase, let alone a retroactive one.

This is not a proceeding where the courts are asked to remedy a constitutional violation by a government *agency*, as in

the precedents cited by the dissent. Each of those cases involve pay disparities within trial level courts that were created by policy decisions made by the Office of Court Administration, the *agency* responsible for administrating the courts. The funds involved in those disputes had already been appropriated to the judiciary by the legislature and were part of that year's judicial budget. It was well within the court's domain to address the bases of those disparities and direct certain relief, including retroactive pay adjustments. That is not the case here. By awarding "damages" against a coordinate branch of government in the form of retroactive compensation in an amount to be determined by future proceedings, the dissent would create a situation where the judiciary encroaches on the powers constitutionally placed within the legislature.

> "It must be remembered that the Separation of Powers Doctrine 'is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of harm, can be identified . . . it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict'" (*Maron*, 14 NY3d at 260-261, quoting *Plaut v Spendthrift Farm, Inc.*, 514 US 211, 239 [1995]).

For us to hold otherwise would blur the lines of this doctrine.

The dissent's reliance on *Beer v United States* (696 F3d 1174 [Fed Cir 2012], *cert den* __ US __, 133 S Ct 1997 [2013]) to support its position regarding retroactive pay increases is misplaced. While superficially similar to this case, the factual and constitutional issues in *Beer* are quite different.

Beer concerned the provisions of the Ethics Reform Act of 1989 (1989 Act) and its subsequent amendments. The purpose of the 1989 Act was to revise compensation and ethics rules for all three branches of the federal government.

> "With respect to the judiciary, it contained two reciprocal provisions. On the one hand, the 1989 Act limited a federal judge's ability to earn outside income and restricted the receipt of honoraria. On the other hand, the 1989 Act provided for self-executing and non-discretionary cost of living adjustments ("COLA") to protect and maintain a judge's real salary" (*id*. at 1177).

The 1989 Act provided that whenever COLA for General Schedule federal employees takes effect, the salary of judges "shall be adjusted" pursuant to a set formula set out in the statute. Those adjustments are mandatory. The only limitation on General Schedule COLAs is a formal declaration by the President of a "national emergency or serious economic conditions affecting the general welfare," which would make pay adjustments "inappropriate" (*Beer* at 1177, quoting 5 USC § 5303[b]). When Congress blocked COLA adjustments for federal judges in certain

years where General Schedule federal employees received such adjustments, the judges sued as a class, alleging a violation of the Compensation Clause of the Constitution. The Court of Federal Claims dismissed the complaint.

The Federal Circuit Court reversed, agreeing with the plaintiffs that the withholding of the adjustments was a violation of the Compensation Clause. The court reasoned that "the 1989 Act reduced judges' income by banning outside income but promised in exchange automatic maintenance of compensation - a classic legislative *quid pro quo*," which gave judges "an employment expectation at a certain salary level" (*Beer* at 1182 [internal quotation marks omitted]). The judges were entitled to receive those adjustments because they were mandated by statute, a statute which Congress was free to prospectively amend or repeal but not ignore. The court observed that, while "the Compensation Clause does not require periodic increases in judicial salaries to offset inflation or any other economic forces," where, as here, "Congress promised protection against diminishment in real pay in a definite manner and prohibited judges from earning outside income and honoraria to supplement their compensation, that Act triggered the expectation-related protections of the Compensation Clause for all sitting judges" (*id.* at 1184-1185). It awarded the claimants back pay for the

periods in which Congress unconstitutionally blocked pay increments as mandated by the 1989 Act and subsequent amendments thereto, to be computed by the formula set forth in that legislation.

Beer is therefore distinguishable on a number of grounds. First, its constitutional underpinning falls under the Compensation Clause. The Compensation Clause argument was specifically rejected by the Court of Appeals in *Maron*, which, as noted, was decided under the Separation of Powers Doctrine.

Most importantly, it bears repeating that the article 78 proceeding to compel state officials to implement the 2006 pay increase legislation which had been held hostage to political considerations was dismissed by the Third Department and that dismissal was affirmed in *Maron* as it was a *contingent* pay increase, i.e., it required further action by the other branches in order to be implemented. The issue of retroactivity of any pay increase was thus before the Court, which, by its silence, declined to address the issue. By contrast, *Beer* involved a statute passed by Congress and signed into law by the President which *mandated* judicial pay adjustments without any further legislation or action by either Congress or the Executive. Indeed, the 1989 Act "set a clear formula for calculation and implementation of those maintaining adjustments. Thus, all

sitting federal judges are entitled to expect that their real salary will not diminish due to inflation or the action or inaction of the other branches of Government" (*Beer* at 1184). Congress' action in blocking those mandated pay adjustments was found to contravene the Compensation Clause because "the Act triggered the expectation-related protections of the Compensation Clause for all sitting judges. A later Congress, while "not precluded from amending the 1989 Act" prospectively, "could not renege on that commitment without diminishing judicial compensation" (*id.* at 1185). The failure to implement the automatic pay adjustment required a remand to the Court of Federal Claims to calculate the pay to which the claimants were entitled under the statute.

In the case before us, no such mandatory legislation has been violated. There are no "expectation-related protections" regarding retroactive salary increases to which active and former judges can claim entitlement, as the Court of Appeals declined to order specific relief in connection with the violation of the Separation of Powers Doctrine. For us to now order such specific relief, by finding that the legislature failed to consider retroactive pay increases, would not pass constitutional muster

as it would breach the "high walls and clear distinctions" necessary to maintain the Separation of Powers Doctrine (*Maron*, 14 NY3d at 260 [internal quotation marks omitted]).

FREEDMAN, J. (dissenting)

I respectfully dissent because I believe that the past constitutional violations identified by the Court of Appeals in *Matter of Maron v Silver* (14 NY3d 230 [2010]) warrant retroactive monetary damages. Accordingly, I would reverse the order of Supreme Court and remand this action for a determination of appropriate compensation.

In *Maron*, the Court of Appeals held that the legislature's failure to increase the compensation for judges and justices of the Unified Court System for more than 10 years jeopardized the judiciary's independence and thereby violated the Separation of Powers Doctrine underlying our tripartite system of government (*see generally Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 355-356 [1985]). The Court of Appeals directed the violation to be addressed with "appropriate and expeditious legislative consideration," and reserved to the judiciary the authority to review "whether the Legislature has met its constitutional obligations" (*Maron*, 14 NY3d at 263). Since *Maron* was decided, an independent body, the Commission on Judicial Compensation, was established to recommend judicial salary adjustments and New York State judges and justices have received a three-tier compensation increase beginning in April 2012, more than 13 years after the last

increase.

The questions now before this Court are whether the legislature satisfied its constitutional obligations by creating the Commission, which was authorized to recommend future increases starting almost three years after *Maron* but no retroactive compensation, and whether the judges aggrieved by defendants' past constitutional violation are entitled to compensatory monetary damages. In my opinion, the legislature failed to fully comply with the directives in *Maron* that found a constitutional violation and that past and current members of the judiciary are entitled to monetary damages as the only available remedy for the past violation.

The Court of Appeals and this Court have set forth the relevant facts of this case in detail in *Maron* (14 NY3d at 244-246) and *Larabee v Governor of State of N.Y.* (65 AD3d 74, 77-79 [1st Dept 2009]). Briefly, plaintiffs in this action are four members of the judiciary who in September 2007 brought suit against the executive and legislative branches because plaintiffs and their fellow justices and judges had not received even a cost of living increase since January 1, 1999. Plaintiffs originally advanced two principal claims. First, they alleged that defendants' failure to increase judicial salaries for more than eight years violated the State Compensation Clause (NY Const art

VI, § 25[a]) because defendants allowed inflation to erode the value of those salaries.

Second, plaintiffs claimed that defendants' failure to increase judicial compensation violated the Separation of Powers Doctrine. In support of their separation of powers claim, plaintiffs demonstrated that, since 1999, a number of bills to raise judicial compensation had been proposed to the legislature or passed by one legislative chamber but were not enacted because the proposed increases were linked by political considerations to unrelated objectives that the legislature or the Governor advanced, including legislative raises and measures for campaign finance reform (*see Maron*, 14 NY3d at 245). Plaintiffs sought both injunctive and declaratory relief, including an order compelling defendants to provide them with cost of living adjustments dating back to January 1, 2000.

In June 2008, Supreme Court (Edward H. Lehner, J.) granted plaintiffs' motion for summary judgment on the separation of powers claim to the extent of declaring that "defendants, through the practice of linkage, have unconstitutionally abused their power" and directed defendants to, within 90 days, "remedy such abuse" by making a good-faith adjustment to judicial compensation "to reflect the increase in the cost of living since . . . 1998, with an appropriate provision for retroactivity" (*Larabee v*

Governor of State of N.Y., 20 Misc 3d 866, 878 [Sup Ct, NY County 2008], *affd* 65 AD3d 74 [1st Dept 2009], *mod sub nom. Matter of Maron v Silver*, 14 NY3d 230 [2010]).

In its June 2009 affirmance, this Court stated that the defendants had threatened "the integrity, in a structural sense, of the judicial system as an independent institution, in that New York's constitutional architecture prohibits the subordination of the judicial branch to the other branches of government" (*Larabee*, 65 AD3d at 97).

In *Maron*, decided February 23, 2010, the Court of Appeals consolidated three appeals, including *Larabee*, that present and former State justices and judges brought to challenge the legislature's repeated failure to raise judicial salaries. The Court of Appeals, while rejecting plaintiffs' contention that defendants had violated the State Compensation Clause (NY Const art VI, § 25[a]), which prohibits the diminution of judicial compensation, agreed with the *Larabee* plaintiffs that "as a matter of law, the State defendants' failure to consider judicial compensation on the merits violate[d] the Separation of Powers Doctrine" (*id.* at 261). The Court identified five instances between 2006 and 2008 in which the adjustment of judicial compensation was improperly linked to unrelated objectives, and found that "by . . . holding [judicial compensation increases]

hostage to other legislative objectives, the Legislature weakens the Judiciary by making it unduly dependent on the Legislature" (*id.* at 259 [internal quotation marks omitted]). The Court pointed out that the executive and legislative branches have bargaining power that the judiciary lacks, and accordingly "it is imperative that the legitimate needs of the judicial branch receive the appropriate respect and attention. This cannot occur if the Judiciary is used as a pawn . . . in order to achieve ends that are entirely unrelated to the judicial mission" (*id.*).

Addressing the remedy for defendants' violation, the Court of Appeals stated that specific injunctive relief was unnecessary because the Court presumed that the legislature would comply with "the constitutional standards" articulated in *Maron* (*id.* at 261). Accordingly, the Court of Appeals modified this Court's ruling in *Larabee* by simply declaring that defendants had violated the Separation of Powers Doctrine and "allowing for the remedy discussed in this opinion" (*id.* at 264).

In December 2010, the legislature together with then-Governor David Paterson established the Commission on Judicial Compensation (L 2010, ch 567). The statute provided that members of the Commission were to be appointed on April 1, 2011 and the Commission would meet every four years to make recommendations for future salary adjustments which were to take effect unless

the legislature specifically rejected them (*id.*). The first potential increase would not take effect until April 1, 2012.[1] In August 2011, the Commission recommended a 27% increase in judicial salaries, to be phased in over three years beginning on April 1, 2012, some six years after the first action in *Maron* was commenced. Those recommendations have been implemented.

In April 2011, plaintiffs in this action moved before Supreme Court Justice Richard F. Braun, who has presided over the case since Justice Lehner's retirement, for leave to renew their motion for summary judgment, arguing that they are entitled to damages for defendants' past constitutional violation because the legislature did not empower the Commission to recommend retroactive increases. Plaintiffs claim that damages should be calculated based upon cost of living adjustments that they should have received after January 1, 2000. In opposition, defendants argue that the Court of Appeals indicated that the adjustment of judicial salaries was the legislature's prerogative and that *Maron* does not provide any basis for renewing any claim for retroactive compensation.

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[1]The Commission was empowered to "determine whether, for any of the four years commencing on the first of April of such years, following the year in which the commission is established, the annual salaries [for State judges] . . . warrant adjustment" (L 2010, ch 567 at § 1[ii]).

The motion court denied plaintiffs any further relief, finding that plaintiffs had "failed to establish that the legislature did not abide by the declaration of the Court of Appeals as to the legislature's constitutional duties" (*Larabee v Governor of the State of N.Y.*, 37 Misc 3d 748, 754 [Sup Ct, NY County 2012]). The court stated that "[i]nsofar as the Court of Appeals modified rather than affirmed the Appellate Division . . ., it [superseded] Justice Lehner's order to the extent that Justice Lehner had required a retroactive adjustment to judicial compensation" (*id.* at 755).

I disagree. In *Matter of Maron*, the Court of Appeals may not have explicitly addressed the issue of whether damages for defendants' violation of the Separation of Powers Doctrine were available, but it did not hold that relief was precluded. Although the Court of Appeals implicitly rejected the specific relief that Justice Lehner ordered, which directly required defendants compensate members of the judiciary for the increased cost of living since their last pay raise in 1998 (*see Larabee*, 20 Misc 3d at 878), it still found a past constitutional violation for which there should be a remedy. In deference to the legislative and executive branches, the Court of Appeals declined to order specific relief in connection with defendants' violation of the Separation of Powers Doctrine, but instead

emphasized that "[w]hen this Court articulates the constitutional standards governing state action, we presume that the State will act accordingly" (14 NY3d at 261).

However, the Court of Appeals declared that it was within the province of the Court to determine "whether the Legislature has met its constitutional obligations" (*id.* at 263). Accordingly, defendants' creation of a commission that could not consider retroactive increases is subject to judicial scrutiny. In my opinion, the legislature's response to *Maron* failed to satisfy the Court of Appeals' directives. The record before us contains no indication that the legislature ever considered compensation for past constitutional violations on the merits and defendants' conclusory assertion to the contrary cannot substitute for evidence. The legislature was obligated to consider the merits of retroactive compensation free of any linkage, based on the Court's finding that the first violation of the Separation of Powers Doctrine occurred in 2006. That year, the legislature failed to disburse state budget funds allocated to adjust judicial salaries retroactive to April 1, 2005 because of improper linkage (*id.* at 245).

Relief from defendants' past constitutional violations can only be provided by way of monetary damages. Without a monetary award for past violations, the more than 600 judges and justices

who retired between 2006 and April 1, 2012, including Hon. Arlene Silverman, plaintiff in *Silverman v Silver* (__ AD3d __, 2014 NY Slip Op __ [1st Dept 2014]) will not obtain any redress whatsoever for the violation of their constitutional rights.

Justice Sweeny's concurrence questions whether monetary damages can be awarded to the judiciary against the legislature. However, it is disingenuous to characterize this lawsuit by judges seeking damages for past injuries as a lawsuit by one branch of government against the other. Rather, it is individual judges who are seeking damages for a constitutional violation for which there is no other remedy.

The remedy sought here is analogous to that awarded in *Beer v United States* (696 F3d 1174 [Fed Cir 2012], *cert denied* __ US __, 133 S Ct 1997 [2013]). In *Beer,* federal judges successfully sued the United States Congress for the increase in pay that other federal employees had received as cost of living increases (COLAs) but had been blocked by the United States Congress for judges. As in *Larabee*, the court in *Beer* found a constitutional violation, namely, that failure to allow for pay increases violated the Compensation Clause of the United States Constitution. The United States Circuit Court for the Federal Circuit determined that judges were entitled to an increase equal to the COLAs and also awarded monetary damages to compensate

judges for the increases they should have received since 2003 (*Beer*, 696 F3d at 1186-187). Federal judges have been awarded their COLAs, and damages for lost pay are forthcoming (*see Beer v United States,* 111 Fed Cl 592 [2013]).

Justice Sweeny distinguishes *Beer* on the ground that it involved violation of a different constitutional provision from the one in this case. However, *Beer* is cited, not for the specific constitutional violation involved, but to demonstrate that damages are an appropriate, if not the only, remedy for a past constitutional violation.

Plaintiffs are entitled to a remedy that compensates them for the violations in an amount equal to the economic injury they sustained (*see Albemarle Paper Co. v Moody*, 422 US 405, 418-419 [1975]). The remedy must be "coextensive with the wrong it is to redress" (*Weissman v Evans*, 56 NY2d 458, 467 [1982]).

New York courts have recognized monetary damages as appropriate relief for constitutional violations for judges who have been subject to those violations (*see Dickinson v Crosson*, 219 AD2d 50, 54 [3d Dept 1996] [Equal Protection Clause rights of Family Court Judge plaintiffs in Broome County violated by compensation disparity based upon their geographical location; *Nicolai v Crosson*, 214 AD2d 714, 715 [2d Dept 1995], *appeal dismissed* 88 NY2d 867 [1996] [same for Family Court and County

Court Judges in Westchester County]; *Deutsch v Crosson*, 171 AD2d 837 [2d Dept 1991] [same for New York City Family Court Judges]). In *Dickinson, Nicolai,* and *Deutsch*, the amount of damages was easily calculated by comparing disparities in compensation, but in this case, the amount that would put plaintiffs in the position they would have been in were it not for defendants' improper actions (*see e.g. Weissman v Evans*, 56 NY2d at 467) cannot be calculated based on any single factor. While plaintiffs seek damages calculated based upon the inflation rate, other factors are relevant to making the determination. For example, the amounts that had been budgeted for judicial compensation reform but were never disbursed, the compensation adjustments that other New York State employees received during the relevant period, and adjustments that judges and public employees in other states and the federal government received, are among the multitude of factors that should be considered.

Accordingly, I would remand this action to Supreme Court to determine compensatory damages for the constitutional violations that the Court of Appeals identified from 2006 onward. Contrary to the suggestion in Justice Tom's concurring opinion, I do not

believe that plaintiffs are entitled to damages from January 2000, and emphasize that those damages cannot simply be based on the past increase in the cost of living.

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

ENTERED: JULY 10, 2014

CLERK