SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

LISA FLANZRAICH, BENAY WAITZMAN, LINDA WOOLVERTON, ED FERINGTON, MERRI TURK LASKY, PHYLLIS LIPMAN, on behalf of themselves and others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC., on behalf of former New York City public service employees who are now Medicare-eligible Retirees,

Petitioner,

For Judgment Pursuant to CPLR Article 78

- against -

RENEE CAMPION, as Commissioner of the City of New York Office of Labor Relations, CITY OF NEW YORK OFFICE OF LABOR RELATIONS, the CITY OF NEW YORK,

Respondents.

Index No.: 158815/2021

ORAL ARGUMENT REQUESTED

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATION FOR AN ORDER TO SHOW CAUSE TO SECURE A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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INTRODUCTION

Petitioners seek an injunction to address a serious problem happening now; not a hypothetical problem that might occur four months from now. The City Respondents have announced a plan to forcibly shift 250,000 retirees to a new "Alliance" Medicare Advantage plan that is demonstrably worse than the "Medigap" plan seniors currently have and rely upon, depriving them of vested contractual rights to continued health care benefits.

The new plan – which the City and its Alliance partners (EmblemHealth and Anthem) still do not even have a contract for – is scheduled to take effect on January 1, 2022. The deficiencies of that plan and the Respondents' manifest over-reach in their attempt to illegally impose it on Retirees is the subject of the Petitioners' underlying Article 78 action. This request for an Order preserving the status quo by directing the City to temporarily halt the forced transfer of Retirees into the new plan pending the outcome of this proceeding is in response to an immediate danger to tens of thousands of senior citizens.

"Immediate danger" is not rhetorical excess. The City's actions today are causing retirees irreparable harm by forcing them to make healthcare choices now, based on erroneous, incomplete, and misleading information being recklessly promulgated by the City and its Alliance partners. Examples of this pervasive misinformation are included below. 250,000 Retirees are being told they have to make a potentially irreversible decision whether to accept the City's supposedly "free" new Alliance Medicare Advantage program before October 31, 2021 – by

doing nothing – or affirmatively opt-out of it in order to stay with their existing plan (or perhaps choose another) that will cost them thousands of dollars a year. Attempting to unwind these decisions and restore the status quo once the Court rules that the Alliance plan is unlawful will be virtually impossible.

This important decision would be a difficult one in the best of circumstances, particularly for those whose financial circumstances preclude them from paying $191.57 a month to "opt-out" of the new "free" Alliance plan and retain their current benefits. What makes it an emergency is that seniors cannot make an informed decision. That is because in an extraordinary number of instances, they simply do not know if their doctors will accept the new plan. The City and the Alliance have repeatedly stated that virtually "all doctors and hospitals" will accept the new plan. But that is simply not true. Scores of Retirees have called their doctors' offices and asked if they will be accepting the new plan. And Retirees are being told in an extraordinary number of cases the answer is "no" or "we simply don't know because we don't know anything about this new plan."

Continuity of care is a critical concern for many Retirees – for both senior citizens and those who are on disability. The Retiree group is comprised of grandparents and great-grandparents, 9/11 first responders, and people seriously injured on the job while working to serve the City. Not knowing whether or not one's doctor will accept the insurance is a fundamental issue for these people. If a senior is told that their doctor will not accept the plan – contrary to the City's and Alliance's false assurances – then a very difficult calculation must be made: can

they afford to pay the $2300 annual premium that the City is now going to demand of them to stay with their current plan? For many seniors – particularly those living on fixed incomes – that is a very difficult decision to make. But perhaps worse – when seniors are told that their doctor hasn't decided because the City and the Alliance has failed to inform the doctor about the plan in a timely manner – the Retiree is being forced to make the choice completely in the dark.

Perversely, the City has claimed that both it and the Retirees will be harmed if the plan does not go into effect as scheduled. The City has said – in a hearing before Justice Frank on September 27th – that if implementation doesn't occur on January 1st, and Retirees have to stick with their existing (preferred) plan and later forced to switch to the new Medicare Advantage plan, the Retirees might have to incur two separate deductibles in a calendar year. That is absurd. Deductibles are a function of the contract between the City and the health insurance company. But there is no contract yet between the City and the Alliance, and there is no factual basis for the City's suggestion that a double-deductible-whammy is beyond their control.

The City will suffer no administrative burden or financial burden by maintaining the status quo. The City is not cutting its budget; there is no financial hardship. The City's 2022 budget of over $98 billion in fact shows increased spending of over $163 million.[1]

[1] https://www1.nyc.gov/site/omb/index.page

Importantly, the City has absolutely no basis for claiming financial harm: any unexpected funding shortfall that might result from the cost of Retiree health benefits not shifting from the City budget to the Federal budget can be made up through the Health Stabilization Fund. That is precisely the purpose of the Health Stabilization Fund. As the Independent Budget Office has pointed out, the purpose of the Health Stabilization Fund "must be used exclusively for the city's retiree health benefit costs."[2] In fact, the City recently used the Fund to satisfy a shortfall in the savings goals articulated by the 2018 healthcare savings objective MOA[3]. Funding the continuation of healthcare premiums for seniors wishing to stay with their GHI Senior Care plan is precisely purpose of the Health Stabilization Fund.

In sum, the Retirees are seeking an injunction to halt the irreparable harm that is affecting them today – a harm that will only get worse if Respondents illegal conduct is not enjoined. The Retirees are asking this Court to:

1. Halt the City's rush to illegally force Retirees to choose between remaining in their existing plan – and having to pay for their existing plan themselves – or irreversibly opting-into a new, demonstrably inferior Medicare Advantage plan by October 31, 2021.

2. Continue Retirees' status quo enrollment in their current health plan beginning January 1, 2022.

[2] https://ibo.nyc.ny.us/iboreports/safety-net-background-on-the-citys-budget-reserves-and-how-the-mayor-plans-to-use-them-foeb-may-2020.pdf
[3] https://www1.nyc.gov/site/olr/labor/labor-health-savings.page

3. Continue fully funding Retirees' premiums for the GHI Senior Care plan or any other plan available to Medicare-eligible retirees up to the statutory dollar cap established by City Administrative Code § 12-126.

BACKGROUND

On or about July 14, 2021, the New York City Office of Labor Relations ("OLR") announced that the City was changing the health insurance plan of some 250,000 retirees who had worked for the City and receive a pension and health benefits from the City. The change was from a Medicare "Supplemental" or "Medigap" plan – fully paid for by the City – that covered the 20% of healthcare expenses not covered by Medicare, to a Medicare Advantage plan to be provide by an "Alliance" of EmblemHealth and Anthem. The City also announced that if retirees wished to remain with the Medigap plan they had been receiving, they would have to affirmatively opt-out of the new Medicare Advantage plan by October 31, 2021, and pay the monthly premium of $191.57 per person per month. The benefits of the Medicare Advantage plan are significantly worse than Retirees' existing Medigap plan.

Following that July announcement, the City and the Alliance sent out materials to some retirees, held information sessions with some, and expanded the information on the OLR website. Much of this information was wrong, misleading, and often contradictory. Retirees banded together and created a non-profit organization – NYC Organization of Public Service Retirees, Inc. (referred herein as the "Organization" or "Retirees" or "Petitioners") – to advocate for the protection of

retirees' health benefits. On September 26, 2021, the Organization and several members filed an Article 78 Petition against the City, OLR, and Renee Campion, Commissioner of OLR.

For more than 40 years Retirees have enjoyed a fully paid Medigap plan that was the result of both statutory protection and contract. Respondents' attempt to deprive Retirees of these benefits is an abuse of their discretion, arbitrary, and capricious.

ARGUMENT

The Court should grant preliminary relief to preserve the status quo and prevent the Retirees from being forced to make uninformed decisions and irreversibly accept inferior health coverage while this Court considers the Retirees' Petition. This relief is warranted because, among other things, the Retirees have contractual and statutory rights to the health care benefits that Respondents now seek to deny them, and the Retirees will be irreparably harmed if the status quo is not maintained and they are forced to switch health insurance and doctors.

The City has only given the Retirees until October 31, 2021 to opt out of the inferior Medicare Advantage plan, which takes effect on January 1, 2022. Given the incomplete and misleading information that has been presented to date, some Retirees may not even be aware that their health benefits will be changed dramatically if they fail to act by the October 31 deadline. This is part of a larger strategy to pressure and silence the Retirees into foregoing health care benefits to which they are entitled. The only interest at stake for Respondents is their desire to

shift their financial obligations onto the Retirees. The balance of equities tips sharply in the Retirees favor and the Court should enter a preliminary injunction and temporary restraining order preserving the status quo until the Court rules on the Petition.

I. The City and Alliance are Misleading Retirees with Incorrect Information

Since announcing the intent to change Retirees' health benefit, the City and Alliance representatives have provided inaccurate, often shifting, and contradictory information to Retirees. This misinformation is material to Retirees' understanding of the plan and their options, and one source of immediate irreparable harm.

A. Retirees Do Not Know Whether Their Doctors Will Accept the New Plan

The City and Alliance have stated repeatedly that "all doctors will accept the Alliance Medicare Advantage plan." This is simply untrue. Dozens of retirees have contacted their current doctors and have been told by the doctors that they do not plan accept the plan. The affidavits of Judith Palmer and Richard Oliveri, submitted in support of this motion, contain specific examples of retirees' experiences receiving false, misleading, and contradictory information from Respondents.

B. Retirees Do Not Know Whether Their Hospitals Will Accept the New Plan

The City and Alliance have stated repeatedly that "virtually all hospitals will accept the Alliance Medicare Advantage plan." One example the Respondents have repeated often – because cancer treatment is so important to Retirees – is that Memorial Sloan Kettering Cancer Center ("MSK") is part of the plan. As of late September, it was not. The affidavits of David Shapiro, Phyllis Lipman, Janet Buck, and Alan Odze, submitted in support of this motion, detail specific examples of retirees' experiences receiving false, misleading, and contradictory information on this topic from Respondents

C. The City is Misleading Retirees About How Much it Will cost to Stay on Their Existing Plan

The City OLR website includes an opt-out form that Retirees have to use in order to remain with their existing health plan. The form states in the third paragraph, in **bold** lettering, "**you agree to pay an additional plan premium of $191.57 to remain in your current retiree health plan for 2022…".** That statement is not true. The cost to Retirees is $191.57 **per month**. The form does state, on the second page, that it is a monthly cost. But for retirees who are understandably anxious and confused about these changes being forced upon them, the City's inability to provide clear information about how much health insurance is going to cost compounds the harms caused by the City's illegal plan to deprive them of health benefits they were promised. The affidavit of Richard Oliveri, submitted in

support of this motion, contains specific examples of retirees' experiences receiving false, misleading, and contradictory information on this topic from Respondents.

II. Relevant Legal Standards

A preliminary injunction is appropriate when the party seeking injunctive relief establishes: (1) likelihood of ultimate success on the merits; (2) irreparable injury if the injunction is not granted; and (3) a balancing of the equities in its favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *see also Matter of Yung Bros. Real Estate Co., Inc. v. Limandri*, 26 Misc. 3d 1203(A), at *4 (Sup. Ct., N.Y. Cty. 2009) (CPLR § 7805 allows the Court to "preserve the status quo" in Article 78 proceeding until it is resolved); CPLR §§ 6301, 6313(a). A Court may also enter a temporary restraining order to prevent irreparable injury that would otherwise occur pending a hearing on a preliminary injunction motion. CPLR 6313(a).

"The existence of a factual issue on a motion for a preliminary injunction is not, standing alone, a sufficient basis for its denial." *Sylmark Holdings Ltd. v. Silicone Zone Int'l Ltd.*, 5 Misc. 3d 285, 295 (Sup. Ct., N.Y. Cty. 2004). Further, "[w]here, as here, the denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced." *State v. City of N.Y.*, 275 A.D.2d 740, 741 (2d Dep't 2000). In these circumstances, "the balance of the equities likewise favors the granting of preliminary injunctive relief to maintain the status quo pending resolution of this action." *Masjid Usman, Inc. v. Beech 140, LLC*, 68 A.D.3d 942, 943 (2d Dep't 2009).

III. The Retirees are Likely to Succeed on the Merits

The Retirees are likely to succeed on the merits of their Petition. "It is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive." *Four Times Square Assocs., L.L.C. v. Cigna Inv., Inc.*, 306 A.D.2d 4, 5 (1st Dep't 2003). Where, as here, the preliminary relief is sought to preserve the status quo, the likelihood of success standard is eased. *See North Fork Preserve, Inc. v. Kaplan*, 31 A.D.3d 403, 406 (2d Dep't 2006) ("Where, as here, the denial of a preliminary injunction would disturb the status quo and render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced."); *see also Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1996) (noting same reduced standard). The Retirees easily meet these standards. As detailed in the Petition, the relevant Collective Bargaining Agreements ("CBAs") – as confirmed by extrinsic evidence including past practice – provide the Retirees with vested rights to certain health care benefits.

"As a general rule, contractual rights and obligations do not survive beyond the termination of a collective bargaining agreement. However, '[r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement', and [courts] must look to well established principles of contract interpretation to determine whether the parties intended that the contract give rise to a vested right." *Kolbe v. Tibbetts*, 22 N.Y.3d 344, 353 (2013). "[W]hen a contract is silent as to the duration of retiree benefits, a court may not infer that the parties

intended those benefits to vest for life." *Evans v. Deposit Cent. Sch. Dist.*, 183 A.D.3d 1081, 1083 (3d Dep't 2020) (citation omitted). But "when an agreement is ambiguous or subject to more than one interpretation is it appropriate to '[r]esort to extrinsic evidence to determine the parties' intent.'" *Id.* (quoting *Hudock v. Vill. of Endicott*, 28 A.D.3d 923, 924 (3d Dep't 2006)). If the evidence shows "intent to vest rights under a contract or shows that there was established precedent of such practice, rights are considered vested." *Id.* (citing *Della Rocco v. City of Schenectady*, 252 A.D.2d 82, 84 (2d Dep't 1998)). In determining whether an ambiguity exists, the "court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby." *Warner v. Bd. of Educ.*, 108 A.D.3d 835, 836–37 (3d Dep't 2013).

A. The CBAs Provide a Vested Benefit

Applying these principles to the instant CBAs confirms that the Retirees have vested rights to their current health care. While each of the relevant CBAs used slightly different language, the core concept remained the same – the Retirees have a contractual right to continue receiving the same or equivalent health care benefits to those the City has been providing for the past thirty years. Importantly, each agreement contains specific language referencing retirees' rights to change their health plans at certain intervals. This language confirms that the City had agreed to continue providing such health plans to the retirees, and that only the

retirees had a unilateral option to make changes to those benefits. *See Kolbe*, 22 N.Y.3d at 353–54 ("[A] clear inference can be drawn that the parties intended the right to continued coverage to operate for the same period as the section as a whole.").

The relevant contractual provisions are as follows:

CBA Title	**Term**	**Petitioner**	**Quotes**
The City University of New York Agreement between The City University of New York and the Professional Staff Congress/CUNY	Oct. 20, 2010 - Nov. 30, 2017	Lisa Flanzraich	"CUNY public retirement system retirees shall have the option of changing their previous choice of Health Plans," (First Amended Petition Ex. B, p. 83) (quoted at page 15 of the First Amended Petition)
			"Eligible PSC-represented retirees of the EOCs shall be covered by the New York City Health Benefits Program for retiree health insurance benefits and by the PSC-CUNY Welfare Fund for supplemental health benefits." (First Amended Petition Ex. B, p. 160) (quoted at page 12 of the First Amended Petition)
Municipal Coalition Memorandum of Economic Agreement	1995-2000	Benay Waitzman	"Employer's cost for each contract for each Employee and for each retiree (under age 65) shall be equalized at the community rated basic HlP/HMO plan payment rate." (First Amended Petition Ex. E, p. 13) (quoted at page 16 of the First Amended Petition)
Agreement Between the Board of Education of the	July 1, 2003 – Mar. 5, 2010	Linda Woolverton	"DOE agrees to arrange for, and make available to each supervisor, a choice of health

City School District of the City of New York and Council of Supervisors and Administrators of the City of New York, Local 1, American Federation of School Administrators, AFL-CIO			and hospital insurance coverage from among designated plans and the DOE agrees to pay the full cost of such coverage." (First Amended Petition Ex. F, p. 23) (quoted at page 20 of the First Amended Petition)
Agreement between the Board of Education of the City School District of the City of New York and United Federation of Teachers local 2, American Federation of Teachers, AFL-CIO covering teachers	Nov. 16, 2000 - May 31, 2003	Phyllis Carol Lipman	"Board agrees to arrange for, and make available to each day school teacher, a choice of health and hospital insurance coverage from among designated plans and the Board agrees to pay the full cost of such coverage." (First Amended Petition Ex. M, p. 7) (quoted at page 31 of the First Amended Petition)
Detectives' Endowment Association 2008-2012 Agreement	Apr. 1, 2008 - Mar. 31, 2012	Ed Ferington	"Effective with the reopener period for Health Insurance subsequent to January 1, 1980 and every two years thereafter, retirees shall have the option of changing their previous choice of health plans," (First Amended Petition Ex. G, p. 12) (quoted at page 26 of the First Amended Petition)
			"The City shall continue to provide a fully paid choice of health and hospitalization insurance plans for each employee, not to exceed 100% of the full cost of HIP-HMO on a category basis," (First Amended Petition Ex. G, p. 12) (quoted at page 37 of the First Amended Petition)

			"Effective with the reopener period for Health Insurance subsequent to January 1, 1980 and every two years thereafter, retirees shall have the option of changing their previous choice of health plans," (First Amended Petition Ex. G, p. 12) (quoted at page 38 of the First Amended Petition)

In addition to being the only logical reading of the agreements given the clear references to "retirees … changing their previous choice of health plans," the Retirees reading of the CBA language is supported by multiple forms of extrinsic evidence. These include materials prepared and disseminated by the City, statements made by union representatives, and decades of past practice.

B. The Summary Program Description Prepared by the City Supports the Retirees' Reading

First, the City prepared and distributed materials to the Petitioners confirming that New York City retirees are eligible for benefits based on the "City policy in place at the time you retire" and are entitled to the "applicable" benefits in place when they retire. New York City Summary Program Description ("SPD") Health Benefits Program, October 2020; (First Amended Petition Ex. C, p. 15). These statements are part of a "summary program description" that described the various health plan options available to Petitioners. This included the GHI-CPB for non-Medicare-eligible retirees; and the GHI Senior Care plan for Medicare-eligible retirees.

C. The Statements of Union Representatives Support the Retirees' Reading

Second, upon retirement, each of the Petitioners was told by union representatives that their retirement benefits would include health insurance benefits fully paid for by the City up to the cost of the HIP-HMO which is the same dollar limit for active employees. They were each told by a union representative that upon reaching the age of 65 they would be required to enroll in Medicare, parts A and B. They were told that their Medicare part B premiums would be reimbursed by the City, that their healthcare benefits would switch to a Medicare Supplemental/Medigap plan of their choosing, and that the plan they chose would be fully paid for by the City – for life. They were told that the Supplemental/Medigap plans made available by the City at the time of their retirements fully paid for the 20% of medical costs not covered by Medicare. And they were also told that the cost of the Supplemental/Medigap plan was far lower than the cap set by the CBA and City law. These statements by union representatives provide further evidence of the parties' intent in entering into the CBAs and confirm that the parties intended for the Retirees to have a vested right to health care benefits at the same level provided when they retired.

For example, according to the New York City Employees' Retirement System Handbook, "Coverage for retirees is the same as coverage for active employees." (First Amended Petition Ex. I, p. 44).

D. Past Practice

Third, the health benefit Petitioners chose when they retired and became Medicare-eligible was the GHI Senior Care plan, a "Medigap" plan. When Petitioners became eligible for that plan, the City began paying their entire premium for that plan and has always done so up until the present. Courts "look to the past practice of the parties to give definition and meaning to language in an agreement, including a collective bargaining agreement, which is ambiguous." *Aeneas McDonald Police Benev. Ass'n, Inc. v. City of Geneva*, 92 N.Y.2d 326, 333–34 (1998).

E. The Statutory Mandate

Fourth, the New York City Administrative Code § 12-126 states that the "City will pay the entire cost of health insurance coverage for city employees, city retirees, and their dependents …" with a dollar cap pegged to the cost of the HIP-HMO. That cap is currently about $600 per month per person and is more than sufficient to cover the Medigap plan that Petitioners prefer. Thus, § 12-126 prohibits Respondents attempt to force the Retirees to shoulder additional health care burdens so that the City can avoid paying "the entire cost of [their] health insurance coverage."

F. Even More Extrinsic Evidence

Fifth, the City's own Independent Auditor, Marks Paneth, wrote in its report entitled, "The New York City Other Postemployment Benefits Plan (A Fiduciary Component Unit of the City of New York)" covering the 2018/2019 fiscal years:

> The City provides an option for basic individual or family medical and hospitalization insurance coverage at no cost to the participants.[1]
>
> Basic or enhanced coverage under other health insurance options may require participant contributions, if and to the extent that premiums are above those of the no-cost option.
>
> Footnote 1 states: The City pays for basic coverage at the HIP HMO rate for non-Medicare eligible retirees and at the GHI/EBCBS Senior Care Plan rate for Medicare eligible retirees.
>
> (First Amended Petition Ex. H, p. 10)

Finally, the fact that the retirees were not granted voting rights in their CBAs is further evidence that their health care benefits were intended to be vested and not subject to unilateral modification by the City. *Evans*, 183 A.D.3d at 1083 ("Especially when considering if retirees' rights vested to enforce CBAs, this Court has put great weight on whether retirees had voting rights because, if there were no such rights, 'it is logical to assume [from the absence of any such durational language of how long retirees will receive benefits] that the bargaining unit intended to insulate retirees from losing important insurance rights during subsequent negotiations by using language in each and every contract which fixed their rights to coverage as of the time they retired.") (quoting *Della Rocco,* 252 A.D.2d at 84).[4]

[4] *See also Agor v. Bd. of Educ.*, 115 A.D.3d 1047, 1049 (3d Dep't 2014) ("[T]he provisions in each of the CBAs regarding retiree health insurance, including reimbursement of Medicare Part B premiums, are ambiguous as to their duration. Indeed, the retiree health insurance provisions at issue here contain no language indicating the duration for which the District undertook to provide benefits to its retirees. Furthermore, given that employees are no longer represented by the union upon retirement and, therefore, are not involved in subsequent negotiations, a construction that would limit the right to coverage to the duration of the agreement could potentially "render[ ] the benefit inconsequential, ... as the plaintiffs no longer would be in a position to negotiate with the [District] over future benefits").

In sum, Respondents may not unilaterally deprive the Retirees of their vested contractual rights to the health care benefits they were promised and have been receiving for years. The Retirees have made a more than sufficient showing that they will succeed on the merits of their claims.

G. New York Law Does Not Allow Respondents to Unilaterally Discontinue These Benefits

New York Law prohibits Respondents from unilaterally discontinuing past practices in matters that are subject to mandatory negotiation under Civil Service Law § 209-a(1)(d), also known as the "Taylor Law." *Aeneas McDonald Police Benev. Ass'n, Inc. v. City of Geneva*, 92 N.Y.2d 326, 331, 703 N.E.2d 745 (1998) ("Pursuant to this duty to negotiate, where a past practice between a public employer and its current employees is established, involving a mandatory subject of negotiation, the Taylor Law would bar the employer from discontinuing that practice without prior negotiation.").

The retiree benefits at issue here are subject to mandatory negotiation under the Taylor Law. (*See Albany Police Officers Union v. New York Pub. Emp. Rels. Bd.*, 149 A.D.3d 1236, (3d Dep. 2017) discussing violation of Civil Service Law § 209-a (1)(d) where the town unilaterally discontinued the practice of reimbursing Medicare Part B premiums). According, Respondents may not unilaterally discontinue providing these benefits. *Aeneas*, 92 N.Y.2d at 331; *see also Chenango Forks Cent. Sch. Dist. v. New York State Pub. Emp. Rels. Bd.*, 21 N.Y.3d 255 (2013) ("PERB stated that the test for establishing a binding past practice under the

Taylor Law was set out in its decision in Matter of County of Nassau (24 PERB ¶ 3029 [1991]); namely, that the "practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected [bargaining] unit employees that the [practice] would continue."

H. Respondents' Actions Also Violate the "Moratorium Statute"

In addition, the health benefits of retirees like Phyllis Carol Lipman are protected under Chapter 504, Part B, section 14 of the 2009 session laws—more colloquially known as the "Moratorium Statute." This statute prohibits a school district from diminishing health insurance benefits to retirees or diminishing the contributions a school district makes for such health insurance benefits unless a corresponding diminution is made to active employee benefits. This protection is separate from and in addition to these retirees' contractual rights. As the Court of Appeals has explained, the statute prescribed "a bottom floor, beneath which school districts and certain boards were forbidden to go in diminishing benefits." *Kolbe*, 22 N.Y.3d at 358.

Respondents' plan to force the retirees to accept inferior benefits is barred by the Moratorium Statute because no corresponding diminution will be made to active employee benefits. For example, active employees on GHI-CBP who go to a preferred (in-network) specialist pay $0 co-pays (First Amended Petition Ex. J, p. 2), while retirees have to pay a $15 co-pay for all specialists (First Amended Petition Ex. K, p. 19). Petitioner Lipman and other similarly-situated retirees are therefore

also likely to succeed on their claim that Respondents' Medicare Advantage plan violates the Moratorium Statute.

I. The Alliance Hotline is Providing Inaccurate Information About a Special Open Enrollment Plan in November

In the September 28th call with Ms. Pizzitola, the Alliance representative said that the City would have a special open enrollment period in November 2021 after the October 31 opt-out deadline. The representative stated that choosing a different plan during that special enrollment plan – different from what was chosen in October – would not constitute a retiree using her once-in-a-lifetime-change-plans-anytime option. There is absolutely nothing about a special November enrollment period anywhere on the OLR website.

J. The City Has Represented that if Retirees Switch Plans, They May Have to Satisfy Two Deductibles

In a Court hearing before Justice Lyle Frank on September 27, 2021 in the related matter of *Aetna Life Insurance Company v. Renee Campion et al,* No. 158216/2021 (Sup. Ct., N.Y. Cty. 2021), the City Attorney, Rachel Kane stated that if the new Alliance Medicare Advantage plan did not start on schedule on January 1, 2022 and was delayed to perhaps April 1, 2022, then Retirees might have to satisfy two different plan deductibles in a single calendar year. Without an Alliance contract in place, this is not just speculation, but a scare tactic designed to frighten people into choosing the Alliance Medicare Advantage plan now.

K. There is No Contract Between the City and the Alliance, Which Creates a Moving Target for Retirees

There is no contract yet between the City and the Alliance concerning the actual terms, exclusions, or limitations to be included in the plan. A presentation organized by the UFT and conducted for some Retirees in late August 2021, included a presentation by Kim Parker, a representative of the Alliance. Ms. Parker noted that the new Medicare Advantage plan's "Evidence of Coverage" which would include "every exclusion and plan limitation will be posted on the OLR website before the end of the opt-out period." That is of little solace to Retirees who are being forced to make a choice before the end of the op-out period.

Some of the misrepresentations and misstatements being made by the City and the Alliance are significant. Some are minor. Others were just confusing and anxiety-inducing. But the constellation of the many errors, omissions, and contradictory statements have created a situation that harms retirees today – and will harm them even more after January 1, 2022.

IV. The Retirees Will be Irreparably Harmed Absent an Injunction.

To establish entitlement to injunctive relief, the Retirees need to show only the likelihood—not the certainty—that absent an injunction, they will suffer irreparable harm. *See State of New York v. City of New York*, 275 A.D.2d 740, 741 (2d Dep't 2000). To establish irreparable harm, a party must present facts demonstrating an injury for which money damages are insufficient. *See Barbes Rest., Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 432 (1st Dep't 2016). The

Retirees have shown multiple ways in which they will be irreparably harmed absent an injunction.

As detailed in retirees' affidavits, the Medicare Advantage plan is materially inferior to the Retirees' current MediGap health care coverage in several respects. (*See Exhibits* XXX) Retirees have also been specifically advised by their treating physicians that they will not accept Medicare Advantage, and the Retirees will have to change doctors as a result. As the court explained in *Int'l Union of Operating Eng'rs, Local No. 463 v. City of Niagara Falls*, 191 Misc. 2d 375, 379 (Sup. Ct., Niagara Cty. 2002):

> [R]eal injury would occur if the additional cost imposed upon employees would force them out of [one health insurance] Plan for another plan with lesser coverage. … The court finds that health care coverage is a very important employee benefit and a loss of or reduction in coverage cannot be measured solely by monetary damages. … In addition, the court finds that the loss of … health care coverage may cause irreparable harm especially for those families that have significant health care problems … [loss] of health care coverage cannot be recovered by an award of monetary damages alone since changing a health care provider may require a change in physicians and a course of treatment. It could also adversely affect the ability to access doctors, prescriptive medications, physiotherapy and other medical needs since copays and deductibles may be different among the plans.

The retirees here face the same harms. And New York Courts have repeatedly found irreparable injury in similar circumstances. *See, e.g.*, *Matter of Sheriff Officers Ass'n, Inc. v. Nassau County*, 2012 WL 2367795, 4 (Sup. Ct. Nassau Cty. 2012) ("Here, monetary damages are an inadequate substitute for the anticipated disruption in the continuity of medical care that may result absent the perpetuation of injunctive relief."); *Matter of Freeport Police Benevolent Ass'n v. Inc.*

Vill. of Freeport, 2012 WL 1642709, 4 (Sup. Ct., Nassau Cty. 2012) ("Here, monetary damages are a weak substitute for the anticipated disruption in the continuity of medical care that may result from the implementation of the changes contemplated…."); *Matter of Plattsburgh City Retirees' Ass'n v. City of Plattsburgh*, 2016 NY Slip Op 50512(U) (Sup. Ct., Clinton Cty. 2016) ("Here, the loss of coverage under the Blue Plan cannot be recovered by an award of money damages alone — especially not for individual petitioners like Froehlich and Spinks who face significant health problems. A change in coverage may necessitate a change in health care providers and a change in course of treatment."). No money damages can make the Retirees whole if they are forced into inferior health care coverage and made to switch doctors.

Further, the Retirees will be harmed if they are forced to make choices that affect their healthcare benefits based on the misleading and confusing information that has been provided to date. Yet Respondents have advised Retirees that unless they take affirmative action and commit to paying substantial sums of money to "opt-out" of Medicare Advantage by October 31, 2021, they will lose the opportunity to do so. This puts the Retirees are in the impossible position of having to decide whether to "opt-out" of that plan without even knowing its full details. This is another irreparable injury the Retirees will suffer absent an injunction. *See Woodward & Lothrop, Inc. v. Schnabel*, 593 F. Supp. 1385, 1394 (D.D.C. 1984) ("Given the current state of information now before the shareholders, proceeding with the vote would itself cause an irreparable injury to the shareholders who

would be compelled to make a vital investment decision based on incomplete and potentially materially misleading information.") Here, retirees are being asked to make a critical decision based on incomplete, misleading, and often contradictory information. Only an injunction can prevent the Retirees from suffering these irreparable injuries.

V. The Equities Favor an Injunction

As for the final factor, the equities overwhelmingly favor the Retirees. "A balancing of the equities favors the movant where the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendants through imposition of the injunction." *Kimm v. Blue Cross & Blue Shield*, 160 Misc. 2d 97, 101–02 (Sup. Ct., N.Y. Cty. 1993) (citation and internal quotations omitted).

Petitioners are retired and at a stage in life when health care benefits are critically important. Already, several treating physicians have advised Petitioners that they will not accept Medicare Advantage. The retirees have fixed budgets, and most cannot bear the additional costs associated with maintaining their current coverage if the City breaches its obligation to pay. They will be severely harmed if they are forced to switch doctors and receive inferior medical coverage. Respondents, on the other hand, will suffer little or no harm if an injunction is granted to preserve the status quo. They will simply continue making payments as they have done for decades. "[U]nquantified economic consequences that may ensue would not tip the balance of equities in Respondents' favor. In the event the

Respondents ultimately prevail on the merits, premium payments expended may be recovered and any savings that might have been realized will not be forfeited, merely delayed." *Matter of Sheriff Officers Ass'n, Inc.*, 2012 WL 2367795 at 4.

New York Courts routinely conclude that the equities favor an injunction in similar circumstances. *See, e.g.*, *Int'l Union of Operating Eng'rs, Local No. 463*, 191 Misc. 2d at 379 (granting preliminary injunction to maintain the status quo and explaining that "[a] loss of or reduction in health care coverage outweighs any possible monetary loss to the City"); *see also Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc.*, 306 A.D.2d 4, 6 (1st Dep't 2003) ("[T]he equities demand that Four Times Square should not be forced to purchase terrorism insurance until there is a final determination on the contractual rights and obligations of the parties."); *Matter of Plattsburgh City Retirees' Ass'n*, 2016 NY Slip Op 50512(U) ("[I]f a preliminary injunction is granted, the City stands to lose $81,872.00 per month. While this is certainly a substantial amount, the Court nonetheless finds that '[a] loss of or reduction in health care coverage outweighs any possible monetary loss to the City.' Based upon the figures presented in opposition to the motion, the City paid $917.55 per month for each member in 2015 and can presumably maintain these payments pending the conclusion of this litigation."); *Gibouleau v. Soc'y of Women Eng'rs*, 127 A.D.2d 740, 741 (2d Dep't 1987) ("Special Term did not abuse its discretion in directing SWE to continue payment of insurance premiums, especially

since the plaintiff, who was suffering from lymphatic cancer, would have been unable to obtain alternate medical coverage.").[5]

The same logic applies here. The harm to the Retirees losing their health benefits is serious and irreversible. The harm to Respondents from a brief preservation of the status quo is simply another "cost of doing business," and one they have borne for decades. And indeed, one they are contractually obligated to continue to pay.

CONCLUSION

For the reasons stated above, the Court should grant and injunction to preserve the status quo while it rules on the Retirees' Petition.

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New York, NY

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[5] *See also Kimm*, 608 N.Y.S.2d at 387-88 ("This court will not trivialize the burden, even to a large health insurer, of making rather considerable payments for an indefinite period of time. On the other hand, making such payments is the "cost of doing business" for Blue Cross, whereas plaintiff, who had a right to consider himself financially insured against medical catastrophe, is, quite literally, struggling for his very survival. On balance, plaintiff's death would be more burdensome than Blue Cross' payments."); *Suffolk Cty. Ass'n of Mun. Emps., Inc. v. Cty. of Suffolk*, 163 A.D.2d 469, 474 (2d Dep't 1990) ("[T]his court has, on several more recent occasions, taken the position that those who would otherwise lose, for a period of time, their positions, health benefits, or potentially, their residences, were entitled to a preliminary injunction, emphasizing that the status quo, which is the beneficial effect temporary injunctive relief seeks to attain be maintained.").