

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

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ROBERT BENTKOWSKI, KAREN ENGEL, :  
MICHELLE FEINMAN, NANCY LOSINNO, JOHN :  
MIHOVICS, KAREN MILLER, ERICA RHINE, :  
ELLEN RIESER, and BEVERLY ZIMMERMAN, on :  
behalf of themselves and all others similarly situated, and : Index No. 154962/2023  
THE NEW YORK CITY ORGANIZATION OF :  
PUBLIC SERVICE RETIREES, INC. : (Hon. Lyle E. Frank)

Petitioners-Plaintiffs, :

v. :

THE CITY OF NEW YORK; ERIC ADAMS, Mayor of :  
the City of New York; THE CITY OF NEW YORK :  
OFFICE OF LABOR RELATIONS; RENEE :  
CAMPION, Commissioner of the Office of Labor :  
Relations; THE NEW YORK CITY DEPARTMENT OF :  
EDUCATION (a/k/a THE BOARD OF EDUCATION :  
OF THE CITY SCHOOL DISTRICT OF THE CITY OF :  
NEW YORK); and DAVID C. BANKS, Chancellor of :  
the New York City Department of Education, :

Respondents-Defendants. :

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**PROPOSED INTERVENOR-RESPONDENT  
AETNA LIFE INSURANCE COMPANY'S MEMORANDUM  
OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO INTERVENE**

Karl Geercken  
Elizabeth A. Buckel  
Sharon Steinerman  
Kristen C. Kuan  
ALSTON & BIRD LLP  
90 Park Avenue  
New York, New York 10016  
Tel.: 212-910-9400

*Counsel for Proposed Intervenor-  
Respondent Aetna Life Insurance Company*

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Pursuant to CPLR 1012, 1013, and 7802(d), Proposed Intervenor-Respondent Aetna Life Insurance Company (“Aetna”) respectfully submits this Memorandum of Law in support of its Motion to Intervene in the above-captioned action.

### **PRELIMINARY STATEMENT**

Petitioners, comprised of a small group of New York City municipal retirees and a related corporation formed for litigation purposes as the “NYC Organization of Public Service Retirees, Inc.” (the “Organization”), brought this NY Article 78 action<sup>1</sup> as part of their continued effort to derail the City of New York’s (the “City”) multi-year plan to transition its municipal retiree population to a Medicare Advantage healthcare plan (the “MAP”), without regard to the interests of the vastly greater municipal retiree population which would reap significant benefit from the MAP. This Court has already ruled that “[the City’s] ultimate determination of choosing a Medicare Advantage Plan provider was rational” and it “does not intend to disturb that determination.” *NYC Org. of Pub. Serv. Retirees, Inc. et al. v. Champion et al.* (Sup. Ct. N.Y. Cnty.), Index No. 158815/2021, [NYSCEF Doc. No. 112](#). But having successfully challenged the implementation of the MAP once before, Petitioners—who make countless false allegations about Medicare Advantage and the City’s process undertaken to implement the MAP—now seek to stoke enough chaos and uncertainty through the legal process to cause the City to abandon the MAP altogether.

But this Court must not let a small cadre of misinformed retirees upend the healthcare for the 250,000+ NYC municipal retirees and their dependents based on falsehoods and fear mongering. Instead, the Court need only look to the calculated decision made by the City to control

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<sup>1</sup> While this was brought as a purported class action, the requested class certification should be denied. See *Conrad v. Regan*, 155 A.D.2d 931, 931-32 (4th Dep’t 1989) (“Class action certification is inappropriate in Article 78 proceedings”).

its skyrocketing healthcare obligations while maintaining high-quality, premium-free healthcare for all of its retirees to determine that Petitioners cannot show that the City's implementation of the MAP was arbitrary or capricious, or that Petitioners would face irreparable harm such that the MAP need to be enjoined.

Indeed, the City—like many public sector entities across the country—undertook an extensive procurement process that ultimately resulted in the selection of Aetna to administer the MAP. Aetna, an experienced healthcare administrator that successfully operates large Medicare Advantage programs for hundreds of public sector and union employers, offered the City's retirees comprehensive, premium-free health coverage with enhanced benefits not offered in the retirees' current Senior Care plan such as lower deductibles and out-of-pocket maximums. And, Aetna has worked tirelessly to effectively impart all relevant information about the MAP such that the vast majority of retirees, by all pertinent metrics, are extremely satisfied with the rollout of the MAP and the coverage it provides. This reality sharply undercuts Petitioners' assertion that they speak for the retiree population as a whole in their purported dissatisfaction with the City's implementation of the MAP, and correspondingly dooms this lawsuit.

For this Court to have an accurate factual record under which it can make a determination on the Petition, Aetna must be allowed to intervene. In sum, because Aetna is the entity administering the new MAP and has vast experience in the rollout of similar plans to public sector entities across the country, it is uniquely suited to address each of Petitioners' false allegations and provide this Court with the background necessary to understand what is at stake. Aetna, then, can show that Petitioners cannot meet their burden for any of their claims, including that the City's implementation of the MAP is arbitrary and capricious. As a result, the Petition must be denied.

## RELEVANT BACKGROUND

### 1. The City's Medicare Advantage Procurement Process And Initial Selection Of The Alliance

In 2018, the Municipal Labor Committee (“MLC”), a group that represents retired New York City employees, and the City’s Office of Labor Relations agreed to reduce healthcare costs for NYC retirees by \$600 million a year starting in 2021. *See* Geercken Aff., Ex. A at 1 (the “Scheinman Decision”); Frommeyer Aff. ¶ 18. The parties established a Tripartite Health Insurance Policy Committee to study ways to achieve these healthcare savings, which ultimately recommended that the City transition its retirees from a “Medigap” plan that covered 20% of retirees’ expenses not covered by Medicare (the “Senior Care” plan) to a Medicare Advantage plan administered by a private insurer. Scheinman Decision at 2. Other public sector and union employers around the nation have successfully transitioned to Medicare Advantage for their retirees’ healthcare, and thereafter saved hundreds of millions of dollars. *See* Frommeyer Aff. ¶ 19. Transitioning to a MAP would allow the City to achieve these desired cost savings while—most importantly—maintaining high-quality, premium-free healthcare for all retirees. *See* Scheinman Decision at 13-19.

The City and the MLC thereafter engaged in a lengthy and detailed procurement process in which multiple private insurers submitted proposals to administer the MAP. *Id.* at 3. In 2021, the City chose to partner with the “Alliance,” a partnership between Empire BlueCross BlueShield and EmblemHealth. *Id.* at 18-19. Aetna, the only other finalist in the process, was the runner up in the City’s selection process. *Id.*; *see* Frommeyer Aff. ¶¶ 20-31.

Initially, the City gave retirees a choice: the retirees could receive premium-free healthcare through the MAP, or “opt out” of the MAP and pay approximately \$191 per month to maintain their Senior Care coverage. Scheinman Decision at 19. In response, a small group of retirees and



the Organization, purporting to speak for the 250,000+ retirees, brought an Article 78 proceeding in October 2021 seeking to stop the City from transitioning to the MAP. *See NYC Org. of Pub. Serv. Retirees, Inc. v. Champion*, Index No. 158815/2021 (Sup. Ct. N.Y. Cnty.).<sup>2</sup> Along with arguing that the MAP offered by the Alliance was drastically inferior to Senior Care, the retirees argued that N.Y.C. Administrative Code § 12-126 required the City to pay up to the statutory cap for any health insurance plan offered to retirees, including Senior Care. *See NYC Org. of Pub. Serv. Retirees, Inc. v. Champion*, No. 158815/2021, 2022 N.Y. Misc. LEXIS 1042 (Sup. Ct. N.Y. Cnty. Mar. 3, 2022). The court ultimately held that the City could transition to the MAP, but only by either (a) eliminating all of the more expensive, optional plans that were otherwise available to retirees such as Senior Care, or (b) subsidizing those plans such that the Retirees would not have to pay the incremental \$191 per month. *See id.* This ruling was affirmed on appeal. *NYC Org. of Pub. Serv. Retirees, Inc. v. Champion*, 210 A.D.3d 559 (1st Dep't 2022).<sup>3</sup>

Given the continuing uncertainty as to which plans would be offered to retirees moving forward and the delay in implementation, the Alliance ultimately decided in July 2022 that it could no longer move forward on partnering with the City on providing the MAP to the retirees. *See Scheinman Decision* at 21-22. The City was forced to seek out a new partner. *Id.* at 19-22.

## **2. The City Selects Aetna To Administer The Medicare Advantage Plan**

In need of a new partner going forward, the City turned to the runner up in the procurement process—Aetna. *Id.* at 23. Based on Aetna's proposal during this process, the City and the MLC

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<sup>2</sup> Aetna and other entities that had sought to partner with the City on the MAP also filed Article 78 petitions highlighting significant flaws with respect to the Alliance's proposal, including the Alliance's limited experience in the administration of Medicare Advantage plans. *See Aetna Life Ins. Co. v. Champion*, Index No. 158216/2021 (N.Y. Sup. Ct. Oct. 21, 2021); *United Healthcare Servs., Inc. v. Champion*, Index No. 158757/2021 (N.Y. Sup. Ct. Oct. 21, 2021). The court denied these petitions, finding that the City's selection of the Alliance was not arbitrary and capricious.

<sup>3</sup> The Court of Appeals granted leave to appeal on June 13, 2023.

determined that Aetna was a fully qualified partner to administrate the MAP due to, among other reasons, the fact that it already offered a successful Medicare Advantage plan to City retirees (in which approximately 9,100 retirees were currently enrolled), and because Aetna administers numerous, highly successful Medicare Advantage plans to large public sector entities across the country. *See id.* at 23-24; Frommeyer Aff. ¶¶ 11-17; Salve Aff. ¶¶ 29-39. In addition, based on the prior Article 78 decision in *Campion*, the City and the MLC ultimately decided that the MAP would be the only City-funded plan offered to retirees nationwide, and the retirees could seek other options on the public marketplace should they choose not to proceed with coverage through the MAP. *See Fisher Aff.* ¶¶ 8-18.<sup>4</sup>

On March 30, 2023, the City publicly announced that it had signed a multi-year contract with Aetna to administer the MAP starting on September 1, 2023. *See Geercken Aff., Ex. B.*

### 3. The Aetna MAP

Under the Aetna Medicare Advantage PPO Plan (the “Aetna MAP”) retirees will receive comprehensive, premium-free health coverage, in addition to enhanced benefits not offered in the Senior Care plan. *Id.* Indeed, Aetna worked hand-in-hand with the City and the MLC to design one of the most generous Medicare Advantage plans offered in the market today. *See Frommeyer Aff.* ¶¶ 34-75. Key aspects of the plan include:

- ***Extensive Network of Providers*** – At least 97% of providers who accepted the Senior Care plan have indicated that they will accept the Aetna MAP, including the 88% of providers in the Aetna MAP network, the 8.3% of providers who are not contracted with Aetna but have accepted payment from Aetna, and the other hundreds of providers who have indicated in discussions with Aetna that they will accept the Aetna MAP. *Id.* ¶¶ 65-75. Additionally, there are certain service providers that have signed network contracts with Aetna *specifically for* the Aetna MAP. *Id.* ¶ 52.

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<sup>4</sup> Retirees in select NY counties can also enroll in the HIP VIP Premier Medicare Advantage HMO plan with limited provider coverage. *See Petition* ¶ 20.

- **Limited Prior Authorization Requirements** – Aetna waived 85% of its typical prior authorization requirements for the Aetna MAP. *See* Moffitt Aff. ¶ 35 Prior authorization requirements are standard requirements used across Medicare, Medicare Advantage, and many commercial healthcare plans to ensure patients receive the right treatment at the right place and time. *See id.* ¶ 6. In the Aetna MAP, prior authorizations are only required for a limited set of items/services, such as pre-service inpatient hospital stays, rehabilitation facility stays or long-term acute facility stays, and skilled nursing facility care, as well as certain services/items, like cosmetic procedures; new drugs, therapies, and technologies; and experimental and investigational procedures. *See id.* ¶¶ 33-39.
- **Limited Costs for Retirees** – The Aetna MAP offers retirees a lower deductible of \$150 (compared to \$276 in the current Senior Care plan). *Frommeyer Aff.* ¶¶ 93-94. In addition, it imposes a \$1,500 cap on out-of-pocket expenses (compared to unlimited financial liability under Senior Care). *Id.* ¶ 92. And due to CMS requirements, it is highly unlikely that retirees who saw providers who would not accept the Aetna MAP would be forced to pay out of pocket for their medical care and not get promptly reimbursed by Aetna. *See* Moffitt Aff. ¶¶ 18-28. In addition, there are other services, including primary care office visits, where Senior Care charges a co-pay, and the Aetna MAP does not.<sup>5</sup> *Frommeyer Aff.* ¶ 95. Lastly, the Aetna MAP’s Part D prescription formulary covers *all* approved drugs for seniors, many of which are offered at substantial savings to retirees. *Id.* ¶¶ 97-98. All Tier 1 generics at preferred pharmacies and mail order are also offered to retirees for free. *Id.* ¶ 98.
- **Other Benefits** – The Aetna MAP offers transportation to certain doctors’ appointments, fitness programs, and wellness incentives. *See* Geercken Aff., Ex. C.

#### 4. Aetna’s Implementation Of The Aetna MAP

Aetna invested significant resources and rolled out an extensive information campaign to provide the retiree population with all relevant details concerning their new healthcare plan.

First, starting in mid-March 2023, the retirees received multiple comprehensive packages from Aetna with detailed information about the plan and resources available. *See* *Frommeyer Aff.* ¶¶ 103-13. The Aetna materials include a detailed benefit summary of the plan and the Evidence of Coverage, along with information about the Part D prescription drug rider offered by SilverScript. *See id.* ¶ 108.

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<sup>5</sup> Pursuant to separate litigation brought by the Organization, the co-pays in the Senior Care plan are currently enjoined for this plan year.

Second, Aetna opened a dedicated call center that is open Monday to Friday (8:00 am – 9:00 pm) to answer retirees’ questions concerning benefits, the network, or clinical transitions. *See id.* ¶ 107. Through May 31, 2023, Aetna answered 54,721 calls through this call center. *See id.*

Third, Aetna and the municipal unions offered in-person meetings all over the New York metropolitan area, as well as in other states with large retiree populations such as New Jersey and Florida, and virtually, to assist retirees with the transition. *Frommeyer Aff.* ¶¶ 117-26. The onsite meetings offered retirees the opportunity to have individual discussions with Aetna representatives to assist with any questions they may have. *Id.* ¶ 118. Through May 31, 2023, 44,252 retirees have attended these meetings to learn about the Aetna MAP. *Id.* ¶ 119. Based on surveys filled out by the retirees after those sessions, 94% were either “Highly Satisfied” (54%) or “Satisfied” (46%) with their experience at the meeting. *Id.* ¶¶ 121-26.

##### **5. Petitioners File The Instant Action**

Petitioners filed the instant action seeking to prevent the City from implementing the Aetna MAP with Aetna, claiming in relevant part that there are significant flaws rendering the City’s implementation plan arbitrary and capricious. What is more, Petitioners argue the City should be enjoined from offering the MAP in perpetuity. Certainly, Petitioners would like nothing more than for the MAP to once again be tied up in court to the point at which it becomes untenable for the City and Aetna to proceed.

However, Petitioners’ claims and allegations are based solely on hearsay, speculation, and—candidly—misinformation. *See NYSCEF Doc. No. 1* (the “Petition”), at ¶¶ 172-226. Aetna is uniquely positioned to rebut the many inaccuracies and falsehoods that underpin Petitioner’s allegations.

## ARGUMENT

### I. AETNA IS ENTITLED TO INTERVENE IN THIS ACTION

#### a. Aetna Is Entitled To Intervene As Of Right Under CPLR 1012

CPLR 1012(a)(2) provides that, upon timely motion, a party has a right to intervene in an action “when the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.” Intervention is “liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action.” *Yuppie Puppy Pet Prods. v. Street Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dep’t 2010). Aetna, the provider of the Aetna MAP at issue, is an interested party that has a real and substantial interest in the outcome of this proceeding and has a unique perspective that can assist the Court in its resolution of key issues. As such, Aetna should be permitted to intervene as of right.

#### 1. Aetna’s Motion To Intervene Is Timely

Aetna’s motion for intervention is timely because it would not “cause a delay in resolution of the action or otherwise prejudice a party.” *Yuppie Puppy*, 77 A.D.3d at 201. Here, the instant motion was filed in an expedited manner. Petitioners first asserted claims against Respondents on May 31, 2023, and Aetna seeks to intervene less than 2 weeks later. This motion is well within the timeframe in which courts have found intervention to be timely. *See, e.g., Halstead v. Dolphy*, 70 A.D.3d 639, 640 (2d Dep’t 2010) (permitting intervention four years after action commenced). Moreover, there is no prejudice in allowing intervention; Respondents’ time to answer the Petition

or otherwise move has not yet run, and Aetna has foregone a reply in an effort to put this motion before the Court in an expeditious manner.

**2. Aetna Has A Direct And Recognized Interest In The Implementation Of The MAP And This Interest Is Not Adequately Represented By The City**

Intervention is warranted here because Aetna's interest in the subject of this litigation is not adequately represented by the City. This litigation concerns the proposed implementation of the Aetna MAP, and Aetna is the entity that contracted with the City to administer the plan. While both the City and Aetna's interest are aligned—they certainly have an interest in making sure the Aetna MAP is implemented in a timely fashion—the City cannot fully represent Aetna's interest because it cannot explain key details at issue such as network coverage and availability, and its impact on the retiree population. Aetna has a concrete economic interest in defending itself and the Aetna MAP against baseless allegations, and is the only entity adequately equipped to respond to Petitioners' misstatements with respect to the operations of the Aetna MAP, as detailed further *infra*. As such, Aetna's interests are entirely distinct from the City's, and will be inadequately represented should it not be permitted to intervene. *See R.C. Diocese of Brooklyn v. Christ the King Regional High Sch.*, 164 A.D.3d 1394, 1396 (2d Dep't 2018) (finding intervention warranted where defendant cannot fully represent intervenor's interest even though defendant and intervenor's "respective interests are aligned with . . . each other").

**3. Disposition Of This Action May Practically Impair Or Impede Aetna's Ability To Protect Its Interest**

Any judgment on the merits in favor of Petitioners, including invalidating the Aetna MAP or changing its terms, will undoubtedly cause Aetna substantial economic loss. *See 1200 Bedford Ave. LLC v. Grace Baptist Church*, 2015 WL 4389801, at \*4 (Sup. Ct. Kings Cnty. July 17, 2015) (explaining "courts have routinely held that any substantial economic loss . . . is enough to support

intervention”) (citations omitted). Aetna has invested an incredible amount of resources (*see* Frommeyer Aff. ¶ 131) in the implementation of the Aetna MAP. Any ruling preventing Aetna from offering the Aetna MAP based on the inaccurate information alleged will cause economic harm to Aetna—not only may it lose the resources already invested and potentially have to participate once again in the City’s procurement process, but if the false allegations of the complaint were to go unrebutted, Aetna might face reputational risk that would impair its ability to win procurements for similar Medicare Advantage contracts across the country. As such, disposition of this action will have a direct, practical impact on Aetna’s business.

**b. Alternatively, Aetna Should Be Granted Permissive Intervention Under CPLR 1013 And 7802(d) Or *Amicus* Status**

While Aetna is entitled to intervene as a matter of right, the Court may alternatively permit Aetna to intervene pursuant to CPLR 1013 and 7802(d), or grant it *amicus* status. Under CPLR 1013, a court may permit intervention when “the person’s claim or defense and the main action share a common question of law or fact[,]” and “the intervention will [not] unduly delay the determination of the action or prejudice the substantial rights of any party.” One of the most important considerations for the court is whether the proposed intervenor has a “real and substantial interest in the outcome of the proceedings.” *Berkoski v. Board of Trustees of Incorporated Village of Southampton*, 67 A.D.3d 840, 843 (2d Dep’t 2009) (citations omitted). And, pursuant to CPLR 7802(d), a court “may allow other interested persons” (or one “who will be directly affected by the outcome of [the] proceeding”) to intervene in an Article 78 proceeding. *White v. Incorporated Vil. Of Plandome Manor*, 190 A.D.2d 854, 855 (2d Dep’t 1993). This provision ““grants the court broader power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 and 1013.”” *Bernstein v. Feiner*, 43 A.D.3d 1161, 1162 (2d Dep’t 2007) (citations omitted).

For the reasons set forth *supra*, Aetna is an interested person with a real and substantial interest in the outcome of the proceedings—Aetna will be directly affected by the outcome. Further, Aetna is uniquely positioned to assist the Court in understanding the merits and of the Aetna MAP and the implications to the City’s retirement population. Indeed, as shown by the affidavits submitted in support of this motion, Aetna is the only entity able to provide the Court with relevant facts and perspectives concerning Petitioners’ key concerns about the Aetna MAP, which will aid the Court in its consideration of the matter.

For these reasons and the fact that Aetna’s intervention will result in no prejudice or delay, Aetna’s motion to intervene should be granted. If the Court, however, is not inclined to grant Aetna’s motion, Aetna respectfully requests that the Court grant it *amicus* status and consider its submissions in connection with the resolution of this Action.

## II. THE PETITION SHOULD BE DENIED

Petitioners bring a variety of claims against the City based on misstatements, misunderstandings, and outright falsehoods regarding the Aetna MAP and its components. Pursuant to CPLR 1014 and 7804(d), Aetna submitted concurrent with this Motion a pleading setting forth responses to the Petition’s allegations, objections in point of law, and a statement of pertinent and material facts. That pleading, in relevant part, further highlights that (a) Petitioners failed to show that the City’s implementation of the Aetna MAP violates CPLR 7803(3), (b) neither the City nor Aetna has misrepresented (negligently or otherwise) any information about the Aetna MAP, (c) the Aetna MAP does not violate the Donnelly Act, and (d) there is no violation of the Moratorium Law because the Aetna MAP enhances rather than diminishes the retirees’ health insurance benefits.



**a. Petitioners Fail To Show That The City’s Implementation Of The Aetna MAP Violates CPLR 7803(3)**

Under CPLR 7803, a Court will find an administration action to be arbitrary when Petitioner shows that the action is taken “‘without sound basis in reason’ and ‘without regard to the facts.’” *New York City Mun. Labor Comm. v. City of New York*, 73 Misc. 3d 621, 629 (Sup. Ct. N.Y. Cnty. 2021) (noting “the Court may not upset the agency’s determination in the absence of a finding that the determination had no rational basis”) (citation omitted). In its evaluation, the court “may not substitute its judgment for that of the administrative officer.” *Curb Mobility, LLC v. Metro. Transp. Auth.*, 73 Misc. 3d 277, 281-82 (Sup. Ct. N.Y. Cnty. 2021). Typically, “the standard for vacating an administrative agency’s determination is held to a high bar.” *Lidakis v. N.Y. City Emples. Ret. Sys.*, 2016 NYLJ LEXIS 4494, at \*24 (Sup. Ct. Kings Cnty. Nov. 17, 2016).

Here, Petitioners complain that the City’s implementation of the Aetna MAP “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . .” because (1) it will result in a dangerous disruption in life-saving treatment, and (2) the retirees were provided incomplete and inaccurate information about the Aetna MAP. However, Petitioners have not come close to meeting their burden. The City’s decision to proceed with the implementation of the Aetna MAP had a sound and rational basis.

**1. Petitioners Will Not Be Denied Access To Life-Saving Treatments**

Petitioners first argue that the implementation of the Aetna MAP is arbitrary and capricious and an abuse of discretion because retirees will “will face a dangerous disruption in life-saving medical care.” *Petition* ¶¶ 305-11. However, Petitioners fail to provide any substantive support for this allegation. Nor could they.

First, Petitioners claim, without basis, that they will be denied access to their doctors should they choose to enroll in the Aetna MAP. *See Petition* ¶ 307. However, this is entirely unfounded.

Indeed, Aetna has received a list of all the providers that City retirees on the Senior Care plan had been seeing for treatment and determined that at least 97% of providers who accepted the Senior Care plan have indicated that they will accept the Aetna MAP, including the 88% of providers in the Aetna MAP network, the 8.3% of providers who are not contracted with Aetna but have accepted payment from Aetna, and the other hundreds of providers who have indicated in discussions with Aetna that they will accept the Aetna MAP. *Frommeyer Aff.* ¶¶ 65-75. What is more, there are a number of providers that have signed network contracts with Aetna only for the Aetna MAP, and Aetna is actively working with a number of additional providers to sign additional network contracts. *Id.* ¶¶ 52, 73-74. Indeed, 94% of individuals who are currently enrolled in one of Aetna's Medicare Advantage plans in NYC, NJ, or FL indicated in a recent survey that they were satisfied or extremely satisfied with Aetna's Medicare Advantage offerings. *Id.* ¶¶ 48-60; *Salve Aff.* ¶¶ 29-39.

Petitioners submitted 250 affidavits from retirees in connection with this action, virtually all of which state in summary that their providers will not accept the Aetna MAP. *See NYSCEF Doc. No. 6.* However, the vast majority did not name a specific provider. *Grantham Aff.* ¶ 6. While a few named a provider or system (for example, "NYU Langone"), a significant number of these providers or systems are actually in network (or actively negotiating with Aetna to be in network) or have accepted payments from Aetna in the past. *Id.* ¶¶ 8-14.

And Aetna is directly working with retirees to address *any* concerns that their providers will not be covered. For example, Richard Frommeyer, who leads the CVS/Aetna Group Retiree business, has engaged in extensive correspondence with Petitioner Karen Miller regarding her concern that she would not be able to see her providers at University of Florida ("UF") Health and UF Shands Hospital. *See NYSCEF Doc. No. 34* at ¶¶ 4, 6-8; *Frommeyer Aff.* ¶¶ 78-79. Ultimately,

Aetna has come to an agreement in principle with UF hospitals, facilities, and physicians to participate in the Aetna MAP, including the Oak Hammock community where Ms. Miller resides. *See id.*; Grantham Aff. ¶ 14. Therefore, Petitioners simply cannot show there is *any* appreciable difference between the network of providers who will accept the Aetna MAP and Petitioners' current network.

Second, Petitioners suggest that retirees who choose to opt out of the Aetna MAP and seek Medigap coverage will be denied enrollment. *See Petition* ¶¶ 308-10. This, too, is false. Federal regulations provide that Medicare-eligible retirees aged 65 or older whose employer chooses to terminate their group plan supplementing original Medicare have a Federally-protected right to access a "Guaranteed Issue" Medigap or supplemental coverage on the open market, regardless of preexisting conditions. *See Fisher App.* ¶¶ 8-11. In addition, 36 states have extended Medigap coverage GI rights to retirees under the age of 65 who are Medicare-eligible and—in any event—these retirees have certain of the federally-guaranteed rights available to those over age 65. *See id.* ¶¶ 12-15; *see also id.* ¶¶ 16-17. And, the retirees have an important backstop if they later change their mind: any retiree over 65 who joins a Medicare Advantage plan for the first time and wants to switch back to a Medigap plan may do so in the first 12 months without medical underwriting, which makes it Guaranteed Issue coverage. *See id.* ¶ 12. Aetna itself will offer Medigap coverage in these two situations in the 46 States where it is currently licensed to sell the product to retirees who opt out of the Aetna MAP. *See id.* ¶ 18.

Third, there is no basis to suggest that retirees will be subject to high co-pays or prescription drug prices that would make it impossible for them to receive care. *See Petition* ¶¶ 181-87. The Aetna MAP does not charge co-pays for many services, including primary care visits. Frommeyer Aff. ¶ 95. And Aetna's Part D prescription formulary covers all approved drugs for seniors, many

of which are offered at substantial savings to retirees; for example, all Tier 1 generics at preferred pharmacies and mail order are offered for free. *Id.* ¶¶ 97-100.

Lastly, there is no truth to the suggestion that Aetna's prior authorization requirements will prevent retirees from receiving needed care. *See* [Petition](#) ¶¶ 188-193. Prior authorization requirements are standard requirements used across Original Medicare, Medicare Advantage, and many commercial healthcare plans to ensure insureds receive the right treatment at the right place and time to meet each patient's healthcare needs. *See* [Moffitt Aff.](#) ¶ 6. Indeed, the Centers for Medicare & Medicaid Services ("CMS") requires Medicare Advantage plans to verify that certain treatments are provided for under Medicare rules. *See id.* Here, Aetna has waived 85% of its typical prior authorization requirements with respect to the Aetna MAP; prior authorizations are only required for a limited set of items/services, such as pre-service inpatient hospital stays, rehabilitation facility stays or long-term acute facility stays, and skilled nursing facility care, as well as certain services/items, like cosmetic procedures; new drugs, therapies, and technologies; and experimental and investigational procedures. *See id.* ¶¶ 33-39; *see also* [Frommeyer Aff.](#) ¶¶ 43, 87. And, any future changes to the prior authorization list must be approved by both the City and the MLC. [Frommeyer Aff.](#) ¶ 44.

Therefore, it is incorrect for Petitioners to suggest that retirees will be denied access to life-saving medical care should the implementation of the Aetna MAP proceed. Nor can Petitioners meet the high standard under CPLR [7803\(3\)](#) to make such a showing, let alone a showing of irreparable harm or likelihood of success of the merits sufficient to merit injunctive relief.

## **2. Petitioners Have Not Been Provided Incomplete Or Inaccurate Information About The MAP**

Petitioners additionally argue that the implementation of the Aetna MAP is arbitrary and capricious and an abuse of discretion, in violation of CPLR [7803\(3\)](#), because retirees are being

forced to make a decision about whether to participate in the Aetna MAP without adequate and accurate information. See [Petition ¶¶ 312-19](#). However, their allegations that they have received inaccurate or misleading information as to the Aetna MAP (if they've received any information at all) are, too, without basis or support.

As a preliminary matter, Aetna began to circulate information about the Aetna MAP to all 250,000+ retirees and their dependents before the contract was even signed. *Frommeyer Aff.* ¶ 103. After that initial mailing, Aetna made multiple additional mailings to the retirees with further information. *Id.* ¶¶ 104-13. And, anytime a retiree requested additional information or claimed they did not receive the mailings, Aetna promptly mailed the requested information to the retirees, sometimes via certified mail to ensure the retiree received the information in a timely matter. *Id.* ¶¶ 114-16. Additionally, Aetna held or participated in many in person and virtual seminars, which have been attended by 44,252 retirees, all of which offered the retirees the ability to have any of their questions answered. See *id.* ¶¶ 118-26. 3,171 (94%) of the retirees who responded to a survey after these meeting expressed that they were either “Highly Satisfied” (54%) or “Satisfied” (46%) with their experience at the meeting, and when asked after learning about the plan how satisfied they were with what the Aetna MAP is offering, 83.7% responded that they were either “Completely Satisfied” or “Satisfied”. See *id.* ¶¶ 123, 125.

If a retiree was not able to attend one of the seminars, Aetna also opened a dedicated phone line offering retirees the ability to have their questions answered by an Aetna representative at their convenience. *Id.* ¶ 107. Lastly, Aetna had all of this information on a custom website built for city retirees: <https://cityofny.aetnamedicare.com/>. While Petitioners make the claim that these materials “misrepresent critical features of the MAP” or fail to accurately compare the Aetna MAP to Senior Care ([Petition ¶¶ 316-17](#)), Petitioners do not provide any support to these vague

statements other than repeating and restating its erroneous allegations that the Aetna MAP will not allow retirees to keep their doctors or that the prior authorizations will deprive retirees of life-saving procedures.

Accordingly, it is inaccurate for Petitioners to suggest that retirees have not received needed, accurate information relating to the Aetna MAP. Nor can Petitioners meet the high standard under CPLR 7803(3) to make such a showing, let alone a showing of irreparable harm or likelihood of success of the merits sufficient to merit injunctive relief.

**b. Neither Aetna Nor The City Has Misrepresented The Aetna MAP To Retirees**

Petitioners argue that the City has negligently misrepresented the Aetna MAP to them, in part by making a series of misleading and inaccurate statements about the Aetna MAP—specifically, statements assuring retirees that their medical providers would accept the plan and statements concerning the process for opting out of the Aetna MAP. *See* [Petition ¶¶ 374-81](#). To make a showing of negligent misrepresentation, Petitioners must provide clear and convincing proof: (1) that there exists “a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect [or withheld]; and (3) reasonable reliance on the information [or omission].” *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 959-60 (2d Dep’t 2011). Petitioners must have a “factual basis for claiming” that respondents made misrepresentations; “surmise and speculation” are insufficient. *Matter of Valentin*, 43 A.D.3d 942, 943 (2d Dep’t 2007).

Here, Petitioners cannot prove the second element of a negligent misrepresentation claim – that the retirees have been provided with incorrect information or that the City has withheld

information from the retirees.<sup>6</sup> As detailed *supra* Section II(a)(2), Petitioners have no factual basis for claiming the City falsely stated that the retirees’ providers will not accept the Aetna MAP when Aetna has confirmed the opposite to be the case. And any allegations concerning statements related to the opt out process merely allege that the statements were confusing, not that they are incorrect. See [Petition ¶¶ 219-25](#).<sup>7</sup> In any event, Aetna and the City have provided countless opportunities for the retirees to seek assistance in navigating the opt out process, including mailing large amounts of information to the retirees, providing that information on a website, hosting seminars attended by 44,252 retirees, and staffing a dedicated call center for the retirees. See *supra* Section II(a)(2).

Based on the foregoing, Petitioners are unable to prove that they have been provided false or misleading information about the Aetna MAP and any irreparable harm alleged (emotional and psychological distress) is speculative, at best. Therefore, the claim for negligent misrepresentation must fail.

**c. The Aetna MAP Does Not Violate The Donnelly Act**

Petitioners argue that the implementation of the Aetna MAP is an improper restriction on trade in violation of the [General Business Law § 340](#) (the “Donnelly Act”). See [Petition ¶¶ 382-90](#). As a threshold matter, this argument fails because Petitioners have not—and cannot—allege that the City and Aetna are in competition with one another or with Petitioners. “[A] restraint-of-trade Donnelly Act violation can only occur when the alleged ‘conspirators’ are in competition with one another or with the plaintiff.” *Benjamin of Forest Hills Realty*, 34 A.D.3d

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<sup>6</sup> Aetna takes no position concerning the first or third elements.

<sup>7</sup> Petitioners’ allegation that there is a technical glitch on Aetna’s opt out website is false. The opt out functionality on Aetna’s website, aside from a limited issue affecting tablets and cell phones which was corrected in a matter of hours, has been fully operational since it opened on May 1, 2023. See Price Aff. ¶¶ 8-13.

91, 98 (2d Dep't 2006); *Sands v. Ticketmaster-New York, Inc.*, 207 A.D.2d 687, 688 (1st Dep't 1994) (finding plaintiff failed to properly state a Donnelly Act claim where plaintiff merely alleged that defendant ticket seller preferred certain promoters of tickets since ticket sellers and promoters are not competitors).

But even were the parties in competition, Petitioners still fail to meet each of the required elements of the Donnelly Act. “A party, to state a claim of a violation of the Donnelly Act, must (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities. The failure to allege any one of these elements is fatal to the claim.” *Lopresti v. Massachusetts Mut. Life Ins. Co.*, 798 N.Y.S.2d 710, 710 (Sup. Ct. Kings Cnty. 2004) (citations omitted).

Here, Petitioners have not identified the relevant product market other than broadly alleging that NYC retirees now will only have one option to receive healthcare insurance nationwide. But this is not a “product market” unless the court defines the product market as “premium free, comprehensive healthcare coverage to NYC municipal retirees.” Indeed, there exists multiple other options for the retirees to receive healthcare. *See Fisher Aff.* ¶¶ 8-18.

And, Petitioners fail to explain the nature and effects of the “purported conspiracy” between Aetna and the City to implement the Aetna MAP, nor have they explained how the Aetna MAP restrains trade or demonstrated “a conspiracy or reciprocal relationship” between the City and Aetna. *See Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 333 (1988) (“[w]e recognize that neither the Donnelly Act nor the Sherman Act . . . has been interpreted as prohibiting every agreement that has the effect of restraining trade, no matter how minimal . . . [the Donnelly Act] prohibit[s] only ‘unreasonable’ restraints on trade”). Here, the City underwent a negotiated



acquisition process wherein numerous healthcare insurers—including Aetna—submitted proposals for the administration of a Medicare Advantage plan for the City’s retirees. *See* Frommeyer Aff. ¶¶ 18-31. A municipal procurement process that complied with all acceptable governmental rules and regulations is not a vehicle for the City to enter into an unlawful conspiracy or a restraint on trade. Instead, the City engaged in this process to select a vendor to offer a Medicare Advantage plan to its retiree population. Once the City’s first place finalist in this process—the Alliance—withdrawed, the City proceeded with its runner up, Aetna.<sup>8</sup> This is not an unreasonable restraint on trade. *See Matter of Electrical Inspectors, Inc. v. Village of Lynbrook*, 293 A.D.2d 537, 537-38 (2d Dep’t 2002) (finding ordinance that permitted town to appoint one electrical inspection firm for a time-limited basis after a competitive bidding process did not violate the Donnelly Act because the restraint on trade was not unreasonable and “the possible anticompetitive effects of a limited . . . appointment of an electrical inspection firm do not outweigh the public benefits achieved”).

Petitioners take pains to note that in a previous bid protest to the City, Aetna indicated that the City’s initial selection of the Alliance could amount to a violation of the Donnelly Act. *See Petition* ¶ 386. However, as should be clear from Aetna’s submission on this issue, this argument was based on the contention that the City’s selection of the Alliance was misguided, in part because it was a restraint on trade between two companies that would otherwise be competing against each other for business in the marketplace. *See Aetna Life Insurance Company v. Renee Campion et al.* (Sup. Ct. N.Y. Cnty.), Index No. 158216/2021, [NYSCEF Doc. No. 6](#) at Ex. 5, p. 5. Aetna never

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<sup>8</sup> It is therefore untrue that the Aetna MAP was not subject to public announcement or bidding. *See Petition* ¶ 387.

suggested that the City's decision to select a vendor with whom to partner on providing the MAP to the retirees was in itself an unlawful restraint on trade.

Nor is it accurate to suggest that because the Aetna MAP will be the only premium-free plan offered by the City to all its retirees, the City is improperly restraining trade. This Court itself recognized that the City is not required to provide retirees with more than one healthcare plan. *See NYC Org. of Pub. Serv. Retirees, Inc. v. Champion*, 2022 N.Y. Misc. LEXIS 1042, at \*4 (Sup. Ct. N.Y. Cnty. 2022) (“Of course, *none of this is to say that the [City] must give retirees an option of plans*, nor that if the plan goes above the threshold discussed in NYC Admin. Code § 12-126 (b)(1) that the respondent could not pass along the cost above the threshold to the retiree . . . .”) (emphasis added). And, retirees still have the option to choose coverage on the open market should they decide to opt out of the Aetna MAP. *See Fisher Aff.* ¶¶ 8-18. Therefore, the City's action cannot amount to a Donnelly Act violation.

Lastly, Petitioners have not attempted to show that this alleged anticompetitive behavior between two contracting parties will cause irreparable harm sufficient for an injunction on the implementation of a long-negotiated healthcare plan. As stated *supra*, the retirees have many options for healthcare; their only alleged harm is being limited to one, premium-free option nationwide.

**d. The Aetna MAP Does Not Violate The Moratorium Law Because It Enhances Rather Than Diminishes The Retirees' Health Insurance Benefits**

Petitioners allege the City in violation of the Moratorium Law because the Aetna MAP diminishes health insurance benefits provided to retirees and the City has not made a corresponding diminution in the benefits offered to active employees. *Petition* ¶¶ 283-304. However, this argument fails because there is no diminution of benefits provided to retirees: the Aetna MAP offers more—not fewer—benefits to the retiree population. *See Frommeyer Aff.*

¶¶ 65-100. For instance, the Senior Care plan did not have a cap on out-of-pocket healthcare expenses but the Aetna MAP caps out-of-pocket expenses at \$1,500, meaning that retirees are now protected from the financial burden of unexpected medical expenses. *Id.* ¶ 92. And, the Aetna MAP has a lower deductible (\$150) than Senior Care (\$276). *Id.* ¶ 93. Therefore, Petitioners also cannot show a violation of the Moratorium Law.

### CONCLUSION

For the reasons set forth above, Aetna's motion to intervene should be granted and the Petition should ultimately be denied.

Dated: New York, New York  
June 13, 2023

ALSTON & BIRD LLP

/s/ Karl Geercken

Karl Geercken

Elizabeth A. Buckel

Sharon Steiner

Kristen C. Kuan

90 Park Avenue

New York, New York 10016

Tel.: 212-910-9400

*Counsel for Proposed Intervenor-  
Respondent Aetna Life Insurance Company*

**WORD COUNT CERTIFICATE**

I hereby certify that this affirmation complies with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court. This certificate certifies that the document complies with the word count limit. Compliance relied on the word count of the word processing system used to prepare the document. The total number of the words in this affirmation, exclusive of the caption and signature block is 6,988 words.

Dated: New York, New York  
June 13, 2023

/s/ Karl Geercken  
Karl Geercken