EXHIBIT B

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

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 THE NEW YORK CITY ORGANIZATION OF PUBLIC SERVICE RETIREES, INC, 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.	:	Index No. 154962/2023 (Hon. Lyle E. Frank)

PROPOSED INTERVENOR'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER-PLAINTIFFS' VERIFIED ARTICLE 78 PETITION AND MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Petitioner New York City Organization of Public Service Retirees, Inc. ("Retirees Org.") again lodges a series of frivolous claims to derail a beneficial Citywide healthcare agreement, validly negotiated under collective bargaining law by the City and Proposed Intervenor the Municipal Labor Committee ("MLC"). Petitioners seek to undermine not only basic tenets of collective bargaining law, but also endanger healthcare benefits for *every public-sector employee*.

The retiree plan does not exist in a vacuum. It is part of a larger Citywide health program providing benefits to current employees, pre-65 retirees, disability retirees, Medicare-eligible retirees, and their various dependents. That program is the result of over a half-century of collective bargaining between MLC and the City pursuant to state and local collective bargaining laws, and operates in conjunction with the City's competitive procurement process. The challenged Medicare Advantage plan was arrived at through extended study, collective bargaining, a year-long procurement process, renewed negotiations, and then additional democratic approval by MLC-member unions. It complies with law and specifically with this Court's prior orders.

What Petitioners characterized as a "win" in their prior proceeding served to drain City resources, delay (but not stop) implementation of a Medicare Advantage construct, and—most importantly—forced the City to insist on offering only one plan for Medicare-eligible retirees. It is ironic that Petitioners lament the exclusion of the very pay-up option they previously attacked, and which MLC attempted first to defend and then to reinstate through City Council action, only to have Petitioners attack that effort with a slew of misrepresentations. Having thwarted those efforts, Petitioners—a small fraction of the 250,000 Medicare retirees—have prevented all retirees from maintaining the option to keep their current plan at a monthly fee. Their contorted

effort to freeze retiree benefits in perpetuity ignores fifty years of bargaining history and the fiscal condition of the Citywide benefits program.

To support their continuing campaign, Petitioners lob meritless constitutional, statutory, and common law legal arguments that have all either been squarely rejected by this Court or have no legal grounding.

FACTS

1. MLC's Role Protecting Health Benefits for City Workers

MLC is an association of New York City municipal labor organizations comprised of 102 bargaining units representing approximately 390,000 active City workers, their dependents and a community of 250,000 Medicare retirees dedicated collectively to addressing concerns common to its members and advocating on issues of labor relations relevant to City workers, of which health benefits are central. See [Proposed] Verified Answer ("MLC-Ans.") ¶406. MLC is organized pursuant to §§12-303 and 12-313 of the Administrative Code of the City of New York ("Admin. Code") and created pursuant to a Memorandum of Understanding dated March 31, 1966, signed by representatives of the City and certain employee organizations. See id. ¶407.

One of MLC's central roles has been to negotiate with the City and jointly administer a comprehensive Citywide health benefit program for actives, retirees, and their dependents. See id. ¶408. The provision and composition of health benefits is a mandatory subject of bargaining, and may not be unilaterally altered by the City (or participating agencies) absent collective bargaining with MLC. See id. (citing N.Y. Civil Service Law §§200, et seq. (the "Taylor Law"); Admin. Code §§12-301, *et seq*. (the "NYCCBL")). See id. Accordingly, MLC has both a statutory obligation to address Citywide health benefits and a unique perspective regarding the process by which City benefits are negotiated and administered. See id.

2. The City's And MLC's Longstanding Bargaining Over Citywide Benefits

The City and MLC have negotiated regarding the provision of health benefits to City retirees since the late 1960s. See id. ¶409. Since then, at the urging of City unions, the City adopted a statutory obligation to offer a premium-free option to actives and to retirees: the benchmark plans. See id.¶410. However, any changes to the benchmark plans must be accomplished through collective bargaining and a jointly-administered process. See id.

In 1992, MLC and the City entered into an "Agreement Relating to Procurement of Employee Health Benefits Contracts" (the "1992 Agreement"), which memorialized their respective responsibilities regarding the administration of health benefits. See id. ¶411. The 1992 Agreement provides:

> It is understood and agreed… that the City and the Unions shall jointly continue to participate in all aspects of the procurement process by which the choice of vendors of collectively bargained health benefits shall be made.
>
> ***It is understood and agreed that the parties will continue to bargain over and determine by mutual agreement the terms and conditions of employee health benefits.*** Appropriate issues shall include, but are not limited to, scope of contracts, their costs, their term(s) and whether annual renewals within the existing contract terms will be made, and if terminated, whether a new procurement should take place. ***The parties shall also determine on an ongoing basis whether a material change in the terms of any benefits contained in the contract is necessary***.

See id., Ex. 1 (emphasis added).

The 1992 Agreement squarely sets forth not only all health benefits and related procurement are to be collectively bargained and administered, but also all agreements are subject to future collective bargaining—some in connection with major procurements, and others "on an ongoing basis" depending on whether "material change in the terms of any benefits contained in the contract is necessary" (*i.e.*, consideration of an amendment to plan design).

Pursuant to the 1992 Agreement, MLC and the City jointly prepared several procurements and selected multiple health benefits providers over the years. Id. ¶413.

In a 2018 letter agreement, the City and MLC agreed to measures focused on preserving the quality of health care for active employees, retirees, and dependents (the "2018 Agreement"). See MLC-Ans. ¶414, Ex. 2. That public agreement specifically addressed future negotiations regarding retiree health benefits, and more precisely the consideration of potentially switching to a Medicare Advantage Plan ("MAP") construct. See 2018 Agreement §5(b) (establishing Tripartite Health Insurance Policy Committee ["Tripartite Committee"] of MLC and City Members to discuss "Medicare Advantage – adoption of a Medicare Advantage benchmark plan for retirees").

This dispute concerns a series of agreements entered into by MLC and City regarding Citywide health benefits, specifically MLC's and City's adoption of a MA construct for retirees. See id. ¶¶416-17. While recent changes to City benefits primarily focused on plans available to active employees, that does not mean that the retiree benchmark plan has never changed. Indeed, in 1996, MLC and City entered into a Memorandum of Economic Agreement to address an economic and fiscal crisis affecting the City, including changes to programs for Medicare-eligible retirees. See MLC-Ans. ¶419, Ex. 3. To meet their savings goals, changes were made to Medicare HMO Plans, HIP VIP Premium, HIP Medicare, and GHI Senior Care, including eliminating the $100 Medicare Part B deductible reimbursement and instituting a $200 hospital deductible per hospital admission, with a maximum of $500 per year. Further, in 2004, the medical benefit deductible was increased to $50, and the hospital inpatient deductible per admission was increased to $300, with a maximum of $750. See MLC-Ans. ¶421, Ex. 4 at 132.

These increases are additive to the deductible charged by Medicare, which adjust (generally upward) each year.

The Tripartite Committee recently agreed to evaluate possible changes (ultimately recommended) to plans offered to both active employees *and* retirees. See id. ¶422. The MAP procurement specifically asked for proposals that were equivalent to or improved upon existing retiree benefits, while also reducing costs by taking advantage of federal funding. See id. ¶423.

MLC has always endeavored to protect retirees. See id. ¶424. For that reason, MLC opted first to make changes and find efficiencies within the active/pre-65 retiree plans before looking to Medicare-retiree plans. See id. That protectiveness, however, is not a guarantee that plan designs or vendors will never change. See id. Indeed, the entire Citywide health benefits plan is subject to change where appropriate, through collective bargaining. See id. Since the prior proceeding, the work of the Tripartite Committee has continued, with part of its focus on MAPs. But, simultaneously, MLC and City agreed to issue a negotiated acquisition request for proposals for the PPO plan covering actives and pre-65 retirees and dependents. That process is underway with MLC and City seeking considerable cost savings through that procurement as well. See id. ¶425.

3. Prior Challenges to the Alliance MAP

In July 2021—following a Negotiated Acquisition which found Alliance and Aetna to be the most qualified insurers, and extensive negotiations between MLC and City—MLC members voted to adopt the Alliance MAP, to be offered alongside the option to pay-up to remain in the current most popular Medigap plan: Senior Care.

In September 2021, Petitioner Retirees Org., with different individual petitioners, challenged the Alliance MAP prior to implementation. As the Court is aware, in 2021 MLC sought leave (1) to intervene in that proceeding; or (2) in the alternative, for *amicus curiae*

status—the latter of which was granted. On March 3, 2022, this Court approved the implementation of the Alliance MAP, but enjoining the City from charging-up for Senior Care, if offered, except where such cost rises above the H.I.P.-H.M.O. threshold. This Court reasoned:

> ***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… that the respondent could not pass along the cost above the threshold to the retiree; ***only that if there is to be an option of more than one plan***, that the respondent may not pass any cost of the prior plan to the retirees….

MLC-Ans. ¶429, Ex. 5 (citing NYC Org. of Pub. Serv. Retirees, Inc., et al. v. Campion, et al., Index No. 158815/2021, NYSCEF Doc. #216 (Frank, J.) (the "Prior Decision") (emphasis added)). The First Department affirmed on November 22, 2022.[1] See MLC-Ans. ¶430, Ex. 6.

In light of these rulings, MLC continued to work to try to preserve plan choice. To that end, MLC urged the City Council to amend the Admin. Code to revert to MLC and City's prior understanding that optional plans could be offered to retirees at a pay-up from the benchmark plan. Petitioners thwarted that effort by stoking unwarranted public outrage, ensuring that the City would no longer offer optional plans that cost more than the benchmark, premium-free plan.

Given the considerable delay caused by retirees' challenge to the Alliance MAP, Alliance abandoned the deal on July 15, 2022.

4. The Aetna MAP

Arbitrator Martin Scheinman—who serves as the Impartial Chair of the Tripartite Health Insurance Policy Committee, consisting of City and MLC members banded together to assist crafting a new healthcare plan—presided over an arbitration between the City and MLC

[1] Petitioners mischaracterize the Court's holding in the Prior Decision, falsely stating that "this Court noted that it was not deciding whether the City 'must give retirees an option of [multiple] plans,' since that question was also not before the Court." See Petitioners' Memorandum of Law (Dkt. No. 46) ("Pet.MOL") at 15 n.28. As articulated herein, this is not accurate.

regarding negotiations with the other qualified Negotiated Acquisition candidate, Aetna. Arbitrator Scheinman "determined an MAP should go forward to help alleviate the savings realization shortfall, that the MAP be that of Aetna[.]" MLC-Ans. ¶435, Ex. 7 at 29. Arbitrator Scheinman stressed the imminent depletion of the Stabilization Fund[2] given rising healthcare costs, see id. at 17, stating: "circumstances have evolved to threaten the sustainability of robust premium free benefits for actives and retirees," and that "[f]ailure to have this agreement ratified shall result in finding another revenue source which, inevitably, shall lead to premium contributions." Id. at 27, 30. As illustrated by Arbitrator Scheinman, if savings through an MAP are not realized—one important component of an overhaul—then more painful changes may be needed elsewhere, including for pre-65 retirees.

To continue providing quality healthcare coverage, MLC and City negotiated a MAP with Aetna that complied with this Court's Prior Decision, and took into account the concerns raised by retirees in the prior proceeding.

The parties did so with an agreement to offer a single comprehensive plan where no premium costs are passed to retirees.

Central to the instant proceeding are Petitioners' categorical objections to any and all MAPs, no matter what the terms. Per agreement of the City and MLC, this new plan, which preserves and expands existing benefits, becomes effective September 2023.

[2] The Stabilization Fund is a fund jointly controlled by the City and MLC, providing significant assistance to MLC and City and a funding mechanism for various benefits, including a premium-free PPO plan to actives and pre-65 retirees. In absence of Fund resources, the City pays directly for these benefits. Accordingly, any savings realized inures directly to City spending.

Contrary to Petitioners' contentions, the Aetna MAP is robust, more expansive in its plan offerings than the Alliance MAP, and, indeed, extends beyond other Aetna MA plans through its limitation of prior authorizations.[3]

Neither the City, MLC, nor Aetna has attempted to obscure changes—both improvements and differences between the new plan and Senior Care. Side-by-side comparisons are publicly available, demonstrating the breadth of the new plan. See MLC-Ans. ¶442, Ex. 8. A key improvement is that the Aetna plan has an out-of-pocket maximum of $1,500, whereas the prior Medicare/Senior Care construct does not. This means that any deductible, co-pay or other out-of-pocket cost caps out at $1,500/person. Thereafter, the cost is fully covered. While Petitioners attempt to downplay this improvement by emphasizing co-pays and denying the existence of out-of-pocket costs under traditional Medicare, it is simply untrue. Traditional Medicare has an ever-increasing deductible. So does Senior Care. Other cost-sharing is also present. The out-of-pocket maximum guarantees retirees will not suffer allegedly crippling additional expenses that Petitioners inflate.

The same comparison charts plainly illustrate that Petitioners' argument, that the Aetna MAP offers a limited number of medical providers, is unfounded. See Pet.MOL at 17 n.30. Over 95% of providers who accepted the Senior Care plan have indicated that they will accept the Aetna MAP, including providers in the Aetna MAP network (this includes over 1 million providers), and providers who are not contracted with, but have accepted payment from, Aetna, and others who have indicated that they will accept. See MLC-Ans. ¶445, Ex. 8. This does not

[3] Other Aetna MAPs having garnered support from public sector union workforces in other states. See, e.g., State of New Jersey, Murphy Administration Announces Major Health Care Savings Agreement, Sept. 17, 2018, https://nj.gov/governor/news/news/562018/approved/20180917a.shtml.

mean that the remainder will not accept the plan; rather, Aetna does not currently have matching information for those providers.

While MLC cannot address every baseless misconception raised about the Aetna MAP, Aetna has attempted to correct them by issuing a set of FAQs on June 9, 2023. See MLC-Ans. ¶447, Exs. 9-10. The most recent analysis shows 96.3% of providers who accepted Senior Care are either in network, have indicated that they will accept the Aetna MAP, have accepted payment from Aetna, or have indicated that they will accept Aetna MAP.

Petitioners also present scenarios of people currently in complex treatment that are understandably worried about transitioning their care. However, at Petitioner's apparent urging (Petition ¶192), they do not appear to have utilized Aetna's Continuity of Care Transition service where a nurse case manager is assigned to assist with coordination the transition. See MLC-Ans. ¶448, Ex. 11. In negotiating the MAP, the MLC always worked to minimize disruptions and smooth transitions as much as possible, but change always brings with it some disruption. MLC's intends to work with Aetna and the City to minimize it.

This reconfigured offering of retiree health plans is part of a larger effort by MLC and the City to modernize, preserve and improve the Citywide health benefit program for active employees and retirees. See MLC-Ans. ¶¶449-51.

Petitioners would have this Court invalidate MLC-approved vendor and plan, delaying or derailing implementation of collectively bargained-for changes based upon the erroneous notion that Petitioners' health benefits are never subject to change. Yet, pursuant to, *inter alia*, the 1992 Agreement, MLC and the City have jointly prepared several procurements and made multiple health benefit changes over decades—including with respect to the Negotiated Acquisition here. Petitioners' claims strike directly at MLC's ability to negotiate agreements in the best interest of

its constituents, and are not supported by the series of incongruous—and, frankly, frivolous—constitutional, statutory, and common law legal arguments proffered by Petitioners.

ARGUMENT

Petitioners' Verified Petition and request for a temporary restraining order and preliminary injunction should be denied because none of their claims will succeed on the merits.

1. Petitioners' Cause of Action for Promissory Estoppel Is Barred Because Retirees' Benefits Are Subject to Contract

Petitioners' argument that Respondents are liable for promissory estoppel because they supposedly promised to provide the same choice of plans, without change, in perpetuity fails because "[t]he existence of a valid and enforceable contract governing a particular subject matter precludes recovery under a promissory estoppel cause of action arising out of the same subject matter." Bent v. St. John's University, New York, 189 A.D.3d 973, 975 (2d Dep't 2020) (citation omitted).

Fatal to Petitioners' arguments is the existence of valid collective bargaining agreements governing this dispute. Petitioners acknowledged in prior proceedings before this Court that "fully paid health care for retirees is guaranteed by . . . contract." MLC-Ans. ¶478 (citing Index No. 158815/2021, Doc. # 1 at 33). They have therefore already alleged that the imposition of the MAP is a "breach of the contracts that governed Retirees' work for the City. . . ." Id. ¶ 5. Now Petitioners argue that, in addition to guaranteed benefits in retirement, they are entitled to the same vendor, plan design, and type in perpetuity. While the Admin. Code guarantees the right to premium-free comprehensive coverage, it does not determine the vendor, plan design or type. As demonstrated by the 1992 Agreement and 2018 Agreement, City employee/retiree health insurance benefits are mandatory subjects of bargaining subject to ongoing, decades-long negotiations between the City and MLC and explicitly is always subject to future collective

bargaining. The choice of plan design and vendor has always been dynamic, and does not exist in perpetuity.

Having been unsuccessful in their contractual claims, Petitioners now attempt to excise the MLC and its role to avoid the import of MLC-City agreements. Such gamesmanship should not be permitted.

Regardless, Petitioners' promissory estoppel claim also fails given the absence of any promise by the City or MLC specifically stating that plan designs, vendors and types will never change. See Binkowski v. Hartford Accident & Indem. Co., 60 A.D.3d 1473 (4th Dep't 2009). As described below, the Admin. Code guarantees retirees' health benefits, the parameters of which are collectively bargained. Nothing in the Code mandates that retirees receive a specific plan. While the vendor providing retiree benefits under the Aetna MAP is changing, the City continues to provide statutorily-required premium-free comprehensive coverage. No promise was ever made that the vendor, plan, and design would remain static forever.

Petitioners admitted as much in the prior proceedings when they alleged that the "Summary Program Description ("SPD") describes the health benefits *available to them that year.*" Index No. 158815/2021, Doc. # 1 ¶ 177 (emphasis added). SPDs are not unique to retiree benefits or public employee benefits. Every benefit plan provides its participants an SPD that reflects the benefits at the time of issue, and amended SPDs are reissued each year as new vendors and plans are negotiated. Even if the most recent SPD changes were to the actives plan, Petitioners cite nothing promising that the plan design for active employees can change while the design for retirees remains static. To the contrary, the plan design for retirees has been changed in the past. See supra at 4.

Petitioners argue that the SPD has to affirmatively warn that a new SPD and new year may bring changes, but they point to no legal basis for this assertion. Rather, courts have held, unless contractual language specifically provides that retiree benefits continue unchanged for life, no such benefit exists. In Donohue v. Cuomo, 38 N.Y.3d 1 (2022), a union sued New York State, arguing that the decision to reduce contributions to members' health insurance premiums breached their collective bargaining agreements. The Court of Appeals analyzed whether New York courts should infer vesting of retiree health insurance rights when construing a collective bargaining agreement. The Court of Appeals declined to adopt any ruling in favor of vested rights because "[s]uch inferences conflict with this State's established contract law, which focuses on the parties' chosen language…." See id. at 17-18; see also Donohue v. Hochul, 32 F.4th 200, 211 (2d Cir. 2022) (relevant contractual provisions neither explicitly provide for lifetime vesting, nor are ambiguous regarding the establishment of a vested right). Donohue squarely rejected Petitioners' misguided argument that their retiree health benefits should continue *ad infinitum* absent a specific disclaimer that they do not.

Petitioners assert that City SPD language is most closely analogous to the promise made in Abbruscato v. Empire Blue Cross and Blue Shield, 274 F.3d 90, 101 (2d Cir. 2001), but in Abbruscato there was no discussion of superseding agreements and the SPD specifically provided that "50% of your life insurance coverage remains in force ***for the rest of your life***, at no cost to you." Pet.MOL at 36 n.35 (emphasis added). None of the SPDs state that a specific plan, plan design, or vendor will be provided for the rest of a retiree's life unchanged.

In any event, the SPDs are not operative contracts. Rather the contracts in question are the collective bargaining agreements between the City and MLC, the existence of which precludes Petitioner's estoppel and unjust enrichment claims.[4]

Nor can Petitioners claim any legitimate injury based on the change to the Aetna MAP. See Petition ¶¶279-82. The benefits under the MAP remain comparable—indeed, some more robust—than existing plans. See supra at 7-8.

2. Petitioners' Rights Have Not Been Impaired under the Moratorium Statute

Petitioners' argument that the new plan violates the Moratorium Statute, because it forces retirees to accept inferior benefits from actives, also fails. See Petition ¶¶283-304. The purpose of the Moratorium Statute is to protect retirees "by in effect making them part of the collective bargaining process." See Bryant v. Bd. of Educ., Chenango Forks Cent. Sch. Dist., 21 A.D.3d 1134, 1135 (3d Dep't 2005) (quoting Senate Mem. in Support, 2003 McKinney's Session Laws of NY, at 1624). It was intended to force school districts to negotiate with their unions over changes to employee and retiree health together, in an effort to guard against the district's unilateral change to health benefits. That is precisely what MLC and City have always done. The Aetna MAP was negotiated pursuant to the collective bargaining process that plainly protects educators.[5] See MLC-Ans. ¶417.

[4] Petitioners' unjust enrichment claim is similarly infirm. Indeed, "**unjust enrichment is not a catchall cause of action to be used when others fail.** It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." See Corsello v. Verizon N.Y., Inc., 18 N.Y.3d 777, 790 (2012) (emphasis added).

Regardless, the claim is nonsensical. The gravamen of Petitioners' claim is that the City has been unjustly enriched by eliminating Senior Care and replacing it with MA. See Petition ¶344. Taken to its logical conclusion, that argument would mean that any time the City endeavors to save money, it is unjustly enriched. That cannot be the law.

[5] The UFT represents the largest number of DOE employees. Their retirees play an active role within the UFT, with a retiree chapter that votes in officer elections.

In any event, the Aetna MAP does not result in a diminution of benefits, only a change. It was designed to mirror and improve upon the Senior Care plan and provides additional benefit enhancement. The Aetna MAP provides the same comprehensive coverage in the context of a MA structure and adds certain additional benefits not available under Senior Care. See supra at 7-8. Petitioners' gripes of a lack of "healthcare choice" in the Aetna MAP is disingenuous given that MLC fought hard for a "pay-up" option that provided choice, but was thwarted by Petitioners at every turn. Petition ¶¶292, 296-98.

Regardless, nothing in the Moratorium Statute creates a *per se* bar against reducing retiree benefits or requires identical contemporaneous changes to both the retirees' and actives' plans. Rather, the statute focuses on whether changes to retiree benefits during the active period (April 1, 2012 through 2023)[6] were disproportionate in comparison to changes made to active employee benefits. See, e.g., Altic v. Bd. of Educ., 142 A.D.3d 1311, 1312 (4th Dep't 2016). Petitioners conveniently omit any mention of the law's active period because it destroys their claim.

Numerous changes have been made to the active employee plans over this period corresponding with the current changes to retiree benefits. See id. (finding moratorium statute not violated when retirees' prescription co-pay benefits were reduced in line with active benefits pursuant to collective bargaining agreements). The evidence shows that changes to Citywide benefits during the relevant time period have primarily been to the active health plans. Collectively bargained changes made to active benefits under the recent agreements include:

- Effective on/after 7/1/2016:
    - CBP Plan: (1) non-preferred provider copay increased to $30, (2) Urgent Care copay increased to $50; (3) Emergency Room copay increased to

[6] The law was passed in 1994, and contained a sunset date that was continuously extended until, in 2009, the legislature removed the sunset date entirely so that the law continues in perpetuity.

$150; (4) Increased out-of-pocket maximus to $4,550/$9,100 for GHI and $2,600/$5,200 for Empire;

- HIP HMO: (1) Preferred provider network introduced, increasing non-preferred copay to $10;

- (2) urgent care copay increased to $25 and (3) emergency room copay increased to $150

Contemporaneously with the final written agreement to implement the Aetna MAP, MLC and City also memorialized the following recent changes to the Active/pre-65 plans:

- 10/1/22 CBP Plan
  - Increase all Montefiore-affiliated provider copays to $15/$30 for primary/specialty visits.
  - Increase ProHealth urgent care centers copay to $100.
- 11/1/22 CBP Plan
  - Increase copay to $100 for all high-tech radiology imaging procedures not performed at participating RadNet facilities in NY, MSK and HSS.
- Effective 10/24/2022 the $165 per year contribution for active and retiree welfare benefit funds (many of which provide prescription drug benefits) will be suspended.
- Effective 10/1/22 all new City employees will be required to enroll in the HIP HMO until June 30, 2023 (possible extension to be discussed).
- Effective 4/1/23 increase CBP Plan copay for all CityMD Urgent Care Centers to $100.
- 4/1/23 HIP HMO will charge $10 copay for HMO members with Montefiore PCPs for PCP or specialty visit.

See MLC-Ans. ¶455, Ex. 12.

Given that active plans and retiree plans often start differently, it cannot be that changes can only be made when identical amendments are possible. No comparable change can be made to the active plans since all actives plans already have significant prior authorization requirements. The MAP, on the other hand, provides a very limited list.

Likewise, Petitioners take issue with the fact that the MAP has a network, despite the fact that Aetna also provides an out-of-network benefit under which it pays the full CMS reimbursement rate to any provider that accepts Medicare for Medicare-covered services. The provider need only bill Aetna directly, and not required to sign any agreements. No corresponding change could be made to the active plans, as they already have networks and provide for different cost-sharing for out-of-network services.

Rather, the law looks to the totality of changes to determine whether they are disproportionate. Here, they are not. Petitioners complain that the City reduced its "contribution" to the MAP and not to other plans. Yet, Petitioners use the word contribution quite differently than in the cases they rely upon. In those cases, benefits are provided for a premium, with the employee responsible for a portion of that premium and the employer the remainder or the whole. Thus, when the employer reduces its "contribution," the cost of the premium to the employee increases.

Put directly, premiums went up for employees, which is the scenario for the vast majority of public workers, including State employees. City employees and retirees, however, do not pay a premium. So whether the City was able to obtain the same benefits at a discount and thus pay less for them is irrelevant, so long as the City continues to provide the benefit premium-free.

Here, the City has continuously sought savings in the cost of active programs, just as it does on the MA side; but both programs continue to be offered premium-free.

Next, Petitioners address co-pays. First, MLC and City long ago agreed to implement copays in Senior Care. Implementation was delayed by the uncertainty of the COVID pandemic. Ultimately, during the prior proceeding, those copays were implemented. MLC understands that Petitioners have sued Emblem regarding the implementation of the agreed-upon copays, and that they are currently preliminarily enjoined. However, MLC and City agreed to put those changes in previously, and the Emblem order does not impact MLC's ability to agree to copays in this procurement. The copays in the Aetna plan do not represent an increase, but rather a continuation of those prior agreements, which are reflected in the Aetna agreement. In any event, as evident from list above, many copays have been changed, increased, or tiered on the active/pre-65 side.

Petitioners' focus on instances where a preferred provider has a $0 copay ignores that the remainder of the providers have significantly higher copays. Likewise, hyperbolic statements that retiree copays will soon be higher than active employees (Pet.MOL at 44) purposefully downplay one of the most significant benefit improvements in the Aetna MAP: the out-of-pocket maximum. Traditional Medicare/Senior Care do not offer out-of-pocket maximums, leaving retirees exposed. Copays count towards that maximum. No retiree will be charged more than $1,500 per year in out-of-pocket costs.

Petitioners' argument that the Aetna MAP results in increased prescription drug costs is also factually incomplete. Petition ¶¶302-04. Most retirees are covered under union welfare funds for prescription benefits or are reimbursed drug rider costs. Meaning, most retirees' prescription drug benefits will not change. Some will need to purchase the rider. To inflate this issue, Petitioners purposefully compare the 2024 Aetna rider rate ($135) with the 2023 Senior Care rate ($125). In fact, the Aetna 2023 rate is lower than Senior Care and no 2024 rate has

been set for Senior Care; therefore, Petitioners' "comparison" is inapposite. In fact, the Aetna plan compares favorably, as it offers the broadest formulary including *all* Part D drugs as well as additional supplemental drugs. See MLC-Ans. ¶471, Ex. 13. The discount retail plans Petitioners reference offer limited formularies. Moreover, while the Senior Care rider requires 25% coinsurance for all drug, Aetna offers 0% for common preferred generic drugs if obtained through its extensive pharmacy networks (including ubiquitous CVS brands).

Finally, Petitioners ignore that MLC and City are in the midst of a Negotiated Acquisition procurement process (like the one used to arrive at the MAP) for the CBP-PPO plan for actives/pre-65 retirees. In that procurement, MLC and City also seek to identify plan design efficiencies that will generate considerable cost savings while preserving robust benefits.

Thus, in no way have the City and MLC targeted only Medicare-eligible retirees for changes in their benefits.

Finally, Petitioners' reliance on the Moratorium Statute only underscores the flaws in contending that their benefits should be frozen for life. See Petition ¶¶391-96. Legislative history specifically states that the Moratorium Law "does not . . . prevent school districts from taking cost cutting measures, so long as they apply equally to active employees and retirees." See Petition ¶288. The suggestion that Petitioners' benefits can never be diminished or impaired runs contrary to this history, which recognizes that retiree benefits can be reduced through the bargaining process.[7]

[7] It is telling that Petitioners omit any argument on their constitutional claim pursuant to Article V, Section 7 of the N.Y. Constitution. See Petition ¶¶391-96. The claim is deficient, as the Court of Appeals has already held that health benefits are not covered by this Article, and this Court recognized in the Prior Decision, that petitioners there—which include Petitioner Retirees Org "freely acknowledge [that] the New York State Constitution does not guarantee specific health insurance for retirees." Prior Decision at 2 see also Lippman v. Bd. of Educ. of Sewanhaka Cent. High Sch. Dist., 66 N.Y.2d 313 (1985) (non-impairment clause only protects pensions, not health benefits provided for in statute or collective bargaining agreement).

3. Implementation Of The Aetna MAP Is Not Arbitrary and Capricious

Petitioners argue that the decision to eliminate Medigap coverage is arbitrary and capricious. Petition ¶306. This Court has already determined that this claim fails. This Court issued an order finding that the selection of the Alliance to administer a MAP was not arbitrary and capricious given that the City was "well within its right to work with the [MLC] to change how retirees get their health insurance." Prior Decision at 2.

Then, in its final Order, this Court explicitly found implementation of a MAP for City retirees to be reasonable and allowed that plan to be implemented. See Prior Decision. In the very same decision, specifically in the context of Petitioners' claims regarding Senior Care, this Court also held that the law does not require the City to offer an "option of plans," only that "if there is to be an option of more than one plan," the City may not charge-up for the optional plan. Prior Decision at 3.

The same is true here. In the aftermath of the Alliance's withdrawal from the deal, Arbitrator Scheinman determined that "an MA plan should go forward to help alleviate the savings realization shortfall." See MLC-Ans. ¶435, Ex. 7 at 29. To continue providing quality health care coverage, MLC and the City came to an agreement with Aetna that complied with this Court's Prior Decision. Thus, this Court has already determined that it is not arbitrary and capricious for the City to use the availability of federal funding to mirror benefits of an existing Medigap plan (and improving on them in places), while reducing the costs for taxpayers by leveraging federal subsidies.

Petitioners' argument that the City acted in an arbitrary and capricious manner by forcing Retirees into making a heath care decision by June 30, 2023 without adequate or accurate information, also fails. Petition ¶¶312-319. Aetna has worked tirelessly with retirees through countless meetings, call-center numbers, and mailings to offer a comprehensive process. Aetna

has also been transparent about their plan offerings, understanding that not ever provider is covered, but working with retirees to ensure continuity of care. MLC refers this Court to Aetna's submission on these issues for a full recitation of the facts. To the extent that any retiree has not received Aetna's comprehensive package, they could have simply notified OLR or their union, instead of waiting until the eleventh hour to file this lawsuit. Likewise, those with complex treatment plans, could have engaged with an assigned nurse case-worker specifically provided to assist with transition of care. See MLC-Ans. ¶448, Ex. 11. For substantially similar reasons, Petitioners' negligent misrepresentation claim cannot withstand scrutiny.

4. Petitioners' Admin. Code §12-126 Claims Have Already Been Adjudicated By This Court

Under the doctrine of *stare decisis*, this Court's Prior Decision and the First Department's affirmance are controlling precedent barring Petitioners' claims. See Grady v. Chenango Valley Cent. Sch. Dist., No. 23, 2023 WL 3102723, at *2 (N.Y. Apr. 27, 2023) ("prior decisions should not be overruled unless a compelling justification exists for such a drastic step") (internal citations and quotation marks omitted). *Stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." People v. Taylor, 9 N.Y.3d 129, 148 (2007) (internal citations and quotation marks omitted).

The application of *stare decisis* requires rejecting Petitioners' argument that "Section 12-126 requires the City to offer and pay for a choice of Medicare Supplemental insurance plans" that includes Senior Care. This Court's prior determination, affirmed on appeal and relied upon by MLC, City and Aetna, holds that the City is not obligated to provide more than one plan, and

the premium cost of any plan(s) provided to the retirees must be covered by the City unless those costs exceed the threshold in §12-126(b)(1).

The Court should not allow Petitioners to intentionally end-run a decision that was not favorable to them by allowing this proceeding to move forward.

The Prior Decision is not an outlier. A group of retirees previously challenged the City's ability to agree to copays and deductible changes for retirees—a claim which was squarely rejected by the Southern District of New York, as §12-126 "requires the City to cover health insurance premiums, but does not create a contractual right to health insurance without deductibles and copayments." See New York 10-13 Assoc. v. City of New York, No. 98 CIV. 1425(JGK), 1999 WL 177442 (S.D.N.Y. Mar. 30, 1999).

5. Petitioners' Discrimination Claims Fail

The gravamen of Petitioners' New York City Human Rights Law ("NYCHRL") and New York State Human Rights Law ("NYSHRL") disparate impact claim is that disabled under-65 retirees will experience all the allegedly harmful effects of the Aetna MAP, while their non-disabled under-65 retirees and dependents will not. The fundamental flaw is that non-disabled under-65 retirees are not a similarly situated comparator for purposes of establishing a *prima facie* case of discrimination.

A plaintiff raising a disparate-treatment claim must show "she was similarly situated in all material respects to the individuals with whom she seeks to compare herself. . . ." Pattanayak v. Mastercard Inc., No. 22-1411, 2023 WL 2358826, at *2 (2d Cir. Mar. 6, 2023) (citation omitted); see also Asiedu v. Broadreach Med. Res., No. 19 CIV. 11825 (ER), 2022 WL 4237077, at *13 (S.D.N.Y. Sept. 13, 2022) ("Without the necessary evidence of similarly situated comparators, [plaintiff] cannot meet her burden of demonstrating facts that give rise to an inference of discrimination under a disparate impact theory.").

Here, Petitioners' disparate impact claims fail because disabled retirees under 65 are not a similarly situated comparator to non-disabled retirees under 65. Federal law determines eligibility for Medicare benefits. Disabled retirees under the age of 65 are eligible for Medicare, while non-disabled under-65 retirees are not. Disabled under-65 retirees have never had the same benefits as pre-65 retirees, who do not quality for Medicare. The Aetna MAP is a neutral policy that, pursuant to Medicare eligibility guidelines, applies equally to disabled and non-disabled Medicare-eligible retirees. The federal government made this distinction, and there is no justifiable basis to compare the two groups for purposes of establishing a discrimination claim.

6. The City Did Not Violate the New York City Administrative Procedure Act ("CAPA") or General Business Law §340 (the "Donnelly Act")

Petitioners' argument that the City violated CAPA lacks merit. See Petition ¶¶355-73. As this Court stated in a different challenge by retirees: "[h]ealth benefits for retirees within the City of New York (the "City") is the subject of collective bargaining between the City and the MLC." Index No. 158216/2021, Doc. # 152 at 3. Accordingly, entirely different and specific statutory processes from CAPA exist for agreeing to and procuring health benefits—the Taylor Law, NYCCBL, and applicable City procurement laws. The City and MLC complied with that process. Adopting Petitioners' argument would undermine all collective bargaining law. As a practical matter, it would mean that no public employer could change their employees' health care plan or provider without following CAPA in addition to bargaining and procurement laws.

Ostensible precedent cited by Petitioners is unavailing. Schwartfigure v. Hartnett, 83 N.Y.2d 296 (1994), concerned the Department of Labor in its role as a rulemaking body—*not*, as the City is here, in its role as employer with concomitant collective bargaining obligations. Petitioners' other key case interprets Delaware, not New York law, and fails to provide any final

determination. See RiseDelaware Inc. v. DeMatteis, C.A. No. N22C-09-526 CLS, 2022 WL 11121549 (Del. Super. Ct., Oct. 19, 2022).

Simon v. Sun Ar Wet Wash Laundry, Inc., 153 N.Y.S.2d 967 (Sup. Ct. N.Y. Cnty. 1956), is directly relevant and illustrates the inapplicability of the Donnelly Act in these proceedings. The Supreme Court held that provisions of a collective bargaining agreement between a laundry and a union, prohibiting transfer of hand laundry work from one processing plant to another without prior consent of the union, were valid—and not a restraint of trade in violation of public policy. The court reasoned, "[n]othing is more clearly established than the proposition that the arrangements made by a bona fide labor union in a bona fide effort in the regulation of matters affecting the general interest and welfare of labor are unassailable." See id. at 969. At bottom, this matter concerns a labor matter governed by the Taylor Law and NYCCBL. The public procurement process provides the required competition, and it cannot be that a government agency must always provide its employees a choice of benefits after coming to terms with a single vendor through a lawful procurement process. Petitioners' efforts to impose wholly-inapplicable statutory regimes to that process is against the weight of authority and would severely impair labor relations in New York City.

CONCLUSION

For the foregoing reasons, Petitioners' application for a preliminary injunction and Verified Petition should be denied.

Dated: June 13, 2023

Respectfully submitted,

/s/ ALAN M. KLINGER

STROOCK & STROOCK & LAVAN LLP
Alan M. Klinger, Esq.
Dina Kolker, Esq.
Arthur J. Herskowitz, Esq.
Elizabeth C. Milburn, Esq.
180 Maiden Lane
New York, New York 10038
(212) 806-5400
dkolker@stroock.com
aklinger@stroock.com
aherskowitz@stroock.com
ecmilburn@stroock.com

and

DC37 GENERAL COUNSEL'S OFFICE
Robin Roach, Esq.
125 Barclay St.
New York, New York 10007
(212) 815-1000
rroach@dc37.net

-and-

GREENBERG BURZICHELLI GREENBERG P.C.
Harry Greenberg, Esq.
3000 Marcus Avenue, Suite 1W7
Lake Success, New York 11042
(516) 570.4343
hgreenberg@gbglawoffice.com

Co-counsel for the MLC

WORD COUNT CERTIFICATE

I hereby certify that this memorandum 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 6,935 words.

Date: June 13, 2023

/s/ Alan M. Klinger
ALAN M. KLINGER