SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

In the Matter of the Application of

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

Respondents-Appellants,

For Judgment Pursuant to CPLR Article 78

- against -

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

Appellants-Respondents.

Docket No.:

[redacted]-[redacted]

RESPONDENTS-APPELLANTS' (1) OPPOSITION TO THE MOTION FOR A CALENDAR PREFERENCE AND (2) APPLICATION FOR EXTENSION OF TIME TO FILE THEIR APPEAL BRIEF

POLLOCK COHEN LLP
60 Broad St., 24th Floor
New York, NY 10004

WALDEN MACHT & HARAN LLP
250 Vesey Street, 27th Floor
New York, NY 10281

Counsel for Respondents-Appellants

INTRODUCTION

Respondents-Appellants ("the Retirees") are, and represent the interests of, elderly and disabled retirees who are former New York City first responders, teachers, and other municipal workers. They filed this Article 78 proceeding to protect their existing health insurance coverage and stop the City from forcing them—in violation of the City's repeated promises and N.Y.C. Administrative Code § 12-126—into a federally funded and materially worse Medicare Advantage Plan ("MAP"). On March 3, 2022, the New York County Supreme Court granted in part their Article 78 Petition, holding that the City of New York is statutorily required to continue to pay for their health insurance coverage (up to a specified amount), just as it has done for over half a century.

On March 4, Appellants-Respondents the City of New York, Renee Campion, and the City of New York Office of Labor Relations (together, "the City") filed a notice of appeal. On March 15, the Retirees filed a notice of cross-appeal.

Late last night, with only several hours' notice and in violation of 22 NYCRR § 1250.9(f)(1), the City perfected its appeal and moved the Court to calendar it for the June Term.[1] If granted, the City's procedurally defective motion would require the Retirees to file their opposition brief, cross-appeal, and supplemental record by

[1] The City's counsel informed the Retirees' counsel of the City's plans by email sent at 11:52 am on Monday, March 21.

April 20, which is during Passover, a weeklong religious holiday observed by the Retirees' counsel. It would also conflict with a number of time-sensitive deadlines in counsel's other matters. Moreover, and regardless, the City has not shown the required "good cause" to warrant the granting of their motion.

Because the City's procedurally improper scheduling motion is unjustified and imposes an undue burden on the Retirees and their counsel, the Retirees hereby oppose that motion and further request a 30-day extension of time to file their opposition papers and cross-appeal.

I. The City's Scheduling Motion is Procedurally Improper and Imposes an Undue Burden on Retirees and Their Counsel.

Without any attempt at consultation, the City perfected its appeal on the last day to do so for the June Term.[2] This lack of communication was not just a breach of professional courtesy, it was also a violation of Appellate Division rules. Those rules state unequivocally that, before perfecting an appeal, the appealing party "*shall* consult and make best efforts to stipulate to a briefing schedule" with its cross-appealing opponent, and "*shall* file a joint record or joint appendix." 22 NYCRR § 1250.9(f)(1)(i) & (ii) (emphasis added). These rules were enacted to prevent the precise situation the City has created here: a surprise appeal that poses a severe

[2] *See* https://www.nycourts.gov/courts/AD1/calendar/index.shtml (stating that the "Last Day to File Record Appellants' Points, and Notes of Issue" for the June Term is March 21).

scheduling conflict and requires two separately filed records.[3] The City's failure to comply with this Court's clear rules by itself mandates denial of its scheduling motion.

Even if the City had followed the Court's rules, its motion would still need to be denied because the resulting briefing schedule would not afford the Retirees sufficient time to prepare their opposition brief, cross-appeal, and supplemental record. In order for the present appeal to be calendared for the June Term, the Retirees would have to file their appellate papers by April 20.[4] However, one of the most important Jewish holidays—Passover—starts on April 15. The undersigned counsel will be observing this weeklong holiday with their families.[5] That leaves counsel insufficient time—just over three weeks—to address the many weighty issues in the City's appeal and the Retirees' upcoming cross-appeal. And counsel will be tied up for much of that time briefing and arguing motions and appeals in

[3] Despite labeling their record on appeal a "Joint Record on Appeal," the City did not confer with the Retirees before filing it and also omitted key parts of the record. Accordingly, the Retirees will have to prepare and file a supplement containing the omitted parts.

[4] *See* https://www.nycourts.gov/courts/AD1/calendar/index.shtml (stating that the "Last Day to File Respondents' Points" for the June Term is April 20).

[5] Attorney Benjamin Battles, who recently joined Pollock Cohen LLP and did not participate in the trial court proceedings in this case, will be on a long-planned family vacation from April 18-22, coinciding with his son's school vacation.

several other cases.[6] Put simply, the Retirees cannot feasibly meet the April 20 deadline requested by the City.

Given what is at stake in this case for the Retirees, it would be grossly unfair to force them to litigate under such a strained schedule. Indeed, the Retirees are approximately 250,000 elderly and disabled former City workers, many of whom are living pension-check-to-pension-check with severe health problems. They cannot afford to pay thousands of dollars a year to keep their longstanding health insurance plans (and the doctors and benefits that come with them), which they would have to do if the City were to prevail on this appeal. The Retirees deserve a fair opportunity to present their appellate arguments before risking such a disastrous outcome. The City's requested briefing schedule would deny them that opportunity. It would also force this Court to issue a decision—in a complex case with monumental significance—based on rushed briefing.

[6] Among other time-sensitive matters, the Retirees' counsel have an appeal brief and appendix due in mid-April in *Setrouk v. Philip Morris International*, No. 2022-00025 (1st Dep't); an appeal brief and appendix due in early May in *Valentini v. Group Health Inc.*, No. 22-157 (2d Cir.); various discovery-related motions currently being litigated in *Broidy Cap. Mgmt., LLC v. Muzin*, No. 19-cv-150 (D.D.C.); and oral argument in May in *Glen v. Tripadvisor et al.*, Nos. 21-1842, 21-1843 (3d Cir.).

II. The City Has Not Shown the Required "Good Cause" For a Calendar Preference.

There is a separate reason why the City's motion should be denied: the City has not shown the required "good cause." 22 NYCRR § 1250.15. The City claims that it will suffer "over $150 million in lost savings" if its appeal is not heard during the June Term. That alarmist—and factually unsupported—claim obscures the fact that the only thing that will happen if this appeal gets pushed to the next term is a slightly longer continuation of the status quo, which has existed uninterrupted for over 50 years.

Indeed, it is undisputed that since the 1960s, the City has continuously paid for elderly and disabled retirees' Medicare Supplemental health insurance plans, including the very same plans at issue in this case. The City cannot credibly claim that it will suffer extreme financial hardship if it were forced to continue that statutorily required practice for one additional Appellate Division term. There is no new financial obligation being placed on the City by continuing the status quo; by contrast, the City's illegal attempt to shift the cost of health insurance onto Retirees living on fixed incomes would cause these seniors and disabled first-responders irreparable harm.[7]

[7] Notably, the City's annual budget is approximately $100 billion. *See* https://www1.nyc.gov/office-of-the-mayor/news/307-21/the-recovery-budget-mayor-de-blasio-releases-executive-budget-fiscal-year-2022. The claimed $150 million in "lost savings"—which is money that the City wants to pick from Retirees'

This is not the first time in this case that the City has tried to create a false sense of urgency in order to deny Retirees their procedural rights. The City rushed to implement its overhaul of Retiree healthcare in a way that the trial court found to be arbitrary, capricious, and irrational. It rushed to claim that virtually all doctors were participating in the new MAP when in fact thousands were not. It claimed it could not correct the many mistakes in the MAP's enrollment guide because there was a worldwide paper shortage. It asked the trial court to allow it to rush a transfer of Retiree personal health information lest it "require shutdown of the City's payroll system." And now it wants to rush consideration of critical appellate issues. There is simply no good cause to do so.

Whatever marginal financial burden the City might incur by having its appeal heard in the normal course does not justify the extreme burden the City would place on the Retirees, whose counsel would have to scramble to draft and file appellate papers in the next three weeks (before Passover)—all while juggling pressing deadlines in other matters—in order to satisfy the City's unreasonable and procedurally improper scheduling request.

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pockets by forcing them to pay for their own health insurance—represents approximately 0.15% of that budget. By contrast, the money that the Retirees would suddenly have to expend in order to keep their health insurance represents between 4% and 11% of their pension checks. Significantly, black and latino Retirees, who overwhelmingly receive pension checks at the low end of the scale, would be disparately impacted by the financial burden.

CONCLUSION

For the foregoing reasons, the Retirees respectfully request that the Court deny the City's motion for a calendar preference and grant their application for a 30-day extension of time to file their opposition papers and cross-appeal.

Dated: March 22, 2022
New York, NY

WALDEN MACHT & HARAN LLP

By: /s/ *Jacob Gardener*
Jacob Gardener
250 Vesey St., 27th Floor
New York, NY 10281
(212) 335-2965
jgardener@wmhlaw.com

POLLOCK COHEN LLP

By: /s/ *Steve Cohen*
Steve Cohen
Benjamin Battles
60 Broad St., 24th Floor
New York, NY 10004
(212) 337-5361
SCohen@PollockCohen.com

Counsel for Respondents-Appellants