IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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| Michael C. Underwood, et al.,<br>Plaintiffs,<br>vs.<br>City of Chicago, a Municipal Corporation,<br>Defendant,<br>and<br>Trustees of the Policemen's Annuity and Benefit Fund of Chicago;<br>Trustees of the Firemen's Annuity and Benefit Fund of Chicago;<br>Trustees of the Municipal Employees' Annuity and Benefit Fund of Chicago; and<br>Trustees of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago,<br>Defendants. | 13-CH-17450<br>Hon. Neil Cohen, Judge |

**RESPONSE OF THE LABORERS' AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO TO PLAINTIFFS' MOTION TO COMPEL DEFENDANTS TO BRING SUBSIDIES CURRENT AND PROVIDE A HEALTHCARE PLAN**

The Plaintiffs have filed a so-called "motion to compel" against the defendant pension funds, including the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago (the "LABF"), to compel the Funds to pay healthcare subsidies for eligible retirees and to provide a healthcare plan for retirees. While Plaintiffs' motion raises a contested triable issue in this case, it is wholly improper and deprives the LABF the due process to litigate the issues under the Code of Civil Procedure under a properly filed complaint resulting in a properly adjudicated judgment. Plaintiffs' motion improperly attempts to avoid this Court's directive to plead a complaint to frame the remaining contested issues and, instead, seeks an interlocutory

mandatory injunction.[1] The relief sought in the motion is not properly framed in the 4th Amended Complaint, which is little more than a rehash of the 3rd Amended Complaint. Contrary to the Court's direction, the 4th Amended Complaint still include allegations that *Underwood v. City of* Chicago, 2017 IL App (1st) 162356, *appeal denied.*, 93 N.E.3d (2017) rendered irrelevant, and continues to plead Counts 2-7 whose dismissal was affirmed by that decision. This Court should strike the Plaintiffs' motion and require the Plaintiffs' to re-plead the 4th Amended Complaint in a manner that properly reflects the contested issues remaining after the appellate court decision. [2]

Even if this Court considers Plaintiffs' motion on the merits, it fails. First, the mandatory injunction orders Plaintiffs seek, if granted, alter rather than preserve the status quo. Second, Plaintiffs fail to support their motion by affidavit or any other evidence. Third, Plaintiffs cannot show irreparable injury or that they lack an adequate legal remedy, as the order they seek is for a monetary award. Fourth, Plaintiffs fail to show a likelihood of success on the merits of either bringing the subsidies current or requiring the LABF to "provide" a healthcare plan. The City, not the LABF, is responsible for the payment of the subsidy. Fifth, the balance of equities favors the Funds. The trustees are bound to follow the limited statutory authority granted them in the

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[1] Plaintiffs' motion also makes several untrue and assertions about the defendant funds. Plaintiffs suggest that the funds have disobeyed court orders. This is not true and Plaintiffs identify no order that any of the Funds have allegedly violated. Pl.'s Mot., 10-11. Plaintiffs also falsely claim that the City and the Funds are working "in conjunction", and repeat the falsehood that the Funds are "instrumentalities" of the City. *Id.* The LABF is disappointed in Plaintiffs' misleading and pejorative assertions.

2 This is what this Court previously advised Plaintiffs to do:
THE COURT: "I understand. That's one of my questions to Mr. Krislov, which I hesitated to ask, but I will ask it eventually when I give him the floor, about amending the complaint to reflect the new reality based upon the appellate court and based upon what happened, all my rulings, and the refusal by the Supreme Court of his PLAs. Tr., 47: 16-22, Apr. 30, 2018, attached as Exhibit 1.

Pension Code. The trustees do not have the authority to stray from their statutory mission. Plaintiffs' motion should be denied.

### A. The Subsidy is the Only Protected Benefit and Must be Paid by the City

On June 29, 2017, the Illinois Appellate Court ruled that Plaintiffs had a constitutional right under the Pension Protection Clause only to the statutory subsidies in 1983 amendments to the City of Chicago ("City") Fire and Police articles of the Pension Code and in the 1985 amendments to the LABF and Municipal Employees Annuity and Benefit Fund of Chicago ("MEABF") articles of the Pension Code (collectively, the Fire, Police Municipal and Laborers' pension Funds are referred to as the "Funds"). *See Underwood,* 2017 IL App (1st) 162356, ¶ 40. Moreover, as the LABF has already briefed per prior Court Order, the City--and not the LABF--has the obligation to pay the statutory subsidy. Moreover, the *Underwood* court ruled that City retirees had no constitutionally protected right to healthcare coverage. Only the subsidy is protected and shall be paid by the City:

> Under the 1983 amendment, **the City is obligated to pay** towards its retirees' healthcare ($55 per month for non-Medicare-eligible retirees and $21 per month for Medicare-eligible retirees). Ill Rev. Stat. 1983, Ch. 108–1/2, par. 8–167.5 (eff. Jan.12, 1983). Under the 1985 amendment, **the City is obligated** to pay $25 per month for its municipal employees and laborers and retirement board employees. Ill Rev. Stat. 1985, Ch. 108–1/2, par. 11–160.1 (eff. Aug.16, 1985). The retirees contend that the pension protection clause should be considered to protect their abstract right to "healthcare coverage." But that is not what the Illinois Constitution provides. The pension protection clause protects a specific tangible benefit that cannot be diminished or impaired. See *Kanerva*, 2014 IL 115811, ¶ 38, ¶ 57. **It is the subsidy itself that is protected**. Under count I, the pension protection clause protects the benefits in the 1983 and 1985 amendments for any retiree that began participating in the retirement system before the 2003 settlement was executed. The 1983 and 1985 amendments represent the highest level of benefits to which the retirees ever had an enduring right. For the reasons set forth in section A above, the pension protection clause entitles the retirees to nothing more.

*Underwood*, 2017 IL App (1st) 162356, ¶40 (emphasis added). Accordingly, Plaintiffs, in Count 1, have a claim for payment of statutory subsidies from the City and nothing more.

### B. Plaintiffs' Motion for Mandatory Injunctive Relief is Wholly Improper

Although styled as a motion to compel (a discovery motion), Plaintiffs' motion is, in reality a motion for a mandatory injunction. *See In re Consol. Objections to Tax Levies of Sch. Dis. No. 205*, 193 Ill. 2d 490, 498 (2000) ("An injunction, however, is '[a] court order commanding or preventing an action.'" (quoting Injunction, Black's Law Dictionary (7th ed. 1999))). Plaintiffs' motion seeks an order commanding the LABF to (1) bring healthcare subsidies current, and (2) provide healthcare plans for their annuitants. Pl.'s Mot., 17. Plaintiffs' motion should be denied.

To obtain a preliminary injunction, the Plaintiffs must demonstrate (1) that they possess a clearly ascertained right which needs protection, (2) that they will suffer irreparable harm without the injunction, (3) that there is no adequate remedy at law for the alleged injury, and (4) that they are likely to be successful on the merits of his action. *Shodeen v. Chi. Title and Tr. Co.*, 162 Ill. App. 3d 667, 672 (2d Dist. 1987) (quoting *Levitt Homes, Inc. v. Old Farm Homeowners' Ass.* 111 Ill. App. 3d 300, 307 (2d Dist. 1982)). Even if Plaintiffs meet this burden, then the court must also balance the equities to determine the relative inconvenience to the parties and whether the burdens upon the defendants, should the injunction issue, outweigh the burden to the plaintiff by denying it. *Id.* at 672. Plaintiffs utterly fail to meet their burden.

#### 1. Mandatory Injunctions Are Not Favored and the Injunctions Plaintiffs Seek Would Alter Rather Than Preserve the Status Quo

The purpose of a preliminary injunction is to "preserve the status quo until the case can be decided on the merits." *Id.* (quoting *Buzz Barton & Assocs., Inc. v. Giannone,* 108 Ill.2d 373, 382 (1985). In particular, a mandatory injunction is an extraordinary remedy, viewed with skepticism by courts, and is issued only when such an order is required to preserve the status quo to avoid irreparable harm. *Shodeen,* 162 Ill. App. 3d at 673.

The injunction orders Plaintiffs seek here are mandatory: they ask this Court to order the LABF and the other City pension Funds to affirmatively perform actions. This is so despite the Funds' limited statutory authority, the actual language of the relevant statutory amendments and prior court rulings. Plaintiffs' orders would alter, rather than preserve, the status quo.

Further, the orders Plaintiffs seek are not aimed at preventing irreparable harm. Irreparable harm exists where there is no adequate legal remedy, in particular where no monetary relief is available. *Id.* 673-74. Here, the first injunction Plaintiffs seek, ordering the LABF to immediately pay healthcare subsidies retroactively to January 1, 2017 and going forward, by its own terms belies any claim Plaintiffs might make of alleged irreparable harm because it seeks the payment of money.

Likewise, Plaintiffs only speculate as to irreparable injury to mandate the Funds to "provide" a healthcare plan. Pl.'s Mot., 17. Specifically, Plaintiffs have not and cannot explain how the absence of a healthcare plan "provided" by the Funds would avoid irreparable harm to Plaintiffs. The reality is Plaintiffs, have options to obtain healthcare provided by the City-sponsored BCBS plan, or through the Affordable Care Act or, for those who have small annuities, obtaining coverage through Medicaid. The cost and scope of these healthcare plans are driven by the healthcare market. The Funds cannot change the market. The Funds do not have the legal authority or the financial ability to alter the realities of the marketplace to somehow provide a healthcare plan with comprehensive coverage at greatly reduced premiums, as Plaintiffs demand. Plaintiffs fail to establish how a healthcare plan provided by the Funds would be any less costly or any more comprehensive than the available plans already in the market. The Funds are not causing irreparable harm; access to the healthcare market is costly

and coverage varied. The legislature and courts have determined that the subsidy for such healthcare is the constitutionally protected benefit, not a mandated healthcare plan.

### C. Plaintiffs Have No Clearly Ascertainable Right to the Relief They Seek

In addition, Plaintiffs fail to establish a clearly ascertainable right in need of protection. Plaintiffs demand the $25 per month subsidy to immediately be paid retroactively to January 1, 2017, and be deposited into a segregated protest fund based. Plaintiffs rely on a so-called common fund theory. Pl.'s Mot., 12. This reveals a substantial conflict of interest between the annuitants' interest in the subsidy and Plaintiffs' attorneys' interest in attorneys' fees and costs to be taken from the segregated protest fund. The purpose of this protest fund is to benefit Plaintiffs' attorneys in their quest for fees, not the plaintiffs or other LABF retirees. And, in any event there is no language in Article 11 of the Pension Code or in the 1985 amendments that permits the subsidy to be deposited into such a protest fund, it is prescribed to be paid to an approved underwriter." Neither Plaintiffs nor their counsel have a clearly ascertainable right to such an order.[3]

Also, Plaintiffs ignore unresolved issues in the 1985 amendment as to where the subsidy payments should be directed. The 1985 amendment calls for the subsidy to be paid to the underwriter of a group health plan that the LABF trustees have approved rather than to eligible annuitants. For example, the LABF has approved the City-sponsored Blue Cross Blue Shield ("BCBS") group plan and BCBS is the underwriter of this plan. There is no statutory authority to direct the $25 per month subsidy directly to eligible retirees under the plain language of the 1985 amendment.

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[3] Plaintiffs appear to be using this motion as a back door means of obtaining a ruling on their motion to create a common fund attorneys' fees award, which this Court to date has declined to order briefing on.

Further, the 1985 amendment states that retirees who are 65 years old or older with 15 years or more of service who participate in a group healthcare plan approved by the Board are eligible to receive the subsidy. In other words, not every LABF retiree is entitled to a subsidy. Plaintiffs fail to address this issue. Instead, Plaintiffs assert that the retroactive subsidy amount is $10.2 million across all four Funds, without providing the basis for that calculation. Given these unresolved issues and the lack of support for Plaintiffs' calculation, Plaintiffs have no clearly ascertainable right to any retroactive payment at this time.

In addition, Plaintiffs have no clearly ascertainable right for the LABF to "provide" a healthcare plan. The plain language of the 1985 amendment does not direct the LABF to provide a plan. If the General Assembly had intended the LABF to provide a healthcare plan, it knew how to do so. *See* Illinois Municipal Retirement Fund ("IMRF") Pension Code, 40 ILCS 5/7-199.1 (granting IMRF the express authority to purchase and administer a joint group accident and health insurance policy for retirees). The absence of such language in the 1985 amendment or elsewhere in Article 11 demonstrates that Plaintiffs have no clearly ascertainable right for the LABF to "provide" a healthcare plan. *Adames v. Sheahan*, 233 Ill. 2d 276, 311-13 (2009) ("When Congress includes particular language in one section of a statute but omits it in another section of the same act, courts presume that Congress has acted intentionally and purposely in the inclusion or exclusion.")

**D. Plaintiffs' Request for Relief Is Overly Vague and Ambiguous**

Furthermore, Plaintiffs' request for mandatory injunctive relief is vague, ambiguous, overbroad and fails to provide any guidance to the Court or the parties as to precisely how the injunction should be worded and applied. *See Paschen Contractors Inc. v. Burrell*, 14 Ill. App. 3d 748, 752 (1st Dist. 1973). In *Paschen*, the Court stated:

> The injunction, however, must conform to standards of specificity. It should be so worded that the party enjoined may know from a reading of the order what he is restrained from doing. The order must be complete in the details of its prohibition or direction; it must be so clear that what the court intends is easily discernible.

Id. at 752. (citation omitted). Plaintiffs' entire prayer for relief is as follow:

> This Court should order the City and Funds to comply with their statutory obligations to bring the subsidies current by paying $10.2 million into a segregated Fund under the court's control, add $600,000 each month while the case continues and further order the Funds trustees to fulfill their obligations to provide healthcare plans for their annuitants.

Pl.'s Mot., 17. Plaintiffs' request does not specify how the alleged $10.2 million payment should be allocated among the City and the Funds. It does not indicate which retirees are eligible to receive a subsidy. It does not provide any direction as to when the $10.2 million should be paid. It demands that the payment be made into "segregated fund" that does not exist. It does not explain what Plaintiffs mean by "providing" a healthcare plan. The Plaintiffs' "remedies" are unsupported in the law.

**E. Plaintiffs Have No Likelihood of Success on the Merits.**

**1. Plaintiffs Have No Likelihood of Success as to Their Request for Subsides to Be Paid into a Common Fund**

Plaintiffs' motion also fails because they have no likelihood of success on the merits of their claims. First, paying money into a segregated common fund violates the anti-alienation clause of Article 11, 40 ILCS 5/11-223(a).

> [A]ll annuities, refunds, pension, and disability benefits granted under this Article shall be exempt from attachment or garnishment process and shall not be seized, taken, subjected to, detained, or levied upon by virtue of any judgment, or any process or proceeding whatsoever issued out of or by any court in this State, for the payment and satisfaction in whole or in part of any debt, damage, claim, demand, or judgment against any annuitant, participant, refund applicant, or other beneficiary hereunder.

40 ILCS 5/11-223(a); *see also Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 419-20 (1977) (applying a provision of the Chicago Firemen's Pension Fund, 40 ILCS 5/6-213, that is

virtually identical to Section 11-223(a), to prohibit a judgment creditor from garnishing an annuity). The anti-alienation provisions of the Illinois pension code reflect the legislature's desire to preserve the integrity of the Funds so as to protect its beneficiaries and their families. *In re Marriage of Papeck*, 95 Ill. App. 3d 624, 629 (1st Dist. 1981). Ordering the healthcare subsidies due eligible LABF retirees to be paid into a common fund rather than going to the approved underwriters plainly violates the anti-alienation clause because they would be taken to benefit Plaintiffs' counsel.

Plaintiffs overlook *Friedman & Rochester* and *Papeck* and instead cite to *Bishop v. Burgard*, 198 Ill. 2d 495 (2002), and *Scholtens v. Schneider*, 173 Ill. 2d 375 (1996), cases that involve subrogation liens under ERISA plans. First, these cases are not relevant because they do not concern public pension plans governed by the Illinois Pension Code.

Even if relevant, *Bishop* and *Scholtens* present entirely different factual circumstances and do not involve a court ordering a common fund for attorneys' fees to be created from ERISA plan assets. In each case, a plan member was injured and the plan advanced medical care costs. In each, the member obtained a recovery from third parties. *Bishop,* 198 Ill.2d at 496-97; *Scholtens,* 173 Ill. 2d at 376-77. In each, the plan asked the member to reimburse the costs advance for medical care under each plan's subrogation provision. In each, the member's attorney sought adjudication of the plan's subrogation lien to obtain a common fund attorneys' fee award from the amount recovered from the third party and prevailed. *Bishop,* 198 Ill. 2d at 497-98; *Scholtens,* 173 Ill. 2d at 378-79, 397. In contrast, in this case, Plaintiffs seek a common fund directly from subsidies that are to be paid by the City to the Funds and then to prescribed underwriters. This is precisely the circumstance the anti-alienation clauses are designed to prevent.

Furthermore, the *Underwood* court held that the healthcare subsidies were a constitutionally protected benefit. 2017 IL App (1st) 162356, ¶ 40 ("Under count I, the pension protection clause protects the benefits in the 1983 and 1985 amendments for any retiree that began participating in the retirement system before the 2003 settlement was executed."). If this Court were to order the subsidies to be paid into a "segregated fund" to benefit Plaintiffs' attorney, this would be an unconstitutional diminishment of retirees' constitutionally protected benefits. *Jones v. Mun. Emps' Annuity & Benefit Fund of Chi.* 2016 IL 119618 (2016). For these reasons, Plaintiffs have no likelihood of success on the merits of their request that subsidies be paid into a segregated fund.

**2. The 1985 Amendment Does Not Require the LABF to Provide a Healthcare Plan**

Plaintiffs do not explain what they mean when they allege the Funds must "provide" a plan. Assuming that Plaintiffs mean that the LABF should sponsor or underwrite a health insurance plan, this demand fails. The *Underwood* Court specifically stated that Plaintiffs have no constitutional right to healthcare coverage. 2017 IL App (1st) 162356, ¶ 40.

Moreover, the authority of the LABF's trustees is clearly limited by the General Assembly delegated to them in Article 11, including the 1985 amendment. *Bd. of Educ. of City of Chi. v. Bd. of Tr. of Pub. Schs. Teachers' Pension and Ret. Fund of Chi.*, 395 Ill..App..3d 735, 739 (1st Dist. 2009) "[A]n agency only has the authorization given to it by the legislature....") (quoting *Bus. & Prof'l People for the Pub. Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 243 (1989))). The most reliable indicator of legislative intent is the plain, ordinary, and popularly understood meaning of the statutory language, and if the language is clear and unambiguous, the statute must be given effect as written, without resort to further aids of statutory construction. *Klaine v. S. Ill. Hosp. Servs.*, 2016 IL 118217, ¶ 14 (2016).

The plain language of the 1985 amendment confirms that the LABF has no obligation to provide a healthcare plan. The 1985 amendment allows but does not require the LABF to "approve" a group healthcare plan. "Approve" in the context of the 1985 amendment means "to give formal or official sanction." *See* Merriam Webster Online Dictionary https://www.merriam-webster.com/dictionary/approve, (last visited July 13, 2018). In contrast, "provide" means "to supply or make available (something wanted or needed)." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/provide, (last visited July 13, 2018). There is nothing in the 1985 amendment or elsewhere in Article 11 that permits the LABF to sponsor, underwrite, Fund, supply, make available or otherwise "provide" a healthcare plan. The *Underwood* decision makes clear that eligible retirees are entitled to a $25 per month subsidy, but nothing more, like it or not.

Plaintiffs ignore the statutory language and offer no legal authority that supports their claim that the LABF and the other Funds must "provide" a healthcare plan. Plaintiffs cite only to emails among counsel, some of which were in furtherance of settlement and thus inadmissible, all of which were sent before the June 29, 2017 *Underwood* decision, which is the operative decision at this point in time. Thus, Plaintiffs fail to show a likelihood of success on the merits of their claim that the LABF must provide a healthcare plan.

**F. The Balance of Equities Favors the LABF**

Because Plaintiffs fail to meet their burden of establishing the necessary elements of a preliminary injunction, this Court need not consider the balance of equities. Nonetheless, even if it does, the balance of equities favors the LABF. The LABF is severely underfunded. Even under the City's new funding obligations, the LABF's unfunded liability is projected to increase over the next approximately 15 years before the unfunded liability begins to decline. Plaintiffs are a distinct minority of LABF's 4,263 active and inactive members and retirees. Gabriel,

Roeder, Smith & Co.,; *Laborers Retirement Board and Employees' Annuity and Benefit Fund of Chicago-Actuarial Valuation Report for the Year Ending December 31, 2017, 32, (2018)* http://www.labfchicago.org/assets/1/7/LABF_Val_2017_Final_05042018.pdf, Providing a healthcare plan would no doubt be costly for the LABF, both in terms of monetary outlays and in terms of personnel costs. The LABF trustees have a fiduciary duty to look after the best interests of all its members, and cannot expend funds without lawful authority, no matter how worthy the cause may be. Thus, the balance of equities favors the LABF.

**CONCLUSION**

For all the above reasons, the Plaintiffs' Motion to Compel Defendants to Bring Subsidies Current and Provide a Healthcare Plan should be denied.

Dated: July 13, 2018

Respectfully Submitted,
THE LABORERS' AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO

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# EXHIBIT 1

position that how he is defining classes has already been resolved in some way by the appellate court or it was inaccurate because of resolutions by you and the appellate court, then that's one way we would respond. Otherwise, we'll respond in the normal fashion.

THE COURT: So assuming I agree with you, do you think that that should be filed as a matter of efficiency before the requirement of you answering anything?

MR. PRENDERGAST: Oh, no, Your Honor. I think that -- well, I'll start there.

If it were me -- and these are judgment calls. If it were me, I'd file a complaint that states the classes as he wants them.

THE COURT: I understand. That's one of my questions to Mr. Krislov, which I hesitated to ask, but I will ask it eventually when I give him the floor, about amending the complaint to reflect the new reality based upon the appellate court and based upon what happened, all my rulings, and the refusal by the Supreme Court of his PLAs.

So just as a matter of consolidation and being concise and specific and shooting with, as