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Via email and FedEx
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Hon. John A. Sweeney, A.J.S.C. (Ret.)
200 East 8th Street
Florence, NJ 08518

RE: In re Complaint Filed by the Franklin Township Board of Education Regarding P.L. 2020, Chapter 44

In re Complaint Filed by the Gloucester City Board of Education Regarding P.L. 2020, Chapter 44

In re Complaint Filed by the Lower Township Elementary Board of Education Regarding P.L. 2020, Chapter 44

COLM-0001-21 (Consolidated Action)

Dear Judge Sweeney:

This office represents Respondents Senate President Stephen M. Sweeney and Assembly Speaker Craig J. Coughlin (hereafter collectively "the Presiding Officers") in the above-captioned consolidated action. Please accept this informal letter-brief, in lieu of a more formal submission, in opposition to the Claimants' application for preliminary injunctive relief.

The Presiding Officers rely principally on the brief of the Attorney General in opposition to the Claimants' application for preliminary injunctive relief. The Attorney General's comprehensive legal arguments are incorporated herein by reference. To those arguments the Presiding Officers add the following.

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PRELIMINARY STATEMENT

This matter comes before the Council by way of Complaints filed by the Franklin Township Board of Education, the Lower Township Elementary Board of Education, and the Gloucester City Board of Education (hereafter collectively "the Claimants"). Claimants challenge L. 2020, c. 44 (hereafter "Chapter 44" or "the Act"). The purpose of Chapter 44 is to help school districts control their spiraling employee health care costs through a careful re-design of public employee health insurance plans. Notwithstanding this purpose, Claimants contend that Chapter 44 is an impermissible unfunded mandate within the meaning Article VIII, section 2, paragraph 5 of the New Jersey Constitution.

Chapter 44 is not an unfunded mandate. Quite the contrary. According to a leading actuary retained by the Legislature, Chapter 44 – based on the most recent data -- is projected to save school districts and their employees over $800 million per year.

Chapter 44 is a complex piece of legislation that applies to 584 public school districts across the State. The Legislature anticipated that at least some of these hundreds of school districts might encounter short-term transitional costs, rather than transitional savings. In recognition of this potential circumstance, the Legislature directed school districts that might encounter short-term transitional costs to enter into collective bargaining negotiations with their employee organizations in order to address these costs. This is a requirement of the statute.

Remarkably, none of the three school districts that have brought this action has complied with the statutory mandate to initiate collective bargaining negotiations with their employee organizations. Instead, Claimants seek preliminary injunctive relief from this tribunal without so much as making an effort to engage in collective bargaining.

Claimants have failed to comply with the express terms of the statute. As such, they have no ground to seek relief before this tribunal.

Moreover, the public interest would be ill-served by the Claimants' application More particularly, if the preliminary injunctive relief here sought were granted, the result would place a cloud of uncertainty and potential disruption for hundreds of school districts that are in the process of implementing health care benefit plans mandated by Chapter 44. Claimants' application should be denied for this reason alone.

For this and other reasons that are set forth herein (and that are set forth in the brief of the Attorney General), Claimants' application for preliminary injunctive relief should be denied.

STATEMENT OF FACTS

Under the Unfunded Mandated statute, a claimant may be entitled to preliminary injunctive relief if the Claimant can show, "to the satisfaction of the Council that (1) significant financial hardship to the claimant would result from compliance; and (2) there is a substantial likelihood that the statute or the rule or regulation is, in fact, an impermissible, unfunded State mandate." N.J.S.A. 52:l3H-l6; see also In re a Complaint filed by the Board of Education for the City of Clifton, Council on Local Mandates Decision (May 13, 1998). Here, the Claimants cannot establish *either* of these two conditions precedent to preliminary injunctive relief – let alone *both* of them.

We begin with a brief description of Chapter 44 and the legislative history underlying its enactment.[1] The Legislature's passage of Chapter 44 represented the culmination of years of planning and analysis by the key stakeholders and actuarial experts. As detailed in the accompanying

[1] For the convenience of the Council, a copy of Chapter 44 is annexed as Exhibit "A" to the accompanying Certification of Leon J. Sokol.

certifications of Kevin Drennan and Anthony Cimino, the goal of Chapter 44 – far from shifting additional costs to school districts – was to help school districts in controlling health care costs through a careful re-design of public employee health insurance plans. See Drennan Cert., ¶¶2-8; Cimino Cert., ¶¶3-5. According to a leading actuary retained by the Legislature, Chapter 44 – based on the most recent data -- is projected to provide total claim savings of $865 million for a full year. See Drennan Cert., Exhibit "A" (Milliman Report, Appendix A-3, Column 6 and 8). In light of this substantial savings to school districts and employees, it is ironic – to say the least – that Chapter 44 is here alleged to be an impermissible unfunded mandate within the meaning of Article VIII, section 2, paragraph 5 of the New Jersey Constitution.

The annexed Milliman Report details the substantial cost savings produced by Chapter 44, In particular, Milliman identified the following sources of cost savings for the new health insurance plans authorized by the legislation as compared to the *status quo* health insurance plans:

> The claim savings associated with a full adoption of each of these proposed plans is divided into three components… **The first savings component is a change in provider reimbursement levels resulting from a reduction in the amounts that out-of-network providers are paid**…
>
> The second claim savings component, plan design changes, encompasses two parts: 1) changes in the paid-to-allowed ratio, and 2) changes in induced utilization when moving from a current plan to the proposed plan.
>
> ● Paid-to-allowed ratio refers to the proportion of allowed claims paid by the health plan, on average. The members pay the remaining portion as cost sharing (deductible, coinsurance, or copays). **Thus, for members who migrate to Plan A, B, B-1, C, or D, the employers are expected to realize savings by paying a lower portion of total claims since current plans have lower member cost sharing.**
>
> ● Induced utilization refers to the influence of cost sharing parameters (deductibles, copays, coinsurance, out-of-pocket maximum) on members' utilization of services. All else being equal, the richer a plan is (higher paid-to-allowed ratio), the more services tend to be utilized. **Thus, a lower paid-**

> **to-allowed ratio is expected to "induce" lower utilization of services, resulting in lower claims being incurred, and further reducing the employer's liability.** These estimates assume that benefits are administered as designed, and that cost sharing is not reduced or waived by any providers.
>
> The third claim savings component is related to prescription drug formulary charges for which Milliman did not develop an estimate…
>
> [Drennan Cert., Exhibit "A" (Milliman Report, at 8-9) (emphasis added)]

As the legislative history establishes, the Legislature's enactment of Chapter 44 encompassed careful evaluation of cost-savings measures and years of input from key stakeholders and actuarial experts. See Sokol Cert., Exhibit "B" (Assembly Appropriations Committee, Statement to S. 2273); Drennan Cert., ¶¶2-8; Cimino Cert., ¶¶3-5. As previously noted, the goal – far from shifting additional costs to school districts – was to help school districts in controlling health care costs through a careful re-design of public employee health insurance plans. See id., see also Drennan Cert., Exhibit "A" (Milliman Report, at 8-9 and Appendix A-1 through A-3).

Chapter 44 is a complex piece of legislation that applies to a broad range of school districts. The requirements of Chapter 44 apply to school districts that participate in the School Employees Health Benefits Program (SEHBP)[2] and to school districts that do not participate in the SEHBP. For both participating and non-participating school districts, Chapter 44 requires that the district adopt four statutorily mandated plan designs. These are, respectively, plans referred to as the New Jersey Educators Health Plan, the Garden State Health Plan, the NJ Direct 10, and the NJ Direct 15 plan. See L. 2020, c. 44, §§ 1, 5; Sokol Cert., Exhibit "B" (Assembly Appropriations Committee, Statement to S. 2273, at 1-3)

[2] The SEHBP is administered by the New Jersey Department of the Treasury, Division of Pensions and Benefits.

Under Chapter 44, all school district employees hired on or after July 1, 2020 are automatically enrolled in an NJEHP plan, unless they elect to waive coverage. See L. 2020, c. 44, §§ 2, 5. Furthermore, all school district employees hired prior to July 1, 2020, had the option to enroll in the new NJEHP plan unless they affirmatively elected to waive coverage, or affirmatively elected to remain enrolled in their prior coverage. See L. 2020, c. 44, §§ 2, 5. Again, these statutory requirements apply to both school districts that are members of SEHBP and to school districts that procure health insurance on the private market. See id.

Chapter 44's contemplates that – over time – an increasing number of school district employees will "migrate" from pre-existing plans to the new plans mandated by the Act. Notably, the Office of Legislative Services (OLS) -- in its Fiscal Impact Statement annexed to the Assembly Appropriations Committee Report accompanying the Act – stated that, in the aggregate, "[t]he greatest savings are predicated on 100 percent migration to the new plans and various plan design changes." See Sokol Cert., Exhibit "B" (Assembly Appropriations Committee, Statement to S. 2273, at 7). In other words, the OLS Fiscal Impact Statement further confirms that Chapter 44 – far from imposing additional costs on school district taxpayers – will, in the aggregate, produce substantial savings to taxpayers (as well as to employees) through a reformation of the design of the health insurance plans. The OLS Statement also confirms that, in the aggregate, cost savings to school districts will increase over time as additional employees "migrate" to the new plans. See id.

There remains for discussion one additional and critical feature of Chapter 44. In enacting Chapter 44, the Legislature specifically recognized that some school districts might encounter added costs in the transition from pre-existing health insurance plans to NJEHP or NJEHP-equivalent

plans.[3] As to this specific issue, Chapter 44 provides as follows:

> 8. With regard to employers that have collective negotiation agreements in effect on the effective date of this act, P.L.2020, c. 44, that include health care benefits coverage available to employees when the net cost to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative shall engage in collective negotiations over the financial impact of the difference.
>
> [L. 2020, c. 44, §8]

In enacting Section 8 of Chapter 44, the Legislature recognized that to the extent that some school districts might encounter transitional costs – rather than transitional savings – in adopting to Chapter 44's new plan designs, those school districts were required to enter into collective bargaining negotiations with their employee organizations in order to address the transitional costs. See id. Hence, as further discussed below, Section 8 serves as a critical statutory mechanism that provides a remedy to school in the event that they encounter transitional costs – rather than transitional savings – in adopting to Chapter 44's new plan designs.

Here, the Claimants assert that they have encountered transitional costs – rather than transitional savings – in adopting to Chapter 44's new plan designs. *However, Claimants candidly admit that they have made no effort to enter into collective bargaining negotiations with their employee organizations in order to address these alleged transitional costs*. Claimants' Complaints, ¶5. That admission by Claimants – among others – is fatal to their claim.

[3] Given that there are over 500 school districts in the State, it is not surprising that at least some districts might encounter transitional costs – rather than transitional savings – in adopting to Chapter 44's new plan designs

POINT I

CLAIMANTS CANNOT ESTABLISH PROBABLE SUCCESS ON THE MERITS (THAT CHAPTER 44 IS AN IMPERMISSABLE UNFUNDED MANDATE) BECAUSE TO THE EXTENT THAT A NON-SEHBP SCHOOL DISTRICT MIGHT INCUR CERTAIN ADDITIONAL COSTS IN THE TRANSITION PERIOD TO THE NEW COST-SAVING PLAN DESIGN, CHAPTER 44 REQUIRES THE SCHOOL DISTRICT TO ENTER INTO COLLECTIVE BARGAINING NEGOTIATIONS WITH ITS EMPLOYEE ORGANIZATIONS SO THAT THE SCHOOL DISTRICT WOULD AVOID SUCH COSTS. HERE, IT IS UNDISPUTED THAT CLAIMANTS *NEVER ENTERED INTO COLLECTIVE BARGAINING NEGOTIATIONS* – WHICH CONSTITUTES A VIOLATION OF CHAPTER 44. THAT STATUTORY VIOLATION – BY ITSELF – PRECLUDES CLAIMANTS' UNDERLYING CLAIM AS WELL AS PRECLUDES CLAIMANTS' APPLICATION FOR PRELIMINARY INJUNCTIVE RELIEF.

Chapter 44 is clear: "when the net cost to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative **shall engage** in collective negotiations over the financial impact of the difference." L. 2020, c. 44, §8 (emphasis added). By its terms, Chapter 44 requires the school district to enter into collective bargaining negotiations with its employee organizations so that the school district would avoid such costs. Notably, the statutory language, "shall engage," is mandatory.

Notwithstanding the foregoing, it is undisputed that Claimants never bothered to enter into collective bargaining negotiations in order to address the allegedly excess costs associated with the transition to Chapter 44's new plan designs. See Complaints, ¶5. That is a facial violation of Chapter 44. See L. 2020, c. 44, §8. Having failed to satisfy a statutory mandate to enter into collective bargaining, the resulting statutory violation – by itself – precludes Claimants' underlying claim as well as precludes Claimants' application for preliminary injunctive relief.

POINT II

IN THE ALTERNATIVE, CLAIMANTS CANNOT ESTABLISH THAT THEY WILL SUFFER "SIGNIFICANT FINANCIAL HARDSHIP RESULTING FROM COMPLIANCE" WITH CHAPTER 44 FOR A SIMPLE REASON: CLAIMANTS HAVE NOT COMPLIED WITH CHAPTER 44

As previously moted, a claimant may be entitled to preliminary injunctive relief if the Claimant can show, "to the satisfaction of the Council that (1) significant financial hardship to the claimant would result from compliance; and (2) there is a substantial likelihood that the statute or the rule or regulation is, in fact, an impermissible, unfunded State mandate." N.J.S.A. 52:l3H-l6. In Point I, supra, we addressed and applied the second prong of the two-part test – and demonstrated that Claimants cannot, as a matter of law, satisfy the second prong

Here, we address and apply the first prong. The result is the same.

Claimants cannot establish that they will suffer "significant financial hardship *resulting from compliance*" with Chapter 44 for a simple reason. Claimants have not complied with Chapter 44.

As previously noted, it is undisputed that Claimants never bothered to enter into collective bargaining negotiations in order to address the allegedly excess costs associated with the transition to Chapter 44's new plan designs. See Complaints, ¶5. That is a clear violation of Chapter 44. See L. 2020, c. 44, §8. Having failed to satisfy a statutory command to enter into collective bargaining, the resulting statutory violation – by itself – precludes Claimants' underlying claim as well as precludes Claimants' application for preliminary injunctive relief.

POINT III

IN THE ALTERNATIVE, CLAIMANTS' FAILURE TO COMPLY WITH THE REQUIREMENTS OF CHAPTER 44 PRECLUDE THEM FROM SEEKING PRELIMINARY INJUNCTIVE RELIEF, BECAUSE EQUITABLE RELIEF CANNOT BE GRANTED TO A CLAIMANT WITH "UNCLEAN HANDS"

The doctrine of unclean hands provides that "a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Faustin v. Lewis, 85 N.J. 507, 511 (1981). See also Chrisomalis v. Chrisomalis, 260 N.J. Super. 50, 54 (App. Div. 1992) ("Where the relief sought by the plaintiff is the result of his own wrongdoing, where the unclean hands of the plaintiff [have] infected the very subject matter in litigation, the plaintiff is barred from relief in a court of equity.").

The Council frequently looks to case law in the Superior Court to guide its own determinations. Here, the doctrine of unclean hands properly informs a decision by this tribunal as to whether or not to grant preliminary injunctive relief.

As previously noted, it is undisputed that Claimants never bothered to enter into collective bargaining negotiations in order to address the allegedly excess costs associated with the transition to Chapter 44's new plan designs. See Complaints, ¶5. That is a violation of Chapter 44. See L. 2020, c. 44, §8.

But that is not the only violation of Chapter 44 that is at issue here. Claimant Franklin Township Board of Education admits that it did not complete automatic enrollment of its new employees in the NJEHP equivalent plan as of July 1, 2020 – as required by Chapter 44. See Franklin Township Complaint, ¶6. Franklin Township further admits that it did not allow open enrollment of its existing employees in the NJEHP equivalent plan as of July 1, 2020 – also as required by Chapter 44. See Franklin Township Complaint, ¶7. Thus, Franklin Township is in brazen violation

of three separate and distinct provisions of Chapter 44.

If all of this were not enough, Franklin Township presently comes to the Council seeking preliminary injunctive relief because it has been sued by its employee organizations for noncompliance with Chapter 44 – and it seeks a stay of these pending lawsuits. See Franklin Township Complaint, §5. Thus, Franklin Township seeks relief from the Council *precisely because* of its own willful disregard of three distinct requirements of law. Not only is this "self-created hardship," Franklin Township's willful noncompliance with the multiple requirements of law is manifestly inequitable to its own employees and to the public at large. Claimants' application for preliminary injunctive relief should be denied for this reason alone. See Chrisomalis v. Chrisomalis, supra, 260 N.J. Super. at 54. ("where the unclean hands of the plaintiff [have] infected the very subject matter in litigation, the plaintiff is barred from relief in a court of equity.").

POINT IV

CLAIMANTS CONTEND THAT THEY ARE RELIEVED OF THEIR LEGAL OBLIGATION UNDER CHAPTER 44 TO ENGAGE IN COLLECTIVE BARGAINING NEGOTIATIONS BECAUSE "THERE ARE NO HEALTH CARE RELATED FINANCIAL ASPECTS REMAINING TO NEGOTIATE." CLAIMANTS' CONTENTION IS INCORRECT AS A MATTER OF LAW FOR TWO REASONS.

Finally, we address the sole legal rationale offered by Claimants for their admitted disregard of the collective bargaining requirement of Chapter 44. As previously noted, the statute is clear: "when the net cost to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative **shall engage** in collective negotiations over the financial impact of the difference." L. 2020, c. 44, §8 (emphasis added). By its terms, Chapter 44 requires the school district to enter into collective bargaining negotiations with its employee organizations so that the school district would avoid such costs.

Claimants admit that they ignored the mandate of section 8 of Chapter 44.

By this application for preliminary injunctive relief, Claimants assert that they are relieved of their legal obligation under Chapter 44 to engage in collective bargaining negotiations because "there are no health care related financial aspects remaining to negotiate." See Complaints, ¶5. However, Claimants' contention is incorrect as a matter of law for two reasons.

A. Although Chapter 44 places a statutory cap on health-related expenses for NJEHP equivalent plans for new employees and for incumbent employees who elect to transfer to the NJEHP equivalent plans, Chapter 44 does not place any statutory limits on pre-existing private health insurance plans for which incumbent employees may elect to remain subject to after the effective date of the Act. The terms and conditions of the pre-existing health insurance plans are unquestionably within the scope of mandated collective bargaining under Section 8 of Chapter 44

Claimant is correct that Chapter 44 places a statutory cap on employee contributions and other health care-related costs for NJEHP equivalent plans. See L. 2020, c. 44, §5a(1). However, Chapter 44 does not place any statutory limits on pre-existing private health insurance plans for which incumbent employees may elect to remain subject to after the effective date of the Act. See L. 2020, c. 44, §5a(1) (providing that "[n]othing in this section shall prohibit an employer from offering health care benefit plans that existed prior to the effective date of this act.").

The terms and conditions of the pre-existing health insurance plans are unquestionably within the scope of mandated collective bargaining under Section 8 of Chapter 44. Therefore, contrary to Claimants' contention, Chapter 44's collective bargaining provision permits negotiations between school districts and employer organizations over the terms and conditions of the pre-existing health insurance plans.

That being so, Claimants' proffered legal rationale for ignoring the mandatory collective bargaining provision of the Act does not withstand scrutiny.

B. Even if a school district and an employee organization could not reach an agreement over changes in pre-existing health insurance plans in order to produce additional savings to the school districts that would offset transitional costs to NJEHP equivalent plans, the parties are also free to agree on offsets that would be derived from terms and conditions of employment other than health-care related financial issues.

As previously noted, Claimants assert that they are relieved of their legal obligation under Chapter 44 to engage in collective bargaining negotiations because "there are no health care related financial aspects remaining to negotiate." See Complaints, ¶5. That assertion is wrong for the reasons stated in Point IVA above. And the assertion is also wrong because it is based on the unstated assumption that Section 8 of Chapter 44 precludes a school district and employee organization from obtaining offsets that would be derived from terms and conditions of employment *other than health-care financial issues.* But that is not so. Nothing in Section 8 of Chapter 44 (or any other provision of Chapter 44) limits the scope of collective bargaining to health-care related issues only.

Thus, even if a school district and an employee organization could not reach an agreement over changes in pre-existing health insurance plans in order to produce additional savings to the school districts that would offset transitional costs to NJEHP equivalent plans, the parties are also free to agree on offsets that would be derived from terms and conditions of employment other than health-care financial issues.

In short, the Claimants' only legal rationale for disregarding Chapter 44's collective bargaining mandate is without foundation in fact or law. Preliminary injunctive relief should be denied for this reason alone.

CONCLUSION

For the reasons set forth above and for the other and further reasons set forth in the brief of the Attorney General, the Claimants' application for preliminary injunctive relief should be denied.

Respectfully,

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Attorneys for Respondents Senate President Stephen M. Sweeney and Assembly Speaker Craig J. Coughlin

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