SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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LESLIE RIOS and MELISSA MEDINA-RIOS, individually and as registered domestic partners,

Plaintiffs,

- against -

Index No. 13206/03

METROPOLITAN TRANSPORTATION AUTHORITY d/b/a MTA, PETER S. KALIKOW in his capacity of Chair of the MTA, STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY d/b/a SIRTOA, MTA STATEN ISLAND RAILWAY, MTA NEW YORK CITY TRANSIT, LAWRENCE G. REUTER in his capacity as President of New York City Transit, ROBERT CURCIO, as Manager of Pension and Administrative Benefits for the Staten Island Railway, MTA LONG ISLAND RAILROAD d/b/a LIRR, JAMES J. DERMODY in his capacity as President of the MTA Long Island Rail Road, UNITED TRANSPORTATION UNION LOCAL 1440, ROBERT BILELLO as President of United Transportation Union Local 1440, "JOHN AND JANE DOES 1-10" who are individuals whose identities are currently unknown and to be determined in discovery who administer the health benefits plans at issue herein on behalf of the MTA and Union defendants herein on behalf of plaintiffs,

Defendants.

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MEMORANDUM OF DEFENDANT SIRTOA AND THE OTHER MTA-RELATED DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS UNDER CPLR 3211(a)(7) OR FOR SUMMARY JUDGMENT UNDER CPLR 3212

March 19, 2004

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Introduction

The defendant Staten Island Rapid Transit Operating Authority (also sued as "SIRTOA, MTA Staten Island Railway"), hereinafter referred to as "SIRTOA" – along with SIRTOA's parent, the defendant Metropolitan Transportation Authority (hereafter referred to as the "MTA"), and another public authority, the New York City Transit Authority (sued as "MTA New York City Transit" and hereafter referred to as the Transit Authority), and three officials (the MTA's chairman, Peter Kalikow, the Transit Authority's president, Lawrence G. Reuter, and a SIRTOA manager, Robert Curcio, all three of whom are sued only in their official capacities) – submit this memorandum in support of their motion, pursuant to CPLR 3211(a)(7) and CPLR 3212, to dismiss the complaint in its entirety. (These defendants, collectively, may be referred to as the "MTA-related" defendants.)[1]

In the complaint, the lead plaintiff, Ms. Leslie Rios, a SIRTOA employee, asserts that she entered into a registered "domestic partnership" relationship in October 2002, asked SIRTOA to have SIRTOA extend the medical insurance that it provides to Ms. Rios as a SIRTOA employee to cover her domestic partner, Ms. Melissa Medina (who, as a co-plaintiff, now calls herself Melissa Medina-Rios). (A copy of the complaint is annexed to the Richard Schoolman Affirmation as Ex. E.) SIRTOA, which through collective bargaining with the labor union (defendant United Transportation Union, or "UTU") that represents Ms. Rios as a SIRTOA employee, has agreed to provide medical insurance to UTU-represented employees and only their spouses and certain of their children (entirely at SIRTOA's expense), refused Ms. Rios's request because the governing UTU-SIRTOA collective bargaining agreement does

[1] By a stipulation filed with the Clerk around March 11, 2004, plaintiffs have withdrawn their claims against "MTA Long Island Railroad d/b/a LIRR" and against its president James J. Dermody. Richard Schoolman Affirmation, ¶ 1, Ex. A.

not contemplate medical coverage for any additional persons. In this lawsuit, plaintiffs assert, principally, that that refusal should be reversed by this Court on the grounds that it is discrimination in employment on the basis of "sexual orientation" prohibited by the New York State Executive Law § 290 *et seq.* and by the New York City Administrative Code § 8-101 *et seq.* They may also assert that that refusal violates the Executive Law's prohibition of discrimination in employment on the basis of "marital status." They more clearly assert that that refusal violates, on "sexual orientation" discrimination grounds, provisions of an Executive Order of the Governor, and also violates SIRTOA's own anti-discrimination policy. In all of these respects, plaintiffs are mistaken.

The Parties and the Relevant Collective Bargaining Agreement

Since the year 2000, Ms. Leslie Rios has been employed by SIRTOA as a "[railroad] car cleaner." Owen Swords Affidavit. ¶ 2. As a SIRTOA car cleaner, her wages and benefits, hours, and working conditions have been regulated by a collective bargaining agreement between SIRTOA and the union (defendant UTU) that represents SIRTOA's car cleaners; by virtue of that agreement, SIRTOA fully pays the medical insurance premiums for its (UTU-represented) employees and for (only) specified other persons, i.e., such employees' spouses and dependent children. *Id.* ¶¶ 2-3. Also under that agreement, represented employees who believe that they have been improperly paid by SIRTOA, that employment benefits have been improperly denied or administered by SIRTOA, that hours of work have been improperly determined, that conditions of work are improper, or that any other aspect of the agreement has been improperly interpreted by SIRTOA, may file a "claim or grievance" that, if not resolved, would be decided on a final and binding basis by an arbitration panel. *Id.* ¶ 4. That labor agreement is subject to New York law, the Civil Service Law §§ 200-214 (also referred to as

the "Taylor Law"); under that law, the UTU is Ms. Rios's exclusive representative for purposes of collective bargaining, and SIRTOA, as the employer, may not unilaterally change the wages and benefits, or other terms of the agreement – even after that agreement's expiration date may have passed – except via an amendment to that agreement consented to, via collective bargaining, by the UTU. *Id.* ¶¶ 1, 2, 6. *See also* New York Civil Service Law § 209-(a)(1)(e).[2]

SIRTOA is a public benefit corporation and public authority; it is also a subsidiary of the defendant MTA that the MTA established, under Public Authorities Law §1265(5), to operate the commuter railroad on Staten Island. Richard Schoolman Aff. ¶ 3, Ex. B. SIRTOA may sue and be sued in its own name. *Id.* Ex. B. Neither the MTA, which is established in Title 11 of the Public Authorities Law (§§ 1260-1279), nor any of its officers or employees made the decision challenged by Ms. Rios in this case, that is, the rejection of her request to extend SIRTOA's medical coverage for Ms. Rios to cover her domestic partner, (co-plaintiff) Ms. Melissa Medina-Rios (hereafter, for clarity, called Ms. Medina). Robert Curcio Affidavit ¶ 7; Swords Aff. ¶ 5. That request was made to a SIRTOA manager, defendant Robert Curcio (who is sued in his official capacity). Curcio Aff. ¶ 5. The New York City Transit Authority is not an MTA subsidiary but a distinct public benefit corporation created in Title 9 of the Public Authorities Law (§§ 1200-1221); while the Transit Authority happens to be a signatory of the current SIRTOA-UTU collective bargaining agreement, no Transit Authority employee made the benefits coverage decision of which plaintiffs complain. Curcio Aff. ¶ 7; Swords Aff. ¶ 5.

[2] Civil Service Law § 209(a)(1)(e) states, in relevant part, that "[i]t shall be an improper practice [i.e., unlawful] for a public employer ... to refuse to continue all the terms of an expired [collective bargaining] agreement until a new agreement is negotiated ...."

The Medical Insurance at Issue

As noted above, by virtue of collective bargaining with the UTU, SIRTOA provides medical insurance to SIRTOA's UTU-represented employees, such as Ms. Rios. That medical coverage is provided without regard to Ms. Rios's (or any other UTU-represented SIRTOA employee's) sexual orientation or marital status. Curcio Aff. ¶ 2. That insurance for Ms. Rios is the Empire Plan, and (as a product of collective bargaining) the premiums for that medical insurance are paid *entirely* by SIRTOA; the premiums covering Ms. Rios herself are currently $386.48 per month (*i.e.*, $4,157.76 per year). *Id.* As a product of collective bargaining, SIRTOA would also pay the premiums to cover certain "dependents" of Ms. Rios (a spouse, or unemancipated children [usually up to the age of 19 but under some circumstances up to the age of 25]), in what is often referred to as "family" coverage; Ms. Rios does not have, so far as SIRTOA has been informed, a spouse or children. *Id.* The current collective bargaining agreement between the UTU and SIRTOA does not call for (family) medical coverage for any other kind of "dependent" of a SIRTOA employee, whether a domestic partner or a parent, sibling, cousin, grandchild, best friend, or even an older child (no matter what the degree of emotional or financial dependency on the employee). *Id.* ¶¶ 2-3.

To arrange for coverage of a UTU-represented SIRTOA employee's domestic partner as a (family coverage) dependent – that is, for an expansion of coverage beyond the coverage SIRTOA has agreed with the UTU to pay for – additional payments would have to be made to Empire. In order to add coverage of a domestic partner for someone like Ms. Rios (i.e., an unmarried UTU-represented SIRTOA employee with no children), that *additional* payment would be $479.69 per month (or $5,756 per year), that is, the annual premium cost for someone in Ms. Rios's situation would rise from $4,157.76 per year to $9,916.04 per year. *Id.* ¶ 2. Such

additional payments would have to be negotiated between SIRTOA and the UTU, and they have not been. Swords Aff. ¶ 6.

The Accrual of the Complaint's Causes of Action, and the Prior Proceedings

It appears that, on October 1, 2002, Ms. Rios entered into a registered domestic partnership with Ms. Medina as evidenced by a domestic partnership certificate of that date issued by the Office of the City Clerk of the City of New York. Comp. ¶ 13; Curcio Aff. ¶ 5. On October 9, 2002, she asked SIRTOA, in the person of SIRTOA's Manager of Pension and Administrative Benefits, Robert Curcio, to cover, on the medical insurance that SIRTOA provides to Ms. Rios, Ms. Medina because Ms. Medina had just become Ms. Rios's domestic partner. Mr. Curcio immediately told Ms. Rios that that was not possible as such extended coverage was not part of the (UTU-SIRTOA) labor agreement. Curcio Aff. ¶ 5. That request was repeated by a letter addressed to Mr. Curcio dated almost a year later (September 18, 2003) from a lawyer representing Ms. Rios, Mr. Thomas D. Shanahan; that letter "demanded that the MTA defendants provide Melissa [Medina-Rios] with health benefits as the registered Domestic Partner of Leslie [Rios]" (Comp. ¶ 18), and stated that if that demand was not granted "within five days," a lawsuit might follow. Schoolman Aff. ¶ 3. That demand was not so granted.

Ms. Rios (and Ms. Medina) commenced this action on October 28, 2003, and the summons and complaint were served on various dates in November and December, 2003. Schoolman Aff. ¶ 2. An answer on behalf of SIRTOA and the other MTA-related defendants (i.e., the MTA, the Transit Authority, and the LIRR, and their officials) was served on December 15, 2003. Schoolman Aff. ¶ 2. Because the parties' attorneys seem to agree that no facts material to possible liability are in dispute and that the liability issues raised by the complaint are matters of law and ripe for decision, SIRTOA and the remaining MTA

defendants – pursuant to a schedule agreed to by counsel – are now moving to dismiss the complaint under CPLR 3211(a)(7) and 3212. *Id.* Because that motion, and the claims against which the motion is directed, involve Ms. Rios's having entered into a domestic partnership registered in the Office of the City Clerk of the City of New York, a discussion of such a domestic partnership is called for; such a discussion follows immediately.

"Domestic Partnership" in New York City

It appears that Ms. Rios and Ms. Medina, on October 1, 2002, were issued a "Certificate of Domestic Partnership" by the Clerk of the City of New York stating that they "were registered [by the Clerk] as domestic partners." Schoolman Aff. Ex. C, ¶ 4. Such certificate and registration, made possible under what is now codified at New York City Administrative Code ("Admin. Code") § 3-240 *et seq.*, require merely that the parties submit an affidavit – and it appears that upon presentation of the affidavit the resulting certificate may be issued the same day – to the effect that they are both at least 18 years old, unmarried, not very closely related by blood, and have been living together (for no stated period of time); that both reside in or at least one is employed by the City of New York; and that neither individual has been registered as a member of another domestic partnership within the prior six months. Admin. Code § 3-241. Thus, New York City domestic partnership status requires neither that the partners be of any particular sexual orientation nor even that they be of the same sex. In other words, "sexual orientation" and indeed gender itself are irrelevant to City Clerk-issued domestic partnership certificates. And in fact, at least as of April 1998 (according to the City Council in its legislation converting the New York City domestic partnership from a creature of mayoral executive order to a creature of local law), the *majority* of those registering with the Clerk as domestic partners were "heterosexual couples," that is, composed of a man and a woman, with

a *minority* made up of "same sex couples." Local Law 27/1998, § 1.[3] (Moreover, such a domestic partnership "shall terminate whenever one of the parties to the partnership marries," Admin. Code § 3-242(b), which clearly indicates that the domestic partnership concept in the New York City Administrative Code contemplated that heterosexuals could enter into such partnerships.) Being registered as a New York City domestic partner, thus, is not at all – in law or practical fact – synonymous with being homosexual.

Summary of Defendants' Arguments

For the reasons outlined below, all of the complaint's claims should be dismissed either because they fail to state a cognizable claim within the meaning of CPLR 3211(a)(7), or lack merit on the undisputed facts and so should be dismissed by way of summary judgment under CPLR 3212. As explained in Points I and II, SIRTOA's decision not to grant Ms. Rios's request to provide medical insurance to Ms. Medina (a domestic partner but not a spouse and thus such expanded coverage would involve a *unilateral* change in the collectively bargained medical coverage that would be unlawful under New York law) simply is not discrimination on

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[3] Section 1 of Local Law 27/1998 reads, in part, as follows:

> Declaration of legislative intent and findings. Mayoral Executive Orders spanning the past two administrations have established several rights and procedures relative to domestic partnerships, including a procedure for City residents to register their domestic partnerships in the office of the City Clerk. Such orders have further provided, among other things, that (i) registered domestic partners are eligible for visitation rights in City hospitals and correction facilities; (ii) City employees with registered domestic partnerships are eligible for child care leave and bereavement leave on the same basis as those benefits are afforded to employees with regard to their spouses; and (iii) registered domestic partnership is evidence of the right to succession to tenancy rights in facilities operated by the New York City housing authority and the department of housing preservation and development. *By the end of April 1998, there were approximately 8,700 couples registered as domestic partners in New York City. More than 55% of those registered domestic partners were heterosexual couples, and less than 45% were same sex couples.* Almost forty percent of registered domestic partnerships have accessed City health benefits available to partners of City employees and retirees.
>
> The Council hereby finds that the provisions of those executive orders should now be enacted into local law .... (Emphasis added.)

the basis of Ms. Rios's (or anyone else's) "sexual orientation"; and as explained in Point III, SIRTOA's decision, under controlling precedent, is also not discrimination on the basis of "marital status." As discussed in the remaining Points, the complaint's other claims – all non-statutory – lack merit (Points IV, V, and VI) and are time-barred (Point VII). Ms. Rios's domestic partner Ms. Medina, since she is not a SIRTOA employee, is not a proper party (Point VIII), and all MTA-related defendants other than SIRTOA (i.e., the MTA, the Transit Authority, and the individual MTA-related officials) are not proper parties either. Finally, as SIRTOA and the MTA-related defendants are public benefit corporations, the prayer for punitive damages should be stricken (Point X).

I. THE CLAIMS OF "DISPARATE TREATMENT" SEXUAL ORIENTATION DISCRIMINATION SHOULD BE DISMISSED

At the heart of plaintiffs' lawsuit is the claim that SIRTOA's refusal to expand its collectively bargained medical insurance for its employee Ms. Rios to cover, as a dependent of Ms. Rios's, Ms. Medina (who is neither married to, nor the child of, Ms. Rios) is *intentional* discrimination – often referred to as in the law (and the complaint in this case) as "disparate treatment"[4] – because of Ms. Rios's sexual orientation. That claim is raised under both the New York State Executive Law (within the Third Cause of Action) and under the New York City Administrative Code (in the First Cause of Action and the Second Cause of Action). Because the State Executive Law has prohibited intentional discrimination in employment because of sexual orientation since January 16, 2003 (L. 2002, Ch. 2, eff. Jan. 16, 2003) and SIRTOA does not dispute that it is subject to the State Executive Law, this claim will be addressed on its merits, even though, as discussed in Point II, the City Administrative Code –

[4] *See, e.g., Raytheon Co. v. Hernandez*, 124 S. Ct. 513, 519 (2003).

and thus the Code's parallel prohibition of discrimination in employment because of sexual orientation, with the same elements of proof – does not apply to SIRTOA, or any other MTA-related defendant, by virtue of Public Authorities Law § 1266(8). The complaint's intentional sexual-orientation discrimination claim should be dismissed for failing to state a cognizable cause of action within the meaning of CPLR 3211(a)(7) and by way of summary judgment under CPLR 3212.

To begin with, recognizing that one's being of a particular sexual orientation is different from one's being (or not being) married, and different from one's being in a domestic partnership (that state law treats as not being married), appellate courts around the country generally agree that an employer's not providing insurance or benefits for employees' domestic partners – where such insurance or benefits are provided for employees' spouses – is *not* discrimination based on sexual orientation because such limitation applies equally to *all* unmarried employees with domestic partners, whatever the employees' (or their partners') sexual orientation, heterosexual or homosexual (or something else). *See, e.g., Ross v. Denver Department of Health and Hospitals*, 883 P.2d 516 (Colo. Ct. App. 1994), which explained how an employer's providing certain benefits for employees' spouses, but not employees' domestic partners, did not constitute unlawful sexual orientation discrimination:

> The definition [of those individuals related to the employee who are covered for benefits purposes, which definition includes a spouse but not a domestic partner] applies equally to heterosexual and homosexual employees and thus does not discriminate on the basis of sexual orientation. A homosexual employee is not precluded from enjoying family sick leave benefits.... The only portion of the definition ... that arguably affects homosexuals differently is the language allowing an employee to take family sick leave to care for a husband or wife. This portion of the rule does not differentiate between heterosexual or homosexual employees but rather between married and unmarried employees.... An unmarried heterosexual employee also would not be permitted to take family sick leave benefits to care for his or her

> unmarried opposite-sex partner. Thus, the rule does not treat homosexual employees and similarly situated heterosexual employees differently.

Id. at 519-20. For a sample of the numerous other decisions rejecting, on reasoning similar to that of the *Ross* court, arguments that claims for "sexual orientation" discrimination may be based on allowing benefits for employees' spouses but not their domestic partners, *see Rutgers Council of AAUP Chapters v. Rutgers State Univ.*, 689 A.2d 828, 838 (N.J. App. Div. 1997); *Phillips v. Wisconsin Personnel Comm.*, 482 N.W.2d 121, 127-128 (Wis. Ct. App. 1992); *Hinman v. Dep't of Personnel Admin.*, 167 Cal. App. 3d 516, 530 (Cal. Ct. App. 1985). *See also Lily v. City of Minneapolis*, 527 N.W.2d 107, 112-13 (Minn. Ct. App. 1995) (statute providing certain benefits for married employees but not for employees with domestic partners does not violate state's "prohibition against discrimination based on sexual orientation."). The complaint's claims of intentional, "disparate treatment," discrimination based on sexual orientation fail as a matter of law, and should be dismissed under CPLR 3211(a)(7).[5]

If this Court were to consider evaluating those claims on a summary judgment motion standard, dismissal (under CPLR 3212) would also be called for. In order to survive a motion for summary judgment addressed to a disparate treatment claim of employment discrimination under the State Executive Law (and the City's Administrative Code, even if it were applicable to the defendants), a plaintiff must initially make out a "prima facie" case, that is, show that (among other things) an adverse employment decision or action was taken, and under circumstances suggesting illegal discriminatory intent based on, e.g., race, religion, age, national origin, or, here, "sexual orientation." If such a prima facie case is shown, and the

[5] It may be that Ms. Rios would disagree with how the law of New York traditionally has been interpreted concerning who may be or become a "spouse" or "married," but Ms. Rios's claim then would be addressed to New York's marriage laws (*Ross*, 883 P.2d at 520), and she – quite properly – raises no such claim against SIRTOA, or any other defendant, in this litigation.

defendant-employer articulates a non-discriminatory reason for the employment decision or action, the plaintiff, in order to keep his or her claim alive and proceed to trial, must point to admissible evidence showing that, more likely than not, the explanation for the employment decision or action presented by the employer was actually a pretext to hide illegal discrimination. *See, e.g., Pramdip v. Building Service 32B-J Health Fund*, 308 A.D.2d 523 (2d Dept. 2003).

At least one recent appellate decision has expressed doubt that, by itself, the denial of benefits (in a case in which the benefits were sought for the employee himself or herself, not even – as here – for a non-employee) would be an "adverse employment decision" because the decision does not seem to disadvantage the employee in his or her *employment*, that is, her current job or future career (*Mario v. P&C Food Markets, Inc.*, 313 F.3d 758, 767 (2d Cir. 2002), *citing Torres v. Pisano,* 116 F.3d 625, 639-40 (2d Cir. 1997)).[6] Ms. Rios does not allege that SIRTOA's refusal to cover Ms. Medina on Ms. Rios's medical insurance disadvantages Ms. Rios herself in her present job or in any future one, so SIRTOA's refusal may be an adverse decision but not an averse *employment* decision. Her claim thus is not cognizable.

But even assuming that SIRTOA's refusal to grant Ms. Rios's request to extend its medical insurance for her to cover her domestic partner would be an adverse employment decision, there is no evidence – necessary for plaintiff to make out a prima facie case of discrimination because of "sexual orientation" – that that decision arose under circumstances suggesting intentional discrimination based on Ms. Rios's (or anyone else's) sexual orientation. For instance, there is no evidence that SIRTOA ever agreed to cover a domestic partner of a

[6] New York courts interpreting New York State anti-discrimination legislation frequently rely on decisions interpreting comparable federal legislation. *See, e.g., Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629 (1997).

heterosexual UTU-represented employee (or ever agreed to cover such an employee's domestic partner who was a person of the *opposite* gender); and the history of the New York City "domestic partnership" legislation shows that the majority of registered domestic partners were couples of the opposite gender. (*See* fn. 3, above.) There is also no evidence that SIRTOA ever refused to cover a spouse or a child of a UTU-represented employee because of the employee's, or spouse's, or child's, sexual orientation, or that SIRTOA ever agreed to cover a non-spouse/non-child of a UTU-represented employee who was heterosexual (or otherwise). *See* Curcio Aff. ¶ 3. The standard way to make out a prima facie case of intentional discrimination is for a plaintiff to point to better treatment by the employer of an employee similarly situated to the plaintiff "in all material respects" except for the particular characteristic sued on (e.g., race, religion, national origin, or, here, sexual orientation), *See, e.g., Shumway v. United Parcel Service*, 118 F.3d 60, 64 (2d Cir. 1997); *Ortiz v. Brookstone Co.*, 274 F. Supp.2d 456, 463 (S.D.N.Y. 2003). The circumstances of this case – in which SIRTOA simply adhered to its long-standing practice of not covering *anyone* other than a UTU-represented employee's spouse or child, mandated in SIRTOA's view by its labor agreement with the UTU – are insufficient to suggest, even at the prima facie stage, that the employment decision complained of was made under circumstances suggesting an intent to discriminate against Ms. Rios (or anyone else) because of anyone's sexual orientation. Summary judgment is thus called for.

In any event, SIRTOA has a non-sexual-orientation based explanation for its decision. By virtue of a collective bargaining agreement, the medical insurance that SIRTOA provides to its UTU-represented employees (and whose premiums SIRTOA fully pays for), covers only UTU-represented employees and their spouses and unemancipated children (without regard to

anyone's sexual orientation), and thus all others (whatever their sexual orientation, whether domestic partners of UTU-represented employees or their siblings, parents, or grandchildren) are not covered. For SIRTOA to decide to add coverage of such additional individuals – whatever their sexual orientation – would be very expensive (e.g., for one employee, like Ms. Rios, who is not married and has no minor children, the cost of adding coverage of a domestic partner, or a sibling, or a parent, would cost an additional $5,756/year (Curcio Aff. ¶ 2)). It would also be inconsistent with the collective bargaining agreement with the UTU under which medical coverage for UTU-represented employees is maintained (and it would be illegal under New York Law because the terms and conditions of collectively bargained for labor agreements such as the UTU's agreement with SIRTOA may not be changed – even after such as agreement's nominal expiration date, Civil Service Law § 209(a)(1)(e) – except through agreement of the parties, and no such agreement has been reached (Swords Aff. ¶¶ 2, 6)). These are non-sexual-orientation-based reasons for the employment decision of which Ms. Rios complains. *Cf. Manhattan Pizza Hut, Inc. v. N.Y.S. Human Rights App. Bd.*, 51 N.Y.2d 506, 513-14 (1980) (employer's policy against one spouse supervising another is a policy to avoid on-the-job nepotism and not "marital status" discrimination even if it causes dismissal of wife who had been supervised by husband); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (in religious discrimination case based on employer's failure to change employee's religion-mandated work schedule, employer could rely on provisions of collectively bargained seniority system that prohibited such change; to breach seniority system or to cause employer to incur extra costs, e.g., over-time to other employees, in order to accommodate plaintiff would be undue hardship on employer).

To survive summary judgment, Ms. Rios would have to point to admissible evidence suggesting that these reasons are not just false but also pretexts "for illegal discrimination" intended to harm UTU-represented SIRTOA employees because of their sexual orientation (or someone else's).[7] There is no such evidence. Summary judgment should be granted dismissing the intentional, that is, "disparate treatment," claim in this lawsuit raised under the State Executive Law and, were it applicable to SIRTOA – contrary to SIRTOA's view (Point II) – under the City's Administrative Code. *See, e.g., Mario*, 313 F.3d at 767 (summary judgment dismissing sex discrimination claim affirmed where employment decision, denial of medical coverage for employee's gender reassignment surgeries, was made because insurer believed the surgeries not to be "medically necessary" within the meaning of the insurance policy and plaintiff "had not offered any proof that [this] proffered reason was pretextual.").

The complaint's claims of intentional, disparate treatment, discrimination based on sexual orientation should be dismissed.

II. NO CLAIM OF "DISPARATE IMPACT" SEXUAL ORIENTATION DISCRIMINATION IS PLEADED PROPERLY (IN THE SECOND CAUSE OF ACTION), BUT IF IT IS IT SHOULD BE DISMISSED

Under the City Administrative Code (at § 8-107(17)), an employee may assert a "disparate impact" claim of employment discrimination. A "disparate impact" discrimination claim, as distinct from a "disparate treatment" discrimination claim (which requires proof of *intentional* discrimination because of a person's protected characteristics, e.g., race, religion, national origin, or (in this instance) sexual orientation), involves a facially neutral policy that,

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[7] *See, e.g., King v. Brooklyn Sports Club*, 305 A.D.2d 465, 466 (2d Dept. 2003). *See also Hardy v. General Electric Co.*, 270 A.D.2d 700, 703 (3d Dept. 2000) ("To defeat a properly supported motion for summary judgment in an age discrimination case, a plaintiff must show that there is a 'material issue of fact as to whether (1) the employer's asserted reason [for its employment decision] ... is false or unworthy of belief *and* (2) more likely than not the employee's age was the real reason.'" (Deletion and emphasis in original, internal citation omitted.)

while not intended to be discriminatory, nevertheless has the effect, or "impact," of disadvantaging in their employment or employment opportunities, in a substantially disproportionate way, those with that protected characteristic. *See, e.g., Raytheon*, 124 S. Ct. at 519. Plaintiffs *may* have been considering asserting such a claim in the complaint's Second Cause of Action because they cite to Admin. Code § 8-107(17) and mention that that section is one under which a disparate impact claim may be asserted. But in the complaint's actual allegations *addressed to the conduct of the defendants*, there is *no* allegation that that conduct had any disparate impact (let alone a statement of alleged *evidence* that "demonstrates" that SIRTOA's, and the UTU's, not having agreed to cover for medical insurance purposes the domestic partners of SIRTOA employees "results" in a disparate impact that is "statistically significant," as would be called for by § 8-107(17)(a)(1), (2)). Rather, the allegations directed to defendants' conduct refers only to "disparate treatment" (see Comp. ¶ 31), which is *intentional* discrimination and thus very different from disparate impact (and has been dealt with in Point I). Thus, at the most basic, threshold level, no sexual orientation "disparate impact" discrimination claim has been properly pleaded.

If such a claim has been pleaded, however, it should be dismissed for several reasons. First, it is based solely on the City Administrative Code but SIRTOA (and the other MTA-related defendants, even if *they* did anything of which plaintiffs can properly complain about, which is not the case) have been exempted, under Public Authorities Law ("PAL") § 1266(8), from the jurisdiction of city law. And second, no facts have been pleaded, and no evidence can be presented, to support such a claim on its merits.

At all relevant times for purposes of this lawsuit, PAL § 1266(8) has expressly exempted the MTA and its subsidiaries, which include SIRTOA, and (via an amendment to

§ 1266(8) effective May 15, 2000) the Transit Authority as well, from the jurisdiction of local laws, which would include the City Administrative Code's employment discrimination provisions because they affect MTA and SIRTOA and Transit Authority "activities" such as employing people and providing wages and benefits to them.[8] And indeed, the New York City agency empowered to interpret and enforce those portions of the City Administrative Code that prohibit employment discrimination on the basis of, among other things, sexual orientation – the New York City Human Rights Commission – has repeatedly dismissed employment discrimination claims filed with it by Transit Authority employees because that Commission has concluded that, in light of PAL § 1266(8), as amended in May 2000, it lacks jurisdiction to hear employment discrimination claims under the City Administrative Code against the Transit Authority. *See* Schoolman Aff. ¶ 5, Ex. D (Notice of Administrative Closure, N.Y.C. Comm. on Human Rights, *Pinkston v. N.Y.C. Transit Auth.*, Cmplt. No. M-E-AR-01-1010596-E (March 7, 2002)). Because § 1266(8) also applies to the MTA and its subsidiaries, such as SIRTOA, the City Human Rights Commission would almost certainly dismiss claims against SIRTOA or the MTA for lack of jurisdiction. As the interpretation of the City Administrative

[8] PAL § 1266(8), as amended effective May 15, 2000, reads in part as follows:

> The authority [i.e., the MTA] may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority and its subsidiaries, and New York city transit authority and its subsidiaries. Except as hereinafter specially provided, *no municipality or political subdivision ... shall have jurisdiction over any facilities of the [MTA] and its subsidiaries, and New York city transit authority and its subsidiaries, or any of their activities or operations. The local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision, heretofore or hereafter adopted, conflicting with this title or any rule or regulation of the authority or its subsidiaries, or New York city transit authority or its subsidiaries, shall not be applicable to the activities or operations of the [MTA] and its subsidiaries, and New York city transit authority*, or the facilities of the [MTA] and its subsidiaries, and New York city transit authority and its subsidiaries, except such facilities that are devoted to purposes other than transportation or transit purposes. (Emphasis added.)

Code by the administrative agency established to interpret and enforce it should be given, normally, dispositive weight, *Gaines v. N.Y.S. Div. of Housing*, 90 N.Y.2d 545, 548-49 (1997), a claim (here, a sexual orientation "disparate impact" claim) asserted *solely* under local law – the City Administrative Code – may not, in light of PAL § 1266(8), be entertained against SIRTOA or the MTA (or the Transit Authority). The bulk of the caselaw under PAL § 1266(8) supports this conclusion. MTA subsidiaries have regularly been found exempt from claims under local laws in a variety of circumstances. *See, e.g., Robinson v. Metro-North Commuter R.*, 94 Civ. 7374, 1998 U.S. Dist. LEXIS 373, *33 (S.D.N.Y. Jan. 15, 1998) (City Administrative Code discrimination claim); *Matter of Penny Port LLC*, N.Y.L.J. Sept. 27, 1999, at 30, col. 5 (Sup. Ct. New York County) (City non-smoking legislation); *People v. Metro-North Commuter R.*, 132 Misc. 2d 1072 (Sup. Ct. Bronx County 1986) (City fire ordinances); *People v. Long Island Rail Road*, 90 Misc. 2d 269 (App. Term 2d Dep't 1976), *aff'd*, 41 N.Y.2d 1039 (1977) (County sanitation code).[9]

[9] The decisions in *Everson v. New York City Transit Auth.*, 216 F.Supp.2d 71 (E.D.N.Y. 2002), *Wahlstrom v. Metro-North Commuter R.*, 89 F.Supp.2d 506 (S.D.N.Y. 2000), and *Reilly v. Transport Workers Union*, N.Y.L.J. Jan, 2, 2003, at 18, col. 5 (Sup. Ct. New York County), conclude that §1266(8) does not exempt the Transit Authority or Metro-North from the City Administrative Code. These decisions are not controlling; nor are they persuasive. Among other things, they fail to note the interpretation of the City Commission on Human Rights, which has clearly concluded that it no longer has jurisdiction over the Transit Authority. *See Pinkston* (Schoolman Aff. Ex. D, ¶ 5). And they misconstrue *Levy v. City Commission on Human Rights*, 85 N.Y.2d 740 (1995), which predates the amendment of PAL § 1266(8) that added the Transit Authority to the entities exempted from municipal legislation, and in fact supports the conclusion that § 1266(8) *as amended* would exempt the Transit Authority (as well as the MTA and any of its subsidiaries, e.g., SIRTOA) from the jurisdiction of the City Administrative Code, just as the City Commission on Human Rights concluded after the 2000 amendment went into effect so as to cover the Transit Authority. In *Levy,* the court observed, correctly, that in 1995 there was nothing in the PAL that then expressly exempted the Transit Authority from the reach of local legislation such as the City Administrative Code, and contrasted that state of the law as to the Transit Authority with the specific exempting language of the PAL section governing the Capital District Transportation Authority, which section (§ 1307(7)) contained exempting language almost identical to the *current* PAL § 1266(8). PAL § 1266(8) (as amended in 2000) now expressly exempts the Transit Authority (as well as the MTA and its subsidiaries, such as SIRTOA) from local legislation affecting those authorities' "activities" (and we think is not a matter of fair dispute that employing people to clean railroad cars is one of SIRTOA's "activities").

SIRTOA is the only proper defendant in this case and is not subject to the City Administrative Code because of PAL § 1266(8). (And even if the MTA and the Transit Authority were proper defendants, they would not be subject to the City Administrative Code either). As any "disparate impact" discrimination claim in this case depends on the City Administrative Code, that claim cannot be entertained and should be dismissed.

In any event, plaintiffs could not prevail on a disparate impact claim here because they have alleged no evidence, and none could be presented, showing a substantial disparate impact on homosexual UTU-represented SIRTOA employees from the (collectively bargained) policy that they challenge: SIRTOA's not covering, for medical insurance purposes, anyone other than an employee's spouse (or dependent children). That policy might be said to "disadvantage" unmarried *heterosexual* employees (with domestic partners or friends or parents or siblings whom they would like to have covered by SIRTOA-paid insurance); it might also be said to "advantage" all employees – regardless of their sexual orientation – who live alone and who realize that if SIRTOA changed its policy and began to cover "domestic partners" of employees, which would be expensive, SIRTOA might reduce other benefits that they receive from SIRTOA, such as wages. And since there is no information about how many UTU-represented SIRTOA employees fit into any category of sexual orientation (and the Administrative Code, at § 8-107(16)(b), expressly refuses to authorize an employer's asking for such information, and SIRTOA does not have such information (Curcio Aff. ¶ 4)), plaintiffs could not show any statistical impact for lack of statistics.

Furthermore, SIRTOA has excellent business reasons – "significant business objectives," to use the language of the Administrative Code (§ 8-107(17)(a)(2)) – for maintaining the policy that is being challenged, that is, the policy of not covering medical

insurance for individuals other than (UTU-represented) employees and their spouses and dependent children. Not only is expanding such coverage a violation of New York law (Civil Service Law § 209 (a)(1)(e)) that forbids an employer's changing collectively bargained wages and benefits unilaterally, that is, without the union's agreement, and such an agreement has not been negotiated between SIRTOA and the UTU, but expanding such coverage – even if that expansion is limited to "domestic partners" (of, obviously, both heterosexual and homosexual employees) and thus does not cover needy parents or siblings – is very expensive: for just one employee such as Ms. Rios, for instance, that additional cost is some $5,756 per year. Plaintiffs do not allege, let alone demonstrate, that there is, as would be their burden under the Administrative Code's "disparate impact" provisions, an alternative that would serve SIRTOA's business objectives (in saving a lot of money, to say nothing about not violating New York's law forbidding unilateral changes to the terms of collective bargaining agreements) that are achieved by SIRTOA's maintaining the status quo established by the SIRTOA-UTU labor agreement.

The "disparate impact" version of the complaint's sexual orientation discrimination claim, even if asserted and properly pleaded (in the Second Cause of Action), should be dismissed as lacking merit.

III. THE "MARITAL STATUS" DISCRIMINATION CLAIM SHOULD BE DISMISSED

The complaint, within its Third Cause of Action (at Comp. ¶ 35), seems to assert a claim, under New York State's Executive Law § 296, of employment discrimination on the basis of "marital status." Although not described in any detail, this claim presumably is to the effect that an employee's (e.g., Ms. Rios's) being in a domestic partnership is a "marital status" and SIRTOA's including a UTU-represented SIRTOA employee's spouse on that employee's

SIRTOA-paid medical insurance (as a covered dependent), but not including such an employee's domestic partner, is employment discrimination on the basis of "marital status" prohibited by the Executive Law. That claim should not survive.

To begin with, the Second Department has concluded that being in a domestic partnership is *not* a "marital status" for purposes of the employment discrimination provisions of the State Human Rights Law. *Funderburke v. Uniondale Free School Dist. No. 15*, 251 A.D.2d 622, 623 (2d Dept.), *lv. denied*, 92 N.Y.2d 813 (1998). Moreover, all UTU-represented SIRTOA employees are hired and paid without regard to whether *they* are, or are not, married. Ms. Rios's pay, for instance, has nothing to do with her marital status. Nor do *her* benefits have anything to do with her marital status, as *she* would remain covered by the same SIRTOA-paid medical insurance whether or not she is married or got married. The Executive Law's prohibiting discrimination in employment based on marital status means "that employers may no longer decide whether to hire, fire, or promote someone because *he or she* is single, married, divorced, separated or the like," *Manhattan Pizza Hut,* 51 N.Y.2d at 512 (emphasis added) (employer did not violate State Executive Law's prohibition of discrimination because of marital status by enforcing anti-nepotism rule that required the termination of an employee who was married to her supervisor; there was no cognizable marital status discrimination but rather permissible discrimination against those working directly for their spouses). So, putting aside the Second Department's view that being in a domestic partnership relationship is not a "marital status" at all, there is no violation of the Executive Law's prohibition of discrimination in employment because of marital status in an employer's not providing health insurance coverage for an unmarried employee's domestic partner (or mother, or cousin, or sister) where, as here, the insurance "available *to the plaintiff* as an unmarried [employee or] retiree is the

same as that available to married employees and retirees," *Funderburke*, 251 A.D.2d at 624 (emphasis added).

The complaint's "marital status" discrimination claim, which is presented solely under the New York State Executive Law (within the Third Cause of Action), should be dismissed.

IV. PLAINTIFFS' FOURTH CAUSE OF ACTION SHOULD BE DISMISSED

Plaintiffs' Fourth Cause of Action is one for violation of an "Executive Order codified at 9 NYCRR § 5.32" (Comp. ¶ 39). This § 5.32 (signed by Governor Pataki on April 9, 1996), however, does *not* "prohibit[] discrimination in the terms, conditions and privileges of employment based upon sexual orientation and marital status by State Agencies" (as alleged at Comp. ¶ 39). For one thing, "martial status" is nowhere mentioned. In any event, § 5.32, in relevant respect, does nothing more than, via a new executive order (No. 33), "continue[] and amend[]" an older executive order (issued by Governor Cuomo on November 18, 1983, Exec. Order No. 28, and amended by Governor Cuomo on April 21, 1987, Exec. Order No. 28.1) concerning sexual orientation. The new executive order, i.e., No. 33 (signed by Governor Pataki on April 9, 1996), is codified at 9 NYCRR § 5.33. (The older Orders No. 28 and No. 28.1 are codified at 9 NYCRR § 4.28, which section and both 9 NYCRR § 5.32 and 9 NYCRR § 5.33 are annexed to the accompanying affirmation of Richard Schoolman in Exhibit F, for the Court's convenience.) Nowhere in these executive orders, which deal the State of New York's "policy ... not to discriminate on the basis of sexual orientation" and the staffing of a task force to study the matter, is there any stated policy affecting entities *other than the State of New York itself* "in the provision of benefits or services" – matters not relevant here as the State of New York is not the provider of any benefits or services plaintiffs are seeking in this action – or "in

the [S]tate's capacity as an employer" (Exec. Order No. 33, 9 NYCRR § 5.33, first "whereas" clause).

As outlined above in Point I and Point II, SIRTOA's not adding Ms. Medina as a covered dependent on (SIRTOA employee) Ms. Rios's medical insurance is not an act of discrimination against Ms. Rios (or Ms. Medina) on the basis of anyone's sexual orientation. But even if it were, it would not be conduct of the State of New York in the State's capacity as an employer but conduct of another entity (i.e., SIRTOA), legally and practically distinct from the State, and thus not covered by 9 NYCRR § 5.32 (or § 5.33), or the underlying Executive Order or Orders, relied on in plaintiffs' Fourth Cause of Action. This cause of action thus fails.

And even if SIRTOA were a New York State agency, there is no basis to conclude that a codified Executive Order setting out New York State's "policy" – as opposed to New York State's *law* – would support a private right of action such as Ms. Rios's. Nothing indicates that the Legislature of the State of New York, the body that enacts legislation, intended (or even that Governor Pataki intended) the Executive Order in question to have the force of law and to provide a cause of action to an employee of a New York State executive agency complaining of conduct allegedly inconsistent with the "policy" outlined in the Executive Order.

The plaintiffs' Fourth Cause of Action, accordingly, is multiply defective and should be dismissed.[10]

[10] As discussed in Point VII below, *if* this Executive Order-based cause of action were sufficient to state a claim against SIRTOA (or any other MTA-related defendant), that claim – which has no limitations period of its own – would be subject to the limitations period for proceedings under CPLR Article 78 (i.e., four months under CPLR 217(1)), and thus would be time-barred.

V. PLAINTIFFS' FIFTH CAUSE OF ACTION SHOULD BE DISMISSED

The complaint's fifth cause of action relies on a written statement (described in the complaint as an "Equal Employment Opportunity Policy," Comp. ¶¶ 46, 8) that says that it is SIRTOA's policy to be an "equal opportunity employer" and that SIRTOA will not discriminate "unlawful[ly]" on the basis of, among other things, "sexual orientation." (The "policy" in question, not well identified in the complaint, appears to be an April 2002 letter attached to the Schoolman affirmation as Exhibit G). The complaint asserts that, by SIRTOA's denying Ms. Rios's request to have her domestic partner covered by the medical insurance that SIRTOA provides for Ms. Rios as an employee, SIRTOA is violating its own policy; and because the policy statement is supposedly a "contract," SIRTOA has breached that contract. Comp. ¶ 49. This cause of action fails for several reasons.

To begin with, as explained above, SIRTOA provides medical insurance for its employee Ms. Rios without regard to whatever her sexual orientation may be (and does not include Ms. Medina as a dependent on Ms. Rios's coverage because, *whatever* Ms. Medina's sexual orientation might be, Ms. Medina is simply not Ms. Rios's spouse or minor child). There is no unlawful discrimination by SIRTOA on the basis of sexual orientation here. But even if there were, the April 2002 policy statement itself is merely a general statement of policy, issued unilaterally, and does not address *at all* the issue of extending the medical insurance provided to UTU-represented SIRTOA employees to cover people who are "domestic partners" of such SIRTOA employees or to cover anyone else who is not the spouse or dependent child of a UTU-represented SIRTOA employee. The policy, thus, will not support a private right of action based on contract, *see, e.g., Blaise-Williams v. Sumitomo Bank, Ltd.*, 189 A.D.2d 584, 586 (lst Dep't 1993) (employer's general anti-discrimination policy

statement "may not serve as the basis for a breach of contract claim"). But even if, normally, this policy statement could be deemed to support a private right of action (for breach of contract), *in this case* Ms. Rios is union-represented and subject to a collective bargaining agreement with a broad arbitration clause that permits grievances over SIRTOA's allegedly improper denial of benefits to be arbitrated (Swords Aff. ¶ 4); her claim of breach of a "contract" governing her wages, or benefits, thus – because it was arbitrable (*see, e.g., Bakery Drivers Union v. Krug Baking Co.*, 19 A.D.2d 301 (2d Dept. 1963)) – could not be presented in a court action. *See, e.g., Board of Education v. Ambach*, 70 N.Y.2d 501, 509 (1987). Neither Ms. Rios nor her union commenced such an arbitration proceeding. Swords Aff. ¶ 4.

And even if this matter were not arbitrable, the claim presented could have been presented via an Article 78 proceeding (challenging SIRTOA's administrative decision – of which Ms. Rios was informed on October 9, 2002, over a year before this action was commenced – to deny her request to have Ms. Medina covered on Ms. Rios's SIRTOA-paid medical insurance). This claim thus would be subject to Article 78's four-months limitations period, which would make this claim untimely (as discussed in more detail in Point VII, below).

The fifth cause of action, accordingly, should be dismissed.

VI. PLAINTIFF'S SIXTH CAUSE OF ACTION SHOULD BE DISMISSED

Plaintiffs' sixth cause of action seeks "a declaratory judgment of this Court declaring the [medical insurance coverage] benefits sought herein to be a legal obligation of the defendants rather than a privilege of employment properly achieved through collective bargaining" (Comp. ¶ 51). Because requests for relief are generally deemed *not* to be part of a cause of action (*see, e.g., Philips v. Republic Ins. Co.*, 67 A.D.2d 725 (2d Dept. 1975)),

this "cause of action" should be dismissed as a matter of form. On the merits, the declaratory judgment that plaintiffs seek, in any event, is not called for because – as discussed above – the medical insurance coverage Ms. Rios seeks to have SIRTOA add for her domestic partner is not a legal obligation unless and until mandated by a collective bargaining agreement with Ms. Rios's union (i.e., co-defendant UTU). But the merits should not be reached because where, as here, the essential relief that a party seeks could have obtained through an Article 78 proceeding – *i.e.*, a proceeding asserting that a government employer "failed to perform a duty enjoined upon it by law" or made a "determination ... [that was] affected by an error of law or was arbitrary or capricious" (CPLR 7803[1], [3]), and in which proceeding the court may issue a judgment that "direct[s] or prohibit[s] specified action by the respondent" (CPLR 7806) – the relevant statute of limitations is the four-month one established (in CPLR 217(1)) for Article 78 proceedings, notwithstanding the nominal use of the form of a declaratory judgment action. *See, e.g., Solnick v. Whelan*, 49 N.Y.2d 224 (1980). The plaintiffs' "declaratory judgment" claim, asserted in a plenary action commenced 12½ months after Ms. Rios was informed of SIRTOA's position that it could not then include Ms. Medina as a family-coverage dependent on the medical insurance that SIRTOA provided for Ms. Rios, is thus – as explained further in Point VII – untimely.

VII. THE NON-STATUTORY CLAIMS IN THE COMPLAINT ARE SUBJECT TO THE FOUR-MONTH LIMITATIONS PERIOD FOR CPLR ARTICLE 78 PROCEEDINGS AND ARE THUS UNTIMELY

This action was commenced on October 28, *2003*. Ms. Rios, however, was informed on October 9, *2002* (by a SIRTOA manager, Robert Curcio), that because of SIRTOA's collective bargaining agreement with the UTU, SIRTOA could not cover Ms. Medina (Ms. Rios's domestic partner) on the medical insurance SIRTOA provided to Ms. Rios. Curcio Aff. ¶ 5.

Ms. Rios's claims asserted in this lawsuit thus accrued on October 9, 2002. The non-statutory claims in this case (i.e., the claims not relying on the State Executive Law or the City Administrative Code, which have their own lengthy limitations periods) – violation of anti-discrimination policies supposedly found in a Governor's executive order and in a policy statement expressly covering SIRTOA, which violation(s) would allegedly support the issuance of a declaratory judgment, as outlined in the complaint's Fourth, Fifth, and Sixth Causes of Action – are, notwithstanding how they are styled, claims that, in a matter related to Ms. Rios's employment, a "body" (here, SIRTOA) "failed to perform a duty enjoined upon it by law" or made a decision that "was affected by an error of law or was arbitrary and capricious" within the meaning of CPLR 7803(1), (3). Such claims were, thus, remediable via an Article 78 proceeding and the limitations period for such proceedings – CPLR 217's four months – applies. *See, e.g., Sutherland v. Village of Suffern*, 139 A.D.2d 728 (2d Dept. 1988). This action, having been commenced over one year after Ms. Rios had been informed that her medical coverage would not be changed, is thus untimely as to its non-statutory claims (i.e., those asserted in the complaints Fourth, Fifth, and Sixth Causes of Action); the claims in those Causes of Action should thus be dismissed.

VIII. MS. MEDINA LACKS STANDING TO SUE IN THIS ACTION

All of the claims in this action are, on their face or in substance, state-law *employment* discrimination claims. The complaint asserts that Ms. Rios – as an employee of SIRTOA – has been discriminated against by SIRTOA, her employer, in that SIRTOA has not modified her SIRTOA-paid benefits package to include in Ms. Rios's medical coverage a non-child/non-spouse dependent, Ms. Medina. In other words, Ms. Rios asserts that it is her right, as an SIRTOA employee, to have Ms. Medina added to Ms. Rios's medical insurance that SIRTOA

pays for. Because Ms. Medina is not a SIRTOA employee, her claim at most is derivative of Ms. Rios's; *Ms. Medina herself*, in other words, has no claim for *employment* discrimination and lacks standing to assert any of the claims asserted in her name. *See, e.g., Micek v. City of Chicago*, No. 98 C6757, 1999 U.S. Dist. LEXIS 16263, *11-15 (N. D. Ill. Sept. 20, 1999) (in lawsuit under federal Americans with Disabilities Act challenging failure to provide certain medical insurance benefits for a wife under husband's medical insurance provided to him as employee of employer, wife's derivative claim against husband's employer dismissed because she was not employer's employee and thus *she* was not discriminated against by the terms of the employer's medical insurance coverage provided to husband). To the same effect, dismissing for lack of standing claims raised by a spouse of an employee for benefits denied to the spouse as a dependent under insurance provided by the employer to the employee, *see also Foote v. Folks, Inc.*, 864 F. Supp. 1327 (N.D. Ga. 1994), and more recently, *Collins v. OSF Healthcare Sys.*, 262 F. Supp.2d 959 (C.D. Ill. 2003).

IX. THE MTA AND THE TRANSIT AUTHORITY ARE NOT PROPER PARTIES; NOR ARE MESSRS. KALIKOW, CURCIO, AND REUTER, WHO ARE SUED IN THEIR OFFICIAL CAPACITIES AS OFFICERS OR MANAGERS OF THE MTA, SIRTOA, OR THE TRANSIT AUTHORITY.

The defendant Metropolitan Transportation Authority ("MTA") – and its chairman, defendant Peter Kalikow (sued in his official capacity) – are not proper parties to this action. Ms. Rios is employed solely by SIRTOA, which was created as a "public benefit corporation" in 1970 to operate what was then known as the Staten Island Rapid Transit railway. SIRTOA was created as, and remains, a subsidiary corporation of the MTA under Public Authorities Law ("PAL") § 1266(5); the Long Island Railroad and Metro-North Commuter Railroad are also such subsidiary corporations of the MTA. Schoolman Aff. ¶ 3 n.1. "Section 1266(5) [of the PAL] specifies that the MTA's subsidiary corporations are distinct entities and shall be

individually subject to suit, and [further] provides that '[t]he employees of any such subsidiary corporation, except those who are also employees of the [MTA], shall not be deemed employees of the [MTA].'" *Noonan v. Long Island Railroad*, 158 A.D.2d 392, 393 (1st Dept. 1990). Because Ms. Rios is employed only by SIRTOA (Swords Aff. ¶ 2, page 2), and because there is no claim that the MTA made, or required SIRTOA to make, the decision to deny her request(s) to have her domestic partner covered as a dependent on the medical insurance for Ms. Rios that SIRTOA pays for (and the evidence is to the contrary (Curcio Aff. ¶ 7; Swords Aff. ¶ 5)), the MTA is not a proper party to this action. The MTA (and its chairman, Peter Kalikow) thus should be dismissed as defendants. *See Noonan, id.* (claim for accident on LIRR tracks cannot be maintained against MTA as the parent of the LIRR, a distinct legal entity); *Wenthen v. Metropolitan Transportation Auth.*, 95 A.D.2d 852, 853 (2d Dept. 1983) (where action challenges Long Island Railroad's conduct, MTA properly dismissed as a defendant).

Similarly, the Transit Authority is not a proper party. The facts are that the medical insurance coverage decision complained of (i.e., denying Ms. Rios's request that SIRTOA add Ms. Medina to SIRTOA's medical insurance of Ms. Rios) was made by SIRTOA and SIRTOA alone, and there is no assertion that, if that decision is held to be unlawful, SIRTOA would not be the party that could afford full and appropriate relief. The Transit Authority, while it happens to have signed the UTU-SIRTOA collective bargaining agreement (the legality of which is not challenged in this lawsuit), is not a necessary party for purposes of relief and should thus be dismissed as a party.

Finally, the MTA, SIRTOA, and the Transit Authority are all public benefit corporations that may be, and have been here, sued in their own names. Schoolman Aff. ¶ 3. There is thus no point to allowing, in addition, the complaint to assert claims against an MTA

official (MTA Chairman Peter Kalikow), a SIRTOA official (with the title of "Manager") (Robert Curcio), and a Transit Authority official (President Lawrence G. Reuter) in their "official capacit[ies]." As individuals they are immune from liability in this case, they are not necessary for relief, and the governmental agencies they serve have been sued. These individuals sued in their official capacities – Messrs. Kalikow, Curcio, and Reuter – should be dismissed as defendants.

X. THE PRAYER FOR PUNITIVE DAMAGES SHOULD BE STRICKEN

Presumably based on an awareness that punitive damages are a possible remedy for some violations of the City Administrative Code's prohibitions on employment discrimination, the complaint contains a prayer for punitive damages from SIRTOA and the other MTA-related defendants. However, even if, contrary to the arguments advanced above, at pp. 15 - 18, the MTA-related defendants were generally subject to the Administrative Code despite the language of PAL § 1266(8), SIRTOA and the other MTA-related defendants are public benefit corporations (Schoolman Aff. ¶ 3) and thus punitive damages are not available against them, under any circumstances, as a matter of controlling state law. *See Karoon v. New York City Transit Authority*, 241 A.D.2d 323, 324 (1st Dept. 1997) ("the State and its political subdivisions, as well as public benefit corporations such as the instant Transit Authority defendants, are not subject to punitive damages"), *citing Clark-Fitzpatrick, Inc. v. Long Island Railroad Co.*, 70 N.Y.2d 382, 386-88 (1987) (MTA and its subsidiaries are not subject to punitive damages). The prayer for punitive damages should be stricken.

Conclusion

For the reasons outlined above, the complaint should be dismissed in its entirety.

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Respectfully submitted,

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