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

MARGARETANN BIANCULLI, JANET KOBREN, MERRI LASKY, PHYLLIS LIPMAN, BARRY SKOLNICK, on behalf of themselves and all others similarly situated, and the NYC ORGANIZATION OF PUBLIC SERVICE RETIREES, INC., Plaintiffs, -against- THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS, the CITY OF NEW YORK, EMBLEMHEALTH, INC., and GROUP HEALTH INCORPORATED (GHI), Defendants.	Index No. 160234/2022 (Frank, J.S.C.) **Motion Sequence No. 001**

MEMORANDUM OF LAW OF DEFENDANTS EMBLEMHEALTH, INC. AND GROUP HEALTH INCORPORATED (GHI) IN OPPOSITION TO PLAINTIFFS' ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER

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Defendants EmblemHealth, Inc. ("EmblemHealth") and Group Health Incorporated (GHI) ("GHI") (collectively, with EmblemHealth, "Emblem") respectfully submit this Memorandum of Law in Opposition to Plaintiffs' Order to Show Cause for a Temporary Restraining Order under Rules 6301 and 6313 of the New York Civil Practice Laws and Rules ("N.Y.C.P.L.R.").[1, 2]

PRELIMINARY STATEMENT

Plaintiffs – disingenuously claiming imminent irreparable harm – ask this Court to upend the status quo by restraining Defendants from imposing $15 co-pays on certain medical services that have been in place for the past year under a City-funded health care plan. Plaintiffs seek this extraordinary relief notwithstanding that: (i) Plaintiffs and their current counsel had knowledge of the $15 co-pays, effective January 2022, at least as early as December 2021; and (ii) the harm allegedly suffered for the past twelve months is solely monetary in nature. Plainly, Plaintiffs cannot meet the standards under well-settled New York law for the mandatory temporary injunction they seek.

Plaintiffs are four retired New York City workers ("Retirees")[3] who initiated this action against Defendants on November 29, 2022. Retirees are enrolled in "Senior Care," a health insurance plan administered by Emblem and Empire Blue Cross Blue Shield ("Empire"), and funded by the City. The gravamen of Retirees' complaint is that Emblem and the City improperly implemented a $15 co-pay on certain medical services in the Senior Care plan allegedly in violation of a contract between the City and Emblem of which Retirees are supposedly third-party

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1 This memorandum does not address Plaintiffs' separate request for a Preliminary Injunction. Nor does it address all deficiencies in Plaintiffs' pleadings. These issues will be fully briefed in Emblem's response to Plaintiffs' complaint, which is currently due on January 27, 2023, by stipulation between the parties.

2 Defendants the City of New York Office of Labor Relations ("OLR") and the City of New York (the "City") are collectively referred to herein as "the City." OLR, the City, GHI, and Emblem are referred to collectively herein as "Defendants."

3 The NYC Organization of Public Servicer Retirees, Inc. is also a named Plaintiff alongside the four Retirees (collectively referred to herein as "Plaintiffs").

beneficiaries.

While Plaintiffs' claims are baseless, that issue is for another day. The issue presently before this Court is whether Plaintiffs are entitled to the extraordinary relief of a temporary restraining order ("TRO") forcing Emblem and the City to put an immediate halt to the imposition of $15 co-pays —that have been in place for almost a year. The answer is clearly no.

First, Plaintiffs cannot meet the heavy burden to obtain a TRO in the form of a "mandatory" injunction, as opposed to a "prohibitory" injunction. A mandatory injunction is issued only in the "most drastic" circumstances because it upends the status quo, rather than preserving it. It also provides Plaintiffs with the ultimate relief they seek without giving Defendants an opportunity to present evidence on a hearing for a preliminary injunction. Plaintiffs do not even acknowledge this heightened burden, let alone demonstrate that they have met it.

Second, the harm of which Plaintiffs complain is neither imminent nor irreparable. The $15 co-pays have been in place for eleven months now and any harm caused is solely ***monetary harm***. Plaintiffs apparently appreciated this fact because when they first initiated this action, their Order to Show Cause did not seek a TRO. Indeed, only more than two weeks after filing their Complaint did Plaintiffs amend their Order to Show Cause to request interim relief. This fact alone demonstrates that there is no imminent irreparable harm in the absence of an injunction.

Third, the balancing of the equities clearly tips in favor of denying the TRO. The extraordinary nature of the TRO Plaintiffs seek would cause havoc for Emblem, requiring Emblem to: (1) immediately notify over 200,000 members regarding the halt to the co-pays for an indeterminate period; (2) reprocess claims already in progress; and (3) update IT systems internally to reflect the change – all of which likely would be reversed following an evidentiary hearing on a full record. The benefit to Plaintiffs would be marginal at best: temporary relief from $15 co-

pays which they have been paying for the entirety of 2022. Accordingly, the balancing of the equities tips in favor of denying Plaintiffs' request for extraordinary relief.

Finally, Plaintiffs have failed to demonstrate that they have a likelihood of success on the merits with respect to their underlying claims. Contrary to Plaintiffs' assertion without citation, the contract at issue does not prohibit the imposition of co-pays in Senior Care (or any other healthcare program funded by the City and administered by Emblem for that matter). Moreover, the relevant facts and documents demonstrate that Emblem put the Retirees on notice of these $15 co-pays at least as early as December 2021, and—contrary to Plaintiffs' contention—neither this Court nor any other New York court has ever held that the City and Emblem cannot impose co-pays in City-funded healthcare programs. In fact, Plaintiffs themselves point to such other co-pays in the same Senior Care plan. Accordingly, Plaintiffs' claims, ranging from breach of contract (and quasi-contractual claims) to purported fraudulent concealment, all fail as a matter of law. Here, Plaintiffs' request for extraordinary relief should be denied, and Defendants should be permitted time to respond fully to Plaintiffs' Order to Show Cause for Preliminary Injunction.

FACTUAL BACKGROUND

A. Emblem and the City Enter into a Contract to Provide Healthcare Benefits to New York City Employees

In 2002, Emblem and the City entered into a contract for the provision of healthcare benefits to the City's employees (both active and retired). *See* NYSCEF Doc. No. 3 (the "Contract"). Pursuant to the Contract, "Members"—defined in the Contract as any "Subscriber, covered spouse or . . . covered dependent of such Subscriber"[4]—"shall be eligible for coverage according to criteria determined by the [City]." *See id.*, at p.3. Emblem, as administrator of City-

[4] "Subscriber" is defined in the Contract as "any person covered under this Contract as an eligible employee of the [City], eligible retiree of the [City], or former employee of the [City][.]" *See id.*, at p.2.

funded healthcare insurance programs, implements and administers the healthcare plans (including Senior Care) based on instructions from the City. *See* Affidavit of Diane DiGregorio, dated December 21, 2022, at ¶¶4-5 (hereinafter "DiGregorio Aff."). Emblem then communicates any changes in healthcare coverage to the Members. *See id.*, at ¶5.

One healthcare plan Emblem administers for the City pursuant to the Contract is Senior Care. Specifically, Emblem is a co-administrator of Senior Care with Empire. *See id.*, at ¶¶4-5. Emblem administers the medical component of the Senior Care plan (*e.g.*, primary physician care), while Empire administers the hospital and facilities component of the Senior Care plan. *See id.*, at ¶4. If a Retiree opts into the Senior Care plan, they must accept both components (*i.e.*, the components administered by Emblem and Empire). *See id.*, at ¶4.

Notably, the Contract is silent as to the imposition of co-pays. Nowhere in the Contract does it state that co-pays are prohibited. *See generally*, NYSCEF Doc. No. 3. Thus, for years preceding the instant dispute, the Senior Care plan has required co-pays for certain services. For example, and as Plaintiffs acknowledge, there is, and has been, a $50 co-pay for Retirees enrolled in Senior Care who seek "emergency room care[.]" *See* NYSCEF Doc. No. 1, at ¶122.

B. In 2021, Emblem Informed Retirees Enrolled in the Senior Care Plan that They Would Be Charged a $15 Co-Pay for Certain Healthcare Services

As of December 2021, Emblem and the City informed Retirees that a $15 co-pay would be implemented in the Senior Care plan for certain healthcare services effective January 1, 2022. Emblem and the City notified Retirees of this co-pay in numerous ways, including by:

- publication in the December 2021 Summary Plan Description ("SPD") posted by the City; *see, e.g.*, NYSCEF Doc. No. 9 (December 2021 SPD), at p.68 ("PCP and Specialist services are subject to a $15 copay."); *see also* DiGregorio Aff., at ¶9;

- mail, whereby Emblem sent a letter to all Retirees—on or about December 17, 2021—explaining that Retirees who remained enrolled in Senior Care would be subject to a $15 co-pay; *see* Affirmation of Maria T. Galeno, dated December 21, 2022 (hereinafter

"Galeno Aff."), Ex. 1, at p.4 (Dec. 17, 2021 letter from EmblemHealth to Members); *see also* DiGregorio Aff., at ¶8; and

- Emblem's website, published on April 17, 2022, where it specifically states in bold font that "[e]ffective **Jan. 1, 2022** . . . **some services will also have a $15 copay**;" *see* https://www.emblemhealth.com/resources/city-of-new-york-employees/ghi-senior-care (emphasis in original); *see also* DiGregorio Aff., at ¶9.

It is beyond dispute that Plaintiffs received Emblem's various notices. On December 23, 2021, Plaintiffs' current counsel sent a letter to this Court stating:

> Over the past few days, EmblemHealth . . . sent a letter (Attachment A) ***to retirees informing them that effective January 1, 2022, a new $15 co-pay would be imposed on them for most doctor visits***.

See Galeno Aff., Ex. 1, at p.4 (Pollack Cohen LLP, Dec. 23, 2021 Letter, with attachments) (emphasis added). In the attachment to counsel's letter, Emblem informed the Retirees that:

> Based on negotiations with the City of New York Office of Labor Relations and the city's unions, represented by the Municipal Labor Committee, the following changes to your GHI/Empire BlueCross BlueShield Senior Care plan will take effect **Jan. 1, 2022**: After you have met your annual . . . Part B deductible and $50 Senior Care deductible, some services will also have a $15 copay."

See id.

Accordingly, as of December 2021, Emblem and the City had placed Retirees on notice of the implementation of the $15 co-pay through various means of communication.[5]

As Plaintiffs acknowledge, Members may opt out of Senior Care during the fall season of even numbered years (*e.g.*, November 2022). *See* NYSCEF Doc. No. 1, at ¶182 (alleging that Retirees "were eligible to change their health insurance" during "2020 and 2022").[6] Thus, during

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[5] These co-pays were also disclosed by third parties, including by the unions who negotiated the Senior Care co-pays on behalf of the Retirees. By way of example only, in a Q&A Article published on July 14, 2021 by the United Federation of Teachers (the "UFT"), the UFT disclosed that there "will be new $15 copayments for seeing specialists, having diagnostic procedures and visiting urgent care facilities. The GHI Senior Care program will also be adopting these new copayments effective Jan. 1, 2022." *See* https://www.uft.org/news/you-should-know/qa-on-issues/faq-about-nyc-medicare-advantage-plus-plan.

[6] As of 2022, Members may now participate in open enrollment on a yearly basis. *See* DiGregorio Aff., at ¶7.

the month of November 2022, prior to the filing of this lawsuit, (*see* NYSCEF Doc. No. 1), Plaintiffs, on notice of the $15 co-pays, had the opportunity to opt out of Senior Care and select a different healthcare plan with the City. In addition, Members also have a "once in a lifetime" election, to be exercised at any time, including outside an open enrollment period, to opt out of a City-funded healthcare plan and transfer to a different plan. *See* DiGregorio Aff., at ¶7.

LEGAL STANDARD

The Court must deny a request for a temporary restraining order pending a hearing for a preliminary injunction unless "it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." N.Y.C.P.L.R. § 6301. Because injunctions are "drastic" remedies, Plaintiffs bear the heavy burden of proving: (1) a clear likelihood of ultimate success on the merits; (2) they will suffer irreparable injury unless the relief sought is granted; and (3) that the balancing of the equities lies in their favor. *See Faberge Int'l Inc. v. Di Pino*, 109 A.D.2d 235, 240 (1st Dep't 1985).

Where, as here, the relief requested would disturb the status quo and grant Plaintiffs the "ultimate relief sought," the injunction in the form of a TRO is referred to as "mandatory" rather than prohibitory. *See Spectrum Stamford, LLC v. 400 Atl. Title, LLC*, 162 A.D.3d 615, 617 (1st Dep't 2018). Such relief is granted only in "unusual" situations "where the granting of relief is essential to maintain the *status quo* pending trial of the action." *Id.* (internal quotation and citation omitted).

Therefore, to obtain mandatory injunctive relief in the form of a TRO, Plaintiffs must not only demonstrate that they meet the traditional three-part test for an injunction, but they must also meet the "heightened standard" governing mandatory injunctions. *See Roberts v. Paterson*, 84

A.D.3d 655, 655 (1st Dep't 2011) (noting that plaintiffs failed to "meet the 'heightened standard' governing their application for a mandatory preliminary injunction").

As set forth below, Plaintiffs have failed to establish any of the general prerequisites required for the grant of a TRO, and have failed to address the heightened standard governing their request for a mandatory injunction which would alter the status quo and grant Plaintiffs the ultimate relief they seek in this case.

ARGUMENT

I. Plaintiffs Fail to Address the Heightened Standard Applicable to Mandatory Temporary Injunctions

There can be no dispute that the relief Plaintiffs seek meets the definition of a "mandatory," rather than a "prohibitory" injunction, as it would upend the status quo that has been in place for eleven months and confer upon Plaintiffs the ultimate relief they seek in this action: *i.e.*, the prohibition on the imposition of co-pays in the Senior Care program. *See, e.g.*, NYSCEF Doc. No. 16, at p.9 (requesting that Emblem be enjoined "from charging Retirees co-pays for Senior Care").

Given the extreme nature of a mandatory injunction, New York courts routinely deny them, emphasizing that they should be granted only in "extraordinary circumstances." *See, e.g.*, *Spectrum Stamford*, 162 A.D.3d at 617 ("Here, while plaintiff may have a contractual right to choose the property manager, there has been no showing of extraordinary circumstances requiring [plaintiff's preferred property manager] immediately assume management of the property.").

Here, too, the circumstances are not so "extraordinary" as to warrant the imposition of a TRO. As shown below, Plaintiffs have not even satisfied the basic standard for temporary injunctive relief because, at bottom, Plaintiffs complain of harm that has been ongoing for eleven months and can be remedied with monetary damages. *Compare Huff v. C.K. Sanitary Sys. Inc.*, 246 A.D.2d 795 (3d Dep't 1998) (granting mandatory injunction requiring sewage disposal

company to repair disposal collection pumps without additional charge to homeowners where to do so would maintain the status quo, and the unrepaired pumps posed "serious risk of health hazards in the event a single plaintiff is unable to fix and/or repair" a pump); *with Paterson*, 84 A.D.3d at 655 (affirming denial of plaintiffs' request for mandatory injunction "requiring defendants to fund health insurance benefits for retirees . . . pending determination of plaintiffs' plenary action for the same relief").

II. Plaintiffs Seek Monetary Damages and Have Not Established that they Will Suffer Irreparable Harm Absent Issuance of their Proposed Mandatory Injunction

To obtain a mandatory injunction, Plaintiffs must show that they would suffer "irreparable harm" in the absence of the injunction they seek. *See Mabry v. Neighborhood Defender Serv., Inc.*, 88 A.D.3d 505, 506 (1st Dep't 2011). Accordingly, where a plaintiff can be "fully compensated for his loss" through monetary damages, then an injunction is unwarranted. *See id.* ("Plaintiff has not shown irreparable harm, since he will be entitled to reinstatement and back pay if he prevails on the merits and his termination is annulled."). Thus, the question is not whether Plaintiffs can point to some alleged monetary harm they have suffered over the past eleven months; instead, the question is whether the TRO is necessary to prevent some future irreparable harm. Plaintiffs cannot come close to demonstrating such harm.

In accordance with such authorities, the granting of a TRO here is inappropriate because the crux of Plaintiffs' Complaint is that four Retirees allegedly suffered monetary damages due to the imposition of $15 co-pays since January 2022. *See, e.g.*, NYSCEF Doc. No. 1, at ¶¶147-157 (asserting a breach of contract claim against the City and Emblem on behalf of a purported class alleging "more than $55 million" in damages). Accordingly, because Plaintiffs, if successful in the action, "can be compensated with a future award of money damages," an injunction is inappropriate. *See Ave. A Assocs. LP v. Bd. of Mgrs. of Hearth House Condo.*, 190 A.D.3d 473,

474 (1st Dep't 2021) (denying plaintiff-lessor's request for injunction based on condominium board's rejection of plaintiff's request to install a vent for commercial tenant's use, reasoning that plaintiff's damages were essentially lost profits).

Moreover, Plaintiffs have been aware of the implementation of the $15 co-pays since December 2021. While they complained to this Court in December 2021 regarding these co-pays, they waited eleven months to file this action challenging the implementation of the co-pays. Plaintiffs' "inordinate delay in seeking injunctive relief is itself antithetical to irreparable harm in the absence of" injunctive relief. *See In re Accounting by Carl Stix*, 42 Misc.3d 1236(A), at *2 (Sur. Ct. Nassau Cnty. 2014) (denying request for injunction where movants waited "a year and a half before" seeking injunctive relief) (citing *Mercury Serv. Sys., Inc. v. Schmidt*, 50 A.D.2d 533 (1st Dep't 1975) (denying request for injunction where movant waited "three and one-half months in seeking this relief")). What's more, when Plaintiffs first initiated this action, they did not even seek a TRO. Only weeks after initiating this action did Plaintiffs amend their Order to Show Cause to request the temporary injunctive relief they now seek. This fact "in and of itself weakens the claim of irreparable harm." *See In re Accounting by Carl Stix*, 42 Misc.3d 1236(A), at *2 (finding "[t]he mere fact that this motion was not brought on by order to show cause with a temporary restraining order in and of itself weakens the claim of irreparable harm").

Plaintiffs' feeble excuse for their prolonged delay—that they were busy "combatting" threats to their healthcare "in court and the political arena" (NYSCEF Doc. No. 16, at p.8)—does not pass muster under New York law. The bottom line is that if Plaintiffs were truly suffering irreparable injury in January 2022, they would not have delayed bringing suit for almost a year. Their "inordinate delay" in initiating this action belies their conclusory assertions of "irreparable harm." *See In re Accounting by Carl Stix*, 42 Misc.3d 1236(A), at *2 (noting the court was

"unimpressed" by argument that movants "could not bring this motion sooner" due to non-movant's "foot-dragging on discovery issues," as the injury complained of had been apparent for "a year and a half" before movants requested injunction).

III. The Equities Do Not Favor a Mandatory Injunction

To obtain their TRO, Plaintiffs must demonstrate "a balancing of the equities favor[s] [their] position." *See Ave. A Assocs. LP*, 190 A.D.3d at 474 (denying plaintiff's request for an injunction where "Defendants were acting within their rights under the Declaration," and plaintiff's losses were "directly attributable to its decision to" lease unit to commercial tenant requiring installation of vent that would encroach on building's residential units).

The extraordinary relief that Plaintiffs seek, the absence of irreparable harm absent the imposition of a TRO, the inordinate delay in bringing suit, and the significant impact on Emblem's day-to-day operations that a restraint of this nature would have, all militate in favor of denying Plaintiffs' requested relief. Granting the TRO would not only upend the status quo, but would create nothing short of chaos for Emblem. Indeed, if the TRO were granted pending a hearing on Plaintiffs' request for a preliminary injunction, Emblem would be required to immediately up-end a program that has been in place for eleven months, requiring a significant overhaul in its administration of the Senior Care program. *See* DiGregorio Aff., at ¶¶11-12. By way of example only, it would require Emblem to reconfigure the way it processes and pays claims, immediately notify all of its hundreds of thousands of Members, and potentially reprocess claims that are already in progress. *See id.*, at ¶12. The harm to Emblem in the event a TRO is granted would be extreme, particularly in the absence of a hearing and full record.

In contrast, denial of the TRO merely leaves Retirees in the same position they have been in for the past eleven months. There is no threat of irreparable harm in the absence of the TRO,

as Plaintiffs' alleged injuries are clearly compensable through monetary damages in a plenary action. Accordingly, the balance of equities tips in favor of denying Plaintiffs' requested relief.

IV. Plaintiffs Have Not Shown a Likelihood of Success on the Merits of Their Claims

Most of Plaintiffs' memorandum of law addresses disputes about contractual terms and alleged economic harm that are irrelevant to the issue before this Court on the instant Order to Show Cause for a Temporary Restraining Order. Emblem respectfully requests the opportunity to brief these issues in full on January 27, the agreed upon date for Emblem's response to Plaintiffs' complaint, or in connection with a hearing for a preliminary injunction. Nonetheless, Emblem provides a brief overview here as to why Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims. The following descriptions of Plaintiffs' pleading deficiencies are not intended to be exhaustive but are by way of example only.

A. Plaintiffs' Contractual and Quasi-Contractual Claims are Plainly Flawed Based on the Undisputed Facts

Plaintiffs claim, without direct support, that the Contract "affirmatively prohibits" imposition of co-pays. *See* NYSCEF Doc. No. 16, at p.19. Unsurprisingly, Plaintiffs cannot point to a specific provision in the Contract that prohibits co-pays—because no such provision exists. Rather, Plaintiffs argue that the January 2022 co-pays cannot be imposed because the Senior Care program did not previously impose co-pays for medical services. *See, e.g.*, NYSCEF Doc. No. 16, at p.15. But Plaintiffs then go on to admit that co-pays ***have been*** imposed on Retirees enrolled in the Senior Care plan prior to this, including the $50 emergency services care co-pay. *See* NYSCEF Doc. No. 1, at ¶122.

Plaintiffs' attempt to distinguish co-pays historically imposed by Empire, that administers the hospital and facilities component of Senior Care, from the January 2022 co-pays imposed by Emblem, that administers the medical component of Senior Care, falls flat. Both health plan

administrators (Empire and Emblem) administer the ***same*** plan: Senior Care. A Member cannot join one component without the other. *See* DiGregorio Aff., at ¶4.

Thus, the imposition of a $15 co-pay for certain medical services did not violate any provision of the Contract and was in keeping with the City's and the administrators' rights to manage the Plan, as they have done historically. Plaintiffs' claims sounding in breach of contract or quasi-contract (*i.e.*, unjust enrichment and promissory estoppel)[7] thus will fail as a matter of law.

B. Plaintiffs Cannot Demonstrate any Misrepresentation or Reliance that Allegedly Caused Their Damages

Plaintiffs assert various common law and statutory claims against Emblem sounding in misrepresentation. *See* NYSCEF Doc. No. 1, at Counts 4, 6, 7-10. But all such claims fail because Plaintiffs have not identified any misrepresentation. To the contrary, and as shown herein, Emblem (among others, including Retirees' unions) candidly informed the Retirees on several occasions that, beginning in January 2022, some services in the Senior Care plan would "have a copay." *See, e.g.*, Galeno Aff., Ex. 1, at p.4.

Moreover, several of Plaintiffs' claims (*e.g.*, negligent misrepresentation and fraudulent concealment) require Plaintiffs to demonstrate reasonable reliance on the alleged misrepresentation. *See, e.g.*, *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421 (1996) (holding fraudulent concealment claim requires proof of justifiable reliance on alleged misrepresentation). However, based on the aforementioned disclosures and Members' rights to

[7] Importantly, if there is an applicable contract of which Plaintiffs are beneficiaries—as they contend—then there can be no quasi-contractual claims as a matter of law. *See, e.g.*, *Mark Bruce Int'l Inc v. Blank Rome, LLP*, 60 A.D.3d 550, 551 (1st Dep't 2009) (dismissing unjust enrichment claim as "duplicative of the breach of contract claim"); *Bent v. St. John's Univ., N.Y.*, 189 A.D.3d 973, 975 (2d Dep't 2020) ("The existence of a valid and enforceable contract governing a particular subject matter precludes recovery under a promissory estoppel cause of action arising out of the same subject matter.").

elect out of Senior Care prior to their filing suit, the Retirees can never prove that they relied on any alleged misrepresentations to their detriment.

Consequently, there are significant flaws with Plaintiffs' statutory and common law claims grounded in alleged misrepresentations, which Emblem will fully address in opposition to Plaintiffs' Order to Show Cause for a Preliminary Injunction and in response to the plenary action.

C. Plaintiffs' "Collateral Estoppel" Claim is Based on an Overbroad Reading of this Court's Prior Order in the *Campion* Case

Plaintiffs claim "the imposition of co-pays is a blatant violation of this Court's March 3, 2022 order . . . in *NYC Organization of Public Service Retirees v. Campion*[.]" *See* NYSCEF Doc. No. 16, at p.29. Not so. As this Court is well aware, the *Campion* case involved the issue whether the City was permitted to increase ***premiums*** in the Senior Care program. *See, e.g.*, *NYC Organization of Public Service Retirees v. Campion*, No. 158815/2021, 2022 WL 624606, at *2 (Sup. Ct. N.Y. Cnty. Mar. 3, 2022) (Frank, J.S.C.) (holding the City was not permitted to charge $191 in premiums to retirees).

This Court's decision was based on an interpretation of NYC Admin. Code § 12-126(b)(1), which provides that "[t]he City will pay the entire ***cost*** of health insurance coverage for city employees, city retirees and their dependents, not to exceed one hundred percent of the full cost of H.I.P.-H.M.O. on a category basis." *Id.* (emphasis added). That this Court construed "cost" to include ***premiums*** does not mean that the City and Emblem cannot impose ***co-pays*** on a City-funded healthcare program.

One federal court construing New York law explicitly considered, and rejected, Plaintiffs' proffered interpretation of "cost" as including co-pays, reasoning that "the statutory language and relevant legislative history" demonstrates that "entire cost" should be construed to include "health insurance premiums only." *See New York 10-13 Ass'n v. City of New York*, No. 98 Civ.

1425(JGK), 1999 WL 177442, at *12 (S.D.N.Y. Mar. 30, 1999), *aff'd*, 36 F. App'x 8 (2d Cir. 2002). Consequently, "the City's obligation to pay the 'entire cost of health insurance coverage' does ***not*** require the City to offer only health insurance plans that impose no copayments and deductibles on the insureds." *Id.* (emphasis added). This interpretation is underscored by the fact that co-pays were in place under Senior Care prior to the *Campion* decision (*see* DiGregorio Aff., at ¶6) and were not raised by the *Campion* Plaintiffs before this Court.

Thus, Plaintiffs cannot demonstrate a likelihood of success on the merits as to their collateral estoppel claim.

CONCLUSION

For the foregoing reasons, Emblem respectfully requests that this Court enter an order denying Plaintiffs' Order to Show Cause for a Temporary Restraining Order.

Dated: December 21, 2022

Respectfully submitted,

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WORD COUNT CERTIFICATION

Pursuant to Rule 17 of the Uniform Rules for the Supreme Court and County Court, 22 NYCRR 202.8-b(c), I, Maria T. Galeno, certify that the foregoing Memorandum of Law of Defendants EmblemHealth, Inc. and Group Health Incorporated (GHI) in Opposition to Plaintiffs' Order to Show Cause for a Temporary Restraining Order complies with the word count limit, as it contains 4,493 words.

Dated: New York, New York
December 21, 2022

/s/ Maria T. Galeno
Maria T. Galeno