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 PRELIMINARY INJUNCTION

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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 ("OTSC") for a Preliminary Injunction under Rule 6301 of the CPLR.[1]

PRELIMINARY STATEMENT

Plaintiffs ask this Court to upend the status quo and grant Plaintiffs the ultimate relief they seek—*i.e.*, a determination that Defendants are not permitted to impose $15 co-pays under a City-funded health care plan. Plaintiffs were informed of these co-pays at least as early as December 2021, and they have been in place since January 2022. Yet, when granted the opportunity to enroll in a different health care plan in November 2022, Plaintiffs chose to remain enrolled in the same plan. Now, after being on notice of the co-pays for a year, Plaintiffs seek extraordinary relief in the form of a mandatory preliminary injunction. Because Plaintiffs seek such a drastic remedy for alleged injuries compensable with money damages, this Court should deny Plaintiffs' request.

Plaintiffs are five retired New York City workers ("Retirees")[2] 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 beneficiaries.

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[1] Defendants the City of New York Office of Labor Relations ("OLR") and the City of New York (the "City") are collectively referred to as "the City." OLR, the City, GHI, and EmblemHealth are referred to collectively as "Defendants." All emphasis is added, unless otherwise noted. Internal quotations and citations are omitted, unless otherwise noted.

[2] The NYC Organization of Public Servicer Retirees, Inc. is also a named Plaintiff alongside the five Retirees (collectively referred to as "Plaintiffs").

The issue presently before this Court is whether Plaintiffs are entitled to the extraordinary relief of a mandatory preliminary injunction requiring Emblem and the City to put an immediate halt to the imposition of $15 co-pays—which have been in place for almost a year. The answer is clearly "no."

First, Plaintiffs cannot meet the heavy burden to obtain a preliminary injunction in the form of a "mandatory" injunction, as opposed to a "prohibitory" injunction. A mandatory injunction is issued only in "extraordinary" circumstances because it upends the status quo, rather than preserve it. It also provides Plaintiffs with the ultimate relief they seek. 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 twelve months now and any harm caused is solely ***monetary harm***. As courts have recognized, "[a]ny increased costs associated with new insurance coverage is a mere economic harm which does not support the grant of preliminary injunctive relief." *Custom Survey Grp. v. Oxford Health Plans (NY), Inc.*, No. 32377/13, 2013 WL 7098184, at *5 (Sup. Ct. Suffolk Cnty. Jan. 31, 2013). That is precisely the essence of Plaintiffs' claims: the imposition of a $15 co-pay. These facts stand in sharp contrast to the cases Plaintiffs cite, most of which involved the *termination* of health benefits *without any notice*. *See Strouchler v. Shah*, 891 F. Supp. 2d 504, 520-21 (S.D.N.Y. 2012) (injunction warranted where elderly Medicaid patients had home care services terminated without notice).

To the extent Plaintiffs attempt to demonstrate irreparable harm by claiming all Retirees will forego medical care because of the co-pays, such alleged injuries are purely speculative (and unsupported by Plaintiffs' mere conclusory allegations in their Complaint). Indeed, Plaintiffs readily admit that not all retirees enrolled in Senior Care had "to go to the doctor's much this past

year," (NYSCEF No. 16, at p.22), thus negating Plaintiffs' conclusory contention that *all* retirees require an injunction to prevent irreparable harm. Any such speculative harm is insufficient to warrant an injunction. *See, e.g.*, *In re Valentine v. Schembri*, 212 A.D.2d 371, 372 (1st Dep't 1995) (holding "a possible loss of health benefits" is "speculative," and thus insufficient to demonstrate irreparable harm).

Plaintiffs' contention that they require "immediate injunctive relief" to prevent "further irreparable harm" (NYSCEF No. 16, at p.31) is belied by Plaintiffs' inordinate delay in seeking relief. In fact, Plaintiffs were informed of the $15 co-pays in December 2021; yet, they waited until November 2022 to bring this action. Courts routinely deny injunctive relief in similar circumstances under the doctrine of laches. *See Mercury Serv. Sys., Inc. v. Schmidt*, 50 A.D.2d 533 (1st Dep't 1975) (denying injunctive relief where movant waited "three and one-half months" before seeking it). Where, as here, Plaintiffs have failed to proffer any legitimate basis for their inordinate delay, their request should be denied.

Third, the balance of equities clearly tips in favor of Defendants. The extraordinary nature of the mandatory preliminary injunction Plaintiffs seek would cause havoc, 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. *See* NYSCEF No. 51, at ¶¶12-13. The benefit to Plaintiffs would be marginal at best: temporary relief from $15 co-pays which some have been paying for the entirety of 2022 (and could have avoided this past fall by changing plans). Accordingly, the balancing of the equities tips in favor of denying Plaintiffs' request for extraordinary relief.

Fourth, Plaintiffs fail to demonstrate a clear likelihood of success on the merits. As a threshold matter, Plaintiffs' action should have been brought as an Article 78 proceeding. Here,

where the co-pays were implemented by Emblem at the direction of the City, Plaintiffs effectively are challenging "City action that [allegedly] was taken 'in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" (NYSCEF No. 1, at ¶218). Such actions are governed by the four-month limitations period, regardless of how Plaintiffs styled this action. *See Clissuras v. City of N.Y.*, 131 A.D.2d 717, 718 (2d Dep't 1987). Accordingly, Plaintiffs' claims are time-barred.

The substance of Plaintiffs' claims fare no better. Plaintiffs' breach of contract claim fails because 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). Because Plaintiffs' quasi-contractual claims are duplicative of their breach of contract claim, they also fail as a matter of law.

Plaintiffs' various statutory and common law claims sounding in misrepresentation fail as well because, among other things, Retirees were on notice of these $15 co-pays at least as early as December 2021; the co-pays have been in place for the whole year; and Retirees had the option in the fall of 2022 to opt out of Senior Care but chose not to. Plaintiffs' contention—in their Memorandum of Law, and without any factual support—that Retirees remained enrolled in Senior Care in the fall of 2022 based on Emblem's purported "misrepresentation" because "they forgot about the co-pays they had incurred this year due to their declining memory" (NYSCEF No. 16, at pp.22-23) – does not suffice. Accordingly, Plaintiffs cannot demonstrate they suffered any harm as a result of any alleged misrepresentation by Emblem—Plaintiffs made a conscious decision to remain enrolled in Senior Care despite the co-pays and, thus, all claims sounding in misrepresentation fail.

With respect to Plaintiffs' "collateral estoppel" claim, neither this Court—nor any other New York court—has ever held the City 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, Defendants are *not* collaterally estopped from imposing co-pays.

Finally, if this Court is inclined to grant Plaintiffs' request for extraordinary relief (which it should not), a bond is required under CPLR § 6312(b). Based on Plaintiffs' alleged calculations of the average co-pays per month per retiree, Plaintiffs should be required to post a bond of $5 million per month.

FACTUAL BACKGROUND

A. Emblem and the City 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 No. 3 (the "Contract"). Pursuant to the Contract, "Member"—defined in the Contract as any "Subscriber, covered spouse or . . . covered dependent of such Subscriber"[3]—"shall be eligible for coverage according to criteria determined by the [City]." *See id.*, at pp.2-3. Emblem, as administrator of City-funded healthcare insurance programs, implements and administers the healthcare plans (including Senior Care) based on instructions from the City. *See* NYSCEF No. 51, at ¶¶4-5. 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),

[3] "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.

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) of the single plan. *See id.*

Notably, the Contract is silent as to the imposition of co-pays. Nowhere in the Contract does it state co-pays are prohibited. *See generally*, NYSCEF No. 3. Thus, for years preceding the instant dispute, Senior Care has required co-pays for certain services. For example, and as Plaintiffs acknowledge, there is a $50 co-pay for retirees enrolled in Senior Care who seek "emergency room care[.]" *See* NYSCEF No. 1, at ¶122. Significantly, Plaintiffs do not challenge those co-pays.

B. Retirees were Informed in December 2021 that Senior Care Would Soon Require $15 Co-Pays for Certain Healthcare Services

As of December 2021, Emblem and the City informed Retirees that a $15 co-pay would be implemented in Senior Care 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 No. 9 (December 2021 SPD), at p.68 ("PCP and Specialist services are subject to a $15 copay."); *see also* NYSCEF No. 51, 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* NYSCEF No. 50, Ex. A (Dec. 17, 2021 letter from EmblemHealth to Members); *see also* NYSCEF No. 51, 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* NYSCEF No. 51, 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 NYSCEF No. 50, Ex. A (Pollack Cohen LLP, Dec. 23, 2021 Letter, with attachments). In the attachment to counsel's letter, Emblem informed Retirees:

> 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, Retirees were on notice of the $15 co-pay. *See* Affidavit of Diane DiGregorio, dated January 4, 2023 (hereinafter "DiGregorio Aff."), at ¶¶5-6 (affirming all five Retirees in this action were provided written notice of the co-pays).[4]

As Plaintiffs acknowledge, Members may opt out of Senior Care during the fall season of even numbered years (*e.g.*, November 2022). *See* NYSCEF No. 1, at ¶182 (alleging Retirees "were eligible to change their health insurance" during "2020 and 2022").[5] Thus, during the month of November 2022, prior to the filing of this lawsuit, (*see* NYSCEF 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—including the HIP-VIP plan, which has "$0 copays for most services and $0 deductions."[6] In addition, Members 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* NYSCEF No. 51, at ¶7.

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[4] 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.

[5] As of 2022, Members may now participate in open enrollment on a yearly basis. *See* NYSCEF No. 51, at ¶7.

[6] https://www.emblemhealth.com/resources/city-of-new-york-employees/vip-premier-hmo-medicare.

LEGAL STANDARD

Because preliminary 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) the balancing of the equities lies in their favor. *See OraSure Tech., Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348 (1st Dep't 2007).

Where, as here, the relief requested would disturb the status quo and grant Plaintiffs the "ultimate relief sought," the injunction 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.*; *Roberts v. Paterson*, 84 A.D.3d 655 (1st Dep't 2011) (holding plaintiffs failed to "meet the 'heightened standard' governing their application for a mandatory preliminary injunction").

ARGUMENT

I. Plaintiffs Fail to Address the Heightened Standard Applicable to Mandatory Preliminary 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 twelve months and confer upon Plaintiffs the ultimate relief they seek in this action: *i.e.*, prohibition on the imposition of co-pays in the Senior Care program. *See, e.g.*, NYSCEF No. 16, at p.9 (requesting 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 (denying request for mandatory preliminary injunction where movant failed to demonstrate "extraordinary circumstances").

Here, too, the circumstances are not "extraordinary" at all, much less so extraordinary as to warrant the imposition of a mandatory preliminary injunction. As shown below, Plaintiffs have not even satisfied the basic standard for preliminary injunctive relief because, at bottom, Plaintiffs complain of harm that has been ongoing for twelve months and can be remedied with monetary damages. *E.g.*, *Paterson*, 84 A.D.3d 655 (denying mandatory injunction "requiring defendants to fund health insurance benefits for retirees . . . pending determination of plaintiffs' plenary action for the same relief").

II. Plaintiffs Fail to Demonstrate Imminent Irreparable Harm Under Decades of First Department Precedent

A. Plaintiffs Seek Monetary Damages

To obtain a preliminary injunction, Plaintiffs must demonstrate "irreparable harm" in the absence of the injunction. *See Mabry v. Neighborhood Defender Serv., Inc.*, 88 A.D.3d 505, 506 (1st Dep't 2011). Where a plaintiff can be "fully compensated for his loss" through monetary damages, an injunction is unwarranted. *See id.* The First Department has consistently held that injuries compensable with "money damages" do not constitute "irreparable harm." *See Ave. A Assocs. LP v. Bd. of Managers of Hearth House Condo.*, 190 A.D.3d 473, 474 (1st Dep't 2021) (denying movant's request for preliminary injunction where movant's injuries were essentially lost profits); *Buchanan Cap. Mkts., LLC v. DeLucca*, 144 A.D.3d 508, 509 (1st Dep't 2016) (same, where movant's injury was "compensable with money damages").

Here, the crux of Plaintiffs' Complaint is that five Retirees allegedly suffered monetary damages due to the imposition of $15 co-pays since January 2022. *See, e.g.*, NYSCEF No. 1, at ¶¶147-57 (seeking "more than $55 million" in damages for alleged breach of contract). The Complaint's allegations reveal Retirees' alleged harm is purely monetary, notwithstanding merely conclusory allegations of irreparable injury. Indeed, all five named Retirees allege they sought

and received medical attention throughout 2022 despite the co-pays and then allege in conclusory fashion that they suffered "irreparable injury." *See* NYSCEF No. 1, at ¶¶16-34.

While Plaintiffs cite caselaw purportedly standing for the proposition that "increased healthcare costs may cause" irreparable harm (NYSCEF No. 16, at p.32), the circumstances of these cases are markedly different from the instant case. Indeed, in a vast majority of Plaintiffs' cited cases, the parties requesting injunctive relief either had their health insurance terminated (*see Zotto v. Scovill, Inc.*, No. N-85-494, 1985 WL 14176, at *2 (D. Conn. Nov. 7, 1985) (former employer stopped paying for employees' healthcare and, thus, employees "may lose their insurance benefits" altogether); *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 566 (S.D. Ohio 1983) (same); *Olson v. Wing*, 281 F. Supp. 2d 476, 486 (E.D.N.Y. 2003) (Disaster Relief Medicaid recipients had their benefits terminated without opportunity for a hearing and were "unable to obtain medical services")), or were effectively denied healthcare due to a "drastic" change in their benefits. *See Plattsburgh City Retirees' Ass'n v. City of Plattsburgh*, 51 Misc.3d 1209(A), at *4 (Sup. Ct. Clinton Cnty. 2016) (City of Plattsburgh transferred retirees to new health insurance plan that required many new pre-authorizations for surgeries and did not provide coverage to several retirees in their residential area; thus, coverage under new plan was not "equivalent" to prior plan); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 50 (2d Cir. 2004) (retirees "recently suffered a drastic reduction in their level and quality of health care benefits").[7]

In sharp contrast, an increase in "costs associated with new insurance coverage is a mere economic harm which does not support the grant of preliminary injunctive relief." *Custom Survey Grp.*, 2013 WL 7098184, at *5 (Sup. Ct. Suffolk Cnty.) (denying movant's request for injunction,

[7] The Second Circuit's decision in *LaForest* is also inapposite because the Court had already granted summary judgment on the issue of liability at the time the injunction was issued. *See LaForest*, 376 F.3d at 50-51. In sharp contrast, and as shown in Section IV., *infra*, Plaintiffs here have not—and cannot—establish liability.

reasoning movant's injuries were "fully compensable by an award of money damages"); *In re Gamma v. Ferrara*, 274 A.D.2d 479, 481 (2d Dep't 2000) (same, reasoning movant would "be entitled to reimbursement of all benefits found to have been improperly denied"); *McCall v. State*, 215 A.D.2d 1, 5 (3d Dep't 1995) (same). Plaintiffs' own cited cases recognize this well-settled rule. *See, e.g.*, *Angotti v. Rexam Inc.*, No. 06-CV-0657, 2006 WL 3043130, at *13 (D. Minn. Oct. 25, 2006) (denying request for injunctive relief where class had been certified and "majority of class members face relatively small and readily calculable increases in monthly expenses").

B. Plaintiffs' Alleged Harm is Speculative

No doubt aware their claims are the antithesis of "irreparable harm," Plaintiffs assert, as a result of the $15 co-pays, they are "foregoing medical care" (NYSCEF No. 16, at p.31), "reduc[ing] spending on other necessities in order to continue receiving medical treatment" (*id.*, at p.33), and enduring "emotional and psychological distress." (*Id.*, at p.36).

But such harm is purely speculative. Indeed, Plaintiffs proffer only one Affidavit from a named Plaintiff, in which she asserts that while she had "second thoughts about seeking treatment," she ultimately received treatment throughout 2022. *See* NYSCEF No. 28, at ¶¶5-6.

The various other Affidavits submitted by non-parties similarly state they suffered merely monetary harm as a result of seeing doctors and paying the $15 co-pay. *See, e.g.*, NYSCEF No. 29, at ¶¶2-5 (affirming she covered co-pays for several doctors' visits and medical procedures, but had to curtail purchasing "gifts" and "special dinners" for her grandchildren); NYSCEF No. 33, at ¶¶3-6 (affirming he still attends hospital visits but is required to take public transit as opposed to driving "because parking costs $50 each week"). Such harm simply does not satisfy the standard for "irreparable harm" entitling them to injunctive relief. *See Uber Tech., Inc. v. Am. Arbitration Ass'n, Inc.*, 204 A.D.3d 506, 509-10 (1st Dep't 2022) (holding claims involving "monetary damages" precluded issuance of "preliminary injunction"). Thus, based on the specific allegations

in the Complaint (discussed, *supra*), and the Affidavits submitted, the claimed harm is monetary in nature or otherwise insufficient to constitute irreparable harm.

Moreover, as the circumstances clearly vary on an individual basis, it would be truly extraordinary for Plaintiffs to obtain a blanket preliminary injunction applicable to *every* Member enrolled in Senior Care. Indeed, according to Plaintiffs, several retirees were allegedly unaware of the $15 co-pays implemented in the Senior Care plan in 2022 because they did "not [] have to go to the doctor's much this past year" or were otherwise suffering from "declining memory." (NYSCEF No. 16, at p.22). Thus, an injunction is unwarranted where, as here, the mere nine Affidavits submitted do not demonstrate that all retirees will suffer irreparable harm absent the injunction. *See, e.g.*, *OraSure Tech.*, 42 A.D.3d at 348 (denying request for injunction where record was "devoid" of evidence demonstrating irreparable harm, and "any damages suffered by [plaintiff] [were] calculable").

Accordingly, any claim of irreparable harm as to *all retirees* is mere speculation, and speculation is insufficient to warrant an injunction. *See, e.g.*, *Schembri*, 212 A.D.2d at 372 (holding "possible loss of health benefits" is "speculative," and thus insufficient to demonstrate irreparable harm); *see also Hoffmann Investors Corp. v. Yuval*, 33 A.D.3d 511, 512 (1st Dep't 2006) (denying injunctive relief where harm was merely "speculative" and "de minimis"); *U.S. Re Cos., Inc. v. Scheerer*, 41 A.D.3d 152, 155 (1st Dep't 2007) (holding "speculation is not a basis for the imposition of a preliminary injunction").

C. Plaintiffs' Delay Warrants a Denial of the Injunction

Plaintiffs have been aware of the implementation of the $15 co-pays since December 2021. Yet, Plaintiffs waited eleven months to file this action. 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 preliminary injunction where movants waited "a year and a half before" seeking injunctive relief) (citing *Schmidt*, 50 A.D.2d at 533); *United for Peace & Justice v. Bloomberg*, 5 Misc.3d 845, 849 (Sup. Ct. N.Y. Cnty. 2004) (same, where plaintiff waited "three months").

Moreover, when Plaintiffs first initiated this action, they did not even seek a temporary restraining order ("TRO"). They then amended their OTSC to request a TRO weeks later. This fact "in and of itself weakens the claim of irreparable harm." *See In re Accounting*, 42 Misc.3d 1236(A), at *2.

Plaintiffs' feeble excuse for their prolonged delay—that they were busy "combatting" threats to their healthcare "in court and the political arena" (NYSCEF 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*, 42 Misc.3d 1236(A), at *2-3 (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").

III. The Equities Do Not Favor a Mandatory Injunction

To obtain their preliminary injunction, Plaintiffs must demonstrate "a balancing of the equities favor[s] [their] position." *See Ave. A Assocs.*, 190 A.D.3d at 474. Here, the extraordinary relief Plaintiffs seek, the absence of irreparable harm, the inordinate delay in bringing suit, and the significant impact on Emblem's day-to-day operations that a restraint of this nature would cause, all militate in favor of denying Plaintiffs' requested relief. Granting the preliminary injunction would not only upend the status quo that has been in place for twelve months, but would create nothing short of chaos for Emblem. Indeed, an injunction of this nature would require Emblem to

notify hundreds of thousands of members regarding the change to Senior Care, potentially reprocess claims in progress, and update Emblem's IT systems internally to reflect changes to ensure claims are processed correctly. *See* NYSCEF No. 51, at ¶¶11-12. Following such upheaval, Emblem would have to reverse course again in the event this Court finds that Plaintiffs are not entitled to a permanent injunction.

In contrast, denial of the injunction merely leaves Retirees in the same position they have occupied for the past twelve months. And there is no threat of irreparable harm, as Plaintiffs' alleged injuries are monetary in nature. *See Custom Survey Grp.*, 2013 WL 7098184, at *5-6 (holding balancing of equities weighed against injunction where denial of health benefits could be redressed with monetary damages). Accordingly, the balance of equities tips in favor of Defendants.

IV. Plaintiffs Fail to Demonstrate a Clear Likelihood of Success on the Merits

Plaintiffs are not entitled to a preliminary injunction because they cannot establish a clear likelihood of success on the merits. *First*, Plaintiffs' action, which should have been brought as an Article 78 proceeding, is time barred. *Second*, the Contract at issue does not prohibit the imposition of co-pays. *Third,* Plaintiffs' quasi-contractual claims are duplicative of their breach of contract claim. *Fourth*, Plaintiffs fail to allege their damages were caused by any alleged misrepresentation regarding Senior Care, as Plaintiffs were on notice of the co-pays and chose to enroll in Senior Care months after co-pays were implemented. *Fifth*, New York law does not prohibit the City from implementing co-pays.

A. Plaintiffs' Action is Time Barred

Because Emblem's conduct here was pursuant to governmental direction, this action should have been brought as an Article 78 proceeding subject to a four-month statute of limitations and, as a result, is now time-barred. *See Fisher v. Biderman*, 154 A.D.2d 155, 160 (1st Dep't

1990) ("[A]ny question regarding the legality of the governmental action . . . can properly and expeditiously be resolved by means of a CPLR article 78 proceeding.").

It is well-settled that proceedings under Article 78 are "not strictly limited to government actors." *Bango v. Gouverneur Volunteer Rescue Squad, Inc.*, 101 A.D.3d 1556, 1557 (3d Dep't 2012). Instead, such proceedings may also be brought against "any 'corporation.'" *Id.* (quoting CPLR § 7802(a)). Accordingly, public and private corporations—such as Emblem—"can be compelled in an article 78 proceeding to fulfill not only obligations imposed upon them by State or municipal statutes but also those imposed by their internal rules." *Id.* at 1157.

Here, it is undisputed that Emblem administers Senior Care based on instructions from the City. *See, e.g.*, NYSCEF No. 51, at ¶¶4-5. Accordingly, regardless of Plaintiffs' characterization of their claims, the crux of Plaintiffs' Complaint is a challenge to government action. *See* NYSCEF No. 1, at ¶218 (alleging "City action that was taken 'in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion"').

Thus, Plaintiffs' claims are governed by the four-month statute of limitations. *See Katz v. Third Colony Corp.*, 101 A.D.3d 652, 653 (1st Dep't 2012) (holding plaintiffs' claims should have been brought "via a proceeding pursuant to CPLR article 78" and, thus, were time barred); *Bango*, 101 A.D.3d at 1557 (same).

Here, the four-month limitations period began to run in December 2021 when Plaintiffs were notified of the City's determination to impose $15 co-pays on certain medical services. *See In re Jones v. Bd. of Educ.*, 30 A.D.3d 967, 968 (4th Dep't 2006) (holding four-month limitations period "began to run when petitioners were sent a letter . . . notifying them of the District's determination"). But Plaintiffs did not initiate this action until November 2022—approximately eleven months after Plaintiffs were on notice of the co-pays. Accordingly, Plaintiffs' action—

which could and should have been brought as an Article 78 proceeding—is time barred. *See Katz*, 101 A.D.3d at 653.[8]

B. Plaintiffs' Breach of Contract Claim Fails as a Matter of Law

Plaintiffs contend, without direct support, that the Contract "affirmatively prohibits" imposition of co-pays. *See* NYSCEF No. 16, at p.19. Unsurprisingly, Plaintiffs cannot point to a single, specific provision in the Contract that prohibits co-pays—because no such provision exists. *See, e.g.*, *Uber Tech.*, 204 A.D.3d at 508-09 (denying motion for preliminary injunction on breach of contract claim where plaintiff "failed to demonstrate [defendant] breached any agreed upon terms" of the contract).

The crux of Plaintiffs' argument is essentially that co-pays cannot be imposed because Senior Care did not previously impose co-pays for medical services. *See* NYSCEF No. 16, at p.15. But Plaintiffs admit that co-pays ***have been*** imposed on Retirees enrolled in Senior Care prior to this, including the $50 emergency services co-pay. *See* NYSCEF 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 have one component without the other. *See* NYSCEF No. 51, 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 line with the City's and the administrators' rights to manage the plan, as they have done historically. Plaintiffs' breach of contract claim therefore fails as a matter of law.

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[8] Emblem adopts the City's arguments that Plaintiffs' claims are time-barred as if fully set forth herein.

C. Plaintiffs' Unjust Enrichment and Promissory Estoppel Claims are Duplicative of their Breach of Contract Claim and are Otherwise Flawed

Plaintiffs' unjust enrichment[9] and promissory estoppel claims[10] also fail. First, these quasi-contractual claims are based upon the alleged contractual relationship between the City, Emblem and Retirees. *See, e.g.*, NYSCEF No. 1, at ¶165; *see also id.*, at ¶187. Accordingly, these claims are "duplicative of the breach of contract claim" and thus cannot stand. *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 breach of contract claim); *Bent v. St. John's Univ., N.Y.*, 189 A.D.3d 973, 975 (2d Dep't 2020) (same, with respect to promissory estoppel claim).

Second, Plaintiffs have not alleged why the purported "benefit" that Emblem and the City have retained here is "unjust." Indeed, Emblem and the City maintain the right, under the Contract and applicable law, to impose co-pays in City-funded healthcare programs. *See N.Y. 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) (holding "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"), *aff'd*, 36 F. App'x 8 (2d Cir. 2002).

Accordingly, any purported "benefit" Defendants retained was not "unjust," and thus, no claim for unjust enrichment lies. *See Aquino v. Douglas Elliman Realty, LLC*, 155 A.D.3d 472, 473 (1st Dep't 2017) (dismissing unjust enrichment claim where plaintiff "failed to explain why the benefit retained by [defendants] was unjust").

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[9] To allege unjust enrichment, Plaintiffs must demonstrate: (1) Defendants were enriched; (2) at Plaintiffs' expense; and (3) it is inequitable to permit Defendants to retain what is sought to be recovered. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011).

[10] To allege promissory estoppel, Plaintiffs must demonstrate: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise; and (3) injury caused by the reliance. *See Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 32 (1st Dep't 2015).

Finally, and for the reasons discussed *infra*, Plaintiffs cannot demonstrate "reasonable reliance" on any alleged statement by Emblem or the City, because they had the option to switch plans before bringing this action but chose not to do so. This failure of reliance is fatal to their promissory estoppel claim, and further demonstrates why an injunction, which is forward-looking, is not warranted.

D. Plaintiffs Fail to Allege that they Suffered Damages as a Direct Result of any Purported Misrepresentation

Plaintiffs assert various common law and statutory claims against Emblem sounding in misrepresentation. *See* NYSCEF No. 1, at Counts 3-4, 6-10. But all such claims fail because Plaintiffs have not identified any misrepresentation that allegedly caused their damages. 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.*, NYSCEF No. 50, Ex. A; DiGregorio Aff., at ¶¶5-6. And Retirees had the option to opt out of Senior Care (and choose another City-funded health care plan) during the open enrollment period that ended in November 2022, *before* this action was commenced. Some Retirees, who had not previously exercised their "once in a lifetime" option to change plans, also could have opted out of Senior Care *at any time*.

Plaintiffs' common law claims (*e.g.*, negligent misrepresentation, fraudulent concealment, and promissory estoppel) all require that Plaintiffs demonstrate reasonable reliance on the alleged misrepresentation to their detriment. *See Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996) (fraudulent concealment claim requires justifiable reliance); *Parrott v. Coopers & Lybrand*, 95 N.Y.2d 479, 484 (2000) (negligent misrepresentation claim requires reasonable reliance). But based on the disclosures here and Retirees' rights to elect out of Senior Care prior

to their filing suit, Retirees cannot plausibly allege that they relied on any alleged misrepresentations to their detriment:

> Here, the plaintiffs alleged that they relied solely on [the broker's] alleged misrepresentations without seeing or requesting to see copies of the subject insurance policies, and despite signing applications for the policies that contradicted [the broker's] alleged assurances that the policies would not have annual premiums associated with them. Since the plaintiffs failed to adequately allege justifiable reliance, the causes of action alleging fraud . . . [are] subject to dismissal.

Roumi v. Guardian Life Ins. Co. of Am., 191 A.D.3d 911, 913 (2d Dep't 2021) (dismissing policyholder's fraud related claims).

Similarly, Plaintiffs' statutory claims (*e.g.*, alleged violations of New York Insurance Law § 4226 and General Business Law ("GBL") §§349, 350) require that Plaintiffs "prove that the defendant made misrepresentations or omissions that were likely to mislead a reasonable consumer in the plaintiff's circumstances, that the plaintiff was deceived by those misrepresentations or omissions and that as a result the plaintiff suffered injury." *See Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 52 (1st Dep't 2004) (dismissing claims under GBL §§349, 350).[11] Here, Retirees were informed of the $15 co-pays in December 2021, but still chose to enroll or remain in Senior Care in the fall of 2022 despite knowledge of the co-pays and despite the existence of other available plans with "$0 copays for most services and $0 deductions."[12] This undisputed fact bars Plaintiffs' statutory claims, as they enrolled in Senior Care "with full knowledge of the facts." *See Solomon*, 9 A.D.3d at 55 (holding plaintiffs' claims against internet service company were subject to "voluntary payment doctrine," which "would bar recovery by any subscriber who, having

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[11] Similarly, under N.Y. Insurance Law § 4226, Plaintiffs must demonstrate Emblem knowingly misrepresented the terms, benefits or advantages of Senior Care. *See Cilente v. Phoenix Life Ins. Co.*, 134 A.D.3d 505, 507 (1st Dep't 2015). In light of the disclosures, Plaintiffs cannot satisfy this element of their claim.

[12] https://www.emblemhealth.com/resources/city-of-new-york-employees/vip-premier-hmo-medicare.

experienced slow service and/or frequent connectivity outages, continued to use defendants' DSL service").

Recognizing this significant flaw in their claims, Plaintiffs—in their Memorandum of Law, not their Complaint—argue Retirees were misled because "they forgot about the co-pays they had incurred this year due to their declining memory; or they are (understandably) confused and overwhelmed by all of the health insurance information and expenses that bombard them on a daily basis." (NYSCEF No. 16, at p.22). This unsupported, conclusory statement in Plaintiffs' Memorandum of Law simply does not cut it. *See Bisk v. Manhattan Club Timeshare Ass'n, Inc.*, 118 A.D.3d 585 (1st Dep't 2014) (dismissing complaint where sole allegation regarding deceptive practices was "not in [plaintiffs'] complaint . . . but in their memorandum of law opposing the motion to dismiss").

E. Plaintiffs' "Collateral Estoppel" Claim Fails as a Matter of Law

Plaintiffs' argument that the co-pay somehow violates this Court's order in *NYC Organization of Public Service Retirees v. Campion* (*see* NYSCEF No. 16, at p.29) is simply wrong. As this Court knows, the *Campion* case resolved whether the City, under NYC Admin. Code § 12-126(b)(1), was permitted to increase ***premiums*** in City-funded healthcare programs. *See, e.g.*, *NYC Org. of Pub. Serv. 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). The issue of co-pays and deductibles was not briefed and thus was not before the Court.

NYC Admin. Code § 12-126(b)(1) provides that "the 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.*

Courts construing the phrase "entire cost" have explicitly rejected Plaintiffs' newly-minted argument, reasoning that "the statutory language and relevant legislative history" demonstrates that "entire cost" should be construed to include "health insurance premiums only." *See N.Y. 10-13 Ass'n*, 1999 WL 177442, at *12. 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.* This interpretation is underscored by the fact that co-pays were in place under Senior Care prior to the *Campion* decision (*see* NYSCEF No. 51, at ¶6).

Thus, Plaintiffs fail to demonstrate a likelihood of success regarding their collateral estoppel claim.

V. If an Injunction is Issued, Plaintiffs Must Post a Bond

If the Court is inclined to grant Plaintiffs' request for an injunction—which it should not, for the reasons set forth herein—Emblem respectfully submits that Plaintiffs are required to post an undertaking. *See* CPLR § 6312(b) ("[P]rior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction[.]").

Here, Plaintiffs allege their damages exceed $55 million, which they calculated based on averaging the total co-pays per month. *See* NYSCEF No. 13. Accordingly, by Plaintiffs' own calculations, Plaintiffs should be required to post an undertaking of $5 million per month, which will cover the amount of costs associated with suspending co-pays. *See Suttongate Holdings Ltd. v. Laconm Mgmt. N.V.*, 159 A.D.3d 514, 515 (1st Dep't 2018) (holding "the undertaking must be rationally related to defendants' potential damages should the preliminary injunction later prove to have been unwarranted").

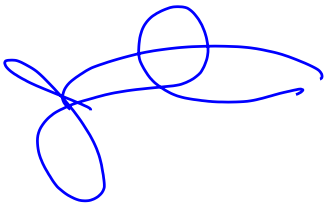
CONCLUSION

For the foregoing reasons, Emblem respectfully requests that this Court enter an order denying Plaintiffs' OTSC for a Preliminary Injunction.

Dated: January 4, 2023

Respectfully submitted,

PILLSBURY WINTHROP SHAW PITTMAN LLP



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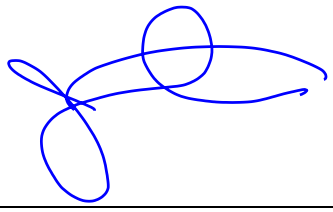
WORD COUNT CERTIFICATION

Pursuant to Rule 17 of the Uniform Rules for the Supreme Court and County Court, 22 NYCRR 202.8-b(c), I, James M. Catterson, 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 Preliminary Injunction complies with the word count limit, as it contains 6,799 words.

Dated: New York, New York
January 4, 2023



James M. Catterson