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,

v.

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

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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Defendants advance meritless arguments for why they should be allowed to charge co-pays that violate the rights of Retirees and cause irreparable harm by forcing Retirees to forego needed medical care and other necessities. As explained below, this Court should reject these arguments and grant Plaintiffs' preliminary injunction motion.[1]

I. NO HEIGHTENED STANDARD OF REVIEW APPLIES

Emblem argues that Plaintiffs should be held to a heightened standard on this motion because "the relief Plaintiffs seek meets the definition of a 'mandatory,' rather than a 'prohibitory' injunction." (Emblem's Br. at 8-9.) Emblem is mistaken, which is likely why the City does not advance this argument in its brief.

"A mandatory injunction is affirmative in character and directs the performance of an act, whereas a prohibitive injunction is preventive in character and forbids the continuance of a wrongful act, or the doing of some threatened or anticipated injury." *Bisca v. Bisca*, 108 Misc. 2d 227, 231 (Sup. Ct. Nassau Cty. 1981) (citing 28 N.Y. Jur. § 5). Here, Plaintiffs merely request that Defendants be forbidden from imposing illegal co-pays. That is a textbook prohibitory injunction.[2] Indeed, it is similar to the preliminary injunction this Court issued a year ago when it temporarily—and later permanently—prohibited the City from charging Retirees for Senior Care.

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[1] In light of the word limit, Plaintiffs do not attempt to rebut every one of Defendants' erroneous arguments here.

[2] Even if Plaintiffs were seeking a mandatory injunction, which they are not, courts routinely grant such injunctions, particularly where, as here, the health and well-being of vulnerable individuals is at stake. *See, e.g., McCain v. Koch*, 70 N.Y.2d 109, 116 (1987) ("There is no question that in a proper case Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct by municipal agencies."); *CanWest Glob. Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 867 (Sup. Ct. N.Y. Cty. 2005) (stating that "an injunction may be used to either restrain or compel performance of an act," and imposing mandatory preliminary injunction relating to enforcement of breached contract); *New York Cty. Lawyers' Ass'n v. State*, 192 Misc. 2d 424, 438 (Sup. Ct. N.Y. Cty. 2002) (granting mandatory preliminary injunction

Emblem appears to be arguing that Plaintiffs' motion should be denied simply because it was filed after Emblem had already started imposing co-pays on January 1, 2022. (Emblem's Br. at 8-9.) But preliminary injunctions are proper regardless of whether the defendant has already begun the conduct sought to be enjoined. *See* CPLR 6301 (preliminary injunctions are equally available where defendant is already "doing or procuring or suffering to be done" a wrongful act as when "defendant threatens or is about to do" such act). Moreover, Emblem glosses over the fact that the first time it even mentioned the existence of co-pays for Senior Care was in a letter mailed on December 17, 2021 (which arrived days later). Thus, there was no practical way for Retirees to litigate a preliminary injunction motion before January 1, 2022. Emblem may not wait until the last second to disclose the co-pays and then complain that a preliminary injunction would upset the status quo.

Separately, Emblem and the City argue that a preliminary injunction here is "inappropriate" because it "would grant Plaintiffs the ultimate relief they would be afforded in a final judgment." (City's Br. at 4; Emblem's Br. at 8.) That is incorrect. The ultimate relief sought in this case is a permanent injunction, compensatory damages, restitution, disgorgement, statutory damages, treble damages, punitive damages, attorneys' fees, and costs. (Compl. ¶¶ 230-37.) The preliminary injunction requested in this case would grant no more "ultimate" relief than any other case involving requests for both preliminary and permanent injunctions, including the case Retirees brought a year ago.

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directing payment of $90/hour); *The City-Wide Council of Presidents v. NYCHA*, 2018 WL 1911926, at *8 (N.Y. Sup. Ct. Apr. 23, 2018) (compelling NYCHA to perform lead inspections).

II. PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED

The New York State legislature has provided specific limitations periods for each of Plaintiffs' plenary action claims, ranging from three to six years. Plaintiffs diligently brought this litigation years before those deadlines. Defendants seek to evade liability for their flagrant contractual breaches and deceptive conduct based on the flawed argument that the 4-month statute of limitations applicable exclusively to Article 78 proceedings governs Plaintiffs' non-Article 78 claims, and that the limitations period accrued in December 2021. Defendants are wrong, for several reasons.

A. Article 78 Cannot Shield Emblem from Liability for its Misconduct.

Although Emblem did not raise any statute of limitations argument in its opposition to Plaintiffs' TRO application (*see* NYSCEF No. 48), it seeks to do so now in the misguided hope that Article 78 will shield it from liability for its myriad misconduct. Article 78 provides Emblem no such protection.

First, although Emblem contends that the legality of "governmental action" should be addressed under Article 78 (Emblem's Br. at 15), Plaintiffs' claims against Emblem are based on *Emblem's* misconduct, not the City's. Plaintiffs have demonstrated that *Emblem* has violated the contract governing Senior Care by imposing on *its* members $15 copays for the health insurance plan that *it* administers. Emblem is a multi-billion-dollar insurance conglomerate that freely negotiates—and is bound by—the contractual terms of its health insurance plans, including Senior Care. It is liable, and cannot blame the City, for its own breach of contract and its independent role in the unlawful and unjust imposition of co-pays. Plaintiffs have also shown that Emblem has harmed Retirees through the false and misleading statements that *it* caused to be made in the 2020 and 2022 SPDs, among other places.

Second, Emblem relies on a narrow line of cases applying Article 78 to actions against corporations that failed to follow internal procedures mandated by their bylaws. (Emblem's Br. at 15, citing *Bango* and *Katz*). Because Plaintiffs are not challenging Emblem's compliance with its bylaws or other internal procedures, these cases are inapposite. Emblem appears to be arguing that, simply because it is a "corporation," any action against it must be filed within four months. That is not the law.

B. Plaintiffs' Claims Against the City are not Time-Barred.

Because Plaintiffs' claims against Emblem are not time-barred, there is no need to even address the City's statute of limitations defense. The requested preliminary injunction may be adequately issued against Emblem alone, as Emblem is the party that actually administers Senior Care and controls the co-pays. Regardless, the City's statute of limitations defense is equally meritless.

i. Plaintiffs' claims are properly asserted in a plenary action.

The gravamen of Plaintiffs' Complaint sounds in contract and tort—not in Article 78—and as such, these claims are properly before this Court in a plenary action.

Though left unmentioned in Defendants' briefs, the Court of Appeals has clearly held that "[w]hen the damage allegedly sustained arises from a breach of the contract by a public official or governmental body, then the claim *must be* resolved through the application of traditional rules of contract law [rather than an Article 78 proceeding]." *Abiele Contr. v. New York City School Constr. Auth.*, 91 N.Y. 2d 1, 7-8 (1997) (emphasis added). And in a case much like this one, retired firefighters sued the City of Ogdensburg when the City stopped reimbursing them for the cost of their Medicare Part B premiums, as required by the collective bargaining agreement. *Gooshaw v. City of Ogdensburg,* 67 A.D.3d 1288 (3d Dep't 2009). The Third Department reversed the

decision of the lower court, finding that it should not have converted the action to an Article 78 proceeding, since "the 'primary thrust' of petitioners' claim was to enforce a provision in the [agreement] that they alleged created a contractual obligation requiring the City to reimburse them for payments they made for Medicare Part B coverage." *Id.* at 1289. *See also Mitchell v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 15 A.D.3d 279, 281 (1st Dep't 2005) (rejecting agency's argument that four-month statute of limitations applied where plaintiff alleged breach of contract).

The thrust of Plaintiffs' contract and quasi-contract claims here is that Defendants violated their contractual obligation to pay 20% of Retirees' healthcare costs by imposing $15 co-pays. Accordingly, these claims are properly before this Court in a plenary action, and are not time-barred. *See Abiele*, 91 N.Y.2d at 8.

Similarly, causes of action that sound in tort are distinct from Article 78 claims, and are not subject to a four-month limitations period. *See, e.g.*, *Abelesz v. City of New York*, 175 A.D.3d 1225, 1226 (2d Dep't 2019) (reversing lower court's determination that action should have been brought as an Article 78 proceeding because plaintiff's claims were based in tort); *Singer v. de Blasio*, 74 Misc.3d 1233, 2022 WL 1180813, at *5 (Sup. Ct. N.Y. Cty. 2022) (holding that City's statute of limitations defense failed because plaintiff alleged tortious interference and was "not solely challeng[ing] the determination of the City").

Finally, and as Defendants well know, claims like those at issue here are frequently—and properly—brought against the City outside of the context of Article 78. *See, e.g.*, *Tridee Assocs., Inc. v. New York City Sch. Constr. Auth. et al.*, 292 A.D.2d 444 (2d Dep't 2002) (contract and quasi-contract claims); *Yarus v. New York City Health and Hosps. Corp.*, 32 Misc.3d 1207 (Sup. Ct. N.Y. Cty. 2011) (fraud, negligent misrepresentation, conversion, breach of contract, unjust enrichment, estoppel, and statutory violations); *Business Relocation Servs., Inc. v. City of New*

York et al., 19 Misc.3d 1114 (Sup. Ct. Kings Cty. 2008) (breach of contract and unjust enrichment); *Kalabakas v. New York City Housing Auth.*, 131 Misc.2d 975 (Civ. Ct. N.Y. Cty. 1986) (unjust enrichment).

Several of the cases relied upon by Defendants are inapposite as they only involved challenges to agency determinations and *did not include* claims sounding in contract, quasi-contract, or tort. *See, e.g., Fisher v. Biderman*, 154 A.D.2d 155 (1st Dep't 1990), citing *Starburst Realty Corp. v. City of New York*, 125 A.D.2d 148, 155 (1st Dep't 1987); *Jones v. Board of Education of Watertown*, 30 A.D.3d 967 (4th Dep't 2006).[3] Indeed, the language in *Starbust* directly following Defendants' selective quote from *Fisher* is: "[s]ince plaintiff has not asserted any valid fraud claims and the only remaining causes of action involve an alleged failure by the by the city to follow various provisions of the New York City Charter," the proper vehicle was an Article 78 proceeding. These cases are clearly not relevant here since Plaintiffs have alleged numerous non-Article 78 claims.

ii. Defendants ignore their recent and ongoing misconduct.

Even if a four-month statute of limitations were to apply (which it does not), the City indisputably engaged in deceptive and misleading conduct in connection with the SPD published during the fall 2022 open enrollment period. Thus, even under the City's erroneous four-month statute-of-limitations argument, Plaintiffs' claims based on this recent misconduct would not be time-barred.

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[3] Defendants also cite *Clissuras v. City of N.Y.*, 131 A.D.2d 717 (2d Dep't 1987), which included contract and tort claims. However, the plaintiff there sought to challenge the amount of her pension where her pension was specifically approved by the relevant public agency two years earlier, and thus her complaint was properly considered as an Article 78 challenge to that agency's decision.

Further, Plaintiffs' claims are not time-barred because the City's illegal conduct is ongoing. Where, as here, there is a "continuing wrong . . . , the action is not time-barred because the cause of action continues to accrue anew." *Town of Huntington v. Cty. of Suffolk*, 910 N.Y.S.2d 454 (2d Dept. 2010) (rejecting county's statute of limitations argument because of its ongoing failure to maintain road system); *see also N. Elec. Power Co., L.P. v. Hudson River-Black River Regulating Dist.*, 122 A.D.3d 1185, 1190 (3d Dep't 2014) (holding that limitations period ran anew from each assessment paid); *New York Ins. Ass'n, Inc. v. State*, 145 A.D.3d 80, 88 (3d Dep't 2016) (holding that limitations period "began to run at the time that each quarterly assessment was levied").

III. PLAINTIFFS' CLAIMS ARE NOT BARRED BY LACHES

Defendants contend that Plaintiffs' claims should be barred based on the equitable doctrine of laches. That defense fails as a matter of law. Indeed, "the doctrine of laches has no application" where, as here, "plaintiffs allege a continuing wrong." *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631, 642 (2014).

Even if laches were an available defense (which it is not), Defendants could not satisfy its stringent elements. Laches requires more than just a delay in bringing suit. It requires, *inter alia*, that such delay cause "significant prejudice" to Defendants. *Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983). "Prejudice . . . is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Abdelnabi v. New York City Transit Auth.*, 273 A.D.2d 114, 115 (1st Dep't 2000). Defendants have not even attempted to identify any such prejudice resulting from the timing of Plaintiffs' suit. Therefore, they have not carried their burden of proof.

Laches also requires that any delay be "unreasonable and inexcusable." *Macon v. Arnlie Realty Co.*, 207 A.D.2d 268, 271 (1st Dep't 1994). There was no such delay here. First, although co-pays were initially imposed in January 2022, many Retirees did not begin paying co-pays until months later, after they started receiving bills in the mail. (Compl. ¶ 131.) That is because: (1) doctors were generally not charging co-pays at the time of service since the Senior Care insurance cards did not identify any co-pays (Ex. 9) and doctors had never previously charged co-pays to patients on Senior Care; and (2) Retirees had to first satisfy the Medicare and Senior Care deductibles before co-pays kicked in.

Further, before bringing this suit, Plaintiffs had to first submit FOIL requests and carefully review all of the contract documents relating to Senior Care, as not all of them are publicly available.

Lastly, Plaintiffs have limited resources, which they have had to devote to the all-consuming, time-sensitive effort to stop the City from forcing them into an inferior Medicare Advantage plan. That effort, which is ongoing, delayed the present action.

IV. THE CO-PAYS CLEARLY VIOLATE THE SENIOR CARE CONTRACT

The contract governing Senior Care states unequivocally that "Medicare will pay 80% of the reasonable charge of your covered service" and "GHI will pay the 20% balance." (Ex. 3 at 37, 98.) Most medical providers follow the Medicare fee schedule. That means that if a Retiree receives a covered service (*e.g.*, physical therapy) that costs $100, Medicare pays $80 and Senior Care is contractually obligated to pay the remaining $20. The Retiree is supposed to pay nothing. The imposition of $15 co-pays violates that contractual right. Because of the co-pays, when that Retiree goes in for her $100 therapy session, she ends up paying $15 and Defendants pay only $5

(not the contractually required $20). That is a clear breach of the contract, an undeniable fact that neither Defendant addresses in its papers.

The fact that co-pays are not permitted for services covered under Senior Care is also apparent from other contractual provisions. The contract sets forth the "medical benefits" that each "Member shall be entitled to." (Ex. 1 at 4.) Because cost is a critical component of "medical benefits," the contract sets forth all of the co-pays applicable to each covered service. By listing the co-pays applicable to *all* services covered under CBP, while listing *no* co-pays for *any* services covered under Senior Care, the parties clearly intended that there would *no co-pays* for Senior Care services. *See Medinol Ltd. v. Bos. Sci. Corp.*, 346 F. Supp. 2d 575, 598 (S.D.N.Y. 2004) (finding the inclusion of language in one section of contract, and exclusion of the same language in another section, to be "purposeful[]" because it would be "hard to believe that the … [a]greement would articulate with such precision" in one provision and "permit the construction" through silence elsewhere); *Harmony Rockaway, LLC v. Gelwan*, 200 A.D.3d 863 (2d Dep't 2021) (stating that a "court's fundamental objective in interpreting a contract is to determine the parties' intent," which requires "giving a practical interpretation to the language employed and reading the contract as a whole"). The fact that, for decades, CBP charged co-pays while Senior Care did not further confirms this intent.

Defendants argue that co-pays for services covered under Senior Care should be allowed because Retirees have had to pay co-pays for prescription drugs and emergency room services. (City's Br. at 13; Emblem's Br. at 16.) However, both of those co-pays are explicitly authorized by contract and are readily distinguishable.

First, prescription drugs are not a "service" performed by a healthcare provider, nor are they covered under the basic Senior Care plan since they are outside the realm of traditional

Medicare. (Compl. ¶ 81.) Therefore, they are not a "covered service" for which Senior Care must pay 20%. As the contract clearly states, prescription drugs are offered through an optional program, and the co-pays for that program—unlike the co-pays at issue in this case—are *specifically listed* in the contract. (*See* Ex. 3 at 38-40, 100.)

Second, emergency room services are not offered by Emblem. They are offered by an entirely separate insurance company (Empire BlueCross BlueShield) pursuant to an entirely separate contract that *explicitly authorizes* the co-pays. Thus, co-pays for those services have no bearing on the breach-of-contract claim in this case.

V. DEFENDANTS DO NOT DISPUTE PLAINTIFFS' CORE FACTUAL ALLEGATIONS

It is important to emphasize that Defendants do not contest the fundamental allegations underlying Plaintiffs' claims. Most notably, Defendants do not dispute that Retirees reasonably rely on the SPDs to make their biennial enrollment decisions, and that the 2020 and 2022 SPDs falsely represented that Senior Care would impose no co-pays for doctor's visits, medical tests, procedures, treatments, and therapies. Defendants' only response—that there may be some Retirees who were not harmed by these indisputably misleading SPDs—is no defense.

Nor do Defendants dispute the basic unfairness of springing co-pays on cash-strapped Retirees in January 2022 when these Retirees did not know about or consent to such co-pays at the time they made their two-year enrollment decision in the fall of 2020, and when the next open enrollment was a year away.

In short, Defendants do not, and cannot, deny that Retirees have been charged co-pays without their consent and have been forced to make consequential healthcare decisions without accurate information.

VI. RETIREES ARE SUFFERING IRREPARABLE HARM

Displaying their usual callousness, Defendants downplay the suffering of elderly and disabled Retirees who have been devastated by co-pays they cannot afford.

First, Defendants argue that Retirees could not actually be suffering that much if they waited until November to bring suit. However, the timing of this suit in no way suggests a lack of irreparable harm. To begin with, as discussed above, it took months for many Retirees to even begin receiving co-pay bills. Further, it was the cumulative effect of the co-pays over time that completely drained Retirees' savings and caused the current emergency. Finally, because Retirees have so little disposable income, and have already been devoting their limited litigation budget to fighting a much larger threat to their healthcare, the fact that they were able to bring this suit at all shows how serious of an emergency this is.

Next, Defendants contend that there is no irreparable harm because Retirees can simply use their once-in-a-lifetime option to switch plans. That argument does not apply to those Retirees who have already used their once-in-a-lifetime option. Moreover, it ignores the fact that this option is a one-time emergency lifeline meant to protect against a sudden and unexpected change in a Retirees' personal circumstances. It is not to be squandered responding to Defendants' unlawful imposition of co-pays.

Lastly, Defendants point to the fact that Retirees could have switched in November 2022 to a Medicare Advantage plan with zero co-pays. However, that is not an option that would have been considered by the many Retirees who were led to believe, based on the false and misleading 2022 SPD, that Senior Care would have no co-pays in 2023. It is also not an option for the many Retirees (including cancer patients at Memorial Sloan Kettering) whose doctors do not accept Medicare Advantage or whose health cannot be risked on the dangerous prior authorization

requirements that come with such healthcare. These Retirees could not avoid irreparable harm by switching to a zero-co-pay Medicare Advantage plan, since such a switch would have posed its own (potentially graver) threats to their health.

VII. THE EQUITIES FAVOR RETIREES

A year ago, as this Court may recall, the City and Emblem inaccurately claimed that if they were enjoined from automatically enrolling Retirees in a Medicare Advantage plan, it would "require shutdown of the City's payroll system" (NYSCEF No. 183), and that if they were forced to send Retirees corrected healthcare information in the mail, it would create a supply chain disaster (NYSCEF No. 157). Once again, the sky is falling: Defendants claim it would be an "administrative debacle" (City's Br. at 3) and "create nothing short of chaos" (Emblem's Br. at 13) if they were to stop charging Retirees co-pays. Defendants grossly exaggerate the burden.

In order to stop the co-pays, all Emblem needs to do is adjust its payment system to account for the $15 difference. Instead of withholding $15 for every payment to a medical provider, Emblem would simply pay the full 20% it owes, just as it did for decades prior to 2022. This adjustment would *simplify* the process for everyone involved, as all payments would once again come entirely from Emblem. Defendants complain that Emblem would have to notify Retirees and medical providers of this change and update its IT system. (City's Br. at 14; Emblem's Br. at 13-14.) But that is a routine process for any insurance company, particularly one as big and established as Emblem, which has tweaked its plans on countless occasions. In fact, just a year ago, Emblem undertook this exact same exercise in connection with the much more burdensome task of imposing co-pays for Senior Care for the first time ever. And it did so just two weeks before the co-pays took effect.

When it comes to balancing equities, the minor administrative burden Emblem faces here pales in comparison to the devastating harm Retirees are experiencing.

VIII. THE COURT NEED NOT SET MORE THAN A NOMINAL UNDERTAKING

Defendants argue that Plaintiffs should not be awarded injunctive relief unless they post a $5 million bond every month. Notably, no such bond was requested, or granted, in the Retirees' case last year, despite Defendants' claim in that case that they would lose $50 million every month as a result of the preliminary injunction.

When plaintiffs seeking injunctive relief would be obligated to post an undertaking under CPLR 6312(b), but have limited means or are non-profits, "[c]ourts, in exercising their discretion, have set nominal undertakings" to account for the fact that "the plaintiff lacks sufficient financial resources." *Wright v. Lewis*, 21 Misc.3d 1120, 2008 WL 4681929, at *14 (Sup. Ct. Kings Cty. 2008). Courts routinely set these nominal undertaking amounts at anywhere between $1 and $1,000. *See, e.g., Brad H. v. City of New York*, 185 Misc.2d 420 (Sup. Ct. N.Y. Cty. 2000) ($1 undertaking); *Wuertz v. Cowne*, 65 A.D.2d 528 (1st Dep't 1978) ($100 undertaking); *Daytop Vill., Inc. v. Consol. Edison Co. of New York*, 61 A.D.2d 933, 934 (1st Dep't 1978) ($1,000 undertaking).

Plaintiffs struggling to pay $15 copays cannot be expected to pay millions of dollars merely to vindicate their healthcare rights, nor does CPLR 6312(b) require it. If the Court grants Plaintiffs' motion and chooses to set an undertaking, Plaintiffs respectfully request that it be a nominal one.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' opening brief, this Court should grant Plaintiffs' preliminary injunction motion.

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