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.: **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR PROPOSED ORDER TO SHOW CAUSE

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Plaintiffs, by their undersigned counsel, respectfully submit this Memorandum of Law in support of their proposed Order to Show Cause why an order pursuant to Article 63 of the Civil Practices Laws and Rules should not be entered enjoining Defendants the City of New York, the New York City Office of Labor Relations (together with the City of New York, the "City"), Group Health Incorporated ("GHI"), and EmblemHealth, Inc. ("Emblem") from imposing co-pays for the GHI Senior Care health insurance plan ("Senior Care").

PRELIMINARY STATEMENT

This Court is by now quite familiar with the City's efforts to force retired municipal workers to pay for health insurance that, under the law, must be—and always has been—free. As the Court will recall from prior litigation, in the summer of 2021, the City announced an unprecedented and unlawful plan to charge Medicare-eligible retirees ("Retirees") approximately $191 per person per month to remain on Senior Care, a popular health insurance plan that had always been free. This $191 charge was scheduled to go into effect in 2022. However, in September 2021, Retirees sued to keep Senior Care cost-free. This Court ruled in their favor—first in a preliminary injunction order in October 2021, and later in a final order in March 2022. Specifically, the Court enjoined the City from "passing along any costs" of Senior Care to Retirees.[1] Last week, the First Department unanimously affirmed that ruling.[2]

When the Retirees filed their previous suit in 2021, they did not (and could not) know that the City's illegal scheme to pass along the costs of Senior Care to Retirees would extend beyond the $191 premiums. However, in 2022, the City, acting in concert with the insurance companies

[1] *NYC Org. of Pub. Serv. Retirees, Inc. v. Campion*, Index No. 158815/2021, 2022 WL 624606, at *2 (Sup. Ct. N.Y. Cty. Mar. 3, 2022).

[2] *NYC Org. of Pub. Serv. Retirees, Inc. v. Campion*, Case No. 2022-01006, 2022 WL 17096611 (1st Dep't Nov. 22, 2022).

administering the Senior Care plan (Defendants GHI and Emblem), quietly began forcing Retirees to pay $15 every time they saw a healthcare provider or received a medical test, procedure, treatment, or therapy (which meant that a single healthcare visit could entail multiple $15 co-pays). This is unprecedented: for decades prior to this year, Senior Care never had co-pays (which was one of its most attractive features). Although $15 might not sound like much, when that cost is incurred several times a week—as it is for many senior citizens and disabled first responders who require constant medical care—it adds up to thousands of dollars a year. And when that expense is unexpectedly thrust upon a Retiree living on a limited, fixed income (tens of thousands of Retirees subsist on pensions that are less than $1,500 a month), it is overwhelming.

The Senior Care co-pays are not just unprecedented and onerous, they are unlawful.

First, the contract governing Senior Care—of which Retirees are third-party beneficiaries—does not permit them.

Second, neither does this Court's March 2022 order.

Third, Defendants have violated their statutory and common law duties by forcing these co-pays on Retirees without consent or advance warning, and by affirmatively lying about them. In even-numbered years, when Retirees have a chance to switch healthcare plans in the fall, they evaluate and compare their health insurance options by reviewing a booklet called the "Summary Program Description," or "SPD." The SPD is an 84-page document put together by the City and insurance companies explaining the benefits and financial costs (including co-pays) of every health insurance plan available to active and retired City workers for the upcoming year(s) (active employees make their selection annually, while retirees make their selection in even-numbered years for two years). The SPD published in October 2020—when Retirees selected their healthcare plan for 2021 and 2022—made no mention of co-pays for Senior Care. Neither did the SPD

published in October of this year. In fact, these SPDs falsely assured Retirees that the Senior Care plan would cover all of the charges that Medicare did not. By contrast, the SPDs honestly disclosed the co-pays associated with every other plan besides Senior Care. Retirees were induced to enroll in Senior Care based on Defendants' false and misleading representations that there would be no co-pays.

The Retirees are all elderly and/or disabled, and many are living pension-check-to-pension-check with debilitating health problems. For the past year, they have been David fighting against multiple Goliaths, namely the City and insurance companies, which have been desperately trying to eviscerate retiree healthcare benefits for their own financial gain. Because the Retirees have had to devote all of their energy and limited resources combatting—in court and the political arena—existential threats to their healthcare, they have had to delay filing the present co-pay suit. However, because the accumulating effect of these illegal co-pays is now overwhelming many Retirees, they can no longer await relief. Thousands are living on small, fixed incomes (less than $1,500 a month) and battling life-threatening illnesses that require constant treatments and diagnostic tests. As a result, they are drowning in co-pays they cannot afford, which is causing them to forego needed medical care and reduce spending on basic necessities. It is also causing unbearable distress. Plaintiffs are filing this proposed Order to Show Cause in order to obtain immediate relief from these irreparable harms.

Plaintiffs satisfy the three requirements for a preliminary injunction.

First, although they need only show a likelihood of success on one of their many causes of action, as explained below, they are likely to succeed on all of them.

Second, the affidavits accompanying this proposed Order to Show Cause reveal that Retirees will suffer at least three well-recognized forms of irreparable harm absent injunctive

relief: (i) many will (and have already had to) forego medical care because they cannot afford the co-pays that come with such care; (ii) many will (and have already had to) reduce spending on basic necessities such as food, housing, medicine, home health aides, heat, electricity, and transportation in order to afford the co-pays for their medical care; and (iii) many will (and have already had to) suffer severe emotional and psychological distress over their precarious medical and financial circumstances. Because such harms cannot be compensated later through a damages award, they are irreparable.

Third, the balance of the equities weighs heavily in the Retirees' favor. As courts have repeatedly held, the health and well-being of vulnerable individuals far outweigh any financial burden on the government and multi-billion-dollar insurance companies, particularly where, as here, that burden is relatively minor to such defendants. Notably, a preliminary injunction in this case would merely return Defendants to the financial arrangement (*i.e.*, no co-pays for Senior Care) that had existed for decades prior to this year.

Accordingly, this Court should grant Plaintiffs' proposed Order to Show Cause why an order pursuant to Article 63 of the Civil Practices Laws and Rules should not be entered enjoining Defendants from charging Retirees co-pays for Senior Care.

STATEMENT OF FACTS

The facts relevant to this case are simple and indisputable. They are summarized below.

I. Defendants Have Sought To Shift the Costs of Senior Care onto Retirees

Plaintiffs represent a putative class of approximately 183,000 Retirees and their spouses who are enrolled in the federal Medicare program as well as a Medicare "Supplemental" or "Medigap" plan known as Senior Care. Like other Medigap plans, Senior Care insures the portion

of healthcare expenses that Medicare does not cover. Senior Care is administered by GHI, a wholly owned subsidiary of Emblem.[3]

For decades, Senior Care has been the go-to health insurance option for Retirees. That is in part because, up until this year, it has always been free, meaning Retirees did not have to pay any premiums or co-pays. As required by statute, contract, and past practice, the City has always covered the costs of Senior Care.

However, in 2021, the City sought to change that. In an effort to cut costs and force Retirees into a new federally funded Medicare Advantage plan, the City announced that it would charge Retirees approximately $191 per person per month to remain in Senior Care starting in 2022. Thanks to preliminary and permanent injunctions ordered by this Court in *NYC Organization of Public Service Retirees v. Campion*,[4] the City never implemented that unlawful policy. However, in January 2022, it began implementing a different cost-shifting scheme that was not publicized in advance. Specifically, the City—acting in concert with GHI and Emblem—began forcing Retirees to pay for Senior Care through $15 co-pays every time they saw a doctor or received a medical test, procedure, treatment, or therapy. For many of these elderly and disabled individuals, particularly those with life-threatening illnesses such as cancer, these co-pay-triggering events occur on a regular basis.

II. The Contract Governing Senior Care Does Not Allow Co-Pays

The Senior Care plan is governed by a contract (the "Contract") between the City and GHI. On February 25, 2000, the City and GHI executed "A Contract Between The City of New York

[3] Retirees enrolled in Senior Care also receive certain inpatient hospital benefits through Empire BlueCross BlueShield. Those benefits are not at issue in this case, and Empire BlueCross BlueShield is not named as a defendant.

[4] *See NYC Org. of Pub. Serv. Retirees, Inc. v. Campion*, Index No. 158815/2021, ECF Nos. 112, 166, 214.

and Group Health Incorporated" whereby the City agreed to pay GHI to provide health insurance benefits to active and retired City employees and their dependents, all of whom are referred to in the Contract as "Members."[5] Ex. 1 at PDF pp.1, 4. The Contract was set to remain in effect "for the duration of the first Contract Period [(July 1, 1997 through June 30, 2002)] and thereafter, unless this Contract is terminated as provided herein." *Id*. at PDF p.4. The Contract has not been terminated and therefore remains in effect today.

The financial arrangement between the City and GHI has evolved over time. The current arrangement is governed by a rider to the Contract that was originally executed by the parties in 2014 (the "Funding Rider"). *See* Ex. 2. Under the Funding Rider, GHI pays claims charged by medical providers directly from a City account, up to a "preset Monthly Trigger amount." If that Monthly Trigger amount is exceeded, GHI pays the claims from its own coffers and then bills the City for that amount plus an agreed-upon premium. In its simplest form, GHI is responsible for paying the doctors; but, ultimately, it is supposed to be the City's money that pays those claims.

In addition to describing the financial arrangement between the City and GHI, the Contract also describes the benefits that GHI must provide to City employees, retirees, and their dependents (the "Members") who enroll in one of the GHI plans. The Contract states that "[e]ach Member shall be entitled to the medical benefits described in the Certificate(s) of Insurance and any riders or agreements made thereto attached hereto and made a part hereof." Ex. 1 at 4.

The GHI Certificate of Insurance and all applicable riders thereto (together the "COI") are packaged together in a single document and published online by Emblem, which owns GHI. *See* Ex. 3. The COI is 159 pages and explains the different sets of benefits provided to: (1) employees

[5] The Members are third-party beneficiaries of the Contract. *Plavin v. Grp. Health Inc.*, 35 N.Y.3d 1 (2020).

and non-Medicare-eligible retirees enrolled in GHI's Comprehensive Benefits Plan ("CBP"); and (2) Medicare-eligible Retirees enrolled in GHI's Senior Care plan ("Senior Care"). To be clear, CBP and Senior Care are two different plans, with different terms, serving two mutually exclusive groups of Members (employees and non-Medicare-eligible retirees are in CBP; Medicare-eligible Retirees are in Senior Care).[6] The two plans both happen to be addressed in the same COI because they are both administered by GHI.

Employees and non-Medicare-eligible retirees—unlike Medicare-eligible Retirees—do not receive any healthcare benefits through Medicare. Accordingly, CBP provides them with comprehensive health insurance coverage. Such coverage includes broader benefits and different terms than Senior Care, which merely supplements the benefits provided by Medicare. One such difference between CBP and Senior Care has always been co-pays. As the COI explains, many of the services covered under CBP require co-pays. *See* Ex. 3 at 9-10, 16, 22, 94. These co-pay amounts have increased over time, as reflected in COI riders. *See, e.g., id*. at 94, 131 (2004 rider showing the co-pay increase that became effective that year for employees and non-Medicare-eligible retirees enrolled in CBP).

The benefits provided to Medicare-eligible Retirees under Senior Care are addressed in a separate section of the COI, specifically Section Fourteen. *See id*. at 37-38 (Section Fourteen), 97-98 ("Rider to Amend the GHI Senior Care Benefits" listed in Section Fourteen). As the COI explains, when Retirees turn 65, they "become eligible for Medicare," and if they enroll in Senior Care, they "receive only those benefits listed in this Section Fourteen." *Id*. Section Fourteen lists various services—such as doctors' visits, surgery, diagnostic procedures, laboratory tests,

[6] The fact that CBP and GHI are separate plans is made clear in the COI as well as countless other sources, including Emblem's website and the SPDs. *See* https://www.emblemhealth.com/resources/city-of-new-york-employees (Emblem's website); Ex. 4 at 30, 65.

radiation therapy, and chemotherapy—that are covered under Senior Care. *Id*. at 38, 98. None of them requires co-pays. *Id*. Instead, the way payment is supposed to work is that, after a deductible is met, "Medicare will pay 80% of the reasonable charge of your covered service" and "GHI will pay the 20% balance." *Id*. at 37, 98. In other words, the COI requires Senior Care to fully pay the 20% of medical providers' claims that Medicare does not cover. It does not allow these costs to be passed along to Retirees through co-pays.[7]

Thus, in sum, the COI has long allowed co-pays for CBP, but has never allowed them for Senior Care. For decades (up until this year), that reflected reality: CBP imposed co-pays, while Senior Care did not. In 2022, Retirees who were enrolled in Senior Care were suddenly—for the first time ever—charged co-pays every time they saw a doctor or received a medical test, procedure, treatment, or therapy. However, the COI was never amended to allow that. Because the COI sets forth the contractual obligations of the City and GHI/Emblem with respect to Senior Care benefits for Retirees, the imposition of co-pays constitutes a clear breach of the Contract.

III. Defendants Have Deceived Retirees and Imposed Co-Pays without Retirees' Consent or Prior Notice

There is arguably no issue more important or consequential to an elderly or disabled Retiree than healthcare. Choosing the wrong health insurance plan can have devastating medical and financial consequences. Thus, it is critical for Retirees to be given accurate and complete information about their healthcare options.

The City offers all of its employees, retirees, and their dependents a choice of health insurance plans through the NYC Health Benefits Program. Every fall, there is an open enrollment period during which individuals can select their health insurance plan for the following calendar

[7] The COI states that Medicare-eligible Retirees who want special prescription drug coverage outside of Senior Care may be subject to co-pays. *Id*. at 39-40, 100.

year. Up until this year, Retirees could only switch plans during open enrollment in even-numbered years. Ex. 5 at 18.[8] This means that, because 2021 was an odd-numbered year, Retirees could not transfer in or out of Senior Care during the 2021 fall open enrollment period. They were stuck with whatever enrollment decision they made in the fall of 2020 for two years (2021 and 2022). Retirees were able to participate in the fall open enrollment period this year (which ends November 30), thus allowing them to choose whatever plan they wanted for 2023.[9]

In order to allow employees and retirees to make an informed healthcare enrollment decision, the City publishes in October a thick booklet called the Summary Program Description ("SPD"), which contains information about all of the health insurance plans offered through the NYC Health Benefits Program. Although the City publishes the SPD, the insurance companies are actively involved in the process and supply information about their plans. The SPD is supposed to provide employees and retirees an accurate summary of all of the healthcare benefits and financial costs (including co-pays) associated with each plan, thus allowing individuals to competently evaluate and compare their healthcare options and select the one that best serves their needs. Retirees with limited resources who require frequent medical attention understandably seek plans with no co-pays.

When making their healthcare enrollment decisions in the fall of 2020 and 2022, Retirees relied on the SPDs published online in October of those years. Defendants knew that Retirees would rely on these SPDs and intended for them to do so.

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[8] Retirees can also switch plans once anytime during their life. *Id*. The even-number-year restriction was lifted in 2022, meaning Retirees can now switch plans every year (during the month of November). Ex. 4 at 18.

[9] *See* https://www.nyc.gov/site/olr/health/retiree/health-retiree-responsibilities-assistance.page.

The October 2020 SPD—on which Retirees relied when choosing the healthcare plan they would be stuck with for 2021 and 2022—did not mention that Senior Care would, or even might, impose co-pays for healthcare visits, medical tests, procedures, treatments, and therapies. Ex. 5 at 68. Thus, when Senior Care co-pays were suddenly imposed in 2022, Retirees were caught unaware and with no escape.

The October 2022 SPD, on which Retirees relied when making their enrollment decision this November, similarly hid the Senior Care co-pays. Ex. 4 at 68.

Defendants' failure to disclose the Senior Care co-pays in the 2020 and 2022 SPDs was especially misleading for several reasons.

First, for decades up until this year, Senior Care never charged co-pays for doctors' visits, medical tests, procedures, treatments, or therapies. Therefore, disclosing co-pays—which the SPDs are required to do for all plans that have them—was particularly critical for the Senior Care plan given their unprecedented nature.

Second, the SPDs disclosed the co-pays applicable to *every other healthcare plan*. *See* Ex. 5 at 31-80; Ex. 4 at 32-81. That includes the co-pays for CBP. Ex. 5 at 44-45; Ex. 4 at 44-45. Senior Care—in which the vast majority of Retirees are enrolled—was the lone exception. The other healthcare plans for which the SPDs did not list co-pays (*e.g.*, Aetna) did so because there were no co-pays. Accordingly, the SPDs' silence regarding co-pays for Senior Care caused Retirees to reasonably believe that there were no co-pays.

Third, the SPDs did disclose two types of co-pays that may be lawfully charged to Retirees enrolled in Senior Care. The first is for emergency room care, a service provided by Empire BlueCross BlueShield, not GHI (meaning the GHI COI does not govern that service). Ex. 5at 68; Ex. 4 at 68. The second is for Retirees who choose special prescription drug coverage from GHI,

an option that is outside of the basic Senior Care plan. *Id*. The COI specifically allows co-pays for such drugs. Ex. 3 at 100. The disclosure of co-pays for these two specific services—and only these services—further misled Retirees to believe that all other services (such as doctor's visits, medical tests, procedures, treatments, and therapies) did not have co-pays.

Fourth, the SPDs did not just fail to disclose the Senior Care co-pays, they affirmatively indicated that there were no co-pays. Indeed, the SPDs—echoing the COI—stated that Senior Care would pay the full 20% of healthcare charges that Medicare does not cover. Ex. 5 at 68; Ex. 4 at 68. By imposing co-pays on Retirees, Senior Care is not paying this full amount; Retirees are paying a significant portion of it.

Lastly, Defendants knew that they needed to disclose the Senior Care co-pays in the SPDs, and they knew exactly how to do it. During a very narrow window of time in December 2021—and only during that narrow window—they posted online a unique version of the SPD that actually disclosed the co-pays. *See* Ex. 6 at 68. This version—which was identical to the October 2020 and 2022 SPDs in all other relevant respects—stated in the summary of the Senior Care plan: "PCP and Specialist services are subject to a $15 copay." *Id*. Inexplicably, this disclosure was removed as quickly and unexpectedly as it appeared. In January 2022 and continuing thereafter, the SPD again made no mention of the $15 co-pays. *See* Ex. 7 at 69.

It is unclear why, in December 2021, Defendants very briefly posted a version of the SPD that disclosed the Senior Care co-pays. However, what is clear is that this isolated disclosure was meaningless. Defendants might as well have whispered the information into the wind. Retirees had no reason to go online and review the SPD in 2021, much less in December 2021. They could not participate in open enrollment that year because it was an odd-numbered year. And even if they could participate (which they could not), the open enrollment period does not extend through

December. The only thing that the December 2021 version of the SPD accomplished was to show what the 2020 and 2022 SPDs should have said, but did not.

Defendants' deception was not limited to the SPDs. It also extended to the health insurance ID cards sent to Retirees. Emblem sends all CBP and Senior Care Members a health insurance card that lists their name and basic information about their plan. The cards provided to those enrolled in CBP disclose the co-pays applicable to that plan. Ex. 8. By contrast, the cards sent to Retirees enrolled in Senior Care do not mention any co-pays.[10] Ex. 9.

Defendants' failure to inform Retirees of the Senior Care co-pays is reminiscent of their flawed rollout of the Medicare Advantage Plus Plan ("MAPP") last year. As this Court will recall, the Court preliminarily enjoined the City from implementing the MAPP a year ago because the City and the insurance "Alliance" administering the MAPP (which included Emblem) failed to adequately inform Retirees of basic information about the MAPP prior to implementing it. *See NYC Org. of Pub. Serv. Retirees, Inc. v. Campion*, Index No. 158815/2021, 2021 WL 4920705, at *1-2 (Sup. Ct. N.Y. Cty. Oct. 21, 2021). The same thing has happened here.

Had Defendants properly notified Retirees during the biennial open enrollment periods in 2020 and 2022 that Senior Care would entail co-pays, many would have chosen not to enroll in the plan. And those who would have enrolled despite the co-pays would have appropriately altered their spending, savings strategies, investments, and other financial and medical decision-making in advance so as to better handle this onerous new expense. By imposing co-pays without proper notice, Defendants prevented Retirees from making an informed healthcare enrollment decision.

[10] Because the Senior Care cards issued for use in 2022 make no mention of co-pays, many Retirees were not charged co-pays at the doctor's office originally when they saw their doctors. It was only months later, when they received Explanations of Benefits from Emblem, that they learned they owed money for all of their healthcare visits since the beginning of the year.

Moreover, as explained in the accompanying affidavits, and summarized below in Section II, the imposition of co-pays is causing irreparable harm to thousands of Retirees who cannot afford theses unexpected costs.

ARGUMENT

A preliminary injunction should be granted where, as here, (1) Plaintiffs have shown a likelihood of success on the merits, (2) they will suffer irreparable harm in the absence of a preliminary injunction, and (3) the balance of equities tips in their favor. *Aetna Ins. Co. v Capasso*, 75 N.Y.2d 860, 862 (1990). Each of these prongs is addressed in turn below.

I. Plaintiffs Are Likely To Succeed on the Merits

To establish a likelihood of success on the merits, "[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits." *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 (1st Dep't 2016) (internal quotations omitted). A likelihood of success on the merits may be sufficiently established "even where the facts are in dispute and the evidence need not be conclusive." *Id*. Plaintiffs more than satisfy that standard here.

The imposition of co-pays for the Senior Care plan is unlawful for several independent reasons, each of which gives rise to its own cause(s) of action. These causes of action include breach of contract; unjust enrichment; violation of N.Y. Insurance Law § 4226; negligent misrepresentation; promissory estoppel; fraudulent inducement; deceptive acts and practices in violation of General Business Law ("GBL") § 349; false advertising in violation of GBL § 350; abuse of discretion and arbitrary and capricious action by the City in violation of CPLR 7803; and violation of this Court's March 3, 2022 order. As explained below, Plaintiffs have a reasonable probability of success on each.

A. Breach of Contract

The breach-of-contract analysis here is simple and has already been laid out in the Statement of Facts. We briefly reiterate that analysis here.

The Senior Care plan is governed by a contract (the "Contract"). *See* Exs. 1, 3. The Contract requires the City to pay GHI to provide healthcare benefits to Retirees. Ex. 1 at 4; Ex. 3. Specifically, GHI must pay claims submitted by medical providers for various services, including doctors' visits, medical tests, procedures, treatments, and therapies. Ex. 1 at 37-38, 98. These claims represent the 20% of costs that Medicare does not cover. *Id*. at 37, 98. The Contract does not permit—and, in fact, it affirmatively prohibits—those costs to be passed along to Retirees through co-pays. *Id*.

By charging Retirees $15 co-pays every time they see a doctor or receive a medical test, procedure, treatment, or therapy, Defendants are breaching the Contract. This breach is causing obvious financial harm to Retirees in the form of unlawful co-pays. It is also causing substantial non-financial harm. As detailed in the accompanying affidavits, Retirees who cannot afford the co-pays are foregoing medical care, reducing spending on necessities, and suffering severe emotional and psychological distress.

Thus, the well-established elements of a breach of contract are satisfied. *See 34-06 73, LLC v. Seneca Ins. Co.*, __ N.E.3d __, 2022 WL 14914085, at *4 (N.Y. Oct. 27, 2022) (breach of contract requires a contract, breach, and damages).

Although Retirees are not parties to the Contract, they have standing to sue as third-party beneficiaries. *See Plavin v. Grp. Health Inc.*, 35 N.Y.3d 1, 8 (2020) (noting that "hundreds of thousands of City employees and retirees are third-party beneficiaries of [the City's] contract [with

GHI]").[11] That is because (1) there "exist[s] a valid and binding contract between [the City and GHI]," (2) that "contract was intended for [Retirees'] benefit," and (3) "the benefit to [Retirees] is sufficiently immediate" and not just "incidental." *State of California Pub. Employees' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434–35 (2000).

B. Unjust Enrichment

"The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (cleaned up). The facts here present a compelling case of unjust enrichment.

Retirees dedicated their lives to—and in many cases risked their lives for—this City. In return, they were promised certain retirement benefits, including lifelong City-funded health insurance. In the fall of 2020, these elderly and disabled Retirees were forced to make a healthcare enrollment decision that would bind them for the next two years (2021 and 2022). After diligently reviewing the October 2020 SPD to determine which one of the various health insurance options would best fit their medical and financial circumstances, the vast majority chose to enroll in the Senior Care plan, in part because it was one of the few plans that did not charge co-pays. For cash-strapped Retirees who might need frequent medical attention, this was a wise choice.

[11] *See also Colavito v. New York Organ Donor Network, Inc.*, 438 F.3d 214, 228 (2d Cir. 2006) ("New York follows the nearly universal rule that a third person may, in his own right and name, enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. . . . [T]here is need for neither consideration from, nor privity with, nor obligation to, the third person." (quoting N.Y. Jur. Contracts § 302)).

Knowing that Retirees would be bound by their enrollment decision through December 2022, Defendants engaged in a classic bait-and-switch: they promised no co-pays for Senior Care in the 2020 SPD and the Contract (among other places), and then, without providing Retirees any warning or opportunity to switch plans, they began imposing co-pays for Senior Care in January 2022, in the midst of a raging pandemic that disproportionately affected senior citizens and the disabled. Retirees did not consent to these unlawful charges. However, they could not escape them.

This deceptive scheme is unjustly enriching Defendants. Co-pays shift a portion of the cost of a medical provider's claim for payment from Defendants to the Retiree. Each $15 co-pay that is imposed on a Retiree is money that would—and should—have been paid to the doctor by GHI using funds from the City. Thus, every dollar that is charged to Retirees in co-pays is a dollar that Defendants avoid having to pay, despite their legal obligation to do so. Equity and good conscience demand that Defendants not be allowed to profit from this scheme.

The need to enjoin Defendants is particularly acute because they are in the process of repeating this scheme next year. Through their false and misleading October 2022 SPD, they have again baited Retirees into thinking that there will be no co-pays for Senior Care in 2023. *See* Ex. 5 at 68. During this year's fall open enrollment period, many Retirees have chosen to enroll in Senior Care based in part on the SPD's misrepresentation that the plan will not have co-pays next year. Although some Retirees might have seen through this lie based on their experience with Senior Care co-pays this year, a large number have been misled. Some of those who have been misled are new to Senior Care—either because they were not previously Medicare-eligible or because they have been enrolled in a different Medicare plan. Thus, they had no prior experience with Senior Care co-pays. Others who have been misled already have Senior Care, but did not

recall there being co-pays because they were lucky enough not to have to go to the doctor's much this past year. And still others, who incurred substantial co-pays while enrolled in Senior Care this past year, have nonetheless been misled because: they reasonably understood the October 2022 SPD to mean that there would be no co-pays for Senior Care next year; 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.

C. Violation of N.Y. Insurance Law § 4226

Insurance companies have a statutory obligation to provide accurate and complete information about their healthcare plans. Specifically, N.Y. Insurance Law § 4226 states in pertinent part: "No insurer authorized to do in this state the business of . . . health insurance . . . shall . . . issue or circulate, or cause or permit to be issued or circulated on its behalf, any illustration, circular, statement or memorandum misrepresenting the terms, benefits or advantages of any of its policies or contracts."

GHI and Emblem have knowingly violated this statute by causing inaccurate and misleading summaries of the Senior Care plan to be published in the 2020 and 2022 SPDs (among other places). The plan summaries falsely represented that Senior Care would not charge co-pays. Ex. 5 at 68; Ex. 4 at 68.

D. Negligent misrepresentation

By misrepresenting the co-pays applicable to Senior Care in the 2020 and 2022 SPDs, Defendants are also liable under a negligent misrepresentation theory. "To recover on a theory of negligent misrepresentation, a plaintiff must establish that [(1)] the defendant had a duty to use reasonable care to impart correct information because of some special relationship between the parties, [(2)] that the information was incorrect or false, and [(3)] that the plaintiff reasonably relied

upon the information provided." *Grammer v. Turits*, 271 A.D.2d 644, 645 (2d Dep't 2000). Each of these elements is satisfied here.

First, Defendants had a duty to accurately describe the Senior Care plan in the SPDs. Defendants have a special relationship with Retirees. They are not just arms-length counterparties in a commercial transaction. Defendants are statutorily, contractually, and morally obligated to provide healthcare to Retirees, all of whom spent their lives serving this City. Retirees are elderly and/or disabled, and they are dependent on Defendants both to provide them with healthcare and to truthfully explain their healthcare options. Defendants publish the SPDs in October for the express purpose of allowing Retirees to make an informed healthcare choice during the fall open enrollment period. As Defendants well know, Retirees rely on the SPDs when choosing a healthcare plan. Thus, the first element is easily met. *See id*. (explaining that the first element requires only "a relationship between the parties such that there is an awareness that the information provided is to be relied upon for a particular purpose by a known party in furtherance of that purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant's understanding of their reliance"); *American Exp. Co. v. Teitel*, 119 Misc. 2d 822 (N.Y. City Civ. Ct. 1983) (holding that airline ticket agent had duty to impart accurate information to passenger, and agent's erroneous statement that passenger could obtain passage on a date other than that specified on the ticket, without any caveat as to limitations and conditions, constituted negligent misrepresentation).

Second, as explained above, the 2020 and 2022 SPDs falsely represented—through affirmative statements and omissions—that there were no co-pays for Senior Care.

Third, Retirees reasonably relied on the 2020 and 2022 SPDs for accurate information about the Senior Care plan. The SPDs are the official, authoritative source of information about

the healthcare options offered through the NYC Health Benefits Program. They are designed to provide, and (with the exception of the Senior Care co-pays) have long provided, accurate and comprehensive information about the healthcare benefits and financial costs (including co-pays) of each healthcare plan.

Thus, in sum, Plaintiffs are likely to prevail on their negligent misrepresentation claim.

E. Promissory Estoppel

Plaintiffs are also likely to prevail on their promissory estoppel claim. "The elements of a promissory estoppel claim are: (i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance." *Castellotti v. Free*, 138 A.D.3d 198, 204 (1st Dep't 2016). Each of these elements is satisfied here.

With respect to the first element (a sufficiently clear and unambiguous promise), in the 2020 and 2022 SPDs and in the Contract between the City and GHI, Defendants made various promises to Retirees regarding their healthcare benefits (benefits they earned based on their decades of public service). One of those promises was that Retirees enrolled in Senior Care would be able to see their doctors and receive medical tests, procedures, treatments, and therapies without having to incur co-pays. Ex. 5 at 68; Ex. 4 at 68; Ex. 1 at 37-38, 98.[12]

With respect to the second element (reasonable reliance), Retirees reasonably relied on this promise of no co-pays. The SPDs and the Contract are designed for reliance. They are the official, authoritative sources of information regarding the benefits and financial costs of the Senior Care plan. They are published online for the explicit purpose of allowing Retirees to evaluate and

[12] This promise was not just made by Defendants to Retirees. The SPDs and the Contract also evince a clear promise by Defendants to each other not to charge Retirees co-pays for Senior Care. Retirees have standing to sue not only for the promise made directly to them, but also as third parties for the promise made by Defendants to each other. *See Henneberry v. Sumitomo Corp. of Am.*, 2005 WL 991772, at *5-6 (S.D.N.Y. Apr. 27, 2005) (explaining the propriety of third-party promissory estoppel claims).

compare plans and to make their biennial enrollment decision. For decades, Defendants kept the co-pay-related promise they made in the SPDs and the Contract, *i.e.*, that Retirees would not be charged co-pays to see their doctors or receive medical tests procedures, treatments, or therapies. Thus, Retirees were reasonable to believe that Defendants would continue to keep their promise of no co-pays.

With respect to the third and final element (injury), Retirees have been injured by incurring co-pays every time they received medical care. Had they been warned in advance about the co-pays, many would have chosen a different plan, one with no co-pays or lower co-pays. And those who would have enrolled despite the co-pays would have appropriately altered their spending, savings strategies, investments, and other financial and medical decision-making in advance so as to better handle this onerous new expense.

F. Fraudulent Inducement

The publicly available evidence demonstrates that Emblem/GHI not only misrepresented the co-pays for its Senior Care plan, but did so on purpose in order to induce Retirees to enroll in it.

In order to prevail on a fraudulent inducement claim, Plaintiffs "must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996). These elements, many of which have already been discussed in connection with the other claims, can be quickly checked off.

First, the 2020 and 2022 SPDs misrepresented and omitted material information regarding the Senior Care co-pays.

Second, Emblem/GHI clearly knew that the information was inaccurate, since it is well aware of the co-pays that are applicable to its healthcare plans. And by disclosing the $15 co-pays for Senior Care in a version of the SPD that was briefly posted online in December 2021, then immediately retracting that disclosure the following month, Emblem/GHI demonstrated that its misrepresentations and omissions were knowing and intentional.

Third, Emblem/GHI has a powerful economic incentive to make Retirees believe that Senior Care has no co-pays. Emblem/GHI has made a fortune on Senior Care, in large part because Retirees (who live on limited budgets and often require frequent medical care) want a plan with no co-pays. Thus, the obvious reason for Emblem/GHI's knowing and intentional misrepresentations and omissions is that it sought to induce Retirees to enroll in Senior Care.

Fourth, Retirees justifiably relied on the information provided in the 2020 and 2022 SPDs regarding Senior Care. The SPDs are published for the express purpose of allowing individuals to make their healthcare enrollment decisions based on the information contained therein.

Fifth, and finally, Retirees have been injured by Emblem/GHI's fraudulent inducement by having to pay co-pays they did not consent to, did not expect, and (in many cases) cannot afford. For those Retirees who cannot afford the co-pays, they have been additionally injured by either having to forego medical care (so as to avoid the co-pays) or reduce spending on other necessities. As detailed in the accompanying affidavits, they have also suffered severe psychological and emotional distress.

G. GBL §§ 349 and 350

General Business Law ("GBL") §§ 349 and 350 prohibit deceptive acts and false advertising "in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The requisite elements of these causes of action are well established. A plaintiff must allege that "a defendant has engaged in (1) consumer-oriented conduct, that is (2) materially

misleading, and that (3) the plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Koch v. Acker, Merrall & Condt Co*., 18 N.Y.3d 940, 941 (2012). Plaintiffs are likely to satisfy each of these elements.

First, with respect to consumer-oriented conduct, the Court of Appeals' recent decision in *Plavin v. Group Health Inc.*, 35 N.Y.3d 1 (2020), is dispositive. Addressing the exact question at issue here, the Court held that disseminating misleading information in an SPD about a healthcare plan constitutes consumer-oriented conduct in violation of GBL §§ 349 and 350. The Court stated that the "alleged dissemination of information" to City employees and retirees in an SPD regarding a GHI health insurance plan "is precisely the sort of consumer-oriented conduct that is targeted by General Business Law §§ 349 and 350." 35 N.Y.3d at 13.

Second, the descriptions of the Senior Care plan in the 2020 and 2022 SPDs were materially misleading. A representation or omission is materially misleading if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20 (1995). Because the SPDs' summary of the Senior Care plan—unlike the summaries of other plans—made *no* mention of co-pays, and in fact affirmatively stated that Senior Care would cover the full 20% of charges that Medicare did not, a reasonable Retiree would of course believe that there would be no co-pays.

Finally, Retirees have unquestionably suffered injury as a result of Defendants' deception and Emblem/GHI's false advertising. Retirees have incurred millions of dollars in unlawful co-pays this year, and they will continue to incur more absent injunctive relief. Moreover, the imposition of these co-pays has caused Retirees who cannot afford them to forego necessary

medical treatment, to reduce spending on necessities, and to suffer severe emotional and psychological distress.

H. CPLR 7803(3)

CPLR 7803(3) allows individuals to challenge 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." The City's ongoing imposition of co-pays on Retirees without their prior consent and without advance warning, and its decision to hide the existence of these co-pays in the October 2020 and 2022 SPDs, are arbitrary and capricious and clear abuses of discretion. Moreover, because these co-pays are not permitted under the Contract governing Senior Care, the City's actions are also "in violation of lawful procedure" and "affected by an error of law."

These propositions are almost too obvious for explanation. Indeed, it cannot possibly be a rational or appropriate exercise of discretion to force co-pays on elderly and disabled Retirees after failing to disclose, and affirmatively misrepresenting, these costs in the SPDs (particularly when these costs had never been imposed before). Nor can it be lawful to impose such co-pays when they are prohibited under the governing Contract. In short, the City's conduct violates CPLR 7803(3) in numerous undeniable ways.

The City has a history of engaging in such irrational and unlawful conduct. A year ago, it hastily attempted to implement a new Medicare Advantage plan (the "MAPP"). However, because the City failed to provide Retirees important information about the MAPP before the opt-out deadline, this Court preliminarily enjoined its implementation, holding that it was "irrational, and thus arbitrary and capricious." *See NYC Org.*, 2021 WL 4920705, at *1. Later, the Court permanently enjoined the City from forcing Retirees into the MAPP by charging them $191 a month to remain in Senior Care, holding that such cost-shifting was unlawful. *NYC Org.*, 2022 WL 624606, at *2.

Because the City's conduct with respect to Senior Care co-pays is just as irrational and unlawful—if not more so—injunctive relief is similarly warranted here.

I. This Court's March 3, 2022 Order

Finally, the imposition of co-pays is a blatant violation of this Court's March 3, 2022 order (the "Order") in *NYC Organization of Public Service Retirees v. Campion* (Index No. 158815/2021). In that Order, the Court held unequivocally that the City was "permanently enjoined from passing along ***any costs*** of [Senior Care] to the retiree." 2022 WL 624606, at *2 (emphasis added); *see id*. (holding "that the respondent may not pass ***any cost*** of [Senior Care] to the retirees" (emphasis added)).[13] On November 22, 2022, the First Department unanimously affirmed that Order.[14]

Co-pays are unquestionably a "cost" of Senior Care that the City is "passing along" to Retirees. Although Defendants may attempt to argue that "costs" should be limited to premiums, the Order does not provide such a limitation. Just the opposite: it requires the City to pay for "any" of the "costs" (plural) of Senior Care, not just one particular type of cost.

Nor would such a limitation serve the interests of justice. Co-pays and premiums are functionally equivalent: they are merely alternative ways of forcing Retirees to shoulder the cost of their own healthcare. The only difference is the timing of the payments (premiums are charged once a month while co-pays are charged when service is rendered). But regardless of whether Retirees pay for their health insurance in $191 premiums every month or $15 co-pays every time they receive medical care, the cost to Retirees and the unjust enrichment to the City remain the

[13] Although the Court noted that costs could be imposed on Retirees if their healthcare plan were to "rise[] above the H.I.P.-H.M.O. threshold," it found that "the threshold is not crossed by the cost of the retirees' current health insurance plan" (*i.e.*, Senior Care). *Id*.

[14] *NYC Org. of Pub. Serv. Retirees, Inc. v. Campion*, Case No. 2022-01006, 2022 WL 17096611 (1st Dep't Nov. 22, 2022).

same. If the City were allowed to shift the financial obligations of Senior Care off of itself and onto Retirees through co-pays, this Court's Order would be rendered meaningless: the City could easily circumvent it by repackaging premiums as co-pays. That is exactly what the City is attempting to do here. This Court should not allow it.

II. Retirees Will Suffer Irreparable Harm Absent a Preliminary Injunction

The unlawful imposition of co-pays is causing irreparable harm to countless Retirees. These individuals are all elderly and/or disabled former City workers. Many are scraping by on small, fixed incomes (often less than $1,500 a month) and, due to their advanced age and disabilities, require constant visits to multiple healthcare providers, resulting in an avalanche of co-pays they cannot afford.

For example, this year, Retiree Fran Scharf has had to see approximately a dozen doctors, physical therapists, and other healthcare professionals for her various medical needs. Scharf Aff. ¶ 1-2. The copays for her visits "have added up to the equivalent of four car payments [even] before [her] upcoming surgery . . . and breast cancer MRI screening." *Id*. ¶ 3. Similarly, Retiree Kathy Goldberg has incurred thousands of dollars in co-pays as a result of the countless doctors' visits, treatments, and medical tests required for her husband, who suffers from Parkinson's disease and recently developed sepsis. Goldberg Aff. ¶ 8. As a result of this extreme financial hardship, she can no longer afford a home health aide, which her husband requires because of his precarious physical condition. *Id*. Retiree Charles Rosen, who is undergoing treatment for cancer, has been charged the "$15 co-pays more than three times every week," which has forced him to reduce spending on transportation in ways that are compromising his health. Rosen Aff. ¶¶ 5-6. And Retiree Lee Rottenberg has, from January to October of this year, "been charged the $15 fee forty times, for a total expense of $600." Rottenberg Aff. ¶ 1, 3. These are just illustrative examples. Scores of Retirees are experiencing the same sort of financial hardship.

Based on explicit representations made by Defendants and decades of past practice, Retirees had no reason to expect that they would be saddled with co-pays for Senior Care, and therefore did not—and could not—save and budget for this onerous expense. After enduring nearly eleven months of unanticipated co-pays, many have little or no savings left. As a result, they are forced to make an impossible choice: either forego needed medical care or reduce their spending on other necessities such as food, housing, medicine, home health aides, heat, electricity, and transportation. Both options entail harm that, because it cannot be compensated later through a damage award, is irreparable. Moreover, the choice itself causes psychological and emotional distress that courts have widely held to be irreparable.

Retirees need immediate injunctive relief in order to prevent further irreparable harm.

A. Foregoing Medical Care

As detailed in the affidavits accompanying this proposed Order to Show Cause, Retirees—many of whom live pension-check-to-pension-check with serious health conditions that require constant treatment—are being forced to reduce, delay, or altogether avoid visits to the doctor because they cannot afford the co-pays. Retiree Gail Sternfeld is an example. She had two spinal surgeries in 2022, which required numerous visits to doctors, surgeons, medical imaging specialists, pain specialists, and physical therapists over the course of the year. Sternfeld Aff. ¶ 4. Ms. Sternfeld has had to pay "nearly $400 in copays" and thus "stopped going to physical therapy entirely." *Id*. ¶ 6. Although she needs the therapy following her surgery, the "copays have made it impossible to continue." *Id*. Similarly, Retiree Lee Rottenberg, who has already paid $600 in co-pays this year, has "not been able to comply with [his] doctors' recommendation of going to Physical Therapy 3 times a week, as it is too expensive." Rottenberg Aff. ¶ 1. Unfortunately, these examples are not isolated instances. As the affidavits make clear, many Retirees have no

choice but to forego needed medical care. *See e.g.* Jordan Aff. ¶ 2; Dooley Aff. ¶ 10. For these elderly and disabled individuals, foregone care poses life-threatening risks.

It is well-settled that where, as here, increased healthcare costs may cause individuals to forego medical care, the harm they face is irreparable. *See, e.g.*, *Civ. Serv. Emps. Ass'n, Inc., Loc. 1000, AFSCME, AFL-CIO v. New York State (Unified Ct. Sys.)*, 73 Misc. 3d 874, 895 (Sup. Ct. Albany Cty. 2021) (holding that irreparable harm exists when individuals are forced to "forego medical treatment"); *Zotto v. Scovill, Inc.*, 1985 WL 14176, at *2 (D. Conn. Nov. 7, 1985) (finding irreparable harm because retirees might "forego needed medical treatment if they were required to pay for it"); *Olson v. Wing*, 281 F. Supp. 2d 476, 486 (E.D.N.Y.), *aff'd*, 66 F. App'x 275 (2d Cir. 2003) ("The award of retroactive benefits cannot ameliorate the harm suffered if such a recipient should be forced by circumstances to forego treatment or medication."); *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 577 (S.D. Ohio 1983) (finding irreparable harm based on the fact that some retirees may "forego needed medical attention" due to cost concerns).

Indeed, unimpeded access to medical treatment is so critical that courts have found that "the *mere threat* of a loss of medical care, even if never realized, constitutes irreparable harm." *Strouchler v. Shah*, 891 F. Supp. 2d 504, 522 (S.D.N.Y. 2012) (emphasis added).

Some Retirees have not foregone care completely, but are instead delaying or reducing their healthcare visits, even if it means suffering through prolonged pain and taking risks with their health. Retiree Janet Kobren, for instance, has "delayed scheduling [doctors'] visits because [she] was avoiding facing the copays. That meant that [she] lived with pain that could have been relieved had [she] started [treatment] earlier." Kobren Aff. ¶ 5. She also "just had a mammogram which [she] also delayed scheduling for the same reason." *Id*. When her healthcare providers found a small mass, Ms. Kobren knew she "should have bitten [her] tongue and scheduled the x-ray earlier"

despite the difficulty she has been having budgeting for the co-pays. *Id*. However, she could not afford it financially. Retiree Irene Jordan has similarly cancelled healthcare appointments and extended the intervals between her regular doctor visits to lessen the impact of the co-pays on her finances. Jordan Aff. ¶ 2.

The suffering experienced by Retirees is succinctly summarized by Evrist Natto. Ms. Natto states in her affidavit: "My husband and I feel incredibly broken down and, with the copays, it is becoming too difficult to maintain our finances and our health." Natto Aff. ¶ 3.

Retirees can no longer sustain the financial burden caused by these co-pays. Their health—and ultimately their lives—are suffering for it. It is difficult to imagine any harm that is more irreparable than that. *See Barbecho v. Decker*, 2020 WL 1876328, at *6 (S.D.N.Y. Apr. 15, 2020) (stating that "irreparable harm exists" where individuals face a "risk to their health, safety, and lives"); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) ("We also consider it crucial that, because the members of plaintiffs' class are largely infirm and disabled, their resources and life spans are by definition extremely limited. Deprivation of benefits pending trial might cause economic hardship, suffering or even death. Retroactive restoration of benefits would be inadequate to remedy these hardships.").

B. Reducing Spending on Basic Necessities

The Retirees are long past their income-earning years. Many live on extremely tight budgets dictated by meager pensions. Accordingly, those who cannot afford the illegal co-pays—because of their limited means, frequent doctors' visits, or both—have no choice but to reduce spending on other necessities in order to continue receiving medical treatment. Because such harm cannot be remedied later through a damages award, it is unquestionably irreparable.

For instance, a number of Retirees are being forced to reduce their expenses by skipping medications or cutting pills. *See, e.g.*, Dooley Aff. ¶ 9. That is a widely recognized form of

irreparable harm. *See, e.g.*, *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 56 (2d Cir. 2004) (upholding finding of irreparable harm because retiree-plaintiffs faced the "threat that they would have to forego needed prescriptions"); *Angotti v. Rexam Inc.*, 2006 WL 3043130, at *13 (D. Minn. Oct. 25, 2006) ("Skipping medications—or cutting pills—can lead to physical problems or even shorten lives, harms that cannot be undone with money."); *Becker v. Toia*, 439 F. Supp. 324, 336 (S.D.N.Y. 1977) (holding that imposition of co-pays would cause irreparable harm to plaintiffs who would not be able to afford medication). As one court put it, "The injury to those whose health is maintained on the slenderest chemical balance provided through medication is not merely irreparable; it is ultimate." *Id*. (internal quotation marks omitted).

Retirees are also reducing spending on other necessities, such as food, housing, home health aides, heat, electricity, transportation, child support, and travel to see family. The experience of Retiree Sharon Thomas Dooley is instructive. Ms. Dooley had to make multiple visits to the doctor for an infected knee. Dooley Aff. ¶ 1. She eventually received a complete knee replacement to avoid amputation of her leg, which required a multitude of additional visits to orthopedic surgeons, rehabilitation clinics, and physical therapists among a long list of other specialists. *Id*. ¶¶ 3-5. Ms. Dooley is currently scheduled for another full knee replacement later this year. *Id*. ¶ 6. The spiraling costs of the co-pays have forced Ms. Dooley to cut back on essential needs, including her "mortgage, utilities, life insurance policies, prescription copays, and most importantly, [the] child support that [she] pay[s] for [her] two sons." *Id*. ¶ 9.

Ms. Dooley is hardly alone. Retiree George Roman, for example, has had to reduce spending on food, and he could not pay his electric bill because of the dozens of unexpected co-pays he has incurred over the past several months. Roman Aff. ¶ 1. Mr. Roman's name has already been sent to a collection agency, and his situation will only get worse as he begins radiation

treatment soon, which will require numerous additional co-pays. *Id*. ¶¶ 1-2. Retiree Kathy Goldberg can no longer afford a home health aide for her husband, who suffers from Parkinson's disease and sepsis, thanks to thousands of dollars in co-pays from countless doctors' visits, treatments, and medical tests. Goldberg Aff. ¶ 8. Her husband needs a full-time home health aide in order for him to walk and complete other basic tasks. *Id*. ¶ 4. Retiree Irene Jordan has been forced to reduce the number of meals she eats per day and limit the heat in her house. Jordan Aff. ¶ 4. She also has had to "forgo[] time with friends and family" because she "cannot afford to drive or fly to see [them]." *Id*. *See also* Scharf Aff. ¶ 4 (describing how she can no longer afford to go to dinners with her grandchildren). Moreover, Ms. Jordan "cannot afford to attend service at [her] favorite church, which is 60 miles away," which has caused her to "los[e] contact with [her] friends from that community." *Id*. As stated by Retiree Ann Anesta, whose husband is currently being treated for metastatic cancer, "[t]he imposition of new, unexpected co-pays has had a life-changing effect for [her] and [her] husband on [their] spending. If the co-pays continue, [they] will have to give up other important expenses." Anesta Aff. ¶ 4.

Irreparable harm is commonly found in circumstances such as these, where retirees living on fixed incomes are forced to reduce spending on basic necessities in order to pay for increased healthcare costs. *See, e.g.*, *United Steelworkers of America, AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987) (explaining that irreparable harm is commonly found when retired union members—"most [of whom] live on fixed incomes" and "are not rich"—must pay for healthcare expenses "out of money that they need for other necessities of life"); *Angotti v. Rexam, Inc.*, 2006 WL 1646135, at *15 (N.D. Cal. June 14, 2006) (finding irreparable harm to individuals "who must pay an additional $261.14 for supplemental insurance and therefore have [to] cut back on spending for grocery trips and visiting family," and observing that "for retirees, not being able to travel may

be an incompensable harm"); *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1267–68 (W.D. Mich. 1990), *aff'd*, 948 F.2d 1290 (6th Cir. 1991) (finding that "a cost shift to retirees" of $592 to $1,900 in additional yearly medical expenses would impose irreparable harm on fixed-income retirees); *Angotti v. Rexam Inc.*, 2006 WL 3043130, at *13 (D. Minn. Oct. 25, 2006) (finding irreparable harm based on retirees having to pay $100 a month for insurance); *Helwig v. Kelsey-Hayes, Co.*, 857 F. Supp. 1168, 1179–80 (E.D. Mich. 1994) (enjoining defendant from raising health insurance costs, even though some retirees were likely well-off, because others were former secretarial and clerical workers who likely faced financial hardship).

C. Emotional And Psychological Distress

As explained above, Retirees who cannot afford the barrage of co-pays must either forego medical attention or reduce spending on other necessities, both of which entail harm that cannot be remedied after the fact through a damages award. Regardless of which option they choose, however, these senior citizens and disabled individuals—who are some of the most vulnerable members of society—face additional irreparable harm in the form of emotional and psychological distress over their precarious medical and financial circumstances. For some, this distress is even causing physical illness. *See, e.g.*, Goldberg Aff. ¶ 9.

Although it is nearly impossible to capture this distress in writing, the affidavits offer a glimpse. *See, e.g.*, Goldberg Aff. ¶ 9; Rosen Aff. ¶ 6; Kobren Aff. ¶ 6; Natto Aff. ¶ 3. They reveal an elderly, infirm population filled with anxiety and fear regarding the fact that these constant and unprecedented co-pays are forcing them and their dependents to go without medical treatment and other necessities. Such emotional and psychological distress is another widely recognized form of irreparable harm. *See, e.g.*, *Thrower v. Perales*, 138 Misc. 2d 172, 178 (Sup. Ct. N.Y. Cty. 1987) (finding irreparable harm based on "psychological hardship" faced by those in dire financial circumstances); *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir.

1987) (finding irreparable harm where "retired workers would likely suffer emotional distress [and] concern about potential financial disaster"); *Angotti*, 2006 WL 1646135, at *16 (finding irreparable harm based on the "reasonabl[e] infer[ence] that all or virtually all retirees will be faced with some increased financial anxiety"); *Laforest v. Honeywell Int'l, Inc.*, 2003 WL 23180220, at *2 (W.D.N.Y. Sept. 19, 2003), *aff'd and remanded sub nom. LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48 (2d Cir. 2004) (finding irreparable harm due to the "anxiety associated with uncertainty" regarding insurance benefits); *cf. Collins v. Brewer*, 727 F. Supp. 2d 797, 812 (D. Ariz. 2010), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (holding that loss of benefits "does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages").

III. The Balance of Equities Weights Heavily in the Retirees' Favor

The equities here weigh heavily in the Retirees' favor. As described above, co-pays are causing Retirees to endure unbearable and irreparable harm. Absent immediate injunctive relief, tens of thousands of elderly and disabled individuals will be forced to go without medical treatment and/or basic necessities. By contrast, if the Court were to temporarily enjoin the imposition of co-pays for the Senior Care plan, Defendants—a multi-billion-dollar insurance conglomerate and New York City, the richest city in the country[15]—would merely experience a relatively minor financial burden. Indeed, for decades prior to this year, Senior Care never even had co-pays. Thus, a preliminary injunction enjoining these charges would simply put Defendants in the same (comfortable) position they had always previously occupied.

[15] New York City's budget for Fiscal Year 2023 is $101.1 billion. Citizens Budget Commission, *Big Budget, NYC's Adopted FY 2023 Budget – Spending and Growth* (Jun. 28, 2022), https://cbcny.org/research/big-budget.

Courts in New York and elsewhere have held in cases similar to this that the health and well-being of vulnerable individuals outweighs any potential monetary loss to the government or to an insurance company. *See, e.g., Plattsburgh City Retirees' Ass'n v. City of Plattsburgh*, 51 Misc. 3d 1209(A), at *5 (Sup. Ct. Clinton Cty. 2016) (holding that a "loss of or reduction in health care coverage outweighs any possible monetary loss to the City"); *Thrower v. Perales*, 138 Misc. 2d 172, 178 (Sup. Ct. N.Y. Cty. 1987) ("Plaintiffs have also shown that the equities balance in their favor. Their physical and emotional suffering is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government." (internal citations omitted)); *Warshaw v. Jacobs*, 16 Misc. 2d 844, 846–47 (Sup. Ct. Queens Cty. 1959) (holding that "[m]ore important than property and profit rights are the health and welfare of the public," and that "[t]here is no balance of equities when public health and welfare are at stake" because "pecuniary profits . . . are secondary to the public welfare." (internal quotations omitted)); *Becker v. Toia*, 439 F. Supp. 324, 336 (S.D.N.Y. 1977) ("Although I am sympathetic to the State's financial difficulties, I find that the balance of equities clearly weighs in favor of the plaintiffs. The implementation and enforcement of Section 16 will irreparably damage certain of the Medicaid beneficiaries who are required to make co-payments and who are without funds to do so."); *Stormont-Vail Health Care, Inc. v. U.S. Dep't of Lab. Emp. Benefits Sec. Admin.*, 2010 WL 2132004, at *5 (D. Kan. May 27, 2010) (balance of equities tipped in favor of insured because insurer was more capable of paying for medical costs).

Finally, in weighing the balance of the equities, the Court should also consider the public interest. *Destiny USA Holdings, LLC v. Citigroup Glob. Markets Realty Corp.*, 24 Misc. 3d 1222(A) (Sup. Ct. Onandaga Cty.), *aff'd as modified*, 69 A.D.3d 212 (4th Dep't 2009) ("As part of the balancing of the equities prong of the preliminary injunction test, courts may consider the

affect that a preliminary injunction would have on the public interest at large." (internal quotations omitted)). As poignantly stated by the Ninth Circuit:

> It is not only the harm to the individuals involved that we must consider in assessing the public interest. Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges…. It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time. It would be unfortunate, but far less harmful to society, were the government to succeed in overturning the preliminary injunction but be unable to recoup all or a portion of the funds.

Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983). The same analysis applies here. Society as a whole has a strong interest in ensuring the welfare of these elderly and disabled Retirees, all of whom spent (and in many cases risked) their lives serving this City.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' proposed Order to Show Cause why an order pursuant to Article 63 of the Civil Practices Laws and Rules should not be entered enjoining Defendants from imposing co-pays on Retirees enrolled in the Senior Care plan.

Dated: November 29, 2022
New York, NY

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