

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

BRACHA ETENGOFF, On Behalf of Herself and
All Others Similarly Situated,

Plaintiff,

v.

EXPRESS SCRIPTS, INC., EXPRESS SCRIPTS
HOLDING COMPANY, CIGNA
CORPORATION, and EMPIRE
HEALTHCHOICE HMO, INC.,

Defendants.

Index No.

Date Index No. Purchased:
Apr. 30, 2019

SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiffs' attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if the summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis for venue is Plaintiff's Residence.

Dated: New York, New York
April 30, 2019

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Jury Trial Demanded

CLASS ACTION COMPLAINT

Plaintiff, Bracha Etengoff (“Plaintiff”), individually and on behalf of a class of similarly situated persons, alleges the following upon information and belief, except as to those allegations concerning Plaintiff, which are alleged upon personal knowledge. Plaintiff’s information and belief is based upon, among other things, the investigation undertaken by Plaintiff’s undersigned counsel, which included review and analysis of publicly available information. Plaintiff believes that additional evidentiary support will exist for the allegations contained herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. This is a class action alleging unfair business practices and breach of the covenant of good faith and fair dealing regarding prescription medication pricing, against Express Scripts, Inc., Express Scripts Holding Company, and Cigna Corporation that acquired Express Scripts Holding Company, the parent of Express Scripts, Inc. in December 2018 (Express Scripts, Inc., Express Scripts Holding Company and Cigna Corporation are collectively referred to herein as “Express Scripts”) and Empire HealthChoice HMO, which uses the trade name Empire Blue

Cross Blue Shield (“Empire”) (Empire and Express Scripts are referred to collectively as “Defendants”).

2. Plaintiff is a cancer survivor, who receives prescription medications from her local retail pharmacy in New York City. In March of 2017, Plaintiff noticed that the price for one of her prescription medications had more than tripled, from the usual \$10 co-pay to a new price of \$35.87. The pharmacist had no explanation for the increased price, which Plaintiff was forced to pay because she needed access to her medication immediately.

3. Shortly thereafter, Plaintiff telephoned Empire and was told that the reason for the price increase was that Plaintiff had not opted out of the Express Scripts mail order drug program, even though no increased cost or penalty was ever disclosed to her. Plaintiff then expressed her desire to “opt-out” and explained that she did not wish to participate in any mail order drug program because, among other reasons, her prescription dosage could change month to month. The Express Scripts mail order program provides a 90 day supply.

4. The Empire representative then explained that Plaintiff could request a refund for the additional cost of her medication, but there was no online procedure for making such a request, and the request might not be approved. Instead, Plaintiff would have to request that a claim form be sent to her by mail, and would need to provide the label from the prescription bag as well as the pharmacist’s original signature. Upon information and belief, Empire already had this information because it had covered Plaintiff’s earlier prescriptions for the same drug at the same pharmacy at the original price.

5. Following her purported “opt out,” Plaintiff’s prescription returned to its \$10 co-pay, indicating that there was not an increase in cost of the prescription or administration, but

instead Plaintiff had been penalized for not actively “opting in or out” of Express Scripts’ mail order service.

6. Despite having “opted out,” a few months later in July or August 2017, Plaintiff was again charged an unusually high price for a prescription. Plaintiff again telephoned Empire and was informed during the call that coverage may have been denied for her medication because she had not made an election to opt out of the Express Scripts mail order program. Plaintiff explained that she had already opted out of the program, but the representative suggested that Plaintiff do so again, and Plaintiff verbally opted out once again during this call.

7. The Empire representative also explained that Express Scripts mails promotional materials to plan members touting the benefits of the Express Scripts mail order program, and that these materials noted that a failure to opt out of the program could result in higher prescription drug prices.

8. The representative confirmed, however, that no such letter appeared in Plaintiff’s electronic file even though all correspondence with participants is supposed to be saved there. The representative stated even if the letter was not in the electronic database, a hard copy would still be on file. Plaintiff then requested that a copy of the letter be mailed or emailed to her. The representative agreed to “put in a request” that the letter be sent to Plaintiff, but Plaintiff has never received any such letter. The Empire representative then transferred Plaintiff to an Express Scripts representative, who tried to convince Plaintiff to participate in its mail order program.

9. When Plaintiff did not receive a copy of the letter, she followed up with Empire on September 22, 2017. The first representative Plaintiff spoke with said that Plaintiff probably did not receive a letter because letters were only sent to plan participants in States that require

them, and New York may not be one of those States. A few days later, Plaintiff spoke with another Empire representative, who confirmed that no such “warning letters” were sent to anyone. This representative then directed Plaintiff to one paragraph in the 109-page insurance contract which states:

For prescription drugs that have a restricted distribution by the FDA or require special handling, provider coordination or patient supports, You may obtain Your first two (2) Prescription Orders at a retail Participating or Non-Participating Pharmacy. *After Your first two (2) Prescription Orders, You must obtain these Prescription Drugs from Our mail order pharmacy or You must opt out of obtaining Your Prescription Drugs from Our mail order pharmacy.* You may opt out by visiting Our website at www.empireblue.com or by calling the number on Your ID card. *You must opt out on an annual basis.*

Emphasis added.

10. In a subsequent call to Empire on September 26, 2017, an Empire representative explained to Plaintiff that failure to opt out of the mail order program results in a “*retail penalty*” that is “processed by Express Scripts,” and that neither Empire nor Express Scripts provides any notice or warning letters prior to imposing this penalty. He also stated he did not know how the penalty was calculated. This demonstrates that the undisclosed penalty is imposed by Express Scripts for its own benefit to coerce customers into using its mail order program, instead of refilling their prescriptions at retail pharmacies, where Express Scripts would not generate as much revenue.

11. Based on New York consumers’ complaints and testimony, consistent with Plaintiff’s experience, New York passed a law in 2011 called the Anti-Mandatory Mail Order law (“AMMO”), which requires insurers to provide consumers with the option to use a non-mail order retail pharmacy rather than requiring a mail order pharmacy, like Express Scripts, to refill their prescriptions at the same reimbursement amount. Specifically, the law prohibits the imposition of “a co-payment fee or other condition on any insured who elects to purchase

prescription drugs from a network participating non-mail order retail pharmacy which is not also imposed on insureds electing to purchase drugs from a network participating mail order or other non-retail pharmacy.”

12. By failing to provide any information disclosing and explaining and by improperly imposing this “retail penalty,” Defendants are engaging in an unfair and deceptive business practice to coerce Plaintiff and the Class (defined herein) to use Express Scripts’ mail order program. Defendants’ conduct also runs afoul of the New York Insurance Law by imposing a “retail penalty” not imposed on consumers who use Express Scripts. This conduct affects thousands of New Yorkers and may persist nationwide.

13. The contractual language that purportedly explains the mail order opt out requirement is itself highly deceptive, materially misleading, and incomplete. Among other things, the language does not even attempt to explain what types of drugs have a “restricted distribution by the FDA” or require “special handling, provider coordination or special support.” Moreover, the language *does not disclose the “retail penalty”* (let alone how it is calculated) that Defendants impose on persons, who do not opt out of mail order prescription drug service, which the contract purportedly required customers to do proactively every year even though they do not receive any notice to do so. Defendants also fail to inform customers that imposition of such a “retail penalty” runs afoul of New York Insurance law if it is only imposed on persons who use a retail pharmacy and not on those who use Express Scripts. Furthermore, the requirement to annually opt out without notice of the time to do so or disclosure of the penalty for not doing so demonstrates the continued threat of harm to Plaintiff and the Class.

14. Due to the refusal to provide any disclosure of any financial penalty, notification of when to opt out of Express Scripts’ mail order program and imposition of a “retail penalty” on

consumers who do not use Express Scripts, it is highly likely that thousands of reasonable health insurance consumers are unknowingly paying these additional costs under the mistaken assumption that their prescription drug prices have simply gone up. Furthermore, Defendants seek to improperly impose the unfair penalty prohibited by New York Insurance law without adequate notice, and without informing customers of the requirement to opt out every year or face the penalty, even though it is indisputable that prescription medications are often extremely expensive, and individuals in need of their medication are in no position to question the increased costs at the time of purchase.

15. Plaintiff brings this class action against Defendants, on behalf of herself and the proposed class, in order to: (a) halt the imposition of the retail penalty on customers, who fail to opt out of Express Scripts mail order program every year; (b) secure redress for customers, who have been forced to pay the unfair and undisclosed penalty when purchasing their prescription drugs; (c) require adequate notice and disclosure to customers so that they are able to make a timely and informed decision about whether to opt out of the Express Scripts mail order program.

JURISDICTION AND VENUE

16. This Court has jurisdiction over this matter pursuant to, *inter alia*, New York CPLR § 301 *et seq.*, and New York General Business Law § 349(h), which confers a private right of action for allegedly deceptive business practices. Furthermore, the insurance contract that exists among the parties, to the extent that contract is at issue, purports to limit jurisdiction to the courts of this State.

17. This Court has personal jurisdiction over all parties. Plaintiff submits to the jurisdiction of this Court, and at all relevant times was, and remains, a resident of the City, County and State of New York. Defendants are either incorporated in the State of New York,

authorized to do business in New York, headquartered in the State of New York, or have purposefully availed themselves of the privilege of conducting business in the State of New York. Defendants have also consented to the jurisdiction of this Court in that the insurance contract that exists among the parties, to the extent that contract is at issue, purports to limit jurisdiction to the courts of this State.

18. Venue is proper in this Court pursuant to New York CPLR § 503 because Plaintiff is a resident of this County and a substantial part of the events giving rise to this action occurred in this County. Venue is also proper in this Court pursuant to New York CPLR § 509 as Plaintiff's choice of forum.

PARTIES

19. Plaintiff, Bracha Etengoff, is, and at all relevant times was, a resident of the city, county and State of New York.

20. Defendant Empire is a health maintenance organization that is incorporated in New York and maintains its principal place of business in New York City. Empire is a licensee of Blue Cross Blue Shield Association and uses the trade name Empire Blue Cross Blue Shield. It is also part of Anthem, Inc.¹

21. Defendant Express Scripts, Inc. is a pharmacy benefit management company ("PBM") registered to do business in New York as a foreign business corporation that is incorporated in Delaware and maintains its principal place of business in St. Louis, Missouri. Express Scripts, Inc. was a wholly owned subsidiary of Express Scripts Holding Company, and now as of December 2018, Cigna.

¹ Anthem, Empire Blue Cross Blue Shield, <https://www.antheminc.com/Companies/EmpireBlueCrossBlueShield/index.htm> (last visited Aug. 28, 2018).

22. Defendant Express Scripts Holding Company is the parent company of Express Scripts, Inc. It is a Delaware corporation and headquartered in St. Louis, Missouri. Express Scripts Holding Company, a public company, merged with Cigna in December 2018 and now publicly trades under Cigna.

23. Defendant Cigna Corporation is a Delaware corporation and headquartered in 900 Cottage Grove Road, Bloomfield, Connecticut. On December 20, 2018, Cigna merged with Express Scripts Holding Company and became Express Scripts successor in interest.

SUBSTANTIVE ALLEGATIONS

A. The Relationship between Health Insurers and their Pharmacy Benefit Managers “PBM”s

24. Pharmacy Benefit Managers, or “PBMs,” are essentially “middleman” entities that emerged in the 1960s. PBMs initially served to process prescription medication claims for insurance companies and employers in exchange for a small fee per claim.

25. Today, however, PBMs have evolved into large corporations that impact almost every aspect of the prescription drug marketplace. Far beyond their original role as claim processing services, PBMs are now involved in drug utilization review, drug plan formulary development, determining which pharmacies are included in a prescription drug plan’s network, deciding how much network pharmacies will be reimbursed when prescriptions are filled, and operating mail order and retail pharmacies themselves.

26. After a succession of mergers and acquisitions in recent years, the industry is now dominated by three PBMs – Express Scripts, OptumRx (a subsidiary of UnitedHealth Group) and CVS Caremark (a subsidiary of the CVS drugstore chain). Together, these three entities control over 80% of the market for PBM services. Collectively, Express Scripts, OptumRx and CVS Caremark collect more than \$200 billion a year to manage prescription services for

insurance carriers that cover 180 million Americans, as well as government programs that cover 110 million others.

27. PBMs, like Defendant Express Scripts, are also extremely profitable. In 2016, Express Scripts reported profits of \$3.4 billion, which was an increase of 34% over the previous year.

28. PBMs generate revenues and profits in one of three ways: (i) rebates paid to PBMs by drug manufacturers; (ii) administrative fees that PBMs charge health plan sponsors and drug manufacturers; and (iii) the “pharmacy spread,” a controversial revenue stream whereby the PBM charges the plan sponsor a certain price for a prescription drug, reimburses the filling pharmacy a lower amount, and pockets the difference.

29. Among the most controversial aspects of PBMs is their purported effect on prescription drug pricing. PBMs and their lobbying groups have been largely successful in avoiding additional regulation, disclosure and transparency requirements by claiming that such oversight would adversely affect prescription drug prices. Conversely, consumer groups and independent pharmacy associations, among others, contend that PBMs “have successfully leveraged their ‘middle-man’ status to maximize profits while simultaneously harming American pharmacies and increasing costs to patients.”²

30. Heather Bresch, the CEO of pharmaceutical giant Mylan, testified before Congress that of the \$608 list price that Mylan charges for a two-pack of its emergency anti-allergy medication EpiPens, \$334 went to middlemen, like PBMs. As reported in the *Los*

² Brittany Hoffman-Eubanks, *The Role of Pharmacy Benefit Managers in American Health Care: Pharmacy Concerns and Perspectives: Part 3*, Pharmacy Times, Feb. 26, 2018, <https://www.pharmacytimes.com/news/the-role-of-pharmacy-benefit-mangers-in-american-health-care-pharmacy-concerns-and-perspectives-part-3> (last visited April 29, 2019).

Angeles Times, “Bresch asserted Mylan had little choice but to jack up the EpiPen list price to accommodate the middlemen’s demands for rebates and fees.”³

31. PBMs also seek to increase profits by funneling prescriptions through mail order pharmacies that they themselves own. In some cases, patients are forced to fill prescriptions through the PBM’s self-owned mail order pharmacy or their medication will not be covered at all.⁴

B. The Relationship between Express Scripts and Empire

32. Upon information and belief, Empire engages Express Scripts as its sole PBM.

33. Upon information and belief, Express Scripts is responsible for determining which drugs are included in Empire’s formulary - *i.e.* the list of approved drugs for which patients may seek insurance reimbursement.

34. Upon information and belief, Express Scripts negotiates with drug manufacturers such as Mylan and Pfizer, on behalf of Empire, in order to determine the prices that those drug companies will charge for the drugs listed on Empire’s formulary.

35. As evidence of Express Scripts’ influence over the prescription drug benefits and process, when a patient is prescribed a drug that does not appear on Empire’s formulary, Empire directs that customer to Express Scripts. Empire’s website, in one of the few instances in which Express Scripts is mentioned, states that if a prescription drug is not listed on Empire’s formulary

³ Michael Hiltzik, *How ‘Price-Cutting’ Middlemen are Making Crucial Drugs Vastly More Expensive*, *Los Angeles Times*, June 9, 2017, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-pbm-drugs-20170611-story.html> (last visited April 29, 2019).

⁴ Brittany Hoffman-Eubanks, *The Role of Pharmacy Benefit Managers in American Health Care: Pharmacy Concerns and Perspectives: Part 2*, *Pharmacy Times*, Dec. 15, 2017, <https://www.pharmacytimes.com/news/the-role-of-pharmacy-benefit-mangers-in-american-health-care-pharmacy-concerns-and-perspectives-part-2> (last visited April 29, 2019).

the patient “will be responsible for the full cost of the drug” but that a patient whose prescribed drug is not listed should contact Express Scripts, not Empire, to request an “exception.”⁵

36. Upon information and belief, Express Scripts determines the retail price for the prescription medications listed on Empire’s formulary, and also determines the portion of that price that will be paid to the filling pharmacy, the portion that will be paid by Empire, and the portion that will be retained by Express Scripts.

37. In addition to managing prescription drug benefits, Express Scripts also maintains its own mail order pharmacy. As explained on Express Scripts’ website: “We’re the largest independent manager of pharmacy benefits in the United States and one of the country’s largest pharmacies, serving more than 85 million people.”⁶

38. On December 20, 2018, the merger between Cigna and Express Scripts was completed with the new company publicly traded as Cigna. According to Cigna’s 2018 Form 10-K, Cigna disclosed its “revenues are derived principally from premiums on insured products, fees for products and services provided to self-insured plans, pharmacy sales, and investment income.” According to Cigna’s Consolidated Financial Statements, which included Express Scripts, its total assets were \$153.2 billion.⁷

⁵ Empire Blue, <https://www.empireblue.com/faqs/empireblue/pharmacy/> (explaining that patient “can also talk to your doctor about making a request to Express Scripts for an exception review of a drug not on the medication list”) (last visited April 29, 2019).

⁶ Express Scripts, <https://www.express-scripts.com/> (last visited Aug. 29, 2018).

⁷ Cigna, 2018 Form 10-K, https://www.google.com/url?q=https://www.cigna.com/assets/docs/about-cigna/Investor%2520Relations/cigna-fourth-quarter-2018-form-10-k.pdf?WT.z_nav%3Dabout-us%252Finvestors%252Fquarterly-reports-and-sec-filings%253Blink-List%253BFourth%2520Quarter%25202018%2520Earnings%2520%252F%2520February%25201%252C%25202019%253BFourth%2520Quarter%25202018%2520Form%252010-K&source=gmail&ust=1556388469027000&usg=AFQjCNGHqX4d5HPoo2Hey7KQEvxF4equXQ (last visited Apr. 26, 2019).

39. The annual report further stated that following the merger, Cigna's segments have changed to the following:

- 1) Integrated Medical, consisting of both a Commercial operating segment that includes our employer-sponsored medical coverage and a Government operating segment that includes Medicare offerings for seniors and individual insurance offerings to non-seniors both on and off the public health insurance exchanges;
- 2) Health Services, consisting primarily of Cigna's legacy home delivery pharmacy business and *Express Scripts' pharmacy benefit management ("PBM") business beginning December 21, 2018*; and
- 3) International Markets, that offers global supplemental benefits and global medical solutions.⁸

C. Plaintiff's Experience Demonstrates Defendants' Deceptive Business Practices

40. Plaintiff is dependent upon a prescription medication called Synthroid. This medication is a synthetic thyroid hormone that Plaintiff must take every day because her own thyroid became cancerous and had to be removed years ago.

41. In or around January of 2017, Plaintiff purchased health insurance from Empire and began filling her prescription for Synthroid at her local Duane Reade pharmacy in New York City.

42. On or around March 11, 2017, Plaintiff refilled her prescription for thirty pills of 0.112 mg (112 mcg) of Synthroid processed by her pharmacy, Express Scripts and Empire on March 10, 2017. She was told by the pharmacist that Empire had covered the prescription, but the co-pay had increased from \$10 to \$35.87. Because she needed her medication, Plaintiff had no choice but to pay the increased price and seek an explanation for the increase later.

43. A few weeks later, Plaintiff called Empire to verbally inquire and complain about the increased prescription cost. Empire informed her that the price had increased because

⁸ *Id.*

Plaintiff had failed to opt out of the Express Scripts mail order program. Plaintiff then verbally opted out of the Express Scripts program, which is all that Empire required of her. The Empire representative said that Plaintiff could attempt to request a refund for the increased price, but since there was no online procedure to make the request, Plaintiff would need to have a claim form mailed to her and would have to provide the label from the prescription bag and obtain the pharmacist's signature. Several weeks later, Plaintiff received the claim form in the mail, but declined to go through the burdensome process of requesting a refund, which may not have been approved.

44. The procedure for requesting a refund is unnecessarily complicated and designed to discourage patients from seeking and obtaining refunds for Defendants' practice of deceptively imposing "retail penalties" on patients, who purportedly fail to timely opt out of the Express Scripts mail order prescription drug program. As an initial matter, and as explained herein, without disclosure, the vast majority of customers have no reason to believe they are being assessed a "retail penalty" at all, and instead believe that their prescription drug price increased for some unrelated economic reason. Those customers who do find out they are being assessed a financial penalty through their own investigation, like Plaintiff, are discouraged from pursuing a refund, because, among other things, (i) the process must be completed by mail; (ii) the process requires customers to obtain information that Defendants already have in their possession as a result of filling previous prescriptions; (iii) the process requires a label from the pharmaceutical bag even though most consumers discard them when they pick up pill bottles (or at least as soon as they are empty); (iv) the process requires an original signature from a pharmacist, which can be inconvenient and may not be possible in situations where a

prescription is filled out of town; and (v) after completing this process, the requested refund might not be approved.

45. In or around July or August, 2017, only a few months after her verbal opt out of Express Scripts mail order program, Plaintiff was again charged an unusually high price for a prescription. Once again Plaintiff telephoned Empire, and was told that the price increase might have occurred because she failed to opt out of the Express Scripts mail order program. Plaintiff explained that she had already opted out of the Express Scripts program in a previous call, and that she did not wish to participate in the program because, among other things, the dosage on her Synthroid prescription sometimes changed.

46. On this call the Empire representative stated that other customers had complained of increased drug prices as high as \$300 per prescription. The Empire representative also stated that promotional materials had been mailed to customers encouraging participation in the Express Scripts mail order program, and the last mailing contained a warning that failure to either sign up or opt out of the program would result in increased prescription drug prices. After Plaintiff stated that she did not receive any such mailing, the representative checked Plaintiff's electronic correspondence file and could not locate a copy of the letter. The representative said she was surprised because all correspondence with plan participants is saved. She stated that even if the letter was not in the electronic database, a hard copy would still be on file. Plaintiff then asked for a copy of the letter to be mailed or emailed to her. The representative said she would "put in a request" to send a paper and electronic copy of the letter to Plaintiff, but to date Plaintiff has neither received a letter from Empire about the Express Scripts mail order program nor disclosure of increased fees or penalties for failing to opt out.

47. The Empire representative asked Plaintiff to verbally opt out of the Express Scripts mail order program for a second time. However, unlike the first time, this Empire representative transferred Plaintiff to Express Scripts. The opt out process was made burdensome and inconsistent for customers by forcing them to speak with an Express Scripts representative in addition to their insurer to ensure a successful opt out.

48. The Express Scripts representative asked Plaintiff, "Do you want to save \$5 a month on your 90 day prescription?" This was a blatant sales pitch designed to funnel her back into the Express Scripts program. The process reflected Express Scripts' monetary incentive to discourage opt-outs rather than respecting the customers' directions.

49. A few weeks later, Plaintiff called Empire to ask why she had not yet received a copy of the letter. The Empire representative stated that letters were only sent to participants who lived in States that required written notice of a drug price increase, and New York might not be one of those States. He advised Plaintiff to call back at a later time if she did not receive a copy of the letter.

50. On or around September 22, 2017, Plaintiff called Empire again. This time the Empire representative explained that no warning letters, like the one described to Plaintiff earlier, had ever been sent to anyone, by either Empire or Express Scripts. When Plaintiff asked whether she was required by her contract with Empire to make an election regarding the mail order program, the representative pointed out the contractual language set forth on page 55 and emailed Plaintiff a copy of the 119-page contract while they were on the phone. Specifically, the Empire representative directed her to the paragraph stating, in pertinent part:

For prescription drugs that have a restricted distribution by the FDA or require special handling, provider coordination or patient supports, You may obtain Your first two (2) Prescription Orders at a retail Participating or Non-Participating Pharmacy. *After Your first two (2) Prescription Orders, You must obtain these*

Prescription Drugs from Our mail order pharmacy or You must opt out of obtaining Your Prescription Drugs from Our mail order pharmacy. You may opt out by visiting Our website at www.empireblue.com or by calling the number on Your ID card. You must opt out on an annual basis.

Emphasis added.

51. When Plaintiff asked the Empire representative whether he thought the contractual language was sufficient to explain the requirement and justify extreme increases to prescription drug prices without notice, the representative replied: “You accepted the contract.”

52. On or around September 26, 2017, after looking over the contract, Plaintiff again contacted Empire to request clarification on the terms. During this conversation, the Empire representative explained that Plaintiff had been assessed an undisclosed “retail penalty” for failing to either enroll in or opt out of the Express Scripts mail order program. He stated he did not know how the penalty was calculated.

53. The representative also stated that he didn’t think the penalty should have been imposed because Synthroid is “just a normal drug” and the contract states that the requirement only applies to drugs having a “restricted distribution by the FDA” or that require “special handling, provider coordination or patient supports.” In fact, Synthroid is a commonly prescribed drug. The Empire representative further confirmed that neither Empire nor Express Scripts send any “warning letter” before assessing the retail penalty, and that the penalty is “processed by Express Scripts,” but retained by “the provider.” He also stated that most consumers who call Empire after being assessed a retail penalty “don’t even know what a mail order pharmacy is.”

54. On November 19, 2018, Plaintiff sent a letter, through certified mail, to Empire regarding the undisclosed “retail penalty” that applied to prescriptions filled at retail pharmacies rather than through Express Scripts mail order program. Plaintiff’s letter was received at the

address listed in Empire's contract on November 21, 2018. Plaintiff did not receive any response.

55. Upon information and belief, Plaintiff complied with Empire's claim and grievance process, with both oral and written complaints to Empire and Express Scripts, ahead of filing this lawsuit.

D. New York Consumers are Harmed by Defendants' Deceptive Business Practices

56. Defendants' business practices described herein are highly deceptive and cause thousands of New Yorkers to pay a significant financial penalty in the form of increased prescription drug prices that is never disclosed and do not correlate to any increased drug or administrative cost. Instead, the penalty is imposed by Express Scripts for its own benefit to coerce Plaintiff and other Class members into using its mail order program, which generates more revenue for Express Scripts.

57. Defendants' deceptive and unfair practices and resulting consumer complaints, like Plaintiffs, are what led New York to pass the AMMO law in 2011. Specifically, New York Insurance Law § 3216 subsection (i)(28) states, in pertinent part:

*Any policy that provides coverage for prescription drugs shall permit each insured to fill any covered prescription that may be obtained at a network participating mail order or other non-retail pharmacy, **at the insured's option, at a network participating non-mail order retail pharmacy** provided that the network participating non-mail order retail pharmacy agrees in advance, through a contractual network agreement, to the same reimbursement amount, as well as the same applicable terms and conditions, that the insurer has established for the network participating mail order or other non-retail pharmacy. In such a case, **the policy shall not impose a co-payment fee or other condition on any insured who elects to purchase prescription drugs from a network participating non-mail order retail pharmacy which is not also imposed on insureds electing to purchase drugs from a network participating mail order or other non-retail pharmacy.***

(Emphasis added).

58. The legislative history demonstrates that AMMO law was enacted in order to “provide freedom of choice to consumers who have coverage for prescribed drugs as part of their health insurance. . . . many consumers, especially senior citizens, rely on their local pharmacist for the service that they provide with respect to monitoring the regimen of drugs that they take. A mandate of purchase by mail denies them of this important service and confidence.”⁹

59. Defendants’ policy of imposing an undisclosed “retail penalty” on Plaintiff and other consumers, who refill their prescriptions at a retail pharmacy without first opting out of Express Scripts mail order program, runs afoul of AMMO law by imposing a prohibited fee on Plaintiff and class members. Defendants are trying to do an end run around AMMO law’s requirements and to deprive Plaintiff and class members of the freedom of choice to refill their prescriptions through a non-mail order pharmacy - expressly intended by AMMO - by coercing them to pay more of their prescriptions or else use Express Scripts mail order program.

60. Consumers, like Plaintiff and other Class members, who purchase insurance services from Defendants, are never told that a failure to opt out of the Express Scripts mail order program will result in an illegal financial penalty in the form of increased prescription drug prices that continues until they actively opt out of the Express Scripts mail order program as they must do on an annual basis. Therefore, customers are threatened with continued harm of the imposition of the undisclosed penalty each year throughout the term of their policy because they are not notified of the penalty and when to opt out of the mail order program. Furthermore, Defendants fail to document when customers have opted out, as Plaintiff experienced several months after she first notified Defendants of her decision to opt out of Express Scripts mail order program.

⁹https://nyassembly.gov/leg/?default_fld=&bn=A05502&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y (last visited Apr. 5, 2019).

61. Consumers, like Plaintiff and other Class members, who purchase insurance services from Defendants are never provided notice prior to or after being assessed a financial penalty in the form of increased prescription drug prices.

62. In the event that a financial penalty is imposed, consumers, like Plaintiff and other Class members, are never informed that the increased price for their prescription drugs is the result of a prohibited financial penalty that will continue unless and until they annually opt out of Express Scripts mail order program and not some unrelated economic reason. Defendants' business practices are highly deceptive because Defendants take advantage of the likelihood that a consumer, who is charged an increase in his or her prescription drug prices, will presume that the increase is a result of unrelated economic factors - such as an increased drug or administrative costs - as opposed to the truth that it is a financial penalty - prohibited by New York's AMMO law - imposed against them without notice or warning to coerce them into Express Scripts mail order program.

63. Defendants' business practices are highly deceptive because Defendants take advantage of the fact that a reasonable consumer would not expect a financial penalty to be imposed against him or her without disclosure, notice or fair warning. Defendants engage in these deceptive practices for their own benefit to coerce customers into using Express Scripts mail order program to generate more revenue for Express Scripts and punish customers, who fail to timely opt out of the program.

64. Defendants' business practices are highly deceptive because Defendants take advantage of consumers' dependence on these medications and that they are frequently in no position to contest an increased prescription drug price at the point of sale.

65. Defendants' business practices are highly deceptive because, in the rare instance where a consumer realizes that his or her prescription drug price is being increased as a result of a financial penalty, Defendants require an unnecessarily cumbersome request for reimbursement procedure that is designed to minimize the chance that any consumer will actually seek or receive a refund of his or her financial penalty if Defendants' approve it. Defendants also unfairly and unilaterally require customers to proactively opt out of the Express Scripts mail order program on an annual basis without notifying them of when to do so or of the financial penalty for failing to timely opt out.

66. To the extent that Defendants rely on the health insurance contract to explain the opt out requirement and financial penalty, the contractual language is itself highly deceptive, materially misleading and incomplete. Among other things, the relevant language (i) does not disclose that a financial penalty can be imposed; (ii) does not explain what the financial penalty is or how it is calculated, that it is prohibited by AMMO law, and that it could have a massive effect on the retail price for prescription drugs and is unrelated to any increase in drug or administration cost; (iii) does not explain which prescription drugs trigger the opt out requirement – *i.e.* the language does not explain which prescription drugs “have a restricted distribution by the FDA” or which prescription drugs “require special handling, provider coordination or patient supports;” and (iv) imposes a unilateral requirement on customers to opt out of the Express Scripts mail order program on an annual basis to avoid paying the undisclosed penalty without providing notice of when or how to do so thereby rendering the ability to opt-out illusory and subjecting Plaintiff and the Class to a continuing threat of harm of imposition of the financial penalty.

67. A FOIA request response from the New York Department of Finance demonstrates that Express Scripts frequently imposes a retail penalty to consumers who attempt to opt-out of their mail order program, and that its procedures have caused, and continue to cause, a large amount of confusion and frustration among those New York consumers who bothered to question the prescription price increases.

68. One New Yorker complained that “Express Scripts told me we have to pay full price” to use the pharmacy directly across the street that the consumer had been using for 30 years, even though “our packages in the past have been stolen and express scripts has refused to replace them.” Another complained to Express Scripts that he only has a mailbox slot, and that mail deliveries “would be left out in the open” and would be “sitting in the sun for over 8 hours during the summer months.” He was told that his prescription prices would go up unless he obtained a post office box for deliveries. Another complained of receiving “extortion letters” every month pressuring him to select the mail order option. Yet another complained that his pregnant wife’s daily injection of Enoxaparin, which was necessary to prevent a miscarriage, had increased in price from \$181 to over \$1,800 for a one-month supply, and that he was “required to use Express Scripts mail order or pay cash.” Still another complained of repeatedly opting out of the mail order program, and being told by Express Scripts that no record of that selection existed.

CLASS ACTION ALLEGATIONS

69. Plaintiff brings this action as a class action pursuant to New York CPLR §§ 901 *et seq.* on behalf of a class consisting of all persons, exclusive of Defendants and their employees, who reside in the State of New York and incurred a financial penalty because they did not opt out of a mail order pharmacy program offered by Express Scripts in connection with their Empire health insurance plan, or any other BCBS plan that serves insureds in the State of New

York, (the “Class”) from April 29, 2016 through the present day with respect to the claims under GBL §349 and April 29, 2019 through the present as to all other claims.

70. ***Numerosity – § 901(a)(1)***. The members of the Class are so numerous that their individual joinder is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes there are thousands of members in the proposed Class. The proposed Class may be identified from records maintained by Defendants.

71. ***Common Questions of Law and Fact – § 901(a)(2)***. Common questions of law and fact exist as to all members of the Class. Among the questions of law and fact common to the Class are the following:

- a. Whether Defendants engaged in a deceptive business act or practice in violation of New York General Business Law § 349;
- b. Whether Defendants can impose a financial penalty on customers, who do not opt out of Express Scripts mail order program, and use a non-mail order retail pharmacy under New York Insurance Law § 3216 subsection (i)(28);
- c. Whether Defendants adequately disclosed the financial penalty for failing to opt out of the Express Scripts mail order program such that a reasonable consumer would understand;
- d. Whether a reasonable consumer would understand that an unexpected increase in a prescription drug price was the result of a financial penalty imposed by Defendants and not the result of economics or some other reason;
- e. Whether Defendants provided adequate notice on an annual basis to health insurance consumers prior to imposing a financial penalty for failure to

opt out of the Express Scripts mail order program;

- f. Whether and to what extent Plaintiff and members of the Class have been damaged by Defendants' conduct and the proper measure of damages; and
- g. Whether Plaintiff and the Class are entitled to injunctive relief, restitution or other equitable relief and/or other relief as may be proper.

72. **Typicality – § 901(a)(3).** Plaintiff's claims are typical of the claims of the members of the Class, as all members of the Class have been subject to and affected by the same conduct and omissions by Defendants. Plaintiff's claims do not conflict with the interests of any other Class members. Plaintiff and all members of the Class have sustained economic injury arising out of Defendants' violations of law as alleged herein.

73. **Adequacy – § 901(a)(4).** Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

74. **Superiority of Class Actions – § 901(a)(5).** A class action is superior to other methods for the fast and efficient adjudication of this controversy, for at least the following reasons: (a) absent a class action, members of the Class as a practical matter will be unable to obtain redress, Defendants' violations of their legal obligations will continue without remedy, additional consumers will be harmed, and Defendants will continue to retain their ill-gotten gains; (b) it would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions; (c) when the liability of Defendants has been adjudicated, the Court will be able to determine the claims of all members of the Class; (d) a class action will permit an orderly and expeditious administration of the claims of each member

of the Class and foster economies of time, effort, and expense; (e) a class action regarding the issues in this case does not create any problems of manageability; and (f) Defendants have acted on grounds generally applicable to all members of the Class, making class-wide monetary relief appropriate.

75. ***Injunctive and Declaratory Relief*** – Defendants’ actions regarding the deceptions and omissions concerning the financial penalty for failing to opt out on an annual basis of the Express Scripts mail order program are uniform as to members of the Class. Defendants have acted or refused to act on grounds that apply generally to the Class, so that final injunctive relief as requested herein is appropriate for the Class as a whole.

FIRST CAUSE OF ACTION
Violation of the New York General Business Law
§ 349 – Deceptive Acts and Practices
Against All Defendants

76. Plaintiff incorporates the above paragraphs by reference as if set forth fully herein.

77. This cause of action is brought pursuant to New York General Business Law § 349, which prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York State.

78. General Business Law § 349 applies “to all deceptive acts or practices deemed to be unlawful, whether or not subject to any other law of this state . . .” § 349(g).

79. Plaintiff, Defendants and all Class members are persons within the meaning of General Business Law § 349.

80. Defendants each conduct a “business” or provide a “service” in New York within the meaning of General Business Law § 349.

81. The allegedly deceptive acts complained of herein occurred in the State of New York.

82. The allegedly deceptive acts complained of herein are consumer-based practices in that Plaintiff and other Class members are consumers of health insurance and health insurance-related benefits provided by Defendants.

83. Defendants engaged in a deceptive act or practice by imposing an undisclosed financial penalty - prohibited under New York Insurance Law § 3216 subsection (i)(28) - on Plaintiff and other Class members, who allegedly failed to timely opt out of the Express Scripts mail order program and used a non-mail order retail pharmacy to refill their prescriptions. Among other things, Defendants provided no explanation of this penalty at the time when Plaintiff and other Class members agreed to purchase Defendants' insurance products and related services. Defendants also provided no notice of this financial penalty before imposing it on Plaintiff and other Class members. Further, Defendants provided no disclosure of the penalty even after imposing it, and therefore a reasonable consumer would likely be unaware that he or she was being penalized at all, and would likely believe that the price of medication had simply increased for some unrelated reason.

84. Defendants continue to require that Plaintiff and the Class proactively opt out of Express Scripts mail order program on an annual basis even though Defendants do not provide any notice to consumers of when to do so causing them to face a continued threat of harm from the imposition of the undisclosed penalty throughout the term of their policies.

85. Upon information and belief, Defendants - through Express Scripts - are imposing this illegal, undisclosed penalty on Plaintiff and the Class to coerce them into using Express Scripts mail order program for their own benefit.

86. By reason of the conduct alleged herein, Defendants are engaging in deceptive acts or practices in violation of General Business Law § 349.

87. Plaintiff and other Class members have been injured by Defendants' violations of General Business Law § 349 and have suffered actual damages.

88. Plaintiff and other class members also seek to enjoin Defendants from continuing to engage in the deceptive acts and practices complained of herein.

89. Plaintiff and members of the Class are entitled to recover actual damages to the extent permitted by law, in an amount to be proven at trial, and are further entitled to equitable relief to enjoin Defendants on terms that the Court considers reasonable and appropriate.

**SECOND CAUSE OF ACTION
Breach of Contract Implied Covenant of Good Faith and Fair Dealing
Against All Defendants**

90. Plaintiff incorporates the above paragraphs by reference as if set forth fully herein.

91. Plaintiff and the Class were parties to an insurance contract with Defendants.

92. Like all contracts, the contract between Plaintiff and Defendants contains an implied covenant of good faith and fair dealing.

93. Defendants acted in a manner to deprive the Plaintiff of the right to receive the benefits of the contract by failing to provide notice of the requirement to opt out of Express Scripts mail order program and how to opt out making the ability to opt out illusory; not providing any disclosure and explanation of the imposition of a "retail penalty" for not timely opting out; and imposing an unfair "retail penalty" prohibited by New York's AMMO law on customers, who do not opt out of Express Scripts mail order program and instead use a non-mail order retail pharmacy.

94. This claim is based on Defendants' breach of the implied duty of good faith and fair dealing that adheres to every contract and the requirements of New York law under AMMO law.

95. Defendants' actions, misstatements, and omissions destroyed Plaintiffs' right to receive the benefits of the contract promised by Defendants and caused Plaintiffs substantial damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment as follows:

- a. Declaring this action to be a proper class action and certifying Plaintiff as Class representative and Plaintiff's counsel as Class counsel;
- b. Declaring that Defendants violated New York General Business Law § 349;
- c. Declaring that Defendants breach of contract implied covenant of good faith and fair dealing with Plaintiff and Class Members;
- d. Awarding damages to Plaintiff and other members of the Class, and against Defendants, in an amount to be proven at trial, and including exemplary and punitive damages in order to prevent and deter Defendants from any future unlawful conduct;
- e. Providing restitution to Plaintiff and the Class for any wrongful act or practice under each cause of action where such relief is permitted;
- f. Enjoining Defendants from continuing the deceptive and unlawful practices as set forth herein, including Defendants' failure to disclose the existence of a financial penalty for allegedly failing to timely opt out of the Express Scripts mail order program, failure to provide notice of the financial penalty before it is imposed and

on an annual basis, and failure to disclose the financial penalty after it is imposed, imposition of the financial penalty in violation of New York law on customers, who do not opt out of Express Scripts mail order program and use a non-mail order retail pharmacy, and directing Defendants to engage in corrective action, or providing other injunctive or equitable relief;

- g. Awarding Plaintiff and other Class members pre-judgment and post-judgment interest, as well as reasonable attorneys' fees and expenses incurred in this action, including expert and witness fees and other costs and disbursements; and
- h. Awarding Plaintiff and other members of the Class such further relief as the Court may be just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: April 29, 2019

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