

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

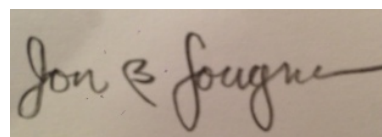
-----X JON FOUGNER, Plaintiff, - against - EMPIRE HEALTHCHOICE HMO, INC. (d/b/a "EMPIRE BLUECROSS" (AKA "EMPIRE BLUE CROSS") (AKA "EMPIRE BLUECROSS BLUESHIELD" (AKA "EMPIRE BLUE CROSS BLUE SHIELD") (AKA "EMPIRE BLUE CROSS AND BLUE SHIELD")) (alternatively d/b/a "ANTHEM") (alternatively d/b/a "WELLPOINT") (a subsidiary of WELLPOINT, INC.). Defendant. -----X	<u>SUMMONS</u> Index Number: _____ Date Index Number Purchased: _____, 2014
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To the person named as Defendant above:

PLEASE TAKE NOTICE THAT YOU ARE SUMMONED to answer the complaint of the plaintiff herein and to serve a copy of your answer on the plaintiff at the address indicated below within 20 days after service of this Summons (not counting the day of service itself), or within 30 days after service is complete if the Summons is not delivered personally to you within the State of New York.

YOU ARE HEREBY NOTIFIED THAT should you fail to answer, a judgment will be entered against you by default for the relief demanded in the complaint.

Dated: October 6, 2014



Jon Fougner
217 E. 70th St., #1126
New York, NY 10021
(646) 583-2381
jon.fougner@yahoo.com

Defendant: Empire HealthChoice HMO, Inc.
P.O. Box 1407
Church Street Station
New York, NY 10008-1407

Venue: Plaintiff designates New York County as the place of trial on the basis that he lives there.

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

<p>-----X</p> <p>JON FOUGNER,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>EMPIRE HEALTHCHOICE HMO, INC. (d/b/a “EMPIRE BLUECROSS” (AKA “EMPIRE BLUE CROSS”) (AKA “EMPIRE BLUECROSS BLUESHIELD” (AKA “EMPIRE BLUE CROSS BLUE SHIELD”) (AKA “EMPIRE BLUE CROSS AND BLUE SHIELD”))) (alternatively d/b/a “ANTHEM”) (alternatively d/b/a “WELLPOINT”) (a subsidiary of WELLPOINT, INC.).</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p><u>COMPLAINT AND JURY TRIAL DEMAND</u></p>
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Something is rotten in the Empire State.

Plaintiff Jon Fougner (“I”) brings this complaint against Defendant Empire HealthChoice HMO, Inc. (d/b/a “Empire BlueCross” (AKA “Empire Blue Cross”) (AKA “Empire BlueCross BlueShield” (AKA “Empire Blue Cross Blue Shield”) (AKA “Empire Blue Cross and Blue Shield”))) (alternatively d/b/a “Anthem”) (alternatively d/b/a “Wellpoint”) (a subsidiary of Wellpoint, Inc.) (“Empire”).

Empire’s myriad corporate names are confusing, but this case is simple: Empire promised me a primary care physician (“PCP”) but didn’t deliver.

Empire sold me the Empire Platinum Guided Access health insurance plan (the “Platinum Plan”) and then frustrated my every effort to obtain a PCP and the other benefits of the bargain. Without a PCP, it is impossible to enjoy the benefits of the bargain, since the PCP serves as—to use Empire’s word—Empire’s “gatekeeper” to any other healthcare. Thus, whether through bad faith or an otherworldly degree of incompetence, Empire materially breached its insurance contract (the “Contract”) with me.

Since Empire knew and had reason to know of the rampant problems obtaining a PCP through the Platinum Plan, its pre-Contract statements to me that a PCP could readily be obtained through the Platinum Plan fraudulently induced me to enter into the contract.

In the process, Empire engaged in unfair trade practices and falsely advertised.

Through its fraudulent inducement, unfair trade practices, false advertising and material breach of contract, Empire unjustly enriched itself.

Accordingly, I seek a declaratory judgment that Empire is in material breach of the Contract, an injunction compelling Empire to cure its breach, contract damages, reasonable and foreseeable consequential damages, restitution of all monies paid to Empire under the Contract, punitive damages for Empire's fraudulent inducement, and reasonable attorney's fees and other costs.

PARTIES

1. I am a natural person residing in New York. I am a citizen of New York and the United States.

2. Empire is a corporation organized under the New York Insurance Law with its principal place of business in New York.

FACTS

A. Empire Advertises the Platinum Plan as Including Coverage for a Readily Obtainable PCP.

3. In June and July 2014, I researched health insurers, including Empire. An essential feature of any plan I would consider was that it allow me to see a PCP.

4. Empire advertised its Platinum Plan and claimed that the plan allowed members to see a PCP. For instance, Empire claimed to "offer you a total health solution" with "[e]asy-to-use tools to find a doctor." Indeed, Empire explicitly promised that "you choose a primary care physician."

5. In particular, Empire promised that its website would be available to find a PCP "anytime."

6. Sadly, nothing could have been further from the truth.

B. Empire Induces Me to Enter into the Contract, Under Which I Perform.

7. On July 11, 2014, in light of Empire's promises of a PCP, I entered into the Contract.
8. The Contract provided that, starting on August 1, 2014, I would pay Empire a monthly fee of \$620.69 in exchange for various health services, including a PCP.
9. In the Contract, Empire covenanted: "A list of Participating Providers and their locations is available on Our website at www.empireblue.com or upon Your request to Us."
10. In the Contract, Empire further covenanted: "We will provide the benefits described in this Contract to You."
11. I have made all payments owed to Empire under the Contract.

C. Empire Frustrates My Every Effort to Obtain Any Benefit of the Bargain.

(i) Empire's Core Strategy: Block All Services Behind a Bottleneck, and Then Clog the Bottleneck

12. The Platinum Plan requires that an Empire-approved PCP provide, or "guide" the member to, *any* health care. In Empire's own words: "The Contract has a gatekeeper usually known as a Primary Care Physician."
13. Empire frustrated my every effort to obtain an Empire-approved PCP, and thus to obtain the benefits of the bargain.
14. The Contract provides for only three ways to find a PCP: (i) request a directory; (ii) call customer support; or (iii) visit Empire's website.
15. I did all three.

(ii) Empire's Primary Tactic: Purport, but Fail, to Provide an Empire-Approved PCP Through its Website

16. On various dates in September and October, 2014, I followed Empire's instructions for finding a PCP who accepts the Platinum Plan: while logged into the account for my Platinum Plan, I correctly followed its hyperlinks to its doctor search interface ("Find a Doctor"), correctly selected "Doctor/Medical Professional," correctly entered my zip code, and correctly clicked "Search." I then correctly filtered the results to only those "[a]ccepting [n]ew [p]atients" and only those "[a]ble to [s]erve as a PCP." I imposed no other constraints—such as gender,

education or specialization—on the results. Thus, the listed results (the “Supposedly Participating PCPs”) should have been PCPs in my area accepting new patients on the Platinum Plan (“Participating PCPs”).

17. Indeed, Empire promised, through Find a Doctor: “How do I *make sure* a doctor accepts my insurance plan? Information about your insurance plan was automatically provided when you logged in. Doctors who accept your insurance plan are displayed in your search results” (emphasis added).

(iii) Empire Breaks its Promise Regarding the First Supposedly Participating PCP

18. I called the phone number listed by Empire for the first listed Supposedly Participating PCP: Ladan Ahmadi.

19. Dr. Ahmadi’s receptionist answered. Out of the blue, the receptionist asked me, “Did you test positive?” Confused, I asked, “For what?” “HIV,” she answered. “No,” I replied, surprised. “Why do you ask?” The receptionist explained that the office was an HIV clinic and Dr. Ahmadi was, contrary to Empire’s promise, not accepting new patients as a PCP.

20. Thus, Empire broke its promise that the first Supposedly Participating PCP was a Participating PCP.

(iv) Empire Fails to Provide Accurate Contact Information for the Second Supposedly Participating PCP

21. Empire provided no email address for the second listed Supposedly Participating PCP: Lester Blair.

22. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Blair.

23. The number was wrong.

24. I obtained the correct number for Dr. Blair, (212) 312-5920, and called it between 9 a.m. and 5 p.m. on a weekday.

25. No person answered. A keypad-based or interactive voice response system (in either event, an “IVR”) answered. I didn’t reach Dr. Blair or any person who works for him.

26. Thus, Empire failed to provide accurate contact information for the second Supposedly Participating PCP.

(v) Empire Provides a Grossly Inaccurate Location for the Third Supposedly Participating PCP

27. I called the phone number listed by Empire for the third listed Supposedly Participating PCP: Andrea Card.

28. The number was wrong.

29. I obtained the correct number for Dr. Card, (718) 482-7772.

30. An IVR answered. I was transferred several times. I was put on hold. I was transferred again. I got a voicemail. I left a voicemail.

31. I heard back from Dr. Card's office. I spent roughly 30 minutes calling back and forth with Dr. Card's office until finally learning that the address Empire claims she works from is incorrect, and she does not even work in New York County.

32. Thus, Empire—whose entire Find a Doctor tool is based on proximity search—untruthfully claimed that Dr. Card worked near me.

(vi) Empire's Fourth Supposedly Participating PCP Doesn't Answer the Phone

33. Empire provided no email address for the fourth listed Supposedly Participating PCP: Vishal Dodia.

34. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Dodia.

35. No one answered the phone.

(vii) Empire's Fifth Supposedly Participating PCP Does Not Even Work with the Organization Listed by Empire

36. Empire provided no email address for the fifth listed Supposedly Participating PCP: Brian Eiss.

37. I called the phone number listed by Empire for Dr. Eiss.

38. The person who answered the phone said, of Dr. Eiss, "He's no longer with us."

(viii) Empire's Sixth Supposedly Participating PCP Apparently Does Not Even Work with the Organization Listed by Empire

39. Empire provided no email address for the sixth listed Supposedly Participating PCP: Pamela Eliach.

40. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Eliach.

41. Neither Dr. Eliach nor Dr. Eliach's staff answered. An IVR answered. The person who eventually answered said that she could not find Dr. Eliach in her system.

(ix) Empire's Seventh Supposedly Participating PCP, a Duplicate of its Sixth, Does Not Answer the Phone

42. Empire provided no email address for the seventh listed Supposedly Participating PCP: Pamela Eliach, an apparent duplicate of its sixth.

43. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Eliach in this seventh listing.

44. Neither Dr. Eliach nor anyone who clearly identified herself as Dr. Eliach's staff answered. A person answered and within one second put me on hold. After five minutes of waiting on hold, I hung up.

(x) Empire Breaks its Promise Regarding the Eighth Supposedly Participating PCP

45. I called the phone number listed by Empire for the eighth listed Supposedly Participating PCP: Rebecca Florsheim.

46. The person who answered the phone said that Dr. Florsheim *isn't* taking new patients, because "she is a hospital doctor only."

47. Thus, Empire broke its promise that the eighth Supposedly Participating PCP was a Participating PCP.

(xi) Empire Breaks its Promise That the Ninth Supposedly Participating PCP Accepts the Platinum Plan

48. I called the phone number listed by Empire for the ninth listed Supposedly Participating PCP: Fabio Giron.

49. The number was wrong.

50. I obtained the correct number for Dr. Giron, (212) 312-5920, and called it.

51. Dr. Giron's employee said Dr. Giron does not accept the Platinum Plan.

52. Thus, Empire broke its promise that the ninth Supposedly Participating PCP accepts the Platinum Plan.

(xii) Empire Breaks its Promise Regarding the Tenth Listed Supposedly Participating PCP

53. I called the phone number listed by Empire for the tenth listed Supposedly Participating PCP: Robert Glennon.

54. The person who answered the phone said that Dr. Glennon could not see me as a PCP because he no longer sees patients in the office—only in the hospital.

55. Thus, Empire broke its promise that the tenth Supposedly Participating PCP is a Participating PCP.

(xiii) Empire Fails to Provide Accurate Contact Information for the Eleventh Listed Supposedly Participating PCP

56. Empire provided no email address for the eleventh listed Supposedly Participating PCP: Robert Lin.

57. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Lin.

58. The number was wrong. An automated message said: “You have reached a non-working number at the New York Presbyterian Hospital. Please check the number and dial again.” Then line then went dead.

59. Thus, Empire failed to provide accurate contact information for the eleventh listed Supposedly Participating PCP.

(xiv) Empire’s Twelfth Listed Supposedly Participating PCP Has No Near-Term Availability

60. I called the phone number listed by Empire for the twelfth listed Supposedly Participating PCP: Cathleen London.

61. Dr. London’s employee asked me to send her a copy of my Empire insurance card in order to research whether or not she accepts the Platinum Plan. I did that.

62. Dr. London’s employee called back the next day and said that she accepts the Platinum Plan but could not see any new patient before late October.

(xv) Empire Fails to Provide Accurate Contact Information for the Thirteenth Listed Supposedly Participating PCP

63. Empire provided no email address for the thirteenth listed Supposedly Participating PCP: Erica Phillips.

64. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Phillips.

65. No one answered. The outgoing message on the voicemail named three doctors, none of whom appeared to be Dr. Phillips. I called again to confirm. Again, no one answered and none of the doctors named on the voicemail appeared to be Dr. Phillips.

66. Thus, Empire failed to provide accurate contact information for the thirteenth listed Supposedly Participating PCP.

(xvi) Empire Breaks its Promise Regarding the Fourteenth Listed Supposedly Participating PCP

67. I called the phone number listed by Empire for the fourteenth listed Supposedly Participating PCP: Paula Roy Burman.

68. Dr. Burman's employee said she isn't taking new patients because "she is a hospitalist only."

69. Thus, Empire broke its promise that the fourteenth listed Supposedly Participating PCP is a Participating PCP.

(xvii) Empire Provides a Grossly Inaccurate Location Regarding the Fifteenth Supposedly Participating PCP

70. I called the phone number listed by Empire for the fifteenth Supposedly Participating PCP: Lawrence Siegel.

71. Dr. Siegel's employee told me that the address listed by Empire for Dr. Siegel is wrong, and Dr. Siegel is actually much farther from my home than Empire claimed.

72. Thus, Empire provided grossly inaccurate location information regarding the fifteenth Supposedly Participating PCP.

(xviii) Empire Breaks its Promise Regarding the Sixteenth Listed Supposedly Participating PCP

73. I called the phone number listed by Empire for the sixteenth listed Supposedly Participating PCP: Anthony Smith.

74. Dr. Smith's employee said he isn't working as a PCP there.

75. Thus, Empire broke its promise that the sixteenth listed Supposedly Participating PCP is a Participating PCP.

(xix) Empire Fails to Provide Accurate Contact Information for the Seventeenth Listed Supposedly Participating PCP

76. Empire provided no email address for the seventeenth listed Supposedly Participating PCP: Erinmarie Sullivan.

77. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Sullivan.

78. The number was wrong.

79. Thus, Empire failed to provide accurate contact information for the seventeenth listed Supposedly Participating PCP.

(xx) Empire's Eighteenth Listed Supposedly Participating PCP Fails to Answer the Phone

80. Empire provided no email address for the eighteenth listed Supposedly Participating PCP: Chin Tang.

81. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Tang.

82. No one answered. The line went dead after about five rings.

(xxi) Empire Fails to Provide Accurate Contact Information for the Nineteenth Listed Supposedly Participating PCP

83. Empire provided no email address for the nineteenth listed Supposedly Participating PCP: Ole Vielemeyer.

84. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Vielemeyer.

85. No one answered. An outgoing message made no reference to Dr. Vielemeyer. Nevertheless, I left a message.

86. The next morning, I got a call back saying that I had the wrong number.

(xxii) Empire Fails to Provide Adequate Contact Information for the Twentieth Listed Supposedly Participating PCP

87. Empire provided no email address for the twentieth listed Supposedly Participating PCP: Usha Wagh.

88. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Wagh.

89. No person answered. An IVR answered. I correctly followed its prompts. The line went dead.

90. Thus, Empire failed to provide information adequate to contact the twentieth listed Supposedly Participating PCP.

(xxiii) Empire's Twenty-First Listed Supposedly Participating PCP Fails to Answer the Phone

91. Empire provided no email address for the twenty-first listed Supposedly Participating PCP: Jerome Breslaw.

92. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Breslaw.

93. The phone beeped repeatedly, as if disconnected or busy, and no one ever came on the line.

(xxiv) Empire Breaks its Promise That the Twenty-Second Listed Supposedly Participating PCP Accepts the Platinum Plan

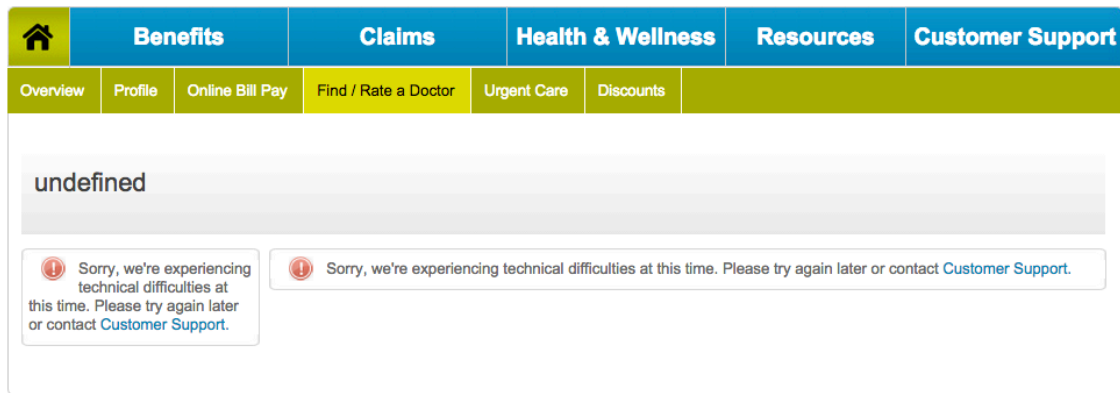
94. I called the phone number listed by Empire for the twenty-second listed Supposedly Participating PCP: "C Cunningham-Rundles" [sic].

95. Dr. Cunningham-Rundles' employee said that he does *not* accept the Platinum Plan.

96. Thus, Empire broke its promise that the twenty-second listed Supposedly Participating PCP accepts the Platinum Plan.

(xxv) Empire Breaks its Promise That the Twenty-Third Listed Supposedly Participating PCP Accepts the Platinum Plan

97. When I returned to the list of Supposedly Participating PCPs after learning that Empire's claim that Dr. Cunningham-Rundles accepts the Platinum Plan was untruthful, Empire's website crashed and the list was gone, as shown below.



98. I regenerated the list and called the phone number listed by Empire for the twenty-third listed Supposedly Participating PCP: Natela Babayeva.

99. Dr. Babayeva's employee said she does *not* accept the Platinum Plan and recommending switching to a different insurance company.

100. Thus, Empire broke its promise that the twenty-third listed Supposedly Participating PCP accepts the Platinum Plan.

(xxvi) Empire Breaks its Promise That the Twenty-Fourth Listed Supposedly Participating PCP, a Duplicate of the Twenty-Third, Accepts the Platinum Plan

101. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for the twenty-fourth listed Supposedly Participating PCP: Natela Babayeva, an apparent duplicate of the twenty-third.

102. No one answered my call to the number associated with the twenty-fourth listing. The outgoing message identified no name—doctor's or otherwise. Since I already knew that a Dr. Natela Babayeva doesn't accept the Platinum Plan, I didn't bother to leave a message.

(xxvii) Empire's Twenty-Fifth Listed Supposedly Participating PCP Fails to Answer the Phone

103. Empire provided no email address for the twenty-fifth listed Supposedly Participating PCP: William Boxer.

104. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Boxer.

105. The phone beeped repeatedly, as if disconnected or busy, and no one ever came on the line.

(xviii) Empire Breaks its Promise Regarding the Twenty-Sixth Listed Supposedly Participating PCP, A Duplicate of the Sixteenth

106. I called the phone number listed by Empire for the twenty-sixth listed Supposedly Participating PCP: Anthony Smith, an apparent duplicate of the sixteenth.

107. Dr. Smith's employee again said he isn't working as a PCP there.

108. Thus, Empire broke its promise that the twenty-sixth listed Supposedly Participating PCP is a Participating PCP.

(xxix) Empire's Twenty-Seventh Listed Supposedly Participating PCP Fails to Answer the Phone

109. Empire provided no email address for the twenty-seventh listed Supposedly Participating PCP: John Getsos.

110. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Getsos.

111. The phone beeped repeatedly, as if disconnected or busy, and no one ever came on the line.

(xxx) Empire's Twenty-Eighth Listed Supposedly Participating PCP Fails to Answer the Phone

112. Empire provided no email address for the twenty-eighth listed Supposedly Participating PCP: Boris Ivkov.

113. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Ivkov.

114. The phone beeped repeatedly, as if disconnected or busy, and no one ever came on the line.

(xxxi) Empire's Twenty-Ninth Listed Supposedly Participating PCP Fails to Answer the Phone

115. Empire provided no email address for the twenty-ninth listed Supposedly Participating PCP: Lauren Acinapura.

116. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Acinapura.

117. No person answered. An IVR answered. I correctly followed its prompts. Easy-listening jazz played. The answered service answered, surprised that they had received the call during normal business hours. They did not know whether Dr. Acinapura was a Participating PCP.

(xxxii) Empire's Thirtieth Listed Supposedly Participating PCP Fails to Answer the Phone

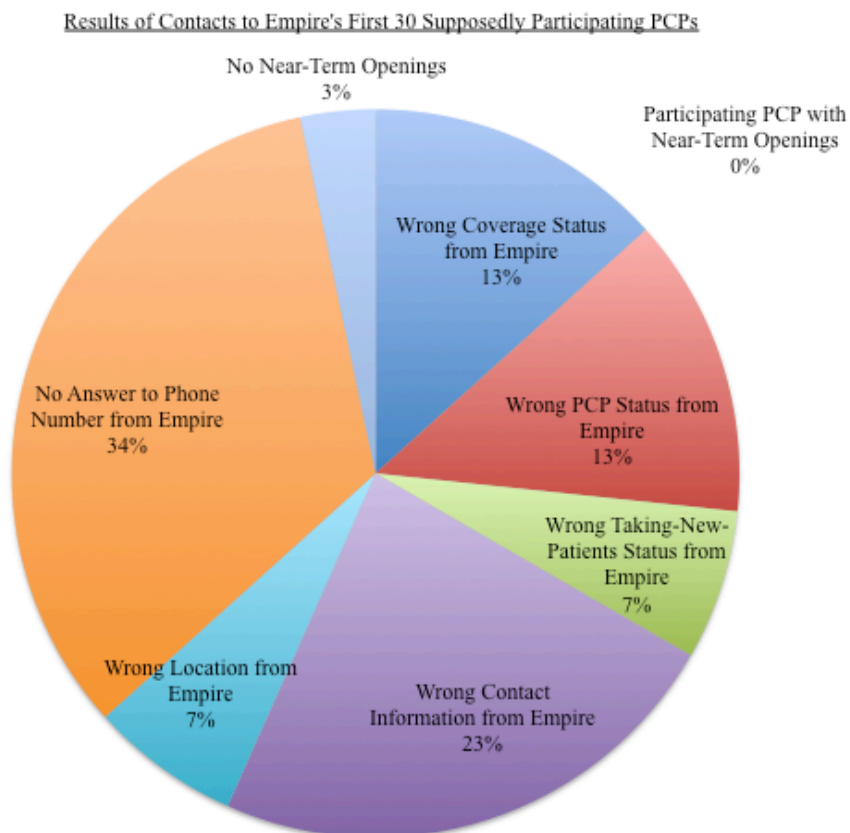
118. Empire provided no email address for the thirtieth listed Supposedly Participating PCP: Pamela Apolaya.

119. Between 9 a.m. and 5 p.m. on a weekday, I called the phone number listed by Empire for Dr. Apolaya.

120. The office was closed.

(xxxiii) Empire's Supposedly Participating PCPs, Aren't

121. Thus, as my failed contacts to Empire's first *thirty* Supposedly Participating PCPs and the chart below illustrate, it's not just that beggars can't be choosers. With Empire, beggars can't even be beggars.



122. In various other instances, between 9 a.m. and 5 p.m. on weekdays, I called Supposedly Participating PCPs beyond the first thirty results only to be told that, contrary to Empire's promise, they do not accept the Platinum Plan or are not accepting new patients as a PCP.

123. In other of these calls beyond the first thirty, the phone number provided by Empire turned out to be wrong. As far as I know, Empire never provided an email address for any of the Supposedly Participating PCPs.

124. In those additional calls, never did I find any Participating PCP.

(xxxiv) Empire's Constantly-Broken Website Sometimes Makes Even Searching for a Doctor—Let Alone Finding One Who Actually Accepts the Platinum Plan—Impossible

125. Often, sadly, Empire's abysmal data hygiene was actually irrelevant, because Find a Doctor *failed altogether, returning no results at all*. For instance, on September 22, 2014, brimming with naïve optimism for a better result, I returned to Find a Doctor to obtain any PCP. I simply searched for doctors within 2 miles of my Manhattan zip code. Empire returned *none*.

126. Empire is aware that it is failing to keep its promise of allowing plan members to find doctors. For instance, on September 23, 2014, I tried to use Find a Doctor to obtain any PCP. It failed, offering this penitence: “We’re sorry, but our Find a Doctor tool is having technical problems. We are working to fix these problems as quickly as we can. Thank you for your patience.”

127. Similarly, on September 25, 2014, Empire offered this apology for the sorry state of Find a Doctor: “Please note that from time to time our Find a Doctor tool may be slow to respond. We are working to fix the problem as quickly as we can. We’re sorry for any trouble this may cause,” as shown below.

The screenshot shows a web browser window with the URL https://www.empireblue.com/consumer/providerdirectory/search-criteria?qs=*MkIUzXnbiwOox/G4YaeR2w==&brand=ebcbs. The page features the Empire Blue Cross Blue Shield logo and a navigation menu with tabs: Home, Benefits, Claims, Health & Wellness, Resources, and Customer Support. Below the navigation menu, there is a sub-menu with links: Overview, Profile, Online Bill Pay, Find / Rate a Doctor, Urgent Care, and Discounts. A red-bordered box highlights a message: "Please note that from time to time our Find a Doctor tool may be slow to respond. We are working to fix the problem as quickly as we can. We're sorry for any trouble this may cause." Below this message, there is a section titled "Find a Doctor" with a link "Encontrar un doctor". The section includes a dropdown menu for "I want to search this plan/network:" set to "My Plan" and another dropdown menu for "I'm looking for a:" set to "Doctor/Medical Professional". A "Watch Video" button is also visible in the top right corner of the section.

128. On September 30, 2014, I devised a new approach to overcome the instability of Empire’s website. The approach was this: on a day when Find a Doctor is at least somewhat functional, extract a list of Supposedly Participating PCPs from Find a Doctor and then work with it in a more stable environment, such as Microsoft Excel or pen and paper, crossing off doctors when I learn that they don’t accept the Platinum Plan, aren’t accepting new patients, aren’t in my area, aren’t reachable at the contact information provided by Empire and/or aren’t

PCPs. Empire purports to offer two ways to extract a list of doctors from Find a Doctor: “Print Results” and “Email.”

129. Regarding the former way, Empire stated: “How do I print these results? Click the ‘Print Results’ link on the left side of the screen.” In fact, there is *no* “Print Results” link on the left side of the screen or anywhere else; there is, however, a “Print” link near the top-right of the screen. I clicked it. Empire generated only a PDF of an error message, as shown below. Never did the “Print Results” approach yield anything other than this error message.



130. Regarding the latter way, Empire stated: “How do I email my search results to myself or someone else? Click the ‘Email’ link on the top right of the screen. Then, enter the email address of the person you’d like to send the search results to, as well as your email address. You’ll also type out the security code you see on the screen. Then, click the ‘Send’ button.” I clicked that link and entered my email address. There was no “security code.” I clicked send. Email emailed me only a PDF of an error message, as shown below. Never did the “Email” approach yield anything other than this error message.



131. As a result of Empire’s breaking its promise to make its website usable “anytime,” I failed to obtain a PCP.

(xxxv) Despite its Rampant Inaccuracies, Empire Covenants to Make Reasonable Efforts to Provide Accurate Data








132. On September 13, 2014, Empire promised, through its employee Joanna Marie Policarpio, to make “reasonable efforts to validate the provider list is up to date and accurate.”

133. Empire broke this promise. Its database is replete with errors, including errors regarding coverage. Empire has failed to make reasonable efforts to correct these errors.

134. On September 25, 2014, Empire, through its employee “Oracio,” conceded that the *only* effort Empire makes to maintain the accuracy of its database is *waiting for doctors proactively to contact Empire* to correct inaccuracies.

135. That is barely any effort on Empire’s behalf at all, let alone “reasonable efforts.” Doctors and their offices are generally busy with patients and do not idle away the day proactively calling insurance companies, only to sit through lengthy and broken IVRs, such as Empire’s, in hopes of correcting an error in the insurer’s database.

136. Even if Empire were to insist on doing no proactive work whatsoever to clean up its database, and instead to rely on the charity of others, it could easily do much more to keep the database accurate. For example, it could add a button next to a “Find a Doctor” result allowing the patient to report incorrect information. Far from amounting to an unreasonable effort, such crowdsourcing would be trivially easy to implement, given that Find a Doctor already has a button for the patient to review a doctor, as shown below.

 CARE PROVIDER	 LOCATION	 QUALITY
LADAN AHMADI MD PCP ID: 561CT3 GENDER: Female SPECIALTY: Internal Medicine <input type="checkbox"/> Compare	DISTANCE: 0.1 miles away 210 E 64TH ST, NEW YORK, NY 10065 New York 212.434.4251	 Quality Snapshot  Be the first to Review <hr/>  See All Provider Awards Certifications <hr/>  Doctor In-Network

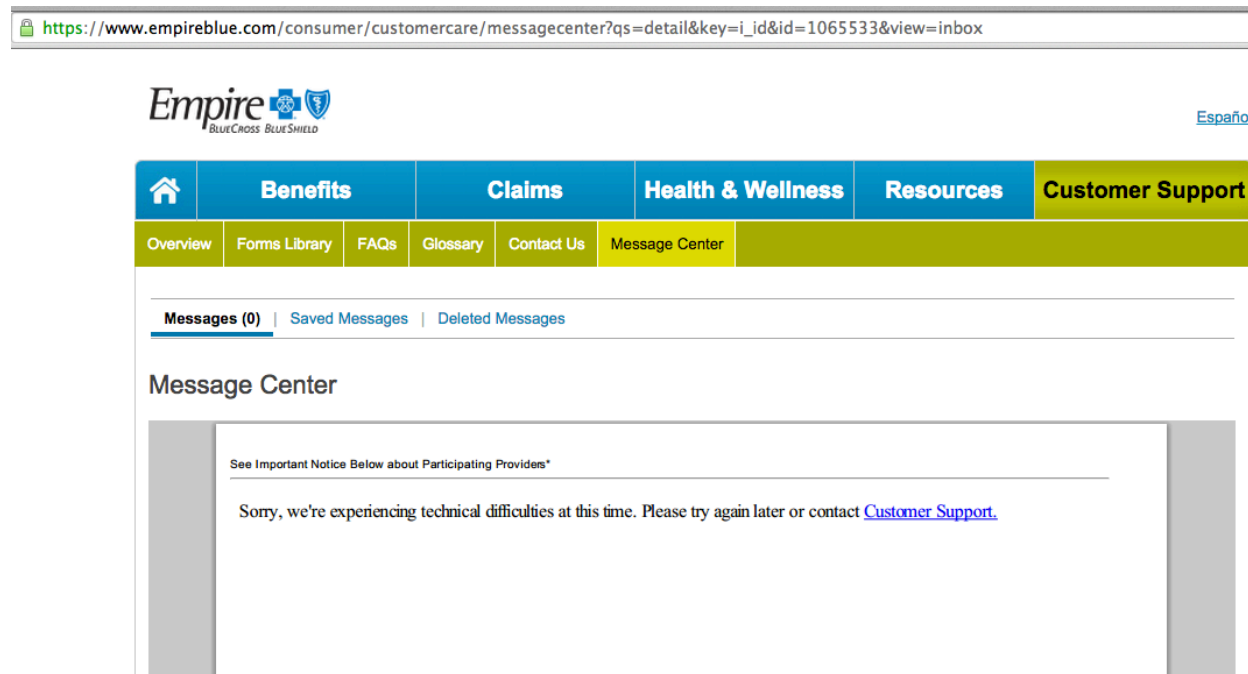
137. Thus, as a result of Empire’s failure to make reasonable efforts to maintain the accuracy of its provider database, I obtained no PCP.

(xxxvi) Empire Breaks its Promise to Help me Obtain a PCP Through its Email Support

138. Having found no doctor through Find a Doctor, I sent an electronic message to Empire on September 12, 2014, requesting a PCP.

139. On September 13, 2014, Empire’s employee Ms. Policarpio replied, claiming to have attached a list of PCPs for me to choose from.

140. That claim was false. Rather than listing PCPs, the attachment offered only the now-familiar and more-than-a-little-ironic refrain, “Sorry, we’re experiencing technical difficulties at this time. Please try again later or contact Customer Support,” as shown below.



141. I both tried again later and contacted customer support—to no avail.

142. On September 22, 2014, I replied to Ms. Policarpio, letting her know the truth about the attachment.

143. On September 24, 2014, Empire’s employee Andrea Young wrote back but failed to fix the attachment.

144. Neither Ms. Policarpio nor Ms. Young, nor any other person, ever corrected the attachment.

(xxxvii) Empire Fails to Let me Obtain a PCP Through its Phone Support

145. On September 22, 2014, I called the “Customer Service” number listed on the back of my Empire insurance card in order to obtain any PCP. No person answered. An IVR answered. I properly followed all IVR prompts. Nevertheless, after asking if I was a senior citizen, trying to sell me a Walgreens gift card, and providing a non sequitur regarding directory assistance, the IVR inexplicably disconnected the call.

146. As a result of Empire’s broken promise to let me find a PCP by calling customer service, I obtained no PCP.

(xxxviii) Empire Breaks its Promise to Obtain a PCP for me

147. On September 25, 2014, in an auspicious turn of events, when I called Empire customer service to obtain any PCP, a human eventually answered.

148. I explained how all the normal ways of finding a PCP had failed and asked for help.

149. Empire promised to find me a PCP and call me back. In return, I promised to set my ringer to maximum volume and to welcome the call even if it should come at 4 a.m.

150. I kept my promise.

151. Empire broke its. It never called back.

152. On September 30, 2014, I called Empire. Empire conceded that it had not kept the promise it had made by phone on September 25, 2014, having instead simply flagged the task as “pending” and abandoned it. “[T]his is taking so long,” Empire conceded.

153. On the September 30, 2014 phone call, I explained in detail to Empire the rampant inaccuracies in its database and the need for Empire to call the doctors to confirm that they are indeed seeing new patients on the Platinum Plan as PCPs. Empire agreed. To illustrate, I gave the example of Ladan Ahmadi, a Supposedly Participating PCP who, as explained above, is instead an HIV clinician. Empire acknowledged the example. Empire then promised anew to send me the name of a PCP in my area on the Platinum Plan taking new patients.

154. Purporting to keep its promise to provide the name of a Participating PCP, later on September 30, 2014, Empire sent me a list of doctors. Amazingly, the *very first name* on the list was *Ladan Ahmadi*, as shown below.

Provider Name

LADAN AHMADI MD <https://www.empireblue.com/health-insurance/provider-directory/searchcriteria?qs=*eZILiIsdNxFVC+p6Yh8F+w==&brand=ebcbs>

PCP ID: 561CT3

GENDER: Female

SPECIALTY: Internal Medicine

Compare

155. In fact, *every* other name on the list I contacted, each to no avail, as discussed above. That is, instead of keeping its promise to provide an actual Participating PCP, Empire simply dumped a list of the first twenty Supposedly Participating PCPs from Find a Doctor—from Dr. Ahmadi to Dr. Wagh.

156. In short, Empire’s approach is “paper-in, paper-out,” regardless of whether what’s written on the paper is utterly incorrect.

157. As a result of Empire’s multiple broken promises, I obtained no PCP.

(xxxix) Empire’s Nomenclature and Card Information Fail to Identify its Plan Clearly to Doctors

158. I also used a variety of resources not provided by Empire in order to try to find a PCP accepting new patients on the Platinum Plan. During this research, I spoke with several doctors’ offices. They asked for, and I gave them, various information from my Empire insurance card in order to confirm that they accepted my insurance before scheduling an appointment.

159. For instance, I spoke with Mark Dursztman’s receptionist, who assured me that Dr. Dursztman accepted the insurance. We scheduled an annual check-up for September 12, 2014.

160. When I arrived for the check-up, I presented my Empire insurance card to the receptionist. After examining it and her records, she informed me that Dr. Dursztman in fact does *not* accept the Platinum Plan.

161. In another instance, on Tuesday, September 23, 2014, I spoke with Oksana Zbarsky's receptionist, who assured me that Dr. Zbarsky accepted the insurance. We scheduled an annual check-up for that same day.

162. When I arrived for the check-up, I presented my Empire insurance card to the receptionist. She examined it, photocopied both sides of it, and told me Dr. Zbarsky accepted it. Success!, I thought.

163. Dr. Zbarsky performed an annual checkup.

164. On September 24, 2014, Dr. Zbarsky's receptionist called me to inform me that, in fact, she did *not* accept the insurance. The receptionist claimed that, in her year of experience, no other plan had ever caused her such confusion.

165. Thus, Empire provides on its insurance cards insufficient information for a doctor's office to readily ascertain whether or not the doctor actually accepts the Platinum Plan—certainly over the phone, and sometimes even in person with the card physically present.

166. Regarding such communication failures, Empire conceded, on September 30, 2014, that “[i]t happens more than you think. There seems to be a large gap in communication.”

167. As a result of Empire's failure to identify its plan clearly to doctors' offices, I obtained no Participating PCP.

JURISDICTION AND VENUE

168. This Court has personal jurisdiction over Empire because it is a domiciliary of New York. Moreover, Empire is a corporate defendant at home in New York in that it is headquartered in New York and does substantially all its business in New York.

169. Venue is proper pursuant to CPLR § 503, as one or more parties reside in New York County. Moreover, by the terms of the Contract, venue is proper “in a court located in the State of New York.”

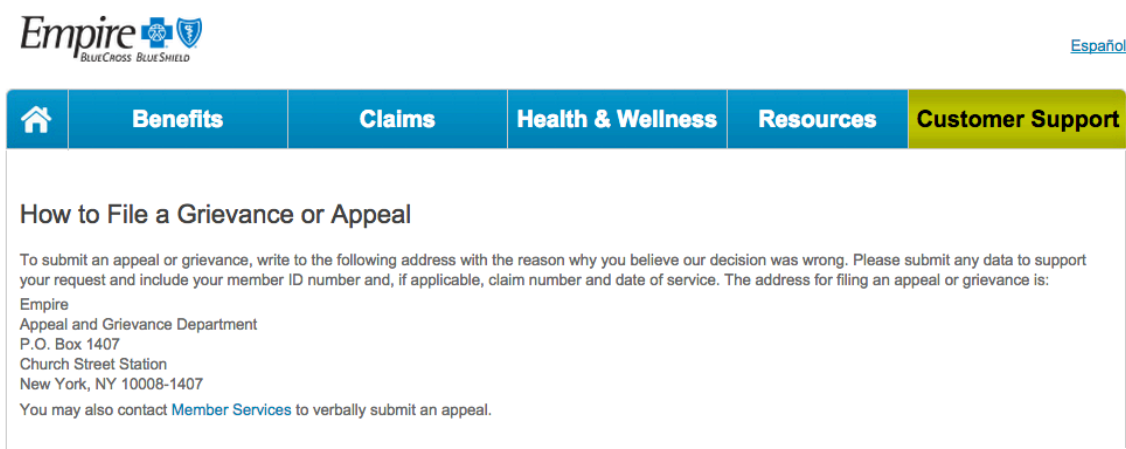
STANDING

170. By the terms of the Contract, it “is governed by the laws of New York State.”

171. The Contract provides: “No action at law or in equity may be maintained against Us prior to the expiration of 60 days after written submission of a claim has been furnished to Us *as required in this Contract*” (emphasis added). Since nothing in the Contract requires the sort of legal misconduct described herein to be submitted to Empire, nothing in the Contract allows Empire to force this suit into abeyance.

172. Indeed, by Empire’s own admission, its internal “appeals” and “grievances” process applies only to challenges to a “decision” by Empire—i.e., a denial of coverage, as shown below. I am not challenging a decision of Empire. Rather, I am challenging fraud, unfair trade practices, false advertising, breaches of contract and unjust enrichment by Empire. Accordingly, even if Empire could *ever* deprive a counterparty of standing or this Court of jurisdiction on an exhaustion theory, it cannot do so here.

https://www.empireblue.com/consumer/customercare/appealsgrievances_overview



173. In any event, on October 2, 2014, Empire waived any such contractual right to correct its misconduct internally, when its in-house counsel suggested I bring the legal misconduct described herein to the attention of the “New York State Department of Insurance” [sic].

174. In fact, on October 3, 2011, the New York State Insurance Department was consolidated into the New York State Department of Financial Services (“NYSDFS”).

175. I shared the details of this Complaint with NYSDFS.

176. NYSDFS replied: “NYS Department of Financial Services do not have jurisdiction over individual complaints, you would have to file in court.”

CAUSES OF ACTION

FIRST CAUSE OF ACTION (Fraud)¹

177. As described in the Facts, Empire advertised and promised that I would be able to obtain a PCP through the Platinum Plan.

178. Empire's promise was material. The ability to obtain a PCP is an essential basis of a bargain for health insurance, especially a "guided" plan wherein the PCP acts as a gatekeeper.

179. Empire's promise was false. As described in the Facts, *never* have I found a Participating PCP with near-term availability, despite diligent and varied attempts.

180. Empire knew or had reason to know the promise was false. For instance, Empire knew that Find a Doctor was dysfunctional, Empire knew that its database was replete with errors, and Empire knew that it was making no proactive efforts to correct its database.

181. I relied on Empire's promise. Had Empire not claimed that I would be able to obtain a PCP through the Platinum Plan, I would not have entered into the Contract.

182. It was reasonable for me to rely on Empire's promise. A reasonable patient would believe a large health insurer when the insurer promised the patient a PCP.

183. As a result of my reasonable reliance on Empire's material falsehood, I have been paying Empire \$620.69 per month since August 1, 2014 and spending dozens of hours trying to find a Participating PCP.

SECOND CAUSE OF ACTION (Unfair Trade Practice)

184. New York's Consumer Protection Law provides: "No person shall engage in any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts." N.Y. ADC. Law § 20-700.

¹ For each cause of action, the prior allegations are incorporated by reference.

185. Nevertheless, as described in the Facts, Empire did just that. In the offer and sale of the Platinum Plan, Empire deceptively claimed that I would be able to obtain a PCP.

THIRD CAUSE OF ACTION (False Advertising)

186. New York's False Advertising Law provides: "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." N.Y. GBS. Law § 350. Advertising (including labeling) is false if it is misleading in a material respect. *Id.* § 350-a.

187. As described in the Facts, Empire falsely advertised. In the offer and sale of the Platinum Plan, Empire deceptively claimed that I would be able to obtain a PCP.

FOURTH CAUSE OF ACTION (Breach of Contract)

188. As described in the Facts, Empire covenanted in the Contract to allow me to obtain a PCP.

189. As described, Empire substantially and materially breached that covenant. Over several weeks, it frustrated my every effort to obtain a PCP by all three means by which Empire had covenanted to allow me to obtain one. It failed to deliver the PCP-finding tools it had promised to make available "anytime." It even failed to follow its own promise to call me back with the name of any available PCP.

190. Further, Empire covenanted to use at least "reasonable efforts" to provide accurate data.

191. Given the importance of accuracy in health care, a reasonable party to the Contract would interpret Empire's duty to provide accurate information as going *far* beyond the slapdash effort Empire has mustered to date.

192. The covenants that Empire breached ran to the very heart of our bargain.

**FIFTH CAUSE OF ACTION
(Promissory Estoppel)**

193. As described in the Facts, after Empire and I entered into the Contract, Empire made several promises that it would find me a Participating PCP.

194. I relied on those promises. For instance, at various times I suspended my own efforts to find a Participating PCP in reliance on Empire's promise to use its expertise to do so for me.

195. That reliance was reasonable. A reasonable customer of a large and experienced health insurer, holding itself out as an expert, would trust the insurer when the insurer promised to find him a doctor.

196. That reliance was detrimental. It prevented me from finding a Participating PCP. A Participating PCP is—to use Empire's own word—the “gatekeeper” to the benefits of the bargain under the contract.

197. The interests of justice require enforcement of Empire's promises.

**SIXTH CAUSE OF ACTION
(Unjust Enrichment)**

198. Empire was unjustly enriched at Jon's expense as a result of its misconduct described above.

199. Equity and good conscience require Empire to return all of the money it obtained at Jon's expense.

**SEVENTH CAUSE OF ACTION
(Money Had and Received)**

200. As described in the Facts, Empire received money belonging to me.

201. Empire benefitted from receipt of the money.

202. Empire cannot in good conscience keep that money.

PRAYER FOR RELIEF

In light of the wrongdoing described above, I ask the Court for a judgment against Empire affording the following relief:

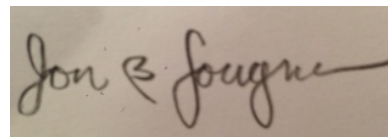
1. A declaratory judgment that Empire is in material breach of the Contract and that my duty to pay Empire is suspended until Empire cures its breach;
2. An injunction compelling Empire promptly to cure its breach;
3. Actual contract damages of \$1241.38, plus any future payments made by me to Empire under the Contract pending the resolution of this controversy;
4. Consequential damages from time lost due to Empire's fraud and material breaches, in an amount to be determined at trial no less than \$12,500;
5. Restitution and disgorgement of Empire's unjust enrichment;
6. Punitive, exemplary and treble damages, in light of Empire's fraud;
7. Any other damages authorized by law;
8. Prejudgment and post-judgment interest at the maximum legal rate;
9. Reasonable attorney's fees and other costs; and
10. Such other relief as the Court deems just and appropriate.

JURY TRIAL DEMANDED

11. I respectfully demand a jury trial.

Dated: October 6, 2014
New York, New York

By:

A handwritten signature in dark ink, appearing to read "Jon Fougner", is written over a light-colored rectangular background.

Jon Fougner, Plaintiff, *pro se*

217 E. 70th St., #1126
New York, NY 10021
(646) 583-2381
jon.fougner@yahoo.com

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

JON FOUGNER,

Plaintiff,

- against -

EMPIRE HEALTHCHOICE HMO, INC. (d/b/a "EMPIRE
BLUECROSS" (AKA "EMPIRE BLUE CROSS") (AKA
"EMPIRE BLUECROSS BLUESHIELD" (AKA
"EMPIRE BLUE CROSS BLUE SHIELD") (AKA
"EMPIRE BLUE CROSS AND BLUE SHIELD"))
(alternatively d/b/a "ANTHEM") (alternatively d/b/a
"WELLPOINT") (a subsidiary of WELLPOINT, INC.).

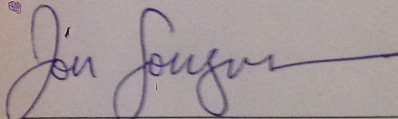
Defendant.

VERIFICATION

SS:

Jon Fougner, being duly sworn, deposes and says:

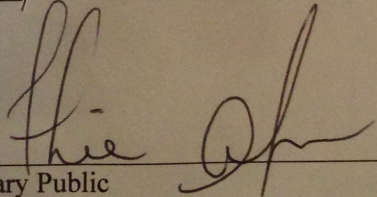
I am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same are true to my knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.



Jon Fougner

Sworn to before me this:

6th day of October, 2014



Notary Public

FRANKIE ALMANZAR
Notary Public, State of New York
Reg. No. 04AL6287906
Qualified in New York County
Commission Expires Sept. 9, 2017