

REDACTED

John Michael Jensen, State Bar No. 176813
LAW OFFICES OF JOHN MICHAEL JENSEN
11500 West Olympic Blvd., Suite 550
(310) 312-1100
Attorneys for Petitioner Brad Heinz,
individually and on behalf of a class of
others similarly situated

Original Filed Under Seal

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BRAD HEINZ, an individual; and on behalf of)
a class of others similarly situated,)

Case No.: BC664844

Petitioners,)

(Assigned for all purposes to the Hon. Yvette
M. Palazuelos, Spring Street Courthouse)

vs.)

**REDACTED PLAINTIFFS' SEPARATE
STATEMENT OF CORE LEGAL AND
FACTUAL ISSUES IN JOINT CASE
MANAGEMENT CONFERENCE
STATEMENT**

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM; BOARD OF
ADMINISTRATION OF CALIFORNIA
PUBLIC EMPLOYEES' RETIREMENT
SYSTEM (collectively "CalPERS");)

Hearing Date: September 27, 2022
At 10 AM

And/or)

Department: 7 Spring Street

BLUE CROSS OF CALIFORNIA d/b/a)
Anthem Blue Cross ("ABC"), a California)
corporation, ANTHEM BLUE CROSS LIFE)
AND HEALTH INSURANCE COMPANY)
("ABCLH"), a California corporation, DOES)
1-100,)

Action filed: June 13, 2017

Respondents.)

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2 **2. PLAINTIFF'S STATEMENT OF CORE FACTUAL AND LEGAL ISSUES.**
3 **Introduction and Procedural History**

4 1. Introduction. A more detailed *Statement of Core Factual and Legal Issues* is
5 required. This case involves layers of deception by CalPERS and Anthem that proximately hurt
6 Heinz and perhaps 325,000 proposed class members each year for the period at of least 2008 to
7 2014. At the same time, Anthem gained secret profits (likely many millions of dollars) under
8 confidential terms of a "Health Benefit Administration" contract with CalPERS. Anthem gained
9 secret profits from its unfair business practice of misrepresenting, false advertising, and secretly
10 reducing the base rate and the amount of reimbursement to PPO subscribers for "out-of-network"
11 medical services. CalPERS and Anthem compounded the problem by requiring a multi-tiered
12 administrative process that they solely controlled and delayed for many many years.

13 2. Material Misrepresentations. From at least 2008 to 2014 and likely continuing to
14 the present, Anthem and CalPERS widely distributed promotional materials across the state that
15 misrepresented the material terms of PPO coverage. Anthem and CalPERS wrote, distributed,
16 and made available standardized promotional material (Health Program Guides, Health Benefit
17 Summaries, and other) that made identical, material misrepresentations about the benefits,
18 advantages, and terms of the PERS Care, PERS Choice, and PERS Select coverage.

19 3. The main advantage of PPO insurance in comparison to HMO or other insurance
20 was that PPO coverage represented that it reimbursed subscribers for out-of-network medical
21 services. Reimbursement for "out-of-network" services was essentially the main reason to buy
22 PPO coverage. The amount and calculation of the reimbursement for out-of-network services
23 were material terms. CalPERS and Anthem misrepresented the material terms in standardized
24 documents distributed across the class, state-wide. CalPERS and Anthem exposed Heinz and
25 each proposed class member to these material misrepresentations as part of Anthem and
26 CalPERS' long-term advertising campaign. **Exhibits 24-26,28,39-53,62-104.**

27 4. As an example, CalPERS' and Anthem's promotional materials for the PPO
28 coverage specifically represented and advertised that the difference between the reimbursement
for "in-network" service and the reimbursement for "out-of-network" service was a "percentage

1 of charges”. Anthem and CalPERS prominently represented that reimbursement for “in-network”
2 medical claims would be calculated at 80% to 90%. In the same documents, Anthem and
3 CalPERS prominently represented that reimbursement for “out-of-network” medical services
4 would be calculated at 60%.

5 5. CalPERS and Anthem misrepresented and did not disclose that Anthem and
6 CalPERS did not utilize the same base rate in calculating the amount of the respective
7 reimbursements. In fact, Anthem and CalPERS used significantly lower base rates for calculating
8 “out-of-network” reimbursement than Anthem and CalPERS used when calculating “in-
9 network” reimbursements for the same medical service, using the same standardized rubric of
10 medical service codes. Even though both services were virtually identical, Anthem and CalPERS
11 used significantly lower base rates for “out-of-network” reimbursement even when the same
12 medical services were provided in the same location by the same health care professional (who
13 chose to leave the Anthem contracted network).

14 6. Anthem and CalPERS’ material misrepresented that reimbursement amounts
15 differed by a change in the percentage of charge. This was false, and they knew it (or should
16 have known it). Anthem and CalPERS’ reduction in the base rate for “out-of-network” medical
17 services rendered CalPERS and Anthem’s “differing by a percentage of charge” and similar
18 misrepresentations as materially false and misleading. Since CalPERS and Anthem did not use
19 the same “Allowable Amount” in both calculations, the difference in the reimbursement was not
20 by “percentage of charge”. Instead, CalPERS and Anthem’s calculation for reimbursement of
21 “out-of-network” medical services was further reduced by both the *lower base rate and then by*
22 *60%*.

23 7. Anthem and CalPERS’ hidden double reduction *compounded both reductions* and
24 led to reimbursements of “out-of-network” services that were approximately 15% to 20% of the
25 “in-network” reimbursement amount. ¹

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27
28 ¹ The medical services were coded with the same matrix that was uniform for both “in-network”
and “out-of-network” medical services.

1 8. Hidden Reduction of Base Rate for Out-of-Network claims. Contrary to the
2 express and implied representations in Anthem's and CalPERS' promotional materials that
3 Anthem and CalPERS widely distributed over many years, CalPERS and Anthem substantially
4 reduced the base "Allowable Amount" rate for "out-of-network" services simply because the
5 services were "out-of-network". Anthem and CalPERS reduced the base "allowable Amount"
6 rate for out-of-network services, and then reimbursed "out-of-network" services at 60% of this
7 hidden reduced "allowable Amount" base rate.

8 9. Brad Heinz is an example. Brad Heinz saw Dr. Walker. When he was an in-
9 network provider, Dr. Walker billed \$420 for a 50-minute visit, his standard billing rate. Heinz
10 paid a small co-pay. Anthem/CalPERS determined that Dr. Walker's "in-network" Allowable
11 Amount was \$299.57 per session.

12 10. In May 2008, Dr. Walker stopped contracting with Anthem, and became an "out-
13 of-network" provider but still provided Heinz the same services in the same location as he had
14 when "in-network." **Exhibit 14, page 2, Exhibit 23.** Dr. Walker continued his "Billed Rate" at
15 \$420 per. Dr. Walker insisted on a minimum payment of \$250 and then increased it to \$275 per
16 visit, which Heinz paid directly to Dr. Walker. Heinz then sought reimbursement by submitting
17 the "out-of-network" claims for Dr. Walker to Anthem. **Exhibits 14, 23, 27, 29-32, 34, 36, 38,**
18 **54.**

19 11. After Dr. Walker no longer contracted as a preferred provider, Anthem and
20 CalPERS reduced the "Allowable Amount" base rate for Dr. Walker's "out-of-network" claims
21 from **\$299.57 to \$113.31** for May 2008 to December 2010. Anthem then paid 60% of the
22 reduced \$113.31 and reimbursed Heinz for Dr. Walker's "out-of-network" expenses at \$67.99.
23 (60% of \$113.31) (2008-2010). Heinz had already paid \$250, so his actual cost per session was
24 \$182.01.

25 12. Anthem's Secret Profit Resulted From and Was Determined In Relation to The
26 Amount of Reduced Reimbursement that Anthem Paid Members, Particularly By Reducing the
27 Reimbursement for Out-of-Network Medical Services. Thirdly, CalPERS and Anthem entered
28 into a Health Benefits Administration contract in 2007 that gave Anthem a profit incentive for

1 reducing the total reimbursement on a year-to-year basis. The contracted profit incentive gave
2 Anthem a percentage of the amount that Anthem reduced reimbursements to subscribers. The
3 terms incentivized Anthem to reduce reimbursements for out-of-network services in particular.

4 13. At the same time, CalPERS gave Anthem discretion to set the Allowable Amount
5 base rate and the reimbursement amount. CalPERS did not oversee Anthem and was uninformed
6 of the purportedly “propriety” methodology. The profit incentive transferred money to Anthem
7 that should have been reimbursed to subscribers.

8 14. Anthem’s and CalPERS Wholly Controlled Administrative Process to Deny,
9 Frustrate, and Delay Claims and Law Suits. Fourthly, CalPERS and Anthem delayed, stalled, and
10 denied Heinz due process. The Evidence of Coverage (“EOC”) for the PPO coverage required
11 that Heinz present and exhaust his individual claims and claims on behalf of another in Anthem
12 and CalPERS’ wholly controlled multi-tiered administrative process.

13 15. Heinz timely filed individual claims for Dr Walker’s “out-of-network” services
14 and also gave CalPERS and Anthem notice of class claims about these matters starting in 2008 in
15 the Anthem “grievance” process.

16 16. Anthem denied higher reimbursement. As the EOC required, Heinz appealed in
17 CalPERS administrative process. CalPERS took jurisdiction in a paper review in about 2009.
18 CalPERS delayed the administrative process for more than 6 years. Heinz was diligent. After a
19 truncated evidentiary process limited to one specific issue that CalPERS chose to litigate in its
20 Statement of Issues, the ALJ issued a Proposed Decision against Heinz. Heinz filed a
21 Government Claims act filing.

22 17. After denying reconsideration, the CalPERS Board finalized a Decision against
23 Heinz. Heinz timely filed a proposed Class Action Complaint with Petitions for writs challenging
24 the CalPERS decision. Heinz also filed a Petition for Writs challenging the GCA decision. The
25 original judge sustained a demurrer.

26 18. In an unpublished case, the Second District Court of Appeal reversed and
27 remanded the Fraud related causes of action, Unfair Business Practices, and Breach of fiduciary
28 duties *with direction*. The trial then sustained a demurrer to the Breach of Fiduciary duties. The

1 decision overruled the demurrer to the misrepresentation, fraud, and unfair business practices
2 causes of action. The court allowed Heinz to condense his 120 or so -page SAC complaint to a
3 30-page TAC that is currently before the court.

4 **Important Background.**

5 19. As background, when patients with health insurance seek medical services, they
6 either pay a small co-pay at the time of service (“in-network”) or they pay the whole cost of the
7 service and then seek reimbursement (if they have purchased a PPO plan) from a health insurer.
8 Doctors, hospitals, and other health care providers who have contracted with a health insurer to
9 provide services are “in-network” providers. “In-network” providers have already negotiated a
10 price for each coded service before the service is rendered².

11 20. Doctors and health care providers that do not contract with a health insurer are
12 called “out-of-network” providers. The reimbursement “price” of medical services by an out-of-
13 network provider is not already negotiated and is not patent or transparent. Generally, the
14 reimbursement rates for out-of-network services are determined under the terms of the Evidence
15 of Coverage (“EOC”), or rather the insurer’s interpretation of the EOC language. Some EOCs
16 list the specific reimbursement amounts for each out-of-network service. CalPERS and Anthem’s
17 promotional material, EOCs, and other documents do not reveal specific pricing for “out-of-
18 network” services.

19 21. Doctors, hospitals, and other health care providers identify the medical services
20 by the same specific standardized codes whether the service is rendered by an “in-network” or
21 “out-of-network” provider. For “out-of-network” services, the patient then submits these coded
22 bills to a health insurance company seeking reimbursement. The price of reimbursement for a
23 specific “out-of-network” service was not previously determined.

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² Reimbursements for emergency medical services are not involved in this case. By law,
reimbursements for emergency services are priced pursuant to an industry-standard often called usual
customary and reasonable (“UCR rate”). There is no contract, negotiation, or discretion involved.

1 22. Upon receipt of a bill, insurance companies process the reimbursement using the
2 standardized medical code and the zip code and identify the base reimbursement rate
3 (“Allowable Amount”) for the specific coded service³. .

4 23. For these purposes, the medical service reimbursements are determined by
5 finding (i) the base rate or “Allowable Amount” for the type of service provided with reference
6 to the medical code by, and multiplying that by (ii) the percentage of charge.

7 24. Caused Damages and Harm. One way to determine the damages and harm to
8 Plaintiffs is calculating the difference between the 2 resulting reimbursement amounts. Other
9 ways of determining the damage to Plaintiffs include determining the (i) profits to Anthem under
10 the Claims Target Guarantee that arose from its unfair business practice and false advertising
11 (which should be restituted); (ii) the excess premiums charged; (iii) the represented value of the
12 health insurance coverage offered less the diminished value of the health insurance coverage
13 actually provided, and (iv) otherwise.

14 **I. Core Factual Issues**

15 25. State-wide, CalPERS and Anthem directed the PPO coverages at CalPERS
16 members who wanted reimbursement for "out-of-network" services. **Exhibit 24-26, 28, 39 -53,**
17 **55, 62-104.** Each year from 2008 to 2015, about 325,000 members enrolled in Anthem and
18 CalPERS’ PPO programs. H0213⁴. It is unknown how many non-PPO claims were submitted.

19 26. Between 2006 and 2013, CalPERS and Anthem widely distributed Health
20 Program Guides, Health Benefit Summaries, and other promotional material that contained
21 material misrepresentations. Anthem and CalPERS represented that the reimbursement for out-
22 of-network medical service differed by a percentage of charge, higher co-payment, higher co-
23 insurance, or higher percentage from the reimbursement for in-network medical service. Anthem
24 and CalPERS inappropriately misrepresented and omitted information about section (i), (.e.

26 ³ CalPERS apparently delegated to Anthem the right to determine the reimbursement “price” for
27 all “out-of-network” services

28 ⁴For clarity and ease of cross-referencing, Heinz concurrently cites to Exhibits, the "AR" refers to
the administrative record, "H" refer to pleadings and exhibits filed with the Court of Appeal, lodged with
the court, and bates stamped "ABC" are filed under seal as **Exhibit 64.**

1 about how the base rate or “Allowable Amount” rates for “out-of-network” services was
2 determined.)

3 27. For example, in August 2006, CalPERS and Anthem wrote, distributed, and made
4 available a “Health Program Guide”(HBD-120) (“HPG”) which read, “You must use doctors in
5 the PPO provider network or pay higher co-insurance (percentage of charges)” and “A PPO is
6 similar to a traditional “fee-for-service” plan, but you must use doctors in the PPO provider
7 network or pay higher co-insurance (percentage of charges). p. 16.⁵ **Exhibit 77.**

8 28. In August 2006, CalPERS and Anthem also wrote and distributed a “Health
9 Benefit Summary” (HBD-110) that stated, “Your cost” for PPO (“in-network”) services in PERS
10 Choice would be 20%, and “Your cost” for non-PPO (“out-of-network”) services in PERS
11 Choice would be 40%. It also represented that “Your cost” for PPO services under PERS Care
12 would ,be 10% and “your cost” for Non-PPO services under PERS Care would be 40%. Page 5-
13 **8. Exhibit 78.**

14 29. For example, In October 2013, CalPERS and Anthem wrote, distributed, and
15 made available an HPG that said: “A PPO is similar to a traditional “fee-for-service” health plan,
16 but you must use doctors in the PPO network or pay higher co-insurance (percentage of charges).
17 In a PPO health plan, you must meet an annual deductible before some benefits apply. You are
18 responsible for a certain co-insurance amount, and the health plan pays the balance up to the
19 allowable amount. When you use a non-participating provider, you are responsible for any
20 charges above the amount allowed.” p. 14. **Exhibit 103.**

21 30. In 2022, CalPERS 2022 Health Benefit Summary reads a PPO “Allows you the
22 option of seeing non-preferred providers, but requires you to pay a higher percentage of the
23 bill FN 4 4 Non-preferred providers have not contracted with the health plan; therefore, you will
24 be responsible for paying any applicable member deductibles or coinsurance, plus any amount in
25

26
27 ⁵ The 2007- 2011 “Health Program Guides” also read: “Except for emergency and urgent care,
28 when you use a non-preferred provider, you are responsible for any charges above the amount allowed *for*
preferred providers.” But in fact, Anthem and CalPERS did *not* use the “amount allowed *for preferred*
providers “when determining what a Plaintiff was responsible for.

1 excess of the allowed amount.” [https://www.calpers.ca.gov/docs/forms-publications/2022-](https://www.calpers.ca.gov/docs/forms-publications/2022-health-benefit-summary.pdf)
2 [health-benefit-summary.pdf](https://www.calpers.ca.gov/docs/forms-publications/2022-health-benefit-summary.pdf), page 3.

3 31. CalPERS and Anthem omitted, concealed, and failed to disclose *that the base*
4 *Allowable Amount for “out-of-network” medical services could be substantially lower than the*
5 *base Allowable Amount for “in-network” services, for the same service.*

6 32. Anthem and CalPERS representations were deceptive, unfair, misleading, and,
7 false including because the difference was not only in “percentage of charge,” co-insurance, or
8 co-payment, **it was also** in the lower base “Allowable Amount” reimbursement rate that
9 CalPERS and Anthem used for out of network reimbursement.

10 33. Again, through years of work and litigation, Heinz discovered that Anthem and
11 CalPERS created a double, compounded reduction: Anthem and CalPERS (1) reduced the base
12 Allowable Amount out of network reimbursements, which was not disclosed, and then also (2)
13 further reduced the lower base rate by 60% (which Anthem and CalPERS did advertise as one of
14 the significant benefits or advantages of the coverage.), so that the subscribers were paid 60% of
15 an often much lower base rate for their out-of-network reimbursement.

16 34. **Anthem then received a percentage of the reduced reimbursements that**
17 **otherwise would have benefitted subscribers.** Secretly Anthem received “incentive payments”
18 and profits associated in large part with Anthem reducing reimbursements. Anthem *and*
19 *CalPERS did not disclose that Anthem had a profit incentive to reduce reimbursement.*

20 35. CalPERS and Anthem’s misrepresentations and concealment made the PPO
21 coverages and “out-of-network” benefits appear substantially more advantageous and more
22 valuable than they were.⁶ Anthem’s and CalPERS’ misrepresentations about the PPO’s benefits,
23 advantages, and terms enticed individuals to buy, enroll, and re-enroll in PPO coverage, pay
24 higher premiums, seek “out-of-network” services, and submit more “out-of-network” claims.

25 **Claim Target Guarantee in “Health Benefit Administration” Contract.**

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27 ⁶ An example of the materiality of reimbursement rate is evident in the different premiums charged for
28 PERS Care and PERS Choice. Although related to the “in-network” reimbursement rate, Anthem and
CalPERS charged higher premiums for (i) PERSCare which reimbursed in-network services at 90% than
(ii) PERS Choice, which reimbursed in-network services at 80%.

1 36. Since entering the “Health Benefit Administration” contract in 2007, Anthem and
2 CalPERS had no reasonable basis to assert that the reimbursements for “in-network” and “out-
3 of-network” medical services differed by a “percentage of charges,” higher co-payment, higher
4 co-insurance, or higher percentage.

5 37. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] **Exhibit 74).**

10 38. The 2007 Anthem- CalPERS “Health Benefit Administration” Contract contains a
11 “Claim Target Guarantee” and other “incentives.” **Exhibits 64-74.** [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 39. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 40. In agreeing to the “Claim Target Guarantee,” Anthem and CalPERS *created* a
28 profit incentive and a conflict-of-interest in these essentially ministerial activities by increasing

1 Anthem's Administrative Fees as Anthem reduces the reimbursements to Plaintiffs on a year-to-
2 year basis. It changed the CalPERS(principal/payor)/Anthem (ministerial administrator)
3 relationship. It newly gave Anthem an active profit incentive to intercede between CalPERS and
4 its members *for Anthem's own advantage*, to act adverse to CalPERS members, and to
5 interfere/intercede between CalPERS duties to its members to act fairly *for Anthem's own*
6 *advantage*.

7 41. It also had a disproportionate effect. Most of Anthem/CalPERS' various options
8 for *annually* reducing the value of Paid Claims were constrained by contract or state law.
9 Emergency services are required to be reimbursed at standard "UCR" rates under state law and
10 regulation, and cannot be reduced at Anthem's discretion. Secondly, "in-network" provider
11 contracts are typically "sticky" multi-year agreements that result from sophisticated represented
12 parties with similar bargaining power negotiating.

13 42. Procedurally, Anthem could reduce "out-of-network" claims more quickly,
14 furtively, and easily because they (i) are not determined by a contract price; (ii) are not priced by
15 regulation or statute; (iii) occur daily; (iv) are submitted by regular individual subscribers
16 without expert knowledge of reimbursement rates; (v) are submitted by individuals with little or
17 no bargaining power; and (iv) individual challenges to the "out-of-network" reimbursement
18 amounts are subject to exhaustion in Anthem/CalPERS' wholly controlled multi-tiered
19 administrative process. Because the "Claim Target Guarantee" compared the reductions
20 *annually*, Anthem's best opportunity to reduce actual "Paid Claims" was to reduce "out-of-
21 network" claims *year-over-year*. **Exhibits 64-74.**⁷ Id. (ABC 927, 1350, 1057, 1075-78, 1451)

22 43. Since 2007, there was no common and no shared basis underlying the calculation
23 for "in-network" and "out-of-network" reimbursement. Anthem and CalPERS knew or should
24 have known that Anthem used a different base Allowable Amount for calculating reimbursement
25 of "out-of-network" service claims than for calculating reimbursement of "in-network" service
26 claims. CalPERS and Anthem did not provide information or, a means to readily compare the
27

28 ⁷ CalPERS also delegated to Anthem discretion to set the Allowable Amount rate for out-of-
network claims, which was recognized in 2014 in *Orthopedics Specialists*.

1 different “in-network” and “out-of-network” “Allowable Amounts” rates or reimbursement
2 methods which they claim in part are proprietary. The different base “Allowable Amounts” were
3 not patent and were not transparent to Plaintiffs.

4 44. Engaging in Unfair Business Practices, Anthem misrepresented, concealed, and
5 falsely advertised in tandem with and as part of one of Anthem’s unfair business practices. By
6 misrepresenting the “out-of-network” reimbursement terms of the PPO coverages as more
7 favorable than how Anthem administered the actual reimbursement to be⁸, Anthem enticed more
8 Plaintiffs to buy PPO coverage, pay higher premiums, seek more “out-of-network” medical
9 services (including in lieu of “in-network” services), and submit more “out-of-network” claims.

10 45. Heinz and the proposed class suffered harm and damage proximately caused by
11 Anthem and/or CalPERS’ misrepresentation, including by (i) paying excessive premiums; (ii)
12 receiving lower value coverage; (iii) suffering the loss of funds transferred to Anthem under the
13 Claim Target Guarantee or other terms; (iv) from Anthem’s secret profits or higher
14 Administrative Fees, (v) reduced reimbursement for out-of-network medical service and (v)
15 similar damage.

16
17 **II. Core Legal Issues:**

18 46. **Negligent Misrepresentation (CalPERS and Anthem)** CalPERS and Anthem
19 misrepresented the benefits, advantages, and terms of the Preferred Provider Organization (PPO)
20 health benefit coverages (PERS Care, PERS Choice, and PERS Select). For example, CalPERS
21 and Anthem negligently misrepresented to Plaintiffs that reimbursement of “out-of-network”
22 medical services differed from the reimbursement of “in-network” medical services by a
23 percentage of the charges, a higher co-payment, higher co-insurance, or higher percentage.

24 47. CalPERS and Anthem representations were not true. Although CalPERS or
25 Anthem may have honestly believed that their representations were true, CalPERS and Anthem
26 had no reasonable grounds for believing the representation was true when CalPERS and Anthem

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28 ⁸ In the reimbursements, Anthem maintained the appearance that Anthem and CalPERS were
abiding by the different percentage of charges described in its promotional material, but in fact also
reduced reimbursements by reducing the Allowable Amount of out-of-network claims.

1 made them. By many years of misrepresenting the rate of reimbursement and the calculation
2 methodology, CalPERS and Anthem intended that Heinz and other proposed class members rely
3 on their representations. Heinz reasonably relied on them. Heinz's reliance on Anthem and
4 CalPERS representations was a substantial factor in causing his harm. The proposed class
5 members are presumed to rely on them, including because CalPERS was their fiduciary and
6 made material misstatements distributed across the class for an extended period of time (before
7 2007 and after 2014).

8 48. CalPERS and Anthem made the representations to a group of persons, CalPERS
9 members and beneficiaries, including Heinz, reasonably expecting that it would be repeated to
10 Heinz or others. (1906)

11 49. **Intentional Misrepresentation, False Promise (Anthem) 1901**

12 50. In addition to the above, Anthem fraudulently misrepresented that reimbursement
13 of "out-of-network" medical services differed from the reimbursement of "in-network" medical
14 services by a percentage of the charges, higher co-payment, higher co-insurance, or higher
15 percentage of the bill.

16 51. Anthem affirmatively represented as fact that the difference in reimbursement
17 between in-network and out-of-network services was a percentage of charge. The calculation
18 methodology of "out-of-network" reimbursement was an existing material fact. The importance
19 and materiality of the representations about the reimbursement for out-of-network services are
20 evidenced by Anthem and CalPERS' prominent representations highlighting the percentage
21 difference (from 80%-90% in-network to 60% out of network).

22 52. Anthem representations were false, or Anthem's representation was asserted
23 recklessly without regard for its truth. By its systemic false representations, omission,
24 concealment, and other conduct, Anthem engaged in systematic conduct designed to mislead.

25 53. Heinz reasonably relied on Anthem's representations which were a substantial
26 factor in causing his harm. The proposed class members are presumed to rely upon the
27 representations. After Heinz initiated a grievance with Anthem, Heinz continued to rely on
28 CalPERS to correct Anthem's errors and provide a higher reimbursement based on a higher

1 Allowable Amount. CalPERS delayed its administrative process for many years, while Heinz
2 remained diligent. Soon after CalPERS' final decision against Heinz, Heinz first timely filed a
3 Government Claim act filing, and then timely filed this proposed class action Complaint with
4 Petitions for writs as a few of several causes of action. Heinz also filed a Petition for writs
5 against the Government Claims Board for failing to accept a timely Government Claim.

6 54. **Concealment(CalPERS and Anthem)** In addition to the above, CalPERS and
7 Anthem omitted, concealed, and failed to disclose (i) *that the base Allowable Amount for “out-*
8 *of-network” medical services could be substantially lower than the base Allowable Amount for*
9 *“in-network” services, for the same service, (ii) Anthem had the discretion to set a lower*
10 *“allowable Amount” base rate for out of network service; and/or (iii) Anthem had a profit*
11 *interest in reducing reimbursements. Exhibits 24-26, 28, 41-53, 55.*

12 55. Heinz and the proposed class were in a fiduciary and confidential relationship
13 with CalPERS. CalPERS had fiduciary duties to disclose all material information that the
14 CalPERS knew or could reasonably obtain regarding the PPO coverage and reimbursement.

15 56. Anthem was CalPERS' agent in promoting, selling, transacting, administering,
16 and paying reimbursement under the PPO coverages and assumed a duty to disclose. Anthem
17 also dealt directly with Heinz and the proposed class members. As CalPERS agent and
18 otherwise, Anthem had a relationship directly with Heinz and the proposed class members,
19 including an insurer-subscriber relationship, as well as an administrator-subscriber relationship.
20 In addition, Anthem is a third party that knowingly assisted CalPERS in concealing and
21 constructive fraud. A duty to disclose all material facts arose for CalPERS and Anthem.

22 57. CalPERS and/or Anthem intentionally failed to disclose certain material facts to
23 Heinz and the proposed class members. Anthem and/or CalPERS disclosed some facts to Heinz
24 and the proposed class members, but intentionally failed to disclose the lower base “allowable
25 Amount” rate for out-of-network reimbursement, the significantly lower reimbursement for out-
26 of-network service, Anthem's profit incentive to reduce reimbursements, and other facts making
27 the disclosure deceptive. These facts were known only to Anthem and/or CalPERS. Heinz could
28 not have discovered it. Anthem and/or CalPERS prevented Heinz from discovering the fact that

1 Anthem had a profit incentive, including as it is still under a protective order and was not made
2 available to Heinz in the administrative process or under PRA requests. Heinz did not know of
3 these concealed facts. If he had, Heinz would have acted differently. The years of the same and
4 similar misrepresentations show Anthem and/or CalPERS intended to deceive Heinz and the
5 proposed class by concealing these facts. If the omitted information had been disclosed,
6 including the significantly lower reimbursement for out-of-network reimbursement or Anthem's
7 profit incentive or other information, then Heinz reasonably would have behaved differently.
8 Heinz and the proposed class were harmed and Anthem and/or CalPERS concealment was a
9 substantial factor in causing the harm.

10 58. **Concealment, Constructive Fraud (CalPERS, Anthem)**. In addition to the
11 above, CalPERS is a fiduciary that concealed and failed to disclose material information
12 described herein, in a manner that damaged Plaintiffs and allowed CalPERS and Anthem to gain
13 additional monies. CalPERS and Anthem misled and caused harm to Heinz and the proposed
14 class by failing to disclose this information and/or providing Heinz and the proposed class with
15 information that was inaccurate or incomplete.

16 59. In addition, CalPERS acted on Heinz's (and the proposed class's) behalf for
17 purposes of selecting health care insurers, establishing the terms of the PPO coverage, and
18 providing health care coverage to CalPERS members and beneficiaries. CalPERS knew or
19 should have known, that the base "allowable Amount" rate for out-of-network services was
20 lower than the base "allowable Amount" rate for "in-network" services, and that the
21 reimbursement amount for "out-of-network" services was substantially below the differing
22 percentage rate (80-90% to 60%), that Anthem had a profit incentive to reduce out-of-network
23 claims, that CalPERS delegated the reimbursement decision wholly to Anthem without
24 oversight, and/or other undisclosed material facts.

25 60. **Unfair Business Practices. (Anthem)** In addition to the above, Anthem engaged
26 in unfair business practices, including misrepresentation, false advertising, unfair practices,
27 deceptive practices, and other inappropriate practices. By false advertising and misrepresenting
28 the "out-of-network" reimbursement terms as more favorable than how Anthem administered the

1 actual reimbursement to be⁹, Anthem enticed Plaintiffs to buy PPO coverage, pay higher
2 premiums, seek more “out-of-network” medical services (including in lieu of “in-network”
3 services), and submit more “out-of-network” claims. Anthem’s unfair business practices relate in
4 part to falsely advertising and misrepresenting (i) the promotional materials; (ii) the policy terms;
5 (iii) the sale of the PPO policy; (iv) the terms and reimbursement of “out-of-network” claims; (v)
6 the administrative process; (vi) that the reimbursement of “in-network” and “out-of-network”
7 claims differed by a percentage of charge, higher co-payment, higher percentage and (vii) similar
8 terms. Anthem’s unfair business practices also relate to the unfair use, abuse, or exploitation of
9 (viii) the powers or discretion that CalPERS delegated to Anthem; (ix) the Claims Target
10 Guarantee and other incentives, (x) the claim administration process, (xi) the determination of
11 Allowable Amount or base rate of “out of network” claims; (xii) the determination of
12 reimbursement amount for “out-of-network” claims (xiii) the reimbursement of out-of-network
13 claims, (xiv) increased Administrative Fees or the secret profits made; and (xv) other related or
14 similar unfair, abusive, or illegal acts.

15 61. Anthem engaged in unfair business practices, false advertising, unfair practices,
16 and other inappropriate acts including by manipulating the “Allowable Amount”, the amount of
17 the “out-of-network” reimbursement, Claim Target Guarantee and/or other terms to gain
18 increased administrative fees and/or secret profits at the expense of the subscribers.

19 62. Anthem engaged in unfair methods of competition and unfair or deceptive acts or
20 practices in relation to promotion, selling, administering, and reimbursement of the PPO
21 coverage and out-of-network claim under the PPO coverages from 2007 to 2013. For example,
22 Anthem represented that the PPO insurance had characteristics, advantages, uses, or benefits that
23 it did not have. Anthem’s misrepresentations persuaded more people to subscribe to the PPO
24 coverage, seek out-of-network services and submit additional “out-of-network” claims that
25 provided Anthem more opportunity to increase its fees under the Claim Target Guarantee and
26 other incentives. Heinz and the proposed class relied and their harm substantially resulted from

27 ⁹ In the reimbursements, Anthem maintained the appearance that Anthem and CalPERS were
28 abiding by the different percentage of charges described in its promotional material, but in fact also
reduced reimbursements by reducing the Allowable Amount of out-of-network claims.

1 Anthem's misrepresentations, unfair business practices, and other inappropriate conduct.
2 Anthem's misrepresentations were material and were a substantial factor in the Plaintiffs'
3 decision to subscribe to PPO coverage, see out-of-network doctors, etc.

4 63. Heinz alleges on information and belief that Anthem received significant fees,
5 incentives, or profits as a result of its unfair practices. [REDACTED]

6 [REDACTED]
7 64. **Heinz and Plaintiffs Reliance.** Brad Heinz actually relied on Anthem's and
8 CalPERS' misrepresentations. CalPERS and Anthem's misrepresentations and omission were a
9 substantial factor in causing harm to Heinz. Heinz relied on CalPERS' and Anthem's
10 representations when he bought PPO coverage, enrolled, and re-enrolled in the PPO coverage,
11 continued the PPO coverage, subscribed, paid premiums, chose "out-of-network" medical
12 services, filed claims for "out-of-network" reimbursements, presented and exhausted individual
13 and class claims in Anthem and CalPERS administrative process, continued in CalPERS
14 administrative process until the final decision, and otherwise. CalPERS and Anthem's
15 misrepresentation substantially influenced Heinz to take these actions. Heinz would not have
16 subscribed to the PPO coverage, gone to see out-of-network doctors, submitted claims for out-of-
17 network reimbursement, undertaken Anthem and CalPERS burdensome administrative process,
18 etc. without CalPERS and Anthem's misrepresentations or concealment.

19 65. Heinz's reliance on CalPERS and Anthem's misrepresentations, conduct, or
20 omissions was reasonable. The rate of out-of-network reimbursement, the calculation
21 methodology, Anthem's discretion, and profit incentive are each material. Heinz and other
22 reasonable people would find these facts important in deciding whether to enroll in the PPO, go
23 to out-of-network providers, submit to the administrative process to correct the incorrect
24 reimbursement, etc. Anthem and CalPERS also solely knew and concealed material facts. These
25 facts were not known and were not available to Heinz. CalPERS and Anthem's purported
26 disclaimer or definitions were vague and did not give notice of the concealed facts, and did
27 insulate CalPERS or Anthem from liability or preclude Heinz from demonstrating justifiable
28 reliance on the misrepresentations.

1 66. Each of the members of the proposed class are presumed to rely, including as
2 Anthem and CalPERS (a fiduciary) distributed identical, material misrepresentations about the
3 “out-of-network” reimbursement term to all members of the class as part of a long-term
4 advertising campaign to promote, sell, and administer “out-of-network” claims under the PPO
5 policies.

6 67. CalPERS and Anthem bear the burden of rebutting the presumption of reliance by
7 the proposed class members. CalPERS and Anthem must prove by substantial evidence that the
8 proposed class could not have reasonably relied on the misleading information or omission.

9 **Injunctive relief**

10 68. Heinz seeks injunctive relief against CalPERS and Anthem as Anthem and
11 CalPERS continue to make material misrepresentations and continue deceptive advertising
12 practices and/or other inappropriate acts.

13 **Damages.**

14 69. Heinz suffered damages. Each of the proposed class members suffered damages.
15 There are several damages remedies, alternatively or collectively: (1) Heinz seeks Anthem to
16 return and retribute any monies or advantages that it received through any unfair business
17 practices, including monies, received related to incentives such as the Claim Target Guarantee
18 (or the portion of the Claim Target Guarantee that is related to out-of-network expenses) for the
19 years 2007-2013, with interest as Anthem gained the monies or advantages through false
20 advertising and other unfair practices. (2) Heinz seeks Anthem and CalPERS to provide the
21 difference between the value of PPO coverage represented and the value of the PPO coverage
22 received and provided for the years 2007-2013. (3) Heinz seeks the return of excessive premiums
23 paid for the years 2007-2013; (4) Heinz seeks Anthem and CalPERS to provide the
24 reimbursement to make him and others whole for all under-reimbursement of claims, including
25 as calculated as the reimbursement rate represented in the promotional material less the actual
26 reimbursement received for the years 2007-2013, (5) Heinz seeks consequential damages,
27 interest, and attorney fees. (6) Heinz seeks statutory penalties as they may exist for the years
28 2007-2013, (7) Heinz seeks restitution from Anthem and CalPERS, including for monies

1 wrongfully obtained as a result of these practices or omissions, (8) Heinz seeks other damages
2 and relief, and (9) Heinz seeks any and all other relief that the court may find appropriate.

3 **Some Initial Dispositive Issues**

4 (1) Did CalPERS misrepresent the material terms about “out-of-network” reimbursement in
5 the PPO coverage? Is CalPERS immune from liability, even for intentional
6 misrepresentations?

7 (2) Did Anthem misrepresent the material terms about “out-of-network” reimbursement in
8 the PPO coverage?

9 (3) Can Heinz bring a class action? Heinz presented and preserved the class claims in the
10 administrative process for later litigation in the superior court. Is the requirement that
11 Heinz must first exhaust his claims administratively before Anthem and CalPERS
12 somehow a bar to proceeding as a class action? Even if there are no class waivers? Even
13 if a class action often requires at least one member to present or exhaust an
14 administrative process? When did the statute of limitations start to run? Was the SOL
15 tolled by Anthem and CalPERS’ requirement to process the “all medical” claims
16 individually and “on behalf of others” in an administrative process that Anthem and
17 CalPERS wholly controlled and delayed for years? Since the CalPERS decision was final
18 only a few days before Heinz filed the Complaint and Writ, does the statute of limitations
19 somehow prevent Heinz from proceeding as a proposed class action?

20 (4) Is CalPERS immune? Can CalPERS make a policy that allows it to falsely advertise the
21 advantage and benefits of the PPO coverage, such that the misrepresentations etc., are a
22 policy decision that is exempt from liability?

23 (5) Did Anthem engage in Unfair Business Practices? Is Anthem somehow shielded from
24 liability by CalPERS agreeing to the Claims Target Guarantee?

25 (6) Can Heinz proceed against Anthem for Unfair business practices even without a class
26 action?

27 (7) Since Judge Hogue required that Heinz redraft the Third Amended Complaint to 30
28 pages but also focused on allowing Heinz to pursue the various fraud or

1 misrepresentation and unfair business practices claims, did Heinz violate the Court's
2 order when condensing the 120-page SAC document to 30 pages when he condensed,
3 clarified, and supplemented other sections of the TAC to satisfy Judge Hogue's 30-page
4 requirement?

5 (8) What are the different damages remedies available? Is class recovery available for
6 damages caused by Heinz and the class members paying more insurance premiums for
7 less coverage than advertised? Is class recovery available for the difference between the
8 value of the out-of-network coverage provided compared to the advertised out-of-
9 network coverage? Is there recovery under Unfair Business practices against Anthem for
10 the secret profits made as a result of the Claims Target Guarantee? Are there other
11 available measures of class recovery?

12 (9) Is Heinz entitled to injunctive relief against CalPERS and Anthem from continuing its
13 deceptive advertising practices or other inappropriate acts?

14
15
16 *Respectfully submitted,*

17 September 20, 2022

18 _____
19 *John Jensen*
20 John Michel Jensen SBN176813
21 Attorney for Brad Heinz and the proposed
22 class of those similarly situated

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PROOF OF SERVICE

I reside or am employed in Los Angeles County, am over age 18, and am not a party to this action. My business address is Law Offices of John Michael Jensen 11500 West Olympic Blvd Suite 550 Los Angeles CA 90064.

On September 20, 2022, I again served the documents titled:

1. **JOINT CASE MANAGEMENT CONFERENCE STATEMENT**
2. **REDACTED PORTION OF PLAINTIFFS’ SEPARATE STATEMENT OF DISPOSITIVE LAW AND FACT FILED UNDER SEAL**
3. **MOTION TO FILE UNDER SEAL**
4. **UNREDACTED PORTION OF PLAINTIFFS’ SEPARATE STATEMENT OF DISPOSITIVE LAW AND FACT FILED UNDER SEAL**
5. **[PROPOSED] ORDER**

in Los Angeles Superior Court case BC 664844 (Heinz, et al).

I served the documents(s) by the method below on the counsel for the parties listed below.

Terrance Hawley
Amir Schlesinger at Reed Smith
Counsel for Defendants CalPERS, Board of Administration of CalPERS, Anthem,
Anthem Blue Cross Life and Health, et al

By mail

Consumer Law Section
Office of the Attorney General-
300 South Spring Street
North Tower, 5th Floor
Los Angeles, CA 90013

Contact Name: Consumer Law Section

1 By Electronic Service. By electronically submitting the document(s) listed above to
2 CaseAnywhere, an electronic filing service provider as www.caseanywhere.com as the parties
3 have agreed or the Court has ordered. The email addresses for the counsel who instructed me to
4 electronically serve the documents are

5 thawley@reedsmith.com
6 aschlesinger@reedsmith.com

7 My email address is johnjensen@johnmjensen.com.

8 I submitted the documents at approximately ____PM See Cal.R.Ct. R 2.251, 2.253, 2.255.
9 I declare the above is true and correct under penalty of perjury under the law of the State of
10 California and the United States of America.

11 My email address is johnjensen@johnmjensen.com.

12 I declare the above is true and correct under penalty of perjury under the law of the State of
13 California and the United States of America.

14 Dated September 20, 2022

15 _____
16 *John Jensen*
17 **John Jensen**
18 johnjensen@johnmjensen.com