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**By Email and ECF**
The Honorable John P. Cronan
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, New York 10007-1312

**Re: *Doe, et al. v. Anthem Healthchoice Assurance, Inc.*; No. 1:24-cv-08012**

Dear Judge Cronan:

Pursuant to Rules 1.A. and 6.A. of Your Honor's Individual Rules and Practices in Civil Cases, Defendant Anthem HealthChoice Assurance, Inc. ("Anthem") submits this pre-motion letter regarding Anthem's anticipated motion to dismiss the Complaint in its entirety based on Plaintiffs' failure to pursue the exclusive administrative remedy available to them. Alternatively, all of the claims asserted are preempted by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914, barred by sovereign immunity and the filed rate doctrine and because Plaintiffs lack standing to pursue contract claims against Anthem.[1]

Plaintiffs are enrollees in the Service Benefit Plan (the "Plan"), which is a health insurance plan for federal employees, retirees, and their families, governed by FEHBA. Compl. ¶¶ 8, 19-20, 70. The Plan is created by a federal government contract between the U.S. Office of Personnel Management ("OPM") and the Blue Cross and Blue Shield Association ("BCBSA"), the latter of which enters into the contract as agent for and on behalf of Anthem and other local Blue Cross and Blue Shield companies that administer the Plan in their individual localities. *Id.* ¶¶ 20, 117; *see also Helfrich v. Blue Cross & Blue Shield Ass'n* ("*Helfrich*"), 804 F.3d 1090, 1092 (10th Cir. 2015) (explaining the administration of the Plan).

Under FEHBA, OPM is vested with sole authority to contract for the provision of health plans, to determine the benefit structure of each plan, and to promulgate the official description of a plan's terms in a Statement of Benefits, which is sometimes referred to as a "Brochure." *See* 5 U.S.C. §§ 8902(a), (d), 8907. The Statement of Benefits is incorporated into the OPM contract. *See Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 684 (2006) (describing the contract between OPM and BCBSA). The Complaint refers to and quotes from the 2024 Statement of Benefits.[2] Compl. ¶¶ 71, 84, 152-54, 170, 240, 253, 262-63, 269.

The Plan offers a "Preferred Provider Organization," which is a network of "certain hospitals and other healthcare providers" that have been designated as "preferred providers" or

[1] Anthem reserves the right to assert additional arguments omitted due to space limitations.
[2] https://www.opm.gov/healthcare-insurance/healthcare/plan-information/plans/pdf/2024/brochures/71-005.pdf.

"PPO providers." *E.g.*, 2024 Statement of Benefits at 12; *see also* Compl. ¶ 104. Plaintiffs refer to such providers as "in-network." *E.g.*, Compl. ¶ 104.

Plaintiffs allege that Anthem's directory of in-network providers contains inaccurate information regarding mental health providers, including by listing providers that are not, in fact, in-network and by listing inaccurate information for those who are. *E.g.*, Compl. ¶¶ 1-3, 10, 126-28. Plaintiffs allege this renders the Plan materials deceptive, including the OPM-approved Statement of Benefits. *Id.* ¶¶ 10, 152, 165-71. Plaintiffs allege this caused them damage by delaying their treatment and forcing them to incur the costs of using out-of-network providers. *E.g.*, *id.* ¶¶ 4, 13, 76. Plaintiffs also claim this effectively denies them the mental health benefits promised under the Plan and that induced them into enrolling in the Plan in the first place. *E.g.*, *id.* ¶¶ 6, 71, 87, 156, 198, 214. Plaintiffs assert state law causes of action for: (1) breach of the OPM contract; (2) violation of N.Y. Gen. Bus. Law ("GBL") § 349; (3) violation of GBL § 350; (4) violation of N.Y. Ins. Law § 4226; (5) fraudulent misrepresentation; and (6) unjust enrichment. Compl. ¶¶ 227-84. Each of those causes of action must be dismissed.

First, because Plaintiffs are disputing the coverage or benefits they received, they must sue OPM. FEHBA gives OPM final authority over a dispute between a carrier and an enrollee regarding benefits. *See* 5 U.S.C. § 8902(j). OPM has implemented that provision by establishing a mandatory administrative remedy for those enrollees who believe the carrier has wrongfully denied benefits. 5 C.F.R. § 890.105; *see also id.* § 890.107(d)(1). If an enrollee is dissatisfied with the carrier's decision, the enrollee can request that the carrier reconsider its decision. *Id.* § 890.105(a)-(d). If the denial is upheld, the enrollee may obtain review by OPM. *Id.* § 890.105(a), (e). If OPM finds that the denial by the carrier was incorrect, then the carrier is contractually obligated to pay the benefits. 5 U.S.C. § 8902(j). If OPM upholds the denial of benefits, then the enrollee may sue OPM. 5 C.F.R. § 890.107(c). But any such lawsuit "must be brought against OPM and not against the carrier or carrier's subcontractors," 5 C.F.R. § 890.107(c), meaning that Anthem "is not a proper party" and must be dismissed. *See Catholic Diocese of Biloxi Supplemental Med. Reimbursement Plan v. Blue Cross, Blue Shield of Tex.*, 960 F. Supp. 1145, 1151-52 (S.D. Miss. 1997) (dismissing claim against FEHBA carrier).

Second, Plaintiffs' claims are preempted by FEHBA's broad express preemption provision, 5 U.S.C. § 8902(m)(1), and courts have routinely dismissed such claims as preempted by FEHBA. *See, e.g., Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87 (2017); *Gonzalez v. Blue Cross and Blue Shield Ass'n*, 62 F.4th 891, 904 (5th Cir. 2023); *Helfrich*, 804 F.3d at 1092; *Hayes v. Prudential Ins. Co.*, 819 F.2d 921 (9th Cir. 1987); *Burkey v. Gov't Emps. Hosp. Ass'n*, 983 F.2d 656 (5th Cir. 1993); *Mahajan v. Blue Cross Blue Shield Association*, Civ. No. 16-cv-6944 (PKC), 2017 WL 4250514, at *5-9 (S.D.N.Y. Sept. 22, 2017); *Calingo v. Meridian Res. Co.*, No. 11 CV 628, 2013 U.S. Dist. LEXIS 42759, at *7-12 (S.D.N.Y. Feb. 20, 2013). Section 8902(m)(1) accords preemptive effect to the terms of the OPM contract (including the terms of the incorporated Statement of Benefits), regardless of whether state law is inconsistent with those terms. Here, the preemptive terms include those establishing and regulating the Plan's provider network, those governing the accuracy and distribution of the Statement of Benefits and the Plan's marketing

materials, and those describing the Plan's mental health benefits.[3] This case is very similar to *Mahajan*, where similar state law claims arising from an alleged failure to provide Plan benefits and in-network providers were held by this Court to be expressly preempted by FEHBA. *See Mahajan*, 2017 WL 4250514, at *6-9.

Third, even assuming they were not expressly preempted, Plaintiffs' claims are "conflict" preempted because they interfere with OPM's exclusive authority over the Plan. *See id*, at *9-11; *Kight v. Kaiser Found. Health Plans of Mid-Atl. States, Inc.*, 34 F. Supp. 2d 334, 342 (E.D. Va. 1999); *see also Bridges v. Blue Cross & Blue Shield Ass'n*, 935 F. Supp. 37 (D.D.C. 1996) (concluding OPM's exclusive authority leaves no room for a federal RICO cause of action). "Congress . . . adopted an enforcement scheme in FEHBA whereby it delegated the power to police the administration of FEHBA plans to OPM." *Kight*, 34 F. Supp. 2d at 342. Among other things, FEHBA delegates to OPM the authority to set standards of conduct for FEHBA carriers, *see* 5 U.S.C. § 8902(e), and FEHBA's implementing regulations vest OPM with the power to penalize carriers for improper conduct, including by withdrawing approval of a carrier or ordering corrective action for "[u]sing fraudulent or unethical business or health care practices or otherwise displaying a lack of business integrity or honesty." 48 C.F.R. § 1609.7001(c)(2), (d). And OPM has contract remedies designed to deal with the very sort of allegations made here.

Fourth, because FEHBA plans are a federally sponsored health benefits plans under which health-benefits costs and administrative expenses are paid from the U.S. Treasury (*see* Compl. ¶ 103), the United States' sovereign immunity bars Plaintiffs' claims. Accordingly, claims against FEHBA administrators like Anthem are routinely dismissed based on sovereign immunity. *See, e.g., Inspire Malibu v. Anthem Blue Cross Life & Health Ins. Co.*, No. CV 16-5229, 2016 U.S. Dist. LEXIS 136244, at *17-20 (C.D. Cal. Sept. 30, 2016); *Vrijesh S. Tantuwaya MD, Inc. v. Anthem Blue Cross Life & Health Ins. Co.*, 169 F. Supp. 3d 1058, 1070-71 (S.D. Cal. 2016); *Ctr. for Reconstructive Breast Surgery, LLC v. Blue Cross Blue Shield of La.*, No. 11-806, 2014 U.S. Dist. LEXIS 139442, at *19-23 (E.D. La. Sept. 30, 2014); *Mentis El Paso, LLP v. Health Care Serv. Corp.*, 58 F. Supp. 3d 745, 753-56 (W.D. Tex. 2014); *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, No. 3:12-cv-1607-O, 2014 U.S. Dist. LEXIS 12750 (N.D. Tex. Feb. 3, 2014); *Calingo v. Meridian Res. Co. LLC*, No. 7:11-cv-628, 2011 U.S. Dist. LEXIS 83496 (S.D.N.Y. July 29, 2011).

Fifth, Plaintiffs' breach of contract claim must be dismissed because Plaintiffs are not *intended* third party beneficiaries with the right to sue to enforce the OPM contract. *See Fero v. Excellus Health Plan, Inc.*, 236 F. Supp. 3d 735, 763-69 (W.D.N.Y. 2017). Only OPM can sue over a breach by Anthem.

Sixth, because the rates under the Plan are approved by OPM, a federal agency, Plaintiffs' attempt to obtain "benefit-of-the-bargain" damages (*see, e.g.*, Compl. ¶ 199) is barred by the filed-rate doctrine. *See Fero*, 236 F. Supp. 3d at 780-81.

To fully detail these arguments, Anthem proposes the following briefing schedule: Motion to Dismiss to be filed by March 28, opposition by April 28, and reply by May 23.

[3] The Complaint references the OPM contract, *e.g.*, Compl. ¶ 117, which Anthem anticipates attaching to its motion to dismiss. Several provisions relevant here are described in *Mahajan*.

**BY EMAIL AND ECF**



Respectfully submitted,

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cc: All counsel of record (via ECF)