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Via ECF
Honorable Edgardo Ramos
United States District Court for the Southern District of New York
40 Foley Square
New York, NY 10007

Re: Doe v. Carelon Behavioral Health, 25 Civ. 3489 (ER)

Dear Judge Ramos:

We represent plaintiffs and write in response to Carelon Behavioral Health's request for a pre-motion conference. Plaintiffs are employees of the State of New York who are enrolled in the State's health insurance program ("NYSHIP") and whose mental health benefits are administered by Carelon. Compl. ¶¶ 20–23. Plaintiffs allege that Carelon has repeatedly lied about the size and adequacy of its provider network—in violation of its contractual, statutory and common-law duties—in order to attract and retain customers. *Id.* ¶¶ 81–130, 181–206. Specifically, Carelon published a directory of supposedly available, in-network providers in which over 80% of the providers listed did not exist, were not in-network, or were not available. *Id.* ¶ 3. Carelon's egregious misrepresentations have stymied plaintiffs' efforts to obtain medically necessary treatment, leaving plaintiffs unable to obtain timely and affordable care for their mental health needs. *Id.* ¶¶ 81–84, 92–104, 111–24. Plaintiffs therefore pursue contractual, statutory and common-law claims to remedy Carelon's failure to provide the healthcare benefits it promised to plaintiffs. *Id.* ¶¶ 268–345. Plaintiffs seek damages and equitable relief on behalf of a putative class.

Plaintiffs defer to the Court on whether a conference would be appropriate. We write to summarize why Carelon's bevy of arguments for dismissal should be rejected.

I. Plaintiffs State A Claim for Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing

Carelon does not dispute that plaintiffs have adequately alleged that Carelon breached its contractual duty to maintain an accurate and adequate provider directory or that it violated the implied covenant of good faith and fair dealing. Instead, Carelon argues that plaintiffs are not entitled to enforce that contract or its covenant because plaintiffs are not in privity with Carelon and are not third-party beneficiaries of Carelon's contract with the State. Dkt. 10 at 1–2. This argument has been soundly rejected, including in cases involving Carelon under its former name, Beacon Health Options, Compl. ¶ 6. *See Sprentall v. Beacon Health Options*, 2021 WL 1063392, at *5 (S.D.N.Y. Mar. 19, 2021) (rejecting argument that Carelon was not in privity of contract with NYSHIP enrollee); *Uddoh v. United Healthcare*, 2017 WL 563973, at *1–2, *4–5 (E.D.N.Y. Feb. 10, 2017) (granting NYSHIP enrollee leave to amend to assert contract claim against third-party administrator).

Carelon relies on language in its contract with the State purporting to disclaim the creation of rights in third parties, but it misunderstands that language and its import here. Dkt. 10 at 2. The contract

says only that it is not "intended to confer upon any person or corporation, other than the Parties hereto and their successors in interest and assigns, any rights or remedies under or by reason of the Contract." Dkt. 1-1 at 69. But plaintiffs (Carelon's customers) are in privity with Carelon and are no strangers to the contract. *See Sprentall*, 2021 WL 1063392, at *5–6. Indeed, the only purpose of the contract is for Carelon "to provide essential behavioral health insurance protection to eligible New York State … employees" as the contract's assignees. Dkt. 1-1 at 2. And even if this Court examined whether plaintiffs were third-party beneficiaries of the contract—rather than whether they were already party to the contract—it is well-settled that "a third party will be deemed an intended beneficiary where performance is rendered directly to it under the terms of the contract." *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 249 (2d Cir. 2002). Here, of course, Carelon provides mental health benefits directly to plaintiffs, who are therefore third-party beneficiaries entitled to enforce the contract and the implied covenant of good faith and fair dealing.

II. Plaintiffs State A Claim For Violations of General Business Law §§ 349, 350

Carelon contends that plaintiffs cannot assert a claim for misrepresentation under GBL §§ 349 and 350 because they could have discovered that Carelon was lying about the size and adequacy of its provider network by contacting all of the providers listed in Carelon's directory. Dkt. 10 at 2–3. The argument does not hold water. Although it is true that GBL claims cannot be asserted "when the allegedly deceptive practice was fully disclosed," plaintiffs do not allege that Carelon disclosed to consumers that the providers listed in its directory were not in fact available or in-network. *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 501 (2d Cir. 2020) (internal quotation marks omitted); *see* Compl. ¶¶ 181–211, 289–91. Rather, plaintiffs allege that they *eventually discovered*, after countless failed attempts to obtain covered medical care, that Carelon was lying about its provider network. Compl. ¶¶ 82, 95, 115. As the Second Circuit has explained, an insurer cannot defeat a GBL claim by contending it fully disclosed its practices when the "essence" of the plaintiff's claim "is that Insurer *did not do* what its policy said it would do." *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 125 (2d Cir. 2017) (emphasis in original).

As in *Nick's Garage*, Carelon's argument fails because it never disclosed to consumers that it acted contrary to its representations. In effect, Carelon is arguing that plaintiffs cannot pursue GBL claims because, through their own spadework, plaintiffs eventually realized that they had been deceived. But the same might be said of any misrepresentation claim, and courts routinely permit such claims to proceed. *See, e.g.*, *Duran v. Henkel of Am.*, 450 F. Supp. 3d 337, 350 (S.D.N.Y. 2020) (explaining that consumers state a claim under the GBL when, after purchase, they "later learned that the product did not, in fact, have the marketed quality").

III. Plaintiffs State A Claim Under New York Insurance Law § 4226

Carelon argues that it cannot be liable under N.Y. Ins. L. § 4226—which prohibits misrepresentations by those "authorized to do in this state the business of … health insurance"—because, Carelon claims, it is not authorized to provide health insurance in New York. Dkt. 10 at 3. Carelon acknowledges that plaintiffs have alleged otherwise, *see* Compl. ¶ 311, but says the allegation is untrue and that the Department of Financial Services' website will demonstrate that Carelon is not licensed. On a motion to dismiss, the Court must accept plaintiffs' allegations as true and may not take judicial notice even of governmental records for their truth. *United States v. Strock*, 982 F.3d 51, 63 (2d Cir. 2020). Insofar as Carelon is arguing that it is exempt from

§ 4226 because its principal regulator is a state other than New York, it has misconstrued the statute. By its plain terms, § 4226 applies to *all* insurers authorized to do business in the State of New York, even a "foreign insurer" incorporated under the laws of another state. *See* N.Y. Ins. L. § 1106(c) (foreign insurers must be "authorized to do business in this state" to conduct insurance business).

IV. Plaintiffs State Claims for Common-Law Misrepresentation

Next, Carelon contends that plaintiffs have not stated a claim for negligent or fraudulent misrepresentation because they lack a "special or privity-like relationship" with Carelon and have not alleged reliance on the misrepresentations. Dkt. 10 at 3. Not so. Here, there is no need to show a "special or privity-like" relationship between plaintiffs and Carelon because the parties are in privity. *See Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, 783 F.3d 395, 405 (2d Cir. 2015) (explaining that misrepresentation claim requires "actual privity of contract between the parties or a relationship so close as to approach that of privity" (internal quotation marks omitted)); *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 271 (2d Cir. 1993) (actual privity of contract sufficient to pursue claim of common-law misrepresentation); *supra* at 1 (explaining that plaintiffs and Carelon are in privity).

Plaintiffs have also adequately alleged that they relied on Carelon's misrepresentations when electing to enroll in the plan Carelon administers. Carelon suggests that plaintiffs failed to allege that they reviewed the directory prior to enrolling, but the complaint makes clear plaintiffs reviewed Carelon's website. *See* Compl. ¶¶ 85, 101, 123, 289, 302, 323, 334. In any event, the question is not whether plaintiffs reviewed the faulty *directory* before enrolling in Carelon's plan, but whether plaintiffs relied on Carelon's misrepresentations that it had a robust and adequate network of mental health providers, and plaintiffs unquestionably did so allege. *Id.*; *see Lugones v. Pete & Gerry's Organic, LLC*, 440 F. Supp. 3d 226, 243 (S.D.N.Y. 2020) (plaintiff must show she "reasonably relied on [defendant's] representation"). Such reliance was undoubtedly reasonable: plaintiffs had "no independent means of ascertaining the truth of Defendant's representations" short of expending significant energy "sleuthing about … for the truth," which is "far beyond" what the law requires. *Lugones*, 440 F. Supp. 3d at 244. Moreover, "reasonable reliance is often a question of fact for the jury rather than a question of law for the court." *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 81 (2d Cir. 2011).

V. Plaintiffs May Pursue Their Claim For Unjust Enrichment

Finally, Carelon argues in cursory fashion that plaintiffs cannot pursue a claim for unjust enrichment because plaintiffs fail to allege a benefit conferred on Carelon. Dkt. 10 at 3. This argument does not work. Plaintiffs allege that they enrolled in the plan administered by Carelon because of its misrepresentations "and thereby direct[ed] their medical premiums to the Defendant." Compl. ¶ 339. It makes no difference if the premiums were routed through NYSHIP as an intermediary before reaching Carelon; "it does not matter whether the benefit is directly or indirectly conveyed." *Myun-Uk Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 69 (2d Cir. 2018) (internal quotation marks omitted and alteration adopted). Even indirect purchasers of a good or service may assert a claim for unjust enrichment. *Id.*; *see Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40 (1st Dep't 2004).

Respectfully submitted.

/s/ Jacob Gardener

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