ATTACHMENT C

RESPONDENT(S) ARGUMENT(S)

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Re: Brad Heinz

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March 3, 2017
BY FAX AND BY MAIL

Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

Re: Brad Heinz, Respondents
CalPERS Case No. No. 2011-0114, OAH Case No. 2015030110

Dear Ms. Swedensky:

Attached please find Brad Heinz's *Respondent's Argument* for consideration by the Board of Administration at its meeting.

This *Respondent's Argument* is being filed by March 3, 2017, pursuant to the *Notice of Full Board Hearing*.

Should you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

John Michael Jensen

JMJ:gm
Enclosure
cc: Matthew G. Jacobs, CalPERS General Counsel

Brad Heinz's *Respondent's Argument*
CalPERS Case No. No. 2011-0114, **OAH Case** 2015030110

Respondent Brad Heinz files this *Respondent's Argument* and incorporates all pleadings and arguments in the administrative record.

I. Mr. Heinz Reserves All Rights, Does Not Waive Any Argument or Defense, Incorporates Prior Pleadings and Arguments by Reference

Mr. Heinz challenges all factual findings and legal conclusions in the *Proposed Decision.* Mr. Heinz reserves all rights to contest and appeal these findings and conclusions and any other findings and conclusions in the *case.*

II. Facts

Bradley Heinz bought one or more preferred provider organization ("PPO") plans from California Public Employees Retirement System and/or its Board of Administration (collectively "CalPERS" or "PERS") and Anthem Blue Cross ("Anthem"). He purchased the PPO coverage on his own behalf and on behalf of his then-spouse. The PPO plans are established by contract or agreement between Anthem and CalPERS. The PPO plans provide health coverage to CalPERS members and beneficiaries.

As opposed to an HMO or other coverage, the PPO coverage offered by CalPERS and Anthem was explicitly directed at, and the only coverage made available to, those CalPERS members who were seeking health insurance benefits for non-emergency care by out-of-network physicians and other providers ("NPPs").

The PPO plans provide for reimbursement to the participants for medical services provided by NPPs. NPPs include medical personnel, institutions, service providers, and practice groups ("IPAs") who do not contract directly with CalPERS or Anthem. Under the PPO plans, participants can get services provided by NPP providers and be reimbursed by the PPO plan even though the NPP does not contract with Anthem or CalPERS directly.

In its publications, forms or each year's detailed Evidence of Coverage booklets for a particular PPO plan ("EOC"), CalPERS and Anthem represented they were offering each year a PPO plan that was both substantively and procedurally reasonable; reasonably consistent with industry standards, including that the plan would in the case of an NPP's care reimburse the plan member at a specific percentage of usual, reasonable, customary and appropriate amounts; or based on an appropriate rate that may be reasonably anticipated to be the same as or similar to in-network contracted rates, or both.[1]

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[1] If nothing else, by obscuring any different information, CalPERS failed to adequately disclose that it was offering a PPO plan that would **not** provide reimbursement for NPP costs at industry standard rates, such as the usual, customary, reasonable, and appropriate rates.

In this case, CalPERS and Anthem have failed to ensure the PPO plan reimburses plan members timely and at appropriate reimbursement rates. CalPERS and Anthem affirmatively fail to disclose or explain, and even hide under pretense that disclosure will belie some proprietary secret, how the reimbursement and Allowable Amount were determined in fact.

Heinz sought reimbursement for out-of-network services provided from 2008 to 2014. CalPERS and Anthem reimbursed at unreasonably low reimbursements based on unspecified standards. CalPERS and Anthem utilized an unreasonably low and inadequate determination of the "Allowable Amount" under the EOC, and perhaps under other documents; or for presently unknown reasons.

A. Representations by CalPERS and Anthem But Anthem and CalPERS Secretly Calculated Allowable Amount at a Huge Discount

From at least 2008 to 2014, CalPERS and Anthem represented they would calculate the Allowable Amount at the same rate for PPO providers as Non-PPO providers. For example, see page 25 of the Evidence of Coverage (EOC) for the PERSCare Basic Plan Preferred Provider Organization effective January 01, 2008 – December 31, 2008

When in-network and during the relevant period, the "Allowable Amount" for Dr. Walker was at its lowest $299.57. Anthem specifically recognized this: "The member has seen this same Doctor under a different PPO Tax ID # & the Contracted rate was $299.57," Exhibit 14, page 3.

Instead, CalPERS and/or Anthem calculated the "Allowable Amount" for non-PPO providers and/or out-of-network expenses at drastically reduced rates. At one point, the Allowable Amount for the same service previously reimbursed at $299.57 was cut to just $76.91, without reason or clear explanation.

This vast unexplained disparity in reimbursement rates between NPP and PP was only discovered by chance in that Heinz's doctor went from in-network to out-of-network, but provided identical services in the same city.

When in network, the Allowable Amount for Dr. Walker's services was at its lowest $299.57. When Dr. Walker was out-of-network, the Allowable Amount for the same services varied dramatically and inexplicably:

The Allowable Amount from 2008-2010 was $113.31. Exhibit 23.

The Allowable Amount from 2010- 7/28/11 was $128.41, Exhibit 23.

The Allowable Amount from 10/06/11 to 11/22/13 was $76.91. Exhibit 23.

The Allowable Amount from 05/03/13 to 08/29/14 was $136.86. Exhibit 23.

Moreover, CalPERS represented that the Allowable Amount for 2010 would be $228.41, but never reimbursed Heinz at that rate[2]. With no notice in writing of reconsideration or change,

[2] CalPERS and Anthem should also be estopped, equitably and otherwise, from reducing the reimbursement rates and or Allowable Amounts to less that the highest that it represented, i.e.

CalPERS and Anthem simply failed to reimburse Heinz at that higher rate. Exhibit 3.

And then Heinz was paid, as the plan clearly provides, 60 percent of those numbers.

In other words, from 2008 to 2010, CalPERS and Anthem paid an Allowable Amount of **$113.31** instead of **$ 299.57,** for an **underpayment** for *each* service visit (before applying Heinz's forty percent (40%) copay) of about **$186.26.** The Allowable Amount in 2008 to 2010 was **calculated at 37.8%** of the Allowable Amount that was proper.

In 2010 to July 2011, CalPERS and Anthem paid an Allowable Amount of **$128.41** instead of **$ 299.57,** for an **underpayment** *for each* service visit (before applying Heinz's forty percent (40%) copay) *of* about **$171.16.** .The Allowable Amount in 2010 to July 2011 **was calculated at 42.8%** of the Allowable Amount that was proper.

In August 2011 to November 2013, CalPERS and Anthem paid an Allowable Amount of **$76.91 instead of $ 299.57,** for an **underpayment** for *each* service visit (before applying Heinz's forty percent (40%) copay) of about **$222.66.** The Allowable Amount from August 2011 to November 2013 was **calculated at 25.6%** of the Allowable Amount that was proper. *(This large and unexplained further reduction in the Allowable Amount occurred after Heinz filed a grievance)*

In December 2013 through 2014, CalPERS and Anthem paid an Allowable Amount of **$136.88 instead of $ 299.57 (or $320),** for an **underpayment** for *each* service visit (before applying Heinz's forty percent (40%) copay and assuming the Allowable Amount was actually $299.57 and not $320) of about **$162.69.** The Allowable Amount from December 2013 through 2014 was **calculated at 45.6%** of the Allowable Amount that was proper.

	Heinz when Dr. Walker was a Preferred Provider	**Heinz when Dr. Walker was NOT a Preferred Provider**
Billed Charge- the amount the provider actually charges for the covered service provided to a Member	$420	$420
Allowable Amount - the allowance or negotiated amount under the Plan for service provided (see definition on page 91). Note this is only an example. Allowable amount varies according to procedure and provider of service	**$ 299.57** **(EX 14, page 3)**	**$113:31 (2008-2010)** **$128.41 (2010-07/11)** **$76.91 (8/11-11/2013)** **$136.86 (5/13-present)** Exhibit 23, page 1

They represented that Allowable Amount in 2010 would be $228.41 but did not pay it.

Lack of Disclosure

The PPO plan documentation does not put one on sufficient notice, especially to the level of disclosure required by a fiduciary or in an insurance contract.

Although two of the three subparts of the Allowable Amount definition are consistent with a reasonable reimbursement rate, PERS claims the third subpart permits Anthem and PERS unfettered discretion to determine the Allowable Amount at a fraction of a reasonable, customary, standard, or agreed rate.

Under the EOC terms, the Allowable Amount should have been calculated at the highest reasonable and appropriate rate available under one of the three subparts of the definition:

(1) in the amount of the prior agreed-upon fee by participating provider when in-network under subsection (b) of the definition, or

(2) otherwise related to the value of other services, market considerations, and provider charge patterns under subsection (a) (which should be consistent with the agreed upon fee by participating provider when in network), or

(3) an appropriate and reasonable amount considering the particular services rendered under subsection (c) of the definition (which should also be consistent with the agreed upon fee by participating provider when in network).

Each of these subparts, if correctly applied, should have yielded a similar or identical Allowable Amount.

There is no disclosure in the plan documents available to prospective members or in the EOB available to enrolled members only that one part of the Definition would provide a significantly reduced calculation of the Allowable Amount.

The third subpart of the Allowable Amount definition is so vague, unilateral, and self-serving without any benchmarking that it fails to provide standards for performance and renders the EOC an illusory contract as presently drafted. To save the contract from being void, a judge would need to excise this third subpart, or at a minimum impose some objective standards and benchmarking and a requirement that the Allowable Amount calculated be reasonable under the third subpart.

There is no notice of this unfettered discretion, including that Anthem and CalPERS do not consider themselves bound by ordinary notions of reasonableness, fair play or consistency in determining the reimbursement and the Allowable Amount.

Both CalPERS and Anthem fail to disclose that the single biggest detriment involved in buying a PPO plan and then "going out-of-network" is a greatly reduced "Allowable Amount." Instead, CalPERS and Anthem indicate that the increased costs for using an NPP's services are that the copay or deductible is twice the cost (40 percent deductible) for the out-of-network services compared to using in-network providers (20 percent deductible).

Legal Issues Presented and Exhausted in Administrative Process

Heinz and the class seek reasonable, appropriate, usual, and customary reimbursement including at the agreed rate (i.e. the "Allowable Amount" for in-network.) Procedurally as required, Heinz filed a grievance in the Anthem administrative process. After exhausting Anthem's administrative process, Heinz, both in an individual and in his representative capacity, then appealed, as required by the Plan, to CalPERS in CalPERS' capacity as administrator of the CalPERS Preferred Provider (PPO) plans ("Plans"). Heinz has exhausted the approximately seven-*year* long Anthem administrative process and the obligatory CalPERS administrative process for all claims from 2008 to 2014.

Heinz is also a proposed representative for a class action of similarly situated CalPERS members and beneficiaries who bought PPO coverage from CalPERS or Anthem between 2007 and the present and sought reimbursement for out-of-network services.

Heinz and the proposed class seek reasonable, appropriate, usual, and customary reimbursement for out-of-network expenses, including as the EOC indicates that the reimbursement should be the agreed rate (i.e. at the "Allowable Amount") for in-network. Heinz is also a class representative for claims alleging that Anthem and CalPERS, individually, severally, or jointly, (1) breached their contractual duties, including made false promises or breached duties and promises (2) misrepresented law and facts in a manner that perpetrated a fraud on plan participants (3) omitted material terms, (4) failed to correctly calculate the "Allowable Amount" consistent with the PPO and EOC terms, (5) failed to provide reasonable, appropriate, usual, and customary reimbursement including at 60 percent of the agreed rate (i.e. the "Allowable Amount" for in-network); (6) failed to adequately disclose that it was offering a nonstandard PPO plan that sanctions or requires the use of exceptional and secret means to determine an Allowable Amount and fails to implement ordinary safeguards to prevent underpayment of NPP reimbursements and for arriving at Allowable Amounts lower than amounts considered usual, customary, reasonable and appropriate for NPP services; (7) failed to act consistent with their promises and legal, fiduciary, and other duties and obligations under law and statute, (8) failed to act in good faith and deal fairly, and (9) otherwise acted unlawfully or incorrectly as described in the hearing, the exhibits, and this Brief. Heinz individually and as a representative of a proposed class of those similarly situated has also asserted and exhausts in this process individual and class claims, facts, law and causes of action against CalPERS and/or Anthem for (1) breach of contract, (2) misrepresentation, (3) breach of the implied covenant of good faith and fair dealing, (4) unlawful, unfair and fraudulent business practices, (5) retaliation and conversion, (6) unjust enrichment, (7) accounting, (8) breach of their various fiduciary duties, and (9) breaches of their various statutory duties.

When CalPERS and Anthem artificially and inappropriately reduce the Allowable Amount and surreptitiously cut the reimbursement rates for out-of-network services, they breach their contractual duties, their fiduciary duties, and gain an advantage at the expense of unsuspecting CalPERS members who purchased the PPO plan coverage in good faith, including that CalPERS and Anthem would provide reasonable and adequate reimbursement.

CalPERS also failed to oversee Anthem sufficiently. CalPERS has various mandatory nondiscretionary fiduciary duties, one of which is a duty to correct all errors of the system under *Government Code* Section 20160 and 20164. CalPERS's various fiduciary duties, including to act in the best interest of members and to correct, requires CalPERS to respond to a filed grievance by making a good faith independent evaluation and determination as to whether Anthem's reimbursement rates and "Allowable Amounts" are appropriate, correct, and consistent with the terms represented to members. CalPERS failed to do an independent investigation to determine if Anthem correctly calculated the "Allowable Amount." For example, even after the issue was raised in the administrative process and it was put on notice by Heinz's claims on behalf of himself and a class of those similarly situated, CalPERS failed to investigate, evaluate, correct, or determine whether the calculation and the information supporting Anthem's calculation of the "Allowable Amount" was correct.[3] CalPERS breached its duties to Heinz and the other putative class plaintiffs, including when CalPERS simply accepted the "Allowable Amount" as calculated by Anthem's systems, whatever they may be.[4]

CalPERS, however, essentially argues that the second CalPERS administrative process is simply to accept Anthem's representation of what its computer printed out. However, since CalPERS has established the second administrative process as mandatory, including as it has duties to correct, it must have some independent purpose and significance where CalPERS has some power and duty to investigate, to acquire independent information, to act in the best interests of its members, to correct its and Anthem's errors, and otherwise fulfill its duties.

I. Conclusion

Based on the foregoing, including Mr. Heinz's reservation of all rights, the fact that he has not waived any claims, and his incorporation of all arguments made in the administrative proceedings, Mr. Heinz urges the Board to find that he is entitled to higher reimbursement for his out of network medical expenses; order their immediate payment, including costs; and do the same for members similarly situated who have been under-reimbursed.

Dated: March 3, 2017

John Michael Jensen, Attorney

[3] For example, CalPERS failed to even inquire or gather independent information on what was the appropriate "Allowable Amount" for a psychiatrist in the SF area, and otherwise failed to investigate whether Anthem was acting appropriately.

[4] Anthem and CalPERS have declined to provide requested disclosure as to how Anthem determines the Allowable Amount for any given service.