

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HEALTHNOW NEW YORK INC. d/b/a BLUE CROSS
BLUE SHIELD OF WESTERN NEW YORK,

Plaintiff,

Civ. No.:

v.

COMPLAINT

CATHOLIC HEALTH SYSTEM, INC.,

Defendant.

Plaintiff HealthNow New York, Inc. d/b/a BlueCross BlueShield of Western New York, by and through its attorneys, Webster Szanyi, LLP, for its Complaint against Defendant Catholic Health Systems, Inc., alleges as follows:

INTRODUCTION

1. Plaintiff HealthNow New York, Inc. d/b/a BlueCross BlueShield of Western New York (“BCBSWNY”) provides health insurance products to companies, groups and individuals throughout Western New York.

2. One of the products offered by BCBSWNY is called the “BlueCross BlueShield Senior Blue HMO Select” (“Senior Blue HMO Select”). The Senior Blue HMO Select product is a direct purchase product, meaning that individual customers (not groups or companies) acquire the product directly from BlueCross BlueShield.

3. Senior Blue HMO Select is a Medicare Advantage Plan, which means that qualified senior citizens (over 65 years of age) can purchase the Senior Blue HMO Select product in connection with their Medicare coverage.

4. Since Senior Blue HMO Select is a Medicare insurance product, it is only available to those sixty-five years of age or older.

5. For calendar year 2015, the Medicare open enrollment period runs from October 15, 2014 through December 7, 2014.

6. During the Medicare open enrollment period, Defendant Catholic Health Systems, Inc. ("CHS" or "Defendant") has engaged in a wide-spread, systematic campaign to disseminate literally false, misleading and defamatory advertisements regarding Senior Blue HMO Select and BCBSWNY products.

7. While all untruthful statements are cause for concern, Defendant's conduct is particularly egregious because it is providing false information to senior citizens about Medicare insurance products during the open enrollment period.

8. Defendant has gone so far as to place advertisements containing false and erroneous information in numerous church bulletins throughout Western New York.

9. By way of example, Defendant published or caused to be published the following advertisement in the St. Mark & St. Rose of Lima church bulletin:

Attention Medicare Advantage Participants: BlueCross BlueShield of WNY has recently introduced a new Medicare Advantage product, Senior Blue HMO Select that replaces its existing Senior Blue HMP-POS 650 plan. This product specifically excludes all Catholic Health facilities, including all hospitals, labs diagnostic imaging, rehabilitation centers, home care and all other sites-services. . . .

10. A copy of the church bulletin containing Defendant's advertisement is attached hereto as **Exhibit A**. Upon information and belief, **Exhibit A** was published and circulated in late October of 2014.

11. This advertisement contains literally false statements because it claims that Senior Blue HMO Select “specifically excludes all Catholic Health facilities.” This statement is not true for several reasons.

12. First, as with all Medicare Advantage products, Senior Blue HMO Select covers emergency care at **all** Catholic Health facilities. The Defendant’s failure to mention this critical fact is false and misleading.

13. By failing to mention that Senior Blue HMO Select provides coverage for emergency services at **all** Catholic Health facilities, Defendant’s false statements could cause senior citizens to avoid seeking emergency care at a Catholic Health facility, even if a Catholic Health hospital is nearby, out of fear that the emergency treatment may not be covered by BlueCross BlueShield health insurance.

14. Upon information and belief, the Catholic Health System is knowingly disseminating this false information.

15. The aforementioned church bulletin is also “literally false” because, contrary to Defendant’s claim, Senior Blue HMO Select provides coverage for treatment with primary physicians at **all** Catholic Health facilities, so long as the physician accepts BCBSWNY insurance, which most do.

16. Thus, if a patient covered by Senior Blue HMO Select seeks treatment with a primary care physician at a Catholic Health facility, and that physician accepts BCBSWNY insurance (which most do), then the medical bills associated with the work performed by the primary care physician in the outpatient setting would be covered under the Senior Blue HMO Select insurance policy.

17. Defendant's statements in **Exhibit A**, which are directed toward senior citizen church parishioners, are literally false, defamatory, deceptive, and intended to injure Plaintiff's business reputation and its relationship with its customers.

18. In addition, upon information and belief, Defendant has caused statements to be made from the pulpit during Catholic services throughout Western New York, wherein the speaker has falsely stated to the parishioners that BlueCross BlueShield does not cover treatment at Catholic Health facilities, which is a literally false statement.

19. On November 2, 2014, Defendant published an advertisement in the Buffalo News, containing false and misleading statements, which read: "**BlueCross BlueShield Senior Blue HMO Select customers will no longer have access to Catholic Health.**" (emphasis in original)

20. The foregoing is false and misleading.

21. The advertisement further states that:

BlueCross BlueShield is unveiling a new Medicare Advantage product, Senior Blue HMO Select, that will replace its existing Senior Blue HMO-POS 650 plan. This plan excludes all Catholic Health facilities, including all hospitals, labs diagnostic imaging, rehabilitations centers, home care and all other sites. (emphasis in original).

22. A copy of Defendant's false advertisement in the Buffalo News is attached hereto as **Exhibit B**.

23. This advertisement is literally false because Senior Blue HMO Select customers will receive coverage for a wide array of non-emergency services at Catholic Health facilities throughout Western New York.

24. In addition, upon information and belief, Mount Saint Mary's Hospital in Lewiston, New York is widely perceived to be a Catholic Health facility where a wide

variety of services, including non-emergency services, are covered by the Senior Blue HMO Select policy.

25. The information contained in Defendant's Buffalo News advertisement is literally false, deceptive, and *per se* defamatory, and intended to injure BCBSWNY's business reputation and its relationship with its customers.

26. Additionally, Defendant has re-published the Buffalo News advertisement on its website. A copy of that publication is attached hereto as **Exhibit C**, and Plaintiff believes the advertisement was published in late October or early November of 2014.

27. Defendant has also published an open letter to its employees, authored by Defendant's CEO and President, Joseph D. McDonald. A copy of Mr. McDonald's letter, which is believed to have been published in November of 2014, is attached hereto as **Exhibit D**.

28. In relevant part, Mr. McDonald's letter reads:

We want to make you aware of **an important change** this year to the Medicare Advantage product, Senior Blue HMO Select, being offered by BlueCross BlueShield of Western New York. **This year, this product specifically excludes all Catholic Health facilities** including all hospitals, labs, diagnostic imaging, rehabilitation centers, home care and all other sites. This is not a tiered product, meaning that other any emergency services, no coverage is provided for services at Catholic Health facilities." (emphasis in original)

29. These statements by Mr. McDonald are literally false, misleading, and are intended to deceive vulnerable senior citizens.

30. Again, contrary to Mr. McDonald's false, deceptive and defamatory statements, customers who obtain Medicare Advantage insurance coverage through

Senior Blue HMO Select can continue to receive medical treatment from primary care physicians at Catholic Health facilities.

31. It is untrue that Senior Blue HMO Select “specifically excludes all Catholic Health facilities.”

32. In truth, Senior Blue HMO Select customers can continue to treat with their primary care physicians at Catholic Health facilities and that treatment will be covered under the policy.¹

33. Mr. McDonald’s open letter is literally false, deceptive, *per se* defamatory, and intended to injure BCBSWNY’s business reputation and relationship with its customers.

34. Defendant also distributed a letter, authored by Mr. McDonald, to retirees of the Catholic Health System. A copy of that letter, dated “November 2014,” is attached hereto as **Exhibit E**.

35. Mr. McDonald’s letter repeats the false language contained in his prior publications, but also states:

We are not confident that BlueCross BlueShield has adequately communicated this change to its members. A recent letter from them referred only to a “tailored network of facilities,” and **did not expressly state anything about the exclusion of Catholic Health**. As you consider your options this open enrollment season, we wanted you to be informed about this change. (emphasis added)

36. These statements by Defendant and Mr. McDonald are literally false because BlueCross BlueShield’s Medicare Advantage products, including Senior Blue HMO Select, do not exclude Catholic Health.

¹ As with any insurance policy, the customer must comply with the applicable terms of the policy to obtain coverage.

37. As previously explained, BlueCross BlueShield's Medicare Advantage products, including Senior Blue HMO Select, covers treatment by primary care physicians at Catholic Health facilities.

38. Mr. McDonald additionally authored an op-ed article, which was published by the Western New York Catholic News, wherein he writes:

A new product being offered by BlueCross BlueShield of Western New York, called Senior Blue HMO Select, completely excludes all Catholic facilities. This means that, seniors who enroll in this plan would not receive benefits for non-emergency services provided at all Catholic Health sites....

39. Mr. McDonald's op-ed article, which was published on November 5, 2014, is attached hereto as **Exhibit F**.

40. As with his previous statements, Mr. McDonald's statements are literally false and are intended to confuse and deceive senior citizens regarding the coverage provided by Senior Blue HMO Select, and, more generally, their Medicare Advantage Plan coverage options.

41. Importantly, Mr. McDonald is an experienced health care executive, and is fully aware that the statements contained in his op-ed article are literally false, deceptive, and defamatory.

42. Finally, Defendant's website contained false and misleading statements regarding the products offered by BCBSWNY. Plaintiff's website reads "**A Medicare Advantage Plan from BlueCross BlueShield of WNY Excludes Coverage at All Catholic Health Facilities for Non-Emergency Services.**" (bold in original).

43. The website then states "there are several other Medicare Advantage plans available that enable you to continue to receive care from Catholic Health." The

website listed several other insurance companies but failed to list BCBSWNY.² A copy of the relevant portions of Defendant's website are attached hereto as **Exhibit G**.

44. In truth, all of BCBSWNY's Medicare Advantage policies, including Senior Blue HMO Select, allow its customers to receive some level of treatment at Catholic Health facilities.

45. By failing to list BCBSWNY as one of the insurers that provides insurance coverage for services rendered at Catholic Health facilities, Defendant has purposefully mislead and deceived senior citizens about BCBSWNY's Medicare Advantage products.

46. As a consequence of Defendant's false statements, senior citizens have been deceived into believing that none of BCBSWNY's Medicare Advantage products allow for the customer to receive care from Catholic Health.³

47. This is plainly untrue and literally false, because, in truth, **all** of BCBSWNY's Medicare Advantage products allow the customer to receive medical treatment at Catholic Health facilities; however, the scope of covered services varies.

48. Despite receiving notice of its inaccurate statements, Defendant has continued to publish its false and misleading advertisements.

49. Defendant's false and misleading statements are resulting in confusion and the erroneous belief by consumers that all BCBSWNY products exclude coverage from all Catholic Health facilities and/or erroneous belief that Senior Blue HMO Select excludes coverage from all Catholic Health facilities. This erroneous understanding

² Defendant has made efforts to correct this false statement, but those efforts cannot "unring the bell" and repair the harm caused by Defendant's misconduct.

³ Defendant's actions also appear to violate Chapter 42 of the Code of Federal Regulations, parts 422 and 423, which govern Medicare advertising and generally prohibit healthcare providers such as the Defendant from encouraging customers to enroll with specific insurers or purchase specific Medicare Advantage plans.

being fostered by Defendant's false and misleading statements is causing confusion, anger and distrust amongst consumers. As a result, BCBSWNY is experiencing damage to its goodwill, reputation, and consumer relationships.

50. Attached as **Exhibit H** is a printout of an article published at WIVB.com and readers' comments demonstrating that consumers are believing Defendant's false statements.

51. For example, a person with the screen name MAVERICK questions whether BCBSWNY will pay for out-of-network emergency care. This comment shows that some people believe that emergency care is not covered – which is patently false.

52. Similarly, a person with screen name DANIELLE BANASZAK suggests that seniors “sign up with one of the other two affordable Medicare advantage insurance companies in the area that doesn't [sic] exclude the catholic [sic] health system hospitals!” This comment shows that some people believe that BCBSWNY does not offer Medicare plans that cover Catholic Health hospitals. This is false. This type of consumer confusion will result in a loss of customers by BCBSWNY.

53. HOLLY SERBA HANS indicated that she “changed and signed my mother up with (IDH) Independent Health!”

54. Likewise, DAVID BUYEA stated that, “I work for independent health, we've switched almost 4000 people from BCBS in a month. What I'm hearing is that both univera and bcbs raised their rates about 150% for next year. Independent health is where it's at.”

55. Another commentator, ANDREA CARCIELLO O'CONNELL, stated, “Shame on BCBS. Not going to forget this PR nightmare.”

PARTIES

56. Plaintiff HealthNow New York, Inc. d/b/a BlueCross BlueShield of Western New York is a New York not-for-profit corporation organized under and operating pursuant to the laws of the State of New York.

57. BCBSWNY maintains its principal place of business at 257 West Genesee Street, Buffalo, New York.

58. BCBSWNY is a health insurance company and is in the business of offering health insurance policies to companies, groups, and individuals.

59. Upon information and belief, Defendant Catholic Health Systems, Inc. is New York not-for-profit corporation organized under and operating pursuant to the laws of the State of New York.

60. Upon information and belief, Defendant maintains its principal place of business at 144 Genesee Street, Buffalo, New York.

61. Defendant operates several hospitals, medical practices, physician groups, and medical facilities in Buffalo, New York and the surrounding areas.

JURISDICTION & DEMAND FOR JURY TRIAL

62. This action arises under the Lanham Act, Title 15 U.S.C. §§ 1125(a) *et seq.*, which confers subject matter jurisdiction to this Court pursuant to 15 U.S.C. § 1121. Subject matter jurisdiction is also proper under 29 U.S.C. § 1367(a).

63. BCBSWNY hereby demands a trial by jury on all issues.

FIRST CAUSE OF ACTION
Lanham Act Violation: literally false statements

64. BCBSWNY repeats and realleges the preceding paragraphs of the Complaint as if fully set forth herein.

65. The statements made by Defendants in Exhibits A, B, C, D, E, and G (collectively, the “Advertisements”) contain literally false statements regarding Senior Blue HMO Select. Upon information and belief, Defendant continues to make the same or similar false statements in advertisements and to the media.

66. For example, in a news article broadcast by WIBV (“Chanel 4”), Chuck Hayes, Defendant’s spokesperson stated, “This plan from Blue Cross Blue Shield is the only plan in Western New York that completely excludes the Catholic Health System.” See Exhibit H.

67. Defendant’s advertisements and similar statements have actually deceived or have the capacity to deceive a substantial portion of the intended audience.

68. As explained in the preceding paragraphs, the literally false and deceptive statements are materially false and are influencing purchasing decisions as noted above.

69. As a consequence of the Defendant’s literally false and deceptive statements, BCBSWNY has been harmed by a diversion of sales or a lessening of goodwill associated with its products.

70. Additionally, because Defendant’s statements are “literally false” BCBSWNY is entitled to presumed damages.

SECOND CAUSE OF ACTION

Lanham Act Violation: deceptive and misleading advertisements

71. BCBSWNY repeats and realleges the preceding paragraphs of the Complaint as if fully set forth herein.

72. The statements made by Defendant in the Advertisements and similar statements contain deceptive and misleading statements regarding Senior Blue HMO Select and BCBSWNY's Medicare Advantage products, and about BCBSWNY in general.

73. Defendant's false statements cause general consumer confusion and imply that no BCBSWNY products include coverage for any physicians or facilities associated in any way with CHS.

74. Defendant's false statements cause consumers to believe that Senior Blue HMO Select and BCBSWNY's Medicare Advantage products do not provide insurance coverage for services provided at Catholic Health facilities, when, in fact, these products do provide coverage for services provided at Catholic Health facilities.

75. The Advertisements and similar statements have actually deceived and have the capacity to deceive a substantial portion of the intended audience.

76. The deceptive and misleading Advertisements and similar statements are likely to influence consumers' purchasing decisions.

77. As a consequence of the Defendant's misleading and deceptive Advertisements, BCBSWNY has been harmed by a diversion of sales or a lessening of goodwill associated with its products.

THIRD CAUSE OF ACTION
Violation of New York General Business Law § 349

78. BCBSWNY repeats and realleges the preceding paragraphs of the Complaint as if fully set forth herein.

79. Defendant's publication of the Advertisements and similar statements were consumer-oriented activities.

80. The Advertisements and similar statements are misleading in a material way.

81. BCBSWNY has suffered injury as a result of Defendant's deceptive practices, including, but not limited to, damages caused by lost revenues, customer confusion and loss of goodwill.

82. Defendant's deceptive conduct is likely to cause harm to the public at large because it is publishing false information about Medicare Advantage Plan products and BCBSWNY to senior citizens. In addition, Defendant has published false statements claiming that Plaintiff's Senior Blue HMO Select product does not provide insurance coverage for emergency medical services at Catholic Health facilities, which is a false, deceptive, and reckless statement.

83. Defendant's statements are false and present a public harm because it could prevent senior citizens from seeking emergency medical treatment at the hospital closest to the emergency—potentially a Catholic Health hospital—because the senior citizen has been misled into believing that BCBSWNY's products do not provide insurance for emergency services rendered at a Catholic Health hospital. Defendant's conduct may cause consumer harm by causing consumers to avoid the most cost effective and suitable health insurance product for their specific situation.

84. Defendant's conduct is willful, because, by virtue of its superior knowledge of Medicare and health insurance, it knows that the Advertisements and similar statements are materially false.

FOURTH CAUSE OF ACTION
Violation of New York General Business Law § 350

85. BlueCross BlueShield repeats and realleges the preceding paragraphs of the Complaint as if fully set forth herein.

86. Defendant's Advertisements and similar statements constitute false advertising as defined by New York General Business Law § 350.

87. As explained above, Defendant's false Advertisements have a broad impact on the public at-large, namely senior citizens seeking to purchase Medicare Advantage insurance products.

88. As a result of Defendant's Advertisements and similar statements, BCBSWNY has suffered and expects to continue to suffer loss of business, loss of customer goodwill, and loss of reputation.

FIFTH CAUSE OF ACTION
Per se Defamation

89. BCBSWNY repeats and realleges the preceding paragraphs of the Complaint as if fully set forth herein.

90. The statements contained in the Advertisements are false and tend to injure BCBSWNY in its trade or business.

91. BCBSWNY is entitled to presumed damages because Defendant's advertisements qualify as *per se* defamation.

92. BCBSWNY has also sustained actual and special damages as a result of Defendant's false statements, including, but not limited to, customer confusion, loss of goodwill, loss of customers, and out-of-pocket expenses incurred in attempting to mitigate against the damages caused by Defendant's false statements.

WHEREFORE, Plaintiff HealthNow New York, Inc. d/b/a BlueCross BlueShield of Western New York demands a judgment against a Defendant in an amount to be determined at trial, plus costs, interests, attorney's fees and associated expert costs, disbursements, permanent injunctive relief, treble damages, punitive damages, and such other and further relief as the Court deems just and proper.

Dated: November 24, 2014

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