



Division of Medical Services
P.O. Box 1437, Slot S401, Little Rock, AR 72203-1437

November 16, 2021
Via Email and United States Postal Service

Mitch Morris, CEO
Empower Healthcare Solutions
1500 Riverfront Drive
Little Rock, AR 72002

Notice of Intermediate Sanction

Dear Mr. Morris

Pursuant to authority provided in the PASSE Provider Manual §272.000(A)(4) and in Section 14.1.7 of the Empower's PASSE Agreement with the Arkansas Department of Human Services ("DHS"), DHS is suspending all new assignment, enrollment, and voluntary transitions to the PASSE, including automatic mandatory assignment and enrollment, effective November 19, 2021. This sanction is imposed due to Empower's misrepresentation of information furnished to DHS. Section 272.000(A)(4) provides:

DHS may impose sanctions specified in this provider manual, in the PASSE Provider Agreement and any sanction specified in 42 CFR § 438 based upon determinations on findings from onsite surveys, member or other complaints, financial status, or any other source. DHS may impose intermediate sanctions if it makes any determinations specified below:

- A. *DHS determines that a PASSE acts or fails to act as follows: . . .*
4. *Misrepresents or falsifies information that it furnishes to DHS, Office of Medicaid Inspector General, CMS, the Office of the Inspector General, the Comptroller General, and any designees.*

Section 14.1.7(c) of the PASSE Agreement states:

If the PASSE misrepresents or falsifies information that it furnishes to CMS or to DHS, DHS may impose a fine of up to \$100,000 for each instance of misrepresentation. DHS may also:

- c. *Suspend all new enrollments to the PASSE after the date the Secretary or DHS notifies the PASSE of a determination of a violation of any requirement under sections 1903(m) or 1932 of the Social Security Act;*

The basis for the determination that Empower misrepresented information that it furnished to DHS is as follows:

Per its July 30, 2021, letter to DHS, Empower identified certain areas that would change due to the transition away from Beacon. Empower represented that the issues identified in the letter were the **only** areas that were changing and, therefore, a full readiness review was not necessary.

DHS agreed to a partial readiness review based on Empower's representation in the July 30, 2021, letter. DHS recently discovered, through the complaint and related motions filed by Empower in the matter styled *Empower Healthcare Solutions, LLC v. Beacon Health options, Inc.*, case number 4:21-cv-01016-JM (E.D. Ark. Filed Nov. 2, 2021), that the representations made in the July 30, 2021 letter are contrary to the factual representations and statements asserted by Empower to the Court:

- Empower does not have access to, or control of, "its own policies, templates, member handbooks and training materials and historical business records relating to operational and compliance areas such as quality assurance, utilization management, grievances, fraud, waste and abuse and care coordination ('Empower's Records')." Compl., ¶ 53. *See* Compl., ¶¶ 54, 64 and 75.
- Empower does not have control of the "landline phone numbers and related accounts, cell phone numbers and related accounts, care coordinator phone numbers and related accounts, an @empowerhcs.com email domain, network, account and system, and provider databases housing credentialing applications and verification documents for Empower's network of facilities, clinics, practice groups and each member of their medical staff (hereinafter referred to as 'Empower's Business Data and Systems.')." Compl., ¶ 25. *See* Compl., ¶¶ 25, 53, 54, 64 and 75.
- Empower does not have unrestricted access to, or control over, Empower's Business Data and Systems. *See* Compl., ¶¶ 53, 54, 64 and 75.
- Empower does not have access/control of the email domain network, nor do they have access to the previous emails. Empower is not in control of the written history of beneficiary care. *See* Compl., ¶¶ 53, 54, 64 and 75.
- Empower does not have control of Empower's BHS Provider Network, Empower's Records and Empower's Business Data and Systems. *See* Compl., ¶ 75.
- There is a question as to whether Empower owns the BHS Provider Network. *See* Compl., ¶ 49.
- Empower does not possess, or control, the individual provider credentialing information. There is a question to whether Empower owns the provider's information and Empower does not have the information to use without Beacon. Empower's subcontractor, Evolent, will no longer be able to utilize the provider information for performing claims management services after December 31, 2021. *See* Compl., ¶¶ 50, 59, 64, and 75.
- Empower does not have administrator rights' access for the website, and the ownership of the website may be in question. *See* Compl., ¶¶ 56 and 64.

- Empower does not own the phone numbers, sim cards, accounts, and history of the care coordinators. Empower does not own, or have access to, the written history of care for approximately 20,000 beneficiaries. Empower does not own or have access to the care coordinator history of text and voice messages. *See Compl., ¶¶ 58 and 64.*

Had Empower not misrepresented the facts in the July 30, 2021, letter and subsequent meetings, a full readiness review would have been required.

It is also quite concerning that, as of today, two weeks since filing the request for a preliminary injunction, a hearing has not been set. As of Friday, November 11, 2021, counsel for Empower advised that no hearing date had been requested. If Empower comes to an agreement with Beacon, DHS must have specific and concrete information on how the issues identified in the filed complaint, brief, and motion will be resolved. Information DHS expects to receive includes, but is not limited to, the new domain name for the website and email addresses, phone numbers, and how Empower plans to obtain control of the member historical data and member records. In the event Empower cannot perform as required, it will be necessary for DHS to implement a plan to continue providing services for approximately 20,000 beneficiaries, which all relies on the records and credentialing that Empower now states it cannot currently provide. Time is of the essence.

If the issues raised in the Complaint filed in Case Number 4:21cv1016-JM are not completely resolved in a manner that meets the requirements of both the Provider Manual and the PASSE Agreement, DHS will impose additional sanctions, as necessary.

You have the right to appeal this action, as provided under the Manual Section 161.400, which states:

Within 30 calendar days of receiving notice of adverse decision/action, or 10 calendar days of receiving an administrative reconsideration decision that upholds all or part of any adverse decision/action, whichever is later, the provider may appeal.

An appeal must be in writing and must specify in detail all findings, determinations, and adverse decisions/actions that the provider alleges are not supported by applicable laws; including state and federal laws and rules, applicable professional standards or both. Mail or deliver the appeal to the Director, Division of Medical Services, P.O. Box 1437, Slot S401, 7th and Main Streets, Little Rock, AR 72203-1437. No appeal is allowed if the adverse decision/action is due to loss of licensure, accreditation or certification.

As required by federal law, a copy of this notice of intermediate sanction will be provided to the Centers for Medicare and Medicaid Services (CMS).

A copy of the July 30, 2021, letter; the Verified Complaint for Injunctive Relief and Damages; the Empower Healthcare Solutions, LLC's Motion for Preliminary Injunction; and Empower Healthcare Solutions, LLC's Brief in Support of Motion for Preliminary Injunction, are attached.

Sincerely,

A handwritten signature in blue ink, appearing to read "David J. Jones".

David B. Jones, Assistant Director
Department of Human Services, Division of Medical Services

cc: Cindy Gillespie, Arkansas DHS
Dennis Smith, Arkansas DIIS
Dawn Stehle, Arkansas DHS
Elizabeth Pitman, Arkansas DHS
Melissa Stone, Arkansas DHS
Marshall Ney, Friday, Eldredge & Clark, LLP



July 30, 2021

Ms. Jenna Goldman
Assistant Director, DMS
PO Box 1437, Slot S418
Little Rock, AR 72203-1437

Via Certified Mail
Via Email

Re: Empower Transition Plan

Dear Ms. Goldman:

I am writing in response to your letter dated July 16, 2021 requesting additional information regarding Empower Healthcare Solutions, LLC (Empower) transition plan. We are providing additional information as requested in effort to address your concerns.

Following are responses to your questions regarding Exhibit E (originally submitted to DHS 6/30/21):

Addressed in Exhibit E	DHS Comments 7/16	Empower Response 7/19
Care Coordination staffing and supervision (including the PCSP)	<p>Empower reports that 90% (325) CC's have agreed to transfer employment to Empower at 'the appropriate time'. There are 40 remaining. Empower believes they will have around 15 more accept offers and will outsource hiring for the remaining CC's.</p> <p>Please provide the additional information:</p> <ul style="list-style-type: none">What is the timeline for hiring/ outsourcing the additional Care Coordinators?Does Empower have a subcontract they are outsourcing this with? If so, please submit the subcontracts for review and approval by DHS prior to the effective date.What is the transition date for the Care Coordinators moving to Empower?	<p>Empower will directly employ Care Coordinators, as well as supervisory and leadership staff, to ensure services continue following termination of Beacon's services and ownership agreements with Empower.</p> <ul style="list-style-type: none">All staff accepting direct Employment with Empower will begin on or before 1/1/2022 (following final separation from Beacon on 12/31/2021). Additional recruitment and hiring processes are underway with regard to new Care Coordinators.Empower is not entering into a subcontract to support Care Coordination staffing and supervision.Care Coordinators will be directly employed with Empower beginning Q4 2021 with all hired and in place no later than 1/1/2022.
Utilization management for BH and IDD, including	Empower states "Evolent currently provides UM services, which includes health information system	The expanded Evolent agreement is currently in development. This document will be presented for DHS

utilization manager	<p>management, data collection and reporting, as well as staffing and supervision for all medical review and decision-making." Empower reports that it will 'expand Evolent's scope of work to include BH/IDD UM services, including staffing and supervision." The PASSE anticipates this will be arranged for no later than September 30th, 2021.</p> <p>Please provide the additional information:</p> <ul style="list-style-type: none"> • A full scope of work as it relates to UM and the services that Evolent will take over is requested. This must be reviewed and approved prior to beginning readiness review. 	<p>review in the near future.</p> <ul style="list-style-type: none"> • Evolent is NCQA Accredited for UM services and complies with Standards of Practice for a UM vendor. • Evolent presently administers fully integrated UM support for other Medicaid clients and complies with Mental Health Parity rules. • Evolent currently follows Empower UM policies to support physical health UM and will expand Arkansas operations to provide BH / IDD UM support, which include, but not limited to, prior and out-of-area authorizations, concurrent and retrospective review, and / or medical necessity determination by appropriately credentialed and trained Physical Health and Specialty Health professionals. • Evolent currently provides physician reviewers that meet PASSE Contract requirements and will continue to do so during and after the contract transition. Integrated rounds (BH/IDD/PH UM/CM) will continue to be held with Empower clinical leadership. • Evolent will continue to use the same UM IT platform in place today to collect, house, and process clinical information. It is Evolent's system that Empower is currently utilizing. • Empower currently uses InterQual, a nationally recognized evidence-based criteria. Evolent will adopt current BH medical necessity and IDD functional guidelines to ensure consistent application of review criteria for authorization decisions and provide notice within required timeframes. • Empower has developed and approved appropriate guidelines
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		<p>for prior authorization of Nonmedical Community Supports and Services (NCSS). These guidelines will be used by the expanded UM team. UM and Care Coordination policies also include the conflict-free “independent review” criteria that will continue to be applied.</p> <ul style="list-style-type: none"> • Empower and Evolent, as part of the UM committee, will continue to monitor the status outcome of utilization management decisions, including determination of metrics to be tracked, the reporting mechanisms used to evaluate quality and trends, innovative testing, and a remediation program process to resolve any identified quality issues. • Empower management currently conducts daily review of all UM denial decisions and this trend oversight/analysis activity will continue • CVS-Caremark will continue to function seamlessly as the Empower Pharmacy Benefit Manager. Thus, all existing pharmacy utilization management and prior auth processes will continue.
Medical Director and oversight for BH/IDD providers	<p>Empower reports that a Medical Director has accepted an offer of employment.</p> <p>Please provide the additional information:</p> <ul style="list-style-type: none"> • Credentials for the medical director along with the transition date following readiness review. 	Dr. Brad Diner, MD is an Arkansas-based, Board certified Psychiatrist, who will serve as Empower’s Medical Director, beginning 1/1/2022.
Member appeals and grievance for BH and IDD	<p>Empower reports that Beacon currently handles behavioral health appeals and grievances. Empower also reports that they plan to secure Evolent's services to handle both PH and BH appeals and grievances. The PASSE anticipates an arrangement to be made no later than September 30, 2021.</p>	<p>The expanded Evolent agreement is currently in development. This document will be presented for DHS review in the near future.</p> <p>Evolent currently is responsible for managing member and provider administrative appeals related to Physical Health and Specialty Health</p>

	<p>Please provide the additional information:</p> <ul style="list-style-type: none"> • The subcontract will need to be reviewed and approved prior to readiness. 	<p>services. Member and Provider Appeals systems are already in place in accordance to all PASSE requirements. Additionally, Evolent already makes determinations in accordance with all applicable laws and regulations.</p> <p>Expanding current key activities for BH / IDD and Pharmacy by Evolent include:</p> <ul style="list-style-type: none"> • Research and respond to all clinical and administrative appeals for delegated functions, including Level 2 appeals, IRO, and state appeals/fair hearing • Receive, store, triage, and respond to appeals from providers and members in a timely manner. • Evolent will escalate and assign out appeals to applicable clinical, management, and / or legal teams for resolution, when necessary. • Manage member and provider complaints and appeals processes in accordance with Arkansas state regulations and requirement, Evolent to assist with investigation and data tracking • Implement and oversee UM Appeals processes in accordance with Empower and State of Arkansas policies, regulations, and requirements • Provide trends and data to identify potential needs for Empower to determine necessary changes to provider or member notifications
Fraud, waste and abuse management and activities, including some payment activities not currently provided by Evolent	<p>Empower reports that Beacon contracts with third party vendors to provide these services. Empower reports they are evaluating Evolent's capabilities to take on these tasks and will utilize the same third - party vendors as did Beacon or will contract with Evolent to perform these services.' The PASSE anticipates an arrangement to be made no later than September 30, 2021.</p> <p>Please provide the additional</p>	<p>The expanded Evolent agreement is currently in development. This document will be presented for DHS review in the near future.</p> <p>Key activities that will be performed by Evolent include Subrogation, COB, FWA, Data Mining, and Clinical Audit services.</p> <p>Subrogation/COB Claim Management</p> <ul style="list-style-type: none"> • Identify and investigate potential

	<p>information:</p> <ul style="list-style-type: none"> • The subcontract will need to be reviewed and approved prior to readiness. 	<ul style="list-style-type: none"> involving subrogation & COB on paid claims • Collection of subrogation/COB dollars • Reprocess claims to recognize collected subrogation/COB dollars at the direction of Empower • Document, track, and report subrogation/COB dollars, as well as all program activity <p>FWA & Special Investigative Unit (SIU)</p> <ul style="list-style-type: none"> • Establish SIU policies and procedures • Maintain secure communication processes • Maintain secure data feed and review claims prior to payment • Provide post payment claims files for Waste, Fraud and Abuse management • Investigate potential cases of waste, fraud and abuse communicated from • Report to Empower and DHS as required with regard to situations deemed appropriate with SIU
Certain member support services and staff not currently provided by Evolent	<p>Please provide specifics on what services this includes and if additional staffing will be required to cover these needs.</p>	<p>The expanded Evolent agreement is currently in development. This document will be presented for DHS review in the near future.</p> <p>In addition to directly employing Care Coordination staff, Empower is working to recruit nearly 30 additional employees.</p> <p>These include director-level positions for Quality Improvement, Utilization Management Regulatory Reporting, Fraud Investigation, Appeals & Grievances, Claim & Encounter Operations, Provider Contract Management, and Member/Provider Communications.</p> <p>Other new Empower staff positions include Chief Operating Officer, Vice President Coordinated Care & Integration, and Provider Relations team. Please reference the updated Empower organizational chart for additional detail.</p>

Contract Manager	<p>Empower reports that a Contract Manager has accepted an offer of employment.</p> <p>Please provide an updated organizational chart and ensure compliance with the agreement.</p>	An updated organizational chart is attached.
Change in provider contracts for approximately 200 BH/IDD provider organizations, not currently provided by Access	<p>Empower reports it has identified the BH/IDD providers <i>needing new contracts</i>. The new contract documents are being developed and Access Health's scope of work will be expanded <i>to</i> manage and execute this contracting activity. The PASSE anticipates that this task will begin no later than August 31, 2021.</p> <p>Empower will be required to meet network adequacy in readiness review prior to January 1, 2022. To be included in Open Enrollment, Empower will need to show, at a minimum, 85% network adequacy.</p>	<p>Empower will be working to re-contract all currently participating BH/DD providers within the next 90 days. Thus, we anticipate no changes or deletions to our existing network of providers and will continue to demonstrate network adequacy and continued member access to care.</p> <p>An expanded Access Health Services agreement will be presented for DHS review in the near future.</p>
Credentialing for BH/IDD providers, not currently provided by Access	<p>Empower reports that its network will be fully credentialled throughout 2021 as part of its ongoing process and Beacon/Access contractual responsibilities and that Beacon only provided credentialing for certain BH/IDD providers.</p> <p>The PASSE reports it is evaluating the combination of internal and third-party services to complete these functions in the future. This includes the expansion of Access's scope of work, which currently credential/recredentials the vast majority of Empower's network.</p> <p>Please provide the additional information:</p> <ul style="list-style-type: none"> • A plan regarding contracting and credentialing providers currently contracted and credentialled with Beacon. DHS understands these providers are currently credentialled under Beacon and will all need to be recredentialled. • Services Access currently provides and which services will be added to its scope of work. • Provide which services Empower will bring in house. 	<p>There appears to be misunderstanding regarding credentialing services provided to Empower. Under the PASSE Agreement, it is Empower's responsibility to credential its network of providers. To accomplish provider credentialing, Empower receives assistance from both Access Health and Beacon to perform certain credentialing activities.</p> <ul style="list-style-type: none"> • Through these services contracts still in effect, Empower has credentialled, and will continue to credential and recredential all BH/DD providers by 12/31/2021. Those credentialing determinations will carry forward through the customary 3-year recredentialing cycle (1-year for HCBS providers). • Beginning 1/1/2022, Empower will credential new providers and re-credential existing providers on as-needed basis through these processes and mechanisms. • Access Health will continue to perform provider credentialing and contracting activities for Empower. • Empower will continue to render final credentialing determinations for

	<ul style="list-style-type: none"> A timeline and detailed efforts of how Empower is going to meet network adequacy requirements. 	<p>all participating providers.</p> <ul style="list-style-type: none"> Empower's entire provider network will be maintained in its current form beyond 12/31/2021. <p>An expanded Access Health Services agreement will be presented for DHS review in the near future.</p>
Support activities for quality assurance and performance improvement activities	<p>Empower reports it has identified the number and qualifications of needed staff to perform the services previously provided by Beacon. Job descriptions and postings are in development. Empower currently anticipates that all of these positions will be filled no later than November 1, 2021.</p> <p>Please provide the additional information:</p> <ul style="list-style-type: none"> Will this staff cover the current Beacon functions related to: <ul style="list-style-type: none"> Quality Management - inclusive of document submission and site reviews performance improvement initiatives conducting site visits and corrective actions conducting quality meetings responding to state agency inquiries preparing and submitting quality reports conducting QM meetings preparing compliance program description conducting compliance meetings conducting contract compliance audits quality metric data/compliance/trending reports? Again, please keep in mind, before these duties can be transitioned from Beacon readiness review will need to be complete 	<p>Empower will continue to directly manage Quality Assurance and Performance Improvement activities. Continued activities include convening QAPI Committee and other quality meetings, as well as development and administration of Provider Improvement Projects and compliance related activity. Data and reporting is currently directly supported by Evolent.</p> <p>We are also actively restructuring in-house capabilities to assume complete ownership of all Quality activities. A Quality Director and 4-5 support staff will be directly employed to deliver the following activities (many of which Empower conducts today):</p> <ul style="list-style-type: none"> Quality Department Staff Quality Management – inclusive of document submission and site reviews Performance improvement initiatives. Conducting site visits and corrective actions Conducting quality workgroups meetings, including Medical Quality Management Committee (MQMC). Responding to state agency inquiries. Preparing, maintaining, and submitting annual quality plan and evaluation, as well as other state reports. Preparing compliance program description. Conducting compliance meetings.

		<ul style="list-style-type: none"> • Conducting contract Compliance Audits <p>Additionally, Evolent will also continue to support the Empower quality program in the following manner:</p> <ul style="list-style-type: none"> • Prepare and validate quality data, trend analysis, and related reports. • Chart Audits and Medical Record review. • Predictive Modeling for Disease Management Systems. • HEDIS Report and data analytics. <p>The expanded Evolent agreement will be presented for DHS review in the near future.</p>
IT manager and data processing/reporting staff not currently provided by Evolent	<p>Empower reports that much of its existing IT infrastructure and support will not be impacted as Evolent provides the core operation system (i.e. enrollment processing, member/provider data management, claim adjudication, encounter submission).</p> <p>The PASSE also reports that it plans to bring some other IT functions to Empower and that job descriptions and postings are in development for an IT Manager. The PASSE anticipates that the position will be filled no later than August 31, 2021 and that any other IT support positions will be filled no later than November 1, 2021.</p> <p>Please provide a detailed plan for the transfer of historical data and all pieces Beacon currently houses. The plan submitted does not address each item.</p>	<p>Empower does not currently rely on Beacon to maintain claims data, historical reports, or other critical data elements. All enrollment activity, member data, provider data, claims history encounter data, PCSP, and other clinical/care coordination information is housed as part of the Evolent information system. This data is owned by Empower and ensures there will be no loss of historical data.</p> <p>Per existing services agreement terms, Beacon will provide Empower with all historical activity/operations data regarding FWA/SIU, BH UM, appeals and grievance handling, and any outstanding financial data.</p>
Certain finance activities (accounts payable, general ledger, financial reporting, and statutory reporting) current partially provided by Beacon	<p>Empower reports its CFO has identified the positions and qualifications needed to perform the limited finance functions currently performed by Beacon. Empower's CFO has identified and contracted for finance software applications and systems. Empower will continue to retain existing third parties (Wakely,</p>	An updated organizational chart is attached.

	<p>Millennium, BKD, etc.) as needed to Ensure a smooth transition. Empower anticipates that its finance functions will be fully internal no later than October 31, 2021.</p> <p>Please remember to submit an organizational chart. This will be needed in readiness review</p>	
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Additional services for which you have requested details and timelines represent activities currently performed by Evolent or Empower, meaning there will be no impact or lapse in these services. The Evolent services contract will provide additional details, but the following list provides a brief summary on several key elements.

- Claims: All claims adjudication and provider claim payment has been, and will continue to be, provided by Evolent. Therefore, all historical claim data will be carried forward and claim performance statistics and reporting will continue to be provided by Evolent.
- Enrollee Services and Eligibility: All enrollment file (834) processing and member data management has been, and will continue to be, provided by Evolent. All historical member data will be carried forward with no impact to file processing and enrollment services.
- Compliance: All compliance activities including compliance plan, (BAA) maintaining all aspects of PHI, maintaining performance and compliance of all subcontractors, and maintaining compliance with the PASSE agreement are the direct responsibility of Empower. The Empower Compliance Officer has historically assumed ultimate responsibility for our compliance program and will continue throughout this transition. Additionally, Empower will be expanding the in-house Compliance department to employ additional support staff focused on regulatory reporting, payment integrity, and appeals and grievance compliance. These positions/responsibilities are reflected within the updated organizational chart (attached as an Exhibit).
- Reporting: Empower currently provides oversight and review / validation of each regulatory report, and that function and responsibility will continue throughout this transition. Because Evolent currently provides enrollment processing, member and provider data management, claim processing, and care coordination/care management platforms, much of the existing operating structure relies on Evolent data today. Evolent will continue to produce those data and reports, as well as assume a larger reporting role as reflected in the forthcoming Evolent services contract and the information provided within this letter. Credentialing and network adequacy reports will be supplied by Access Health Services in similar manner as accomplished today (with the addition of BH/IDD provider support).

The following table summarizes how all services and contract responsibilities will be managed under Empower's structure.

- **Black text** indicates no change from current operations
- **Red text** indicates movement of prior activity from Beacon to Empower or vendor

EMPOWER HEALTHCARE SOLUTIONS – 2022

Empower Operations	Evolent Health (Empower Vendor)
Board Management	Member Enrollment
Executive Management	Welcome Kit/ID Card Fulfillment
Financial Management	Mailroom Operations
Contract Compliance	Care Coordination/Care Mgmt Platform
Regulatory Reporting	Customer Service (Call Center)
Quality Assessment/Perf Improvement Oversight	Portals (Member and Provider)
QA/PI Operations*	Provider Data Management
Vendor Management/Oversight	Provider Directory
Care Coordination Services	Core Platform IT Platform & Support
Member Outreach/Communication	Electronic Data Interface
Provider Relations	Claims Administration
Access Health Services (Empower Vendor)	Pricing and Benefit Configuration
Network Development (Medical + BH / IDD)	Coordination of Benefits
Credentialing	Subrogation
Contracting	Claim Audit & Recovery
	Pharmacy Benefits Management (CVS-Caremark)
	Encounters (Medical/BH/Rx)
	Utilization Management (Medical)
	Appeals & Grievances (Medical)
	Expanded Scope
	New Member Outreach/Engagement
	Fraud/Waste/Abuse Monitoring & Investigations
	Quality Monitoring, Data Analysis, HEDIS
	Utilization Management (BH / IDD)
	Appeals & Grievances (BH / IDD)

*Empower developed many of the QA/PI activities, such as all the improvement plans and annual reports, prior to this transition, despite indicated as "activity moved."

Empower is currently working with AID on all required documents to support and maintain our PASSE License. Upon conclusion of this process, an updated Change of Ownership will be submitted to DHS provider enrollment.

We also understand that a review of subcontracts and impacted policies will be necessary, and we look forward to working with you through that process.

Sincerely,

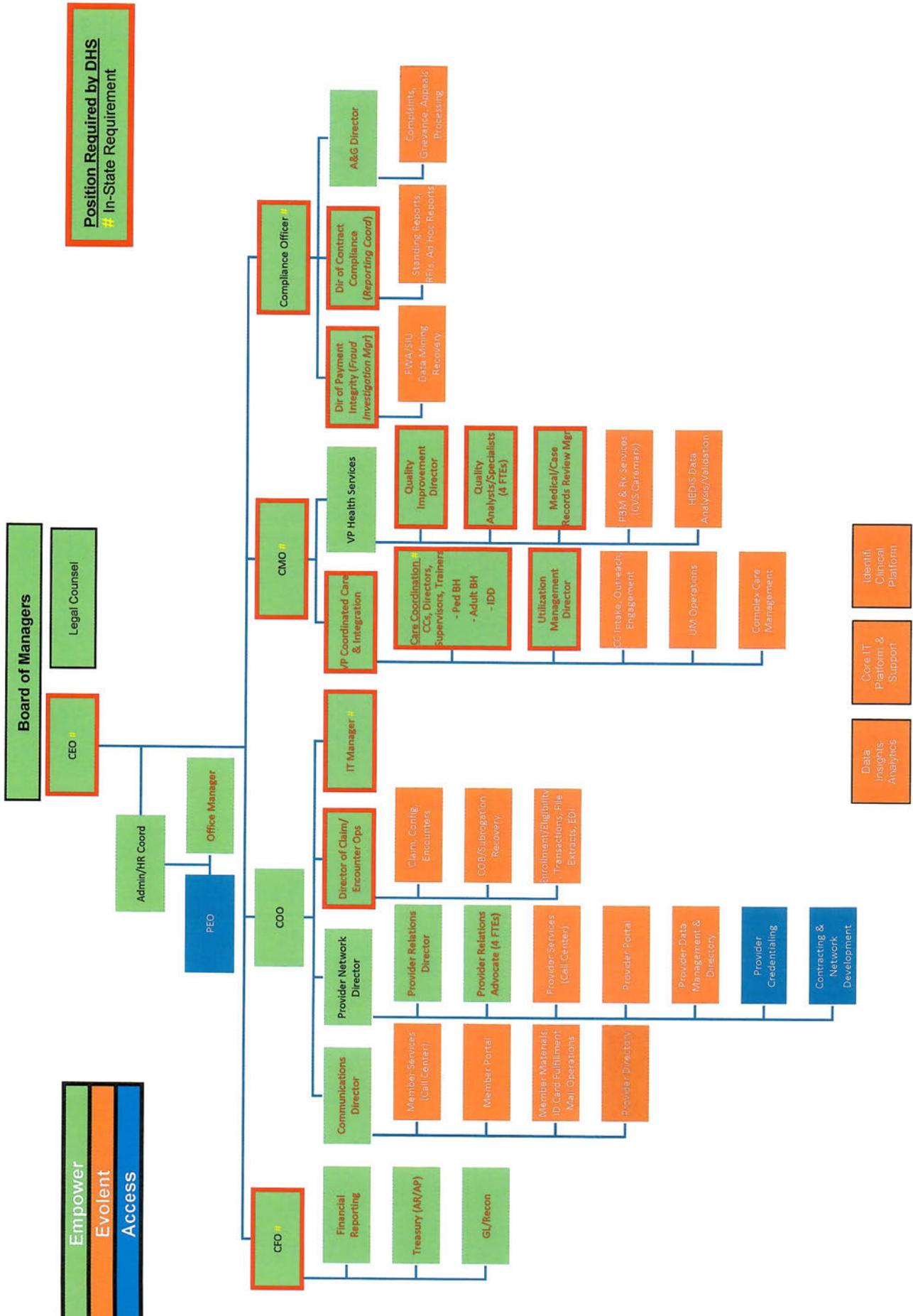


Mitch Morris, CEO
Empower Healthcare Solutions, LLC

Cc: Elizabeth Pittman, Division Director, DMS

Enclosure/Exhibit: Updated Empower Organizational Chart

EXHIBIT



July 30, 2021

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

**EMPOWER HEALTHCARE
SOLUTIONS, LLC**

PLAINTIFF

vs. **NO. _____**

BEACON HEALTH OPTIONS, INC.

DEFENDANT

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Empower Healthcare Solutions, LLC (“Empower” or “Plaintiff”) through its attorneys, Friday, Eldredge & Clark, LLP, submits this Complaint against Beacon Health Options, Inc. (“Beacon” or “Defendant”):

NATURE OF THIS ACTION

1. This action seeks relief, including injunctive relief, arising from Beacon’s unlawful conduct that jeopardizes the business continuity of Empower and the continuity of behavioral healthcare to Empower’s members.

2. Empower was formed in 2017 for the purpose of participating as a Provider-led Arkansas Shared Savings Entity (“PASSE”) under the Medicaid Provider-Led Organized Care Act codified at Arkansas Code Annotated section 20-77-2701 *et seq.* (“PASSE Act”). PASSE’s coordinate and pay for medical, specialty, and home and community based services, uniquely tailored to the needs of Arkansans with behavioral health and/or intellectual or developmental disabilities (“BH / IDD Members”).

3. Beacon is a behavioral health and substance abuse disorder management company offering access to a network of providers and facilities encompassing all levels of specialty mental health and addiction services. Beacon is not a PASSE but is one of six members or owners of Empower.

4. In 2019, Beacon began taking actions clearly designed to harm Empower. Those actions, which have continued through the date of the filing of this Complaint, began, not coincidentally, shortly after the acquisition of Beacon by Anthem, Inc. (“Anthem”), a direct competitor of Empower in the PASSE market via Anthem’s ownership in another PASSE, Summit Community Care (“Summit”).

5. Since the merger, Beacon has engaged in conduct that suggests that it is functioning as a Trojan-horse for Anthem seeking to destroy Empower, Summit’s competitor, from within.

6. Empower brings this action to redress through injunctive relief Beacon’s ongoing misconduct, to obtain specific performance of Beacon’s contractual obligations under a Memorandum of Agreement entered into between the parties on or about June 24, 2020 (the “Restructuring Agreement”) and to recover damages arising from Beacon’s bad faith violations of the Restructuring Agreement. A true and correct copy of the Restructuring Agreement, as amended several times, is attached hereto as Exhibit A and incorporated herein by reference.

7. Empower also has substantial claims against Beacon arising at common law and from Beacon’s breach of other written agreements, including several agreements that are mentioned in later allegations of this Complaint. Claims not asserted here are reserved and will be the subject of subsequent proceedings, either in this action, or, to the extent required, in arbitration proceedings.

PARTIES

8. Plaintiff Empower is a limited liability company organized and existing under the laws of the State of Arkansas, having a principal place of business at 1401 West Capitol Avenue, Suite 430, Little Rock, Arkansas.

9. Defendant Beacon is a corporation organized and existing under the laws of the

State of Virginia, having a principal place of business at 200 State Street, Suite 302, Boston, Massachusetts.

JURISDICTION AND VENUE

10. This Court has original jurisdiction over this action because there is complete diversity of citizenship as between the parties pursuant to 28 U.S.C. § 1332, and the amount in controversy exceeds the jurisdictional amount of \$75,000, exclusive of interest and costs. Beacon has also agreed in contracts from which the asserted claims arise to submit to the jurisdiction of any state or federal court in Arkansas.

11. This Court is the proper venue for this action pursuant to 28 U.S.C. § 1391, as a substantial part of the events involved in this dispute took place in this judicial district including but not limited to: the formation of Empower, business meetings, the awarding of government licenses and the negotiation of agreements pertinent to the legal claims asserted herein.

12. This Court is vested with jurisdiction under 28 U.S.C. § 2201 to fashion the remedy requested by Empower.

THE CREATION, PURPOSE, STRUCTURE AND GROWTH OF EMPOWER

13. Through the passage of the PASSE Act in 2017, the Arkansas General Assembly authorized an innovative organized care model through which PASSE's seek to address the total health care needs of Medicaid beneficiaries who have behavioral health disorders or intellectual or developmental disabilities while reducing the overall cost of such care to taxpayers. As risk-based provider organizations, PASSE's perform the administrative functions of managed care. These new business organizations function as an insurance product and are, therefore, certified and regulated by the Arkansas Insurance Department ("AID"). The purpose of the PASSE model is to improve the health of BH / IDD Members by integrating providers of physical health care

with specialty providers in order to deliver managed care tailored to the unique needs of this population.

14. Empower was registered as a domestic, for-profit limited liability company with the Arkansas Secretary of State on February 3, 2017. The purpose of Empower as recited in the company's operating agreement adopted on or about June 22, 2017 (the "Operating Agreement") was to "establish the company under the laws of the State of Arkansas as a provider-led entity for the purpose of managing and providing certain medical, behavioral and developmental disability health services to beneficiaries of public programs . . . in the State of Arkansas." Ex. B., Op. Agmt., p. 1. A true and correct copy of the Operating Agreement, as amended several times, is attached hereto as Exhibit B and incorporated herein by reference. This Complaint asserts no claims for damages under the Operating Agreement but such claims are expressly reserved. Empower and Beacon agreed that as to disputes arising under or related to the Operating Agreement that no "party shall be required to submit to arbitration any claim for injunctive relief. . ." Ex. B, Operating Agmt. § 15.12.

15. Empower applied for, and received, a PASSE license from AID and the required approval from the Arkansas Department of Human Services ("DHS").

16. Empower's participation in the PASSE program is governed by the terms of a PASSE contract between Empower and DHS (the "PASSE Contract").

17. Beacon is one of six equity members of Empower, owning 16.66% of the initial membership interests in the company. The remaining five members represent various types of healthcare providers. The business affairs of Empower are entrusted under the Operating Agreement to a six person Board of Managers comprised of one designee appointed by each member.

18. Under the Operating Agreement, members are indemnified from certain claims against them with respect to the management of Empower. However, claims, such as those asserted against Beacon herein, arising from, among other things, transactions between a member and Empower that produce an improper personal benefit to a particular member, breaches of loyalty, bad faith conduct and intentional misconduct are expressly excluded from the Operating Agreement's indemnification provision.

19. In addition to being a member of Empower, with a designee serving on the six person Board of Managers, Beacon has been compensated handsomely (more than \$52 Million in 2020 alone) to provide certain administrative services to Empower pursuant to a management services agreement entered into between Beacon and Empower on or about August 31, 2017 (the "Services Agreement"). A true and correct copy of the Services Agreement, including amendments thereto, is attached hereto as Exhibit C and incorporated herein by reference. This Complaint asserts no claims for damages under the Services Agreement but such claims are expressly reserved.

20. The Services Agreement provided for an initial one-year term subject to automatic renewal for successive one-year terms thereafter unless and until either party terminated the agreement or provided timely notice of non-renewal at least sixty days prior to the end of the applicable term. *See Exhibit C, Services Agreement, § 6.1.* The parties allowed the Services Agreement to renew in 2018, 2019 and 2020 for successive terms.

21. Amendments to the Services Agreement entered into by the parties contemporaneous with the Restructuring Agreement, and its amendments, entrusted "disputes arising out of or relating to" such amendments "to the jurisdiction of the state and federal courts of Arkansas. . ." Ex. C, Third Am. § 7.

22. The Services Agreement established Beacon as essentially the operations manager for Empower by obligating Beacon, in exchange for monthly flat fees (determined by the number of BH / IDD Members enrolled in Empower and subject to tiered revenue-based caps) to provide all “services required for [Empower’s] performance of the PASSE Contract [including] all staffing and administrative services required for [Empower’s] operations” Ex. C, Services Agmt., § 1.1.

23. The terms of the Services Agreement expressly prohibit Beacon and/or its subcontractors from purporting to act unilaterally on behalf of Empower thereby usurping the role and authority of the Board of Managers. Ex. C, Services Agmt., § 2.1.

24. Empower has developed a substantial business coordinating care and paying for services to more than 19,900 Arkansas BH/IDD Members in the past 2 ½ years with such services generating annual revenues in excess of \$460,000,000 in 2020.

25. The management services provided by Beacon under the Services Agreement from 2017 until 2020 were central to Empower’s operation, development and growth plans and to maintaining legal compliance with the requirements of the PASSE program. During this time period, Beacon was entrusted with, and/or was paid to procure or develop for Empower’s benefit, landline phone numbers and related accounts, cell phone numbers and related accounts, care coordinator phone numbers and related accounts, an @empowerhcs.com email domain, network, account and system, and provider databases housing credentialing applications and verification documents for Empower’s network of facilities, clinics, practice groups and each member of their medical staff (hereinafter referred to as “Empower’s Business Data and Systems.”)

26. In recognition of the fact that Beacon also operated a separate managed care health organization that included providers in Arkansas, the Services Agreement required that all

intellectual property, records and data (including electronic data) related to Beacon's work as a contractor for Empower was to be maintained *separately* from other records belonging to Beacon. Exhibit C, Services Agmt., § 5.2.

27. Beacon further promised in the Services Agreement that Empower would, at all times, have complete access to Empower's Business Data and Systems sufficient to fully disclose the nature of extent of Beacon's services to Empower in conformance with the applicable standards of care, licensing requirements and the provisions of the PASSE Contract. Exhibit C, Services Agmt., §§ 5.2, 5.3.

28. Empower secures traditional health services for its BH/IDD Members related to physical injuries, conditions and diseases, through a provider network of medical doctors, clinics and hospitals assembled by a company called Access Health. Empower's BH/IDD Members receive health care directly related to their behavioral health and intellectual and developmental disabilities ("IDD and Behavioral Health Services") from a network of providers with specialized education, training and experience in IDD and Behavioral Health Services ("Empower's BHS Provider Network"). Empower's BHS Provider Network is comprised of hundreds of clinics, practice groups or facilities staffed by thousands of individual professionals. Empower's BHS Provider Network is central to Empower's business operations and profitability given that the PASSE program focuses exclusively upon BH/IDD Members, all of which need IDD and Behavioral Health Services.

29. As Empower's contractor, Beacon has been primarily responsible from 2017 until the present time for compliance matters and for the recruitment and contracting necessary to expand and maintain Empower's BHS Provider Network including the negotiation and execution of contracts, on Empower's behalf, and the collection, organization, verification and submission

of credentialing data required by DHS for each individual professional included in the Empower's BHS Provider Network.

BEACON JOINS TEAM ANTHEM

30. Anthem, through its subsidiaries, is a health benefits company servicing more than 40 Million medical members through its affiliated health plans. Anthem is an independent licensee of the Blue Cross and Blue Shields Association. It is one of the largest players in the health insurance market and has a well-earned reputation for anti-competitive conduct including violations of antitrust laws. *See, e.g.,* <https://www.healthcarefinancenews.com/news/anthem-paying-594-million-settle-blues-antitrust-settlement> (Nov. 3, 2020); <https://www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna> (Feb. 8, 2017).

31. Anthem has been, and is, a direct competitor of Empower by virtue of its equity ownership in, and governance of, Summit, which, like Empower is a PASSE offering services to BH / IDD Members in Arkansas. Summit, and, therefore, Anthem will benefit directly from any service disruptions or operational failures that result in either a termination by DHS of Empower's PASSE Contract or the reallocation by DHS of BH / IDD Members of Empower among the remaining two PASSEs, one of which is Summit.

32. Through a merger agreement entered into on or about June 4, 2019 between Beacon, and its affiliated entities and a wholly-owned subsidiary of Anthem, Beacon agreed to merge its operations and assets with, and be acquired by, Anthem.

33. Empower learned of the merger agreement with Anthem when it was announced in the news on June 6, 2019 after it was fully negotiated by Beacon, its business partner.

34. Based upon Beacon's representations, now known to be false, that Empower would continue to receive services in a similar manner despite the proposed merger, Empower and its other members did not exercise their change of control rights against Beacon under the Operating Agreement.

35. Empower later learned that most of the services Beacon was contractually obligated to provide under the Services Agreement (including, but not limited to, finance, personnel / human resources, risk management, legal, operations, fraud, waste and abuse, and the special investigation unit) would be provided by Anthem employees working in a "Shared Services Unit" rather than by the Beacon employees with whom Empower had worked closely in recent years. The transfer and/or realignment of these services created a substantial, and unacceptable, risk of Empower's proprietary information being inevitably disclosed to Anthem, its competitor.

36. The Beacon-Anthem merger was consummated, and publicly announced, on or about March 4, 2020.

37. The press release announcing the Beacon-Anthem merger spotlighted Beacon's provider relationships and expertise in IDD and Behavioral Health Services as the primary goal of the merger stating:

Beacon Health Options (Beacon) . . . [is] the largest independently held behavioral health organization in the country serving more than 36 million people across all 50 states. The acquisition offers Anthem the opportunity to combine its current behavioral health capabilities with Beacon's successful model and support services in order to enhance whole person care.

<https://www.beaconhealthoptions.com/anthem-inc-completes-acquisition-of-beacon-health-options/> (May 2, 2020).

THE FAILED "RESTRUCTURING"

38. After learning of the Beacon-Anthem merger, Empower made numerous requests

to restructure its relationships with Beacon given the potential conflicts of interests presented by Anthem's ownership of Beacon. Empower raised concerns about substandard performance by Beacon and the Anthem "Shared Services Unit. Empower also continued to question the apparent lack of "firewalls" between Anthem and Beacon with respect to Empower's Business Data and Systems over which Beacon had unrestricted access by virtue of its responsibilities under the Services Agreement. Empower also expressed grave concerns about a potential misappropriation or conversion of Empower's BHS Provider Network upon discovering that the contractual relationships that Beacon had been establishing in recent years, while being paid by Empower, were actually established in Beacon's name rather than with Empower.

39. The restructuring conversations between Empower and Beacon quickly became acrimonious.

40. The parties eventually agreed to a restructuring plan which was detailed in the Restructuring Agreement entered into between the parties on or about June 24, 2020 (the "Restructuring Agreement"). Among other terms, Beacon agreed in the Restructuring Agreement to:

- a. establish appropriate firewalls and measures;
- b. reconfigure the Empower BHS Provider Network to ensure direct contractual relationships with Empower;
- c. transition relationships with key subcontractors directly to Empower;
- d. bring certain key staff and functions under the direct control of Empower;

e. provide ongoing annual accountings of all staff and costs attributable to Beacon's services under the Services Agreement;

f. not withhold any consent required of Beacon as a member of Empower for the company to modify or terminate the Services Agreement in the future if necessary; and

g. obtain prior approval from Empower before terminating relationships with any subcontractors involved in Beacon's work under the Services Agreement.

See Exhibit A, Restructuring Agreement, Ex. A, Restructuring Terms. Beacon further promised in the Restructuring Agreement to "work diligently, and in good faith, to conclude negotiations regarding additional details of the restructuring . . . [and] to enter into comprehensive amendments to the [Services Agreement] and Operating Agreement, as necessary, to facilitate the restructuring . . .". Ex. A, Restructuring Agmt., § 2.

41. The Restructuring Agreement further provided that in the event that Beacon refused to agree to the Operating Agreement and Service Agreement modifications deemed necessary by Empower to adequately address the conflict of interest concerns, the parties would "work together in good faith to wind down and terminate their various relationships, including the [Services Agreement] and Beacon's ownership in [Empower] no later than December 31, such that [Empower] will remain, at its discretion, as a participant in the [Arkansas PASSE program]."

Exhibit A, Restructuring Agmt., § 3 (emphasis added).

42. Despite having agreed upon the material terms necessary to restructure their relationships, Beacon steadfastly refused thereafter to perform the tasks necessary to implement the terms of the parties' agreement. Beacon refused to bring critical staff and functions under

Empower's direct control. Instead, Beacon continued to delegate critical service functions to *Anthem* employees within the "Shared Services Unit" who in turn provided incomplete, defective and generic work-product that was not appropriately tailored to Empower's business needs. Beacon's "interim CEO" refused to make decisions without first coordinating with Anthem's Shared Services Unit. Financial reports produced by this unit were inaccurate. Data compilations prepared by this unit were incomplete. And, Beacon failed to timely transfer key subcontractor relationships directly to Empower and reconfigure the provider network as required by the Restructuring Agreement.

BEACON SABOTAGES EMPOWER'S ATTEMPTS TO SEPARATE

43. After months of stonewalling by Beacon, all members of Empower's Board of Managers (except for the member designated by Beacon) voted unanimously to abandon attempts to restructure the parties' relationships and to instead begin implementing an orderly unwinding of the contractual and ownership relationships with Beacon. The Board of Managers agreed to target December 31, 2021 as the completion date for the unwinding.

44. Beacon responded to the Board of Manager's vote by making unilateral demands for a more expedited conclusion to their relationships. On April 30, 2021, Empower received notice from Beacon purporting to terminate the Services Agreement effective as of August 31, 2021 and to withdraw as a member of Empower effective as of October 31, 2021. Beacon subsequently altered the effective date of its purported termination of the Services Agreement to be October 31, 2021, but then tried to renege on that extension by informing DHS on June 30th that Beacon would cease providing administrative services to Empower on August 31, 2021. The withdrawal and termination dates were later extended by the parties to December 31, 2021.

45. Beacon's false claims about an August 31 termination of the Service Agreement alarmed DHS who had been previously told by Empower that it would not be ready to assume Beacon's administrative role for the Empower BHS Provider Network until December 31, 2021, the deadline included in the Restructuring Agreement. Those concerns resulted in DHS threatening to begin immediately transitioning BH / IDD Members from Empower to other PASSEs. Empower eventually assuaged DHS's concerns and narrowly avoided a potentially disastrous interruption in its business due to Beacon's misrepresentations to the agency. However, DHS informed Empower that its continued participation in the PASSE program would remain contingent upon demonstrating its "readiness" in a comprehensive review of its people, system, processes, internal controls and operating procedures to be conducted by DHS from October 1 to December 31, 2021 (the "DHS Readiness Review").

46. Beacon made false representations about Empower to DHS, which representations (if believed by DHS) could jeopardize Empower's future participation in the PASSE program. As just one example, in an August 26, 2021 letter, Beacon asserted to DHS that Empower has no credentialing authority over the providers within its network and that Empower had adopted credentialing policies and procedures that are "inconsistent with regulatory requirements of the PASSE program." Nowhere in this letter, does Beacon identify any actual regulatory requirement which is supposedly not satisfied by the credentialing policies submitted by Empower to DHS. Nevertheless, Beacon asks DHS to "disregard the policies adopted and submitted by Empower." A true and correct copy of the August 26, 2021 letter is attached hereto as Exhibit D and incorporated herein by reference. These misleading communications continue to occur in spite of the fact that Empower has formally notified Beacon on multiple occasions that its representatives

are not to communicate with DHS regarding Empower matters without the participation of a duly authorized Empower representative.

47. Upon information and belief, Beacon's August 26, 2021 letter was prompted by its recognition that its prior regulatory submissions to DHS improperly conflated Beacon's provider network with Empower's BHS Provider Network and treated them as one in the same.

48. Upon information and belief, Beacon used the payments provided by Empower under the Services Agreement to expand its own provider network and now that the relationship between it and Empower is being unwound, Beacon wants to deprive its soon-to-be-former partner, and now-competitor, of those valuable relationships.

49. Beacon has asserted, and continues to assert, that the relationships it established with providers during, and as part of, its work for Empower under the Services Agreement belong to Beacon and not to Empower. These assertions have created, and continue to create, substantial confusion with members of Empower's BHS Provider Network.

50. Beacon has made demands upon Evolent (a subcontractor to whom Beacon delegated a substantial portion of its duties to Empower under the Services Agreement) in furtherance of its attempts to disrupt the business relationships between Empower and its BHS Network Providers. For example, Beacon asserted to Evolent that after December 31, 2021 it could no longer utilize the provider information configured and loaded in Evolent's own systems in performing claims management services for Empower. Beacon asserted that it "owned" the network and information. In fact, the information over which Beacon was asserting exclusive rights was the provider's information, not Beacon's. The provider supplied it to Evolent for use in processing claims to be paid by Evolent on behalf of Empower.

51. For several months immediately preceding the filing of this Complaint, Empower attempted, both through business-to-business discussions and formal demand letters between legal counsel for the parties, to obtain unrestricted access to and a transfer of control over Empower's Business Data and Systems.

52. Beacon has obstinately refused those efforts and instead engaged in a months-long game of obfuscation and stall tactics some, but not all of which, is described hereinafter.

53. Empower has made multiple requests for copies of its own policies, templates, member handbooks and training materials and historical business records relating to operational and compliance areas such as quality assurance, utilization management, grievances, fraud, waste and abuse and care coordination ("Empower's Records").

54. With respect to Empower's Records that exist in paper form, Beacon has argued that even though it was required to separately maintain records related to the services Beacon performed under the Services Agreement, that does not mean that all of the requested records must be made available to Empower for inspection and copying.

55. Beacon's position as to electronic copies of Empower's Records is even more unreasonable. After months of denials and feigned confusion as to what Empower was seeking, Beacon has recently taken the position that Empower must send a representative to "Beacon's Little Rock Office" to access and download those records electronically. This response disregards the fact that Empower's representatives work in, and have since 2020 worked in, that very same office. Had Beacon desired to turn over these electronic records in this manner it could have done so at any time in the past few months. Instead, Beacon stalled and now wants to delay the process even further pending an unscheduled meeting between representatives who literally work in the very same physical office.

56. With respect to the Empower website (<https://www.getempowerhealth.com>) constructed with Empower's money and under Empower's supervision that is visited and used daily by Empower's BH / IDD Members and the health care professionals within Empower's BHS Provider Network, Beacon initially asserted that the website belongs to it and not Empower. It later abandoned that position and now asserts that it is simply not feasible for Beacon to grant administrator rights' access for the website to Empower until December 31, 2021.

57. With respect the @empowerhcs.com email domain network, Beacon has consistently maintained that Empower must create its own separate email domain and network and develop an unnecessary plan to give new email address notices to thousands of people who previously communicated with Empower representatives using the current @empowerhcs.com email addresses. Beacon's attempt to wedge Empower and its members into a new email domain and platform puts upwards of 19,000 Empower members at risk of having their care interrupted by having to hunt and peck for a new email address, and for those who are fortunate enough to find the correct new address, to communicate with a care coordinator who has no written history of their care. These care coordinators all have an @empowerhcs.com email address that is used for all day-to-day correspondence with members, DHS, DCFS, and providers on a daily basis. The majority of the care coordinators will transition to Empower beginning January 1, but under the Beacon plan, will lose all historical emails, correspondence, and other important information regarding patient care and the continuation thereof. These innocent and vulnerable members suffering from significant mental illness and/or developmental disabilities should not be subjected to Beacon's attempt to harm Empower.

58. Beacon takes a similarly disruptive stance with respect to employee and care coordinator phone numbers, sim cards, accounts and history. It outrageously claims that the phone

numbers, sim cards, accounts and history are part of a corporate account and cannot be transferred to Empower. Instead, Beacon is attempting to force all individuals who will remain as Empower representatives after Beacon's December 31, 2021 withdrawal to obtain a new phone number and communicate their new contact information to approximately 19,000 people accustomed to contacting them on the current business phone numbers. Just as with the emails, Beacon's attempt to wedge Empower and its members into new phone numbers and history, without the historical text communications and voicemails, puts upwards of 19,000 Empower members at risk of having their care interrupted by having to hunt and peck for a new telephone number, and for those who are fortunate enough to find the correct new number, to communicate with a care coordinator who has no written history of their care. These care coordinators all have phone numbers and accounts that are used for all day-to-day correspondence with members, DHS, DCFS, and providers on a daily basis, including a vast history of text and voice messages. The majority of the care coordinators will transition to Empower beginning January 1, but under the Beacon plan, will lose all historical voice and text messages, and other important information regarding patient care and the continuation thereof. These innocent and vulnerable members suffering from significant mental illness and/or developmental disabilities should not be subjected to Beacon's attempt to harm Empower.

59. With respect to credentialing information, Beacon claims to have turned over its full database of provider information, but the transferred files do not include the individual provider credentialing that is required DHS contract and manual

60. Beacon's misconduct described herein is designed to impair Empower's transition schedule for the end of 2021.

COUNT I: INJUNCTIVE RELIEF

61. Empower repeats, realleges, and incorporates the allegations in the preceding Paragraphs as if fully restated herein.

62. Beacon's improper withholding of Empower's Records and Empower's Business Data and Systems is prejudicial to Empower's plan to emerge from this unwinding as a full-ready and formidable competitor of Beacon and Anthem in the Arkansas market.

63. Beacon continues to wrongfully assert dominion and control over Empowers' BHS Provider Network thereby creating doubt and confusion among providers, vendors, and regulators as to Empowers' ability to continue to meet its obligations as a PASSE after December 31, 2021.

64. Beacon has not complied with Empower's repeated demands to relinquish Empower's Records and Empower's Business Data and Systems which are essential to Empower's continued operations and its ability to prepare for the DHS Readiness Review.

65. Empower and its members are likely to suffer irreparable harm, including (a) an impairment to its ability to properly and timely meet its obligations to its provider network and enrolled members, (b) disruption to enrollees' continuity of care, and (c) harm to Empower's goodwill with providers and enrollees, in the absence of the issuance of an injunction by this Court ordering Beacon to immediately and fully relinquish Empower's Records and Empower's Business Data and Systems to Empower.

66. The balance of the equities and the public interest favor entry of an injunction in this case.

67. The issuance of an injunction is necessary to prevent irreparable harm that has yet to occur and for which no other adequate remedy exists at law.

68. Empower is substantially likely to prevail on the merits of the legal claims asserted hereinafter.

COUNT II: BREACH OF RESTRUCTURING AGREEMENT – SPECIFIC PERFORMANCE

69. Empower repeats, realleges, and incorporates the allegations in the preceding Paragraphs as if fully restated herein.

70. The Restructuring Agreement constitutes a valid and enforceable contract between Beacon and Empower.

71. Empower has substantially performed in accordance with the terms of the Restructuring Agreement.

72. In the Restructuring Agreement, Beacon agreed to work together in good faith to terminate the parties' relationships in the event that they could not agree upon additional details necessary to restructure those relationships in a manner acceptable to the "non-Beacon members" of Empower.

73. The "non-Beacon members" of Empower have determined that Beacon's conduct precludes a satisfactory restructuring of the parties' relationships.

74. Beacon has refused to cooperate in Empower's attempts to plan and implement an orderly winding down of their relationship and that refusal to cooperate is ongoing as of the filing of this Complaint.

75. Beacon continues to wrongfully assert control over Empower's BHS Provider Network, Empower's Records and Empower's Business Data and Systems. Such conduct is in contravention of its promise in the Restructuring Agreement that it would act in "good faith" in all matters related to unwinding the parties' relationships.

76. Beacon's refusal to relinquish Empower's Records and Empower's Business Data and Systems jeopardizes the stated goal of Paragraph 3 of the Restructuring Agreement in which the parties mutually agreed to act "such that "Empower will remain . . . as a participant in the [PASSE] Program."

77. Beacon is intentionally attempting to sabotage Empower in order to benefit a competitor of Empower, Summit.

78. Monetary compensation alone will not be sufficient to remedy the harm presented by Beacon's ongoing misconduct.

COUNT III: BREACH OF RESTRUCTURING AGREEMENT - DAMAGES

79. Empower repeats, realleges, and incorporates the allegations in the preceding Paragraphs as if fully restated herein.

80. The Restructuring Agreement constitutes a valid and enforceable contract between Beacon and Empower.

81. In addition to the express terms of the Restructuring Agreement, the law implies a promise between the parties to that contract that they act in good faith and deal fairly with one another in performing and enforcing their obligations under the contract.

82. Empower has substantially performed in accordance with the terms of the Restructuring Agreement including the implied covenant of good faith and fair dealing.

83. Beacon materially breached the contract by refusing for over a year to implement the restructuring terms detailed in Exhibit A to the Restructuring Agreement. Such breaches during this time included, among other things, the following acts or omissions:

- a. failing to establish appropriate firewalls and measures;

a. refusing to reconfigure Empower's BHS Provider Network to ensure direct contractual relationships with Empower;

b. refusing to transition relationships with key subcontractors directly to Empower;

c. refusing to bring certain key staff and functions under the direct control of Empower;

d. failing to provide ongoing annual accountings of all staff and costs attributable to Beacon's services under the Services Agreement; and

e. refusing to work diligently, and in good faith, to conclude negotiations regarding additional details of the restructuring.

84. After the "non-Beacon members" of Empower determined that restructuring was impossible because of Beacon's misconduct, the parties were contractually obligated to work together in good faith to unwind their relationships in an orderly manner to facilitate Empower's continued participation in the PASSE Program. Beacon breached this contractual commitment through the following acts or omissions:

a. asserting control over and ownership of the Empower BHS Provider Network that Beacon its was paid to develop for Empower;

b. refusing to timely and fully relinquish Empower's Records and Empower's Business Data and Systems to Empower;

c. refusing to cooperate in Empower's efforts to transition away from Beacon; and

d. making misrepresentations and disparaging comments about Empower to DHS and AID.

85. Beacon's breaches have required Empower to retain and pay for services from third parties that would have been unnecessary had Beacon fulfilled its legal duties and honored its commitments.

86. Beacon's breaches have required Empower to recreate, at substantial cost, systems, data, policies, provider profiles, credentialing records, websites, intellectual property and other work-product that Beacon was previously paid to develop but which Beacon refuses to turnover to Empower.

87. The damages proximately caused by Beacon's contractual breaches are continuing to accumulate and will be determined at trial but are in no event less than the amount required for federal diversity jurisdiction.

88. Empower, pursuant to Rule 38 of the Federal Rules of Civil Procedure, respectfully demands a jury trial on all issues so triable.

WHEREFORE, Empower respectfully prays for the following relief:

- A. An order of specific performance directing Beacon to immediately and fully comply with its obligations under the Restructuring Agreement;
- B. A preliminary and permanent injunction ordering Beacon to provide immediate access to and/or return Empower's Records and Empower's Business Data and Systems;
- C. A preliminary and permanent injunction enjoining, Beacon, its officers, employees, agents, servants, attorneys, instrumentalities, and/or those in privity or acting in concert or participation with Beacon from continuing to assert dominion or control over the assets and/or Empower's BHS Provider Network;
- D. An award of damages caused by Beacon's unlawful conduct, in an amount to be proven at trial, plus costs and interest;
- E. An award of Empower's costs and reasonable attorneys' fees incurred in prosecuting this case; and
- F. Such further other relief as the Court may deem proper and just.

Respectfully submitted,

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By: _____
Marshall S. Ney, Ark. Bar No. 91108

VERIFICATION

I, Mitch Morris, Chief Executive Officer of Empower Health Solutions, LLC, having read the foregoing Verified Complaint for Injunctive Relief and Damages, do swear and affirm that the facts as presented are true and correct to the best of my knowledge and affix my signature hereto as a testament thereof on this 6th day of October, 2021.

Mitch Morris

STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

Subscribed and sworn to before me, a Notary Public, on this 6th day of October, 2021.

Notary Public

My Commission Expires:

NOV 02 2021

**IN THE UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF ARKANSAS
 CENTRAL DIVISION**

TAMMY H. DOWNS, CLERK
 By: *[initials]* **DEP CLERK**

**EMPOWER HEALTHCARE
 SOLUTIONS, LLC**

PLAINTIFF

vs.

NO. 4:21-cv-1016-JM

BEACON HEALTH OPTIONS, INC.

DEFENDANT

**EMPOWER HEALTHCARE SOLUTIONS, LLC'S
 MOTION FOR PRELIMINARY INJUNCTION**

Empower Healthcare Solutions, LLC (“Empower” or “Plaintiff”), through its attorneys, Friday, Eldredge & Clark, LLP, respectfully moves for a preliminary injunction against Defendant Beacon Health Options, Inc. (“Beacon” or “Defendant”), and in support states:

1. Empower was formed in 2017 for the purpose of participating as a Provider-led Arkansas Shared Savings Entity (“PASSE”) under the Medicaid Provider-Led Organized Care Act, codified at Arkansas Code Annotated section 20-77-2701 *et seq.* Compl., ¶ 2. PASSEs coordinate and pay for medical, specialty, and home and community based services, uniquely tailored to the needs of Arkansans with behavioral health and/or intellectual or developmental disabilities (“BH/IDD Members”). *Id.*

2. Empower’s BH/IDD Members receive health care directly related to their behavioral health and intellectual and developmental disabilities (“IDD and Behavioral Health Services”) from a network of providers with specialized education, training and experience in IDD and Behavioral Health Services (“Empower’s BHS Provider Network”). *Id.* at ¶ 28. Empower’s BHS Provider Network is comprised of hundreds of clinics, practice groups or facilities staffed by thousands of individual professionals. *Id.* Empower’s BHS Provider Network is central to

Empower's business operations and profitability given that the PASSE program focuses exclusively upon BH/IDD Members, all of which need IDD and Behavioral Health Services. *Id.*

3. Beacon is a behavioral health and substance abuse disorder management company offering access to a network of providers and facilities encompassing all levels of specialty mental health and addiction services. *Id.*, ¶ 3. Beacon is not a PASSE but is one of six members or owners of Empower. *Id.*

4. As more fully detailed in Empower's verified complaint and the memorandum brief accompanying this motion, in 2019, Beacon began taking actions clearly designed to harm Empower. *Id.* at ¶ 4. Those actions, which have continued through the date of the filing of the verified complaint, began, not coincidentally, shortly after the acquisition of Beacon by Anthem, Inc. ("Anthem"), a direct competitor of Empower in the PASSE market via Anthem's ownership in another PASSE, Summit Community Care ("Summit"). *Id.* Since the merger, Beacon has engaged in conduct that suggests that it is functioning as a Trojan-horse for Anthem seeking to destroy Empower, Summit's competitor, from within. *Id.* at ¶ 5.

5. Beacon is in violation of its contractual obligations under a Memorandum of Agreement entered into between the parties on or about June 24, 2020 (the "Restructuring Agreement").

6. Specifically, Beacon refuses to relinquish control over Empower's landline phone numbers and related accounts, cell phone numbers and related accounts, care coordinator phone numbers and related accounts, an @empowerhcs.com email domain, network, account and system, and provider databases housing credentialing applications and verification documents for Empower's network of facilities, clinics, practice groups and each member of their medical staff (hereinafter referred to as "Empower's Business Data and Systems"). *Id.* at ¶¶ 25, 51-59.

7. Empower has further made multiple requests for copies of its own policies, templates, member handbooks and training materials and historical business records relating to operational and compliance areas such as quality assurance, utilization management, grievances, fraud, waste and abuse and care coordination (“Empower’s Records”), but Beacon has failed to comply with those requests. *Id.* at ¶ 53-55.

8. Beacon has also conflated its provider network with Empower’s BHS Provider Network and treated them as one in the same, using payments provided by Empower under the Services Agreement to expand its own provider network. *Id.* at ¶¶ 47-48. Beacon claims the relationships it established with providers as part of its work for Empower under the Services Agreement belong to Beacon and not to Empower. *Id.* at ¶ 49.

9. Beacon’s actions are causing immediate and irreparable injury to Empower warranting a preliminary injunction. Fed. R. Civ. P. 65.

10. Empower therefore asks that this Court after notice and a hearing, enter a preliminary injunction against Beacon under Fed. R. Civ. P. 65(a).

11. In support of this motion, Empower relies on its verified complaint and a contemporaneously filed memorandum brief in support.

WHEREFORE, Empower respectfully moves that the Court:

1. Upon notice to Beacon, and after an expedited hearing, issue a preliminary injunction:
 - a. ordering Beacon to provide immediate access to and/or return Empower’s Records and Empower’s Business Data and Systems; and
 - b. enjoining, Beacon, its officers, employees, agents, servants, attorneys, instrumentalities, and/or those in privity or acting in concert or participation with Beacon from continuing to assert dominion or control over the assets and/or Empower’s BHS Provider Network; and

2. Set a reasonable amount of security, not to exceed \$10,000, to support the preliminary injunction under Fed. R. Civ. P. 65.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

TAMMY H. DOWNS, CLERK
By: *[Signature]*
DEP CLERK

EMPOWER HEALTHCARE
SOLUTIONS, LLC

PLAINTIFF

vs.

NO. 4:21-cv-1016-JM

BEACON HEALTH OPTIONS, INC.

DEFENDANT

**EMPOWER HEALTHCARE SOLUTIONS, LLC'S
BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

OVERVIEW

Plaintiff Empower Healthcare Solutions, LLC (“Empower”) was formed in 2017 for the purpose of participating as a Provider-led Arkansas Shared Savings Entity (“PASSE”) under the Medicaid Provider-Led Organized Care Act, codified at Arkansas Code Annotated section 20-77-2701 *et seq.* (“PASSE Act”). Compl., ¶ 2. PASSEs coordinate and pay for medical, specialty, and home and community based services, uniquely tailored to the needs of Arkansans with behavioral health and/or intellectual or developmental disabilities (“BH/IDD Members”). *Id.*

Defendant Beacon Health Options, Inc. (“Beacon”) is a behavioral health and substance abuse disorder management company offering access to a network of providers and facilities encompassing all levels of specialty mental health and addiction services. *Id.*, ¶ 3. Beacon is not a PASSE but is one of six members or owners of Empower. *Id.*

In 2019, Beacon began taking actions clearly designed to harm Empower. *Id.* at ¶ 4. Those actions, which have continued through the date of the filing of the Verified Complaint, began, not coincidentally, shortly after the acquisition of Beacon by Anthem, Inc. (“Anthem”), a direct competitor of Empower in the PASSE market via Anthem’s ownership in another PASSE, Summit Community Care (“Summit”). *Id.* Since the merger, Beacon has engaged in conduct that suggests

that it is functioning as a Trojan-horse for Anthem seeking to destroy Empower, Summit’s competitor, from within. *Id.* at ¶ 5.

Beacon is in violation of its contractual obligations under a Memorandum of Agreement entered into between the parties on or about June 24, 2020 (the “Restructuring Agreement”). Beacon’s actions are causing immediate and irreparable injury to Empower warranting a preliminary injunction. The *Dataphase* factors—chief among them Empower’s likelihood of success on the merits and the irreparable harm flowing from Beacon’s actions—warrant this relief for the reasons below.

FACTS

A. The Creation, Purpose, Structure, and Growth of Empower.

Through the passage of the PASSE Act in 2017, the Arkansas General Assembly authorized an innovative organized care model through which PASSEs seek to address the total health care needs of Medicaid beneficiaries who have behavioral health disorders or intellectual or developmental disabilities while reducing the overall cost of such care to taxpayers. *Id.* at ¶ 13. As risk-based provider organizations, PASSEs perform the administrative functions of managed care. *Id.* These new business organizations function as an insurance product and are, therefore, certified and regulated by the Arkansas Insurance Department (“AID”). *Id.* The purpose of the PASSE model is to improve the health of BH/IDD Members by integrating providers of physical health care with specialty providers in order to deliver managed care tailored to the unique needs of this population. *Id.*

Empower was registered as a domestic, for-profit limited liability company with the Arkansas Secretary of State on February 3, 2017. *Id.* at ¶ 14. The purpose of Empower as recited in the company’s operating agreement adopted on or about June 22, 2017 (the “Operating Agreement”) was to “establish the company under the laws of the State of Arkansas as a provider-

led entity for the purpose of managing and providing certain medical, behavioral and developmental disability health services to beneficiaries of public programs . . . in the State of Arkansas.” *Id.*; Ex. B to Compl., Op. Agmt., p. 1. Empower applied for, and received, a PASSE license from AID and the required approval from the Arkansas Department of Human Services (“DHS”). Compl., ¶ 15. Empower’s participation in the PASSE program is governed by the terms of a PASSE contract between Empower and DHS (the “PASSE Contract”). *Id.* at ¶ 16.

Beacon is one of six equity members of Empower, owning 16.66% of the initial membership interests in the company. *Id.* at ¶ 17. The remaining five members represent various types of healthcare providers. *Id.* The business affairs of Empower are entrusted under the Operating Agreement to a six person Board of Managers comprised of one designee appointed by each member. *Id.* In addition to being a member of Empower, with a designee serving on the six person Board of Managers, Beacon has been compensated handsomely (more than \$52 Million in 2020 alone) to provide certain administrative services to Empower pursuant to a management services agreement entered into between Beacon and Empower on or about August 31, 2017 (the “Services Agreement”). *Id.* at ¶ 19; Ex. C to Compl., Services Agmt.

The Services Agreement provided for an initial one-year term subject to automatic renewal for successive one-year terms thereafter unless and until either party terminated the agreement or provided timely notice of non-renewal at least sixty days prior to the end of the applicable term. Compl., ¶ 20; Ex. C to Compl., Services Agreement, at § 6.1. The parties allowed the Services Agreement to renew in 2018, 2019 and 2020 for successive terms. Compl., ¶ 20. Amendments to the Services Agreement entered into by the parties contemporaneous with the Restructuring Agreement, and its amendments, entrusted “disputes arising out of or relating to” such amendments “to the jurisdiction of the state and federal courts of Arkansas. . . .” *Id.* at ¶ 21; Ex. C to Compl., Third Am. § 7.

The Services Agreement established Beacon as essentially the operations manager for Empower by obligating Beacon, in exchange for monthly flat fees (determined by the number of BH/IDD Members enrolled in Empower and subject to tiered revenue-based caps) to provide all “services required for [Empower’s] performance of the PASSE Contract [including] all staffing and administrative services required for [Empower’s] operations” Compl., ¶ 22; Ex. C to Compl., Services Agmt., § 1.1. The terms of the Services Agreement expressly prohibit Beacon and/or its subcontractors from purporting to act unilaterally on behalf of Empower thereby usurping the role and authority of the Board of Managers. Compl., ¶ 23; Ex. C to Compl., Services Agmt., § 2.1.

Empower has developed a substantial business coordinating care and paying for services to more than 19,900 Arkansas BH/IDD Members in the past 2 ½ years with such services generating annual revenues in excess of \$460,000,000 in 2020. Compl., ¶ 24. The management services provided by Beacon under the Services Agreement from 2017 until 2020 were central to Empower’s operation, development and growth plans and to maintaining legal compliance with the requirements of the PASSE program. *Id.* at ¶ 25. During this time period, Beacon was entrusted with, and/or was paid to procure or develop for Empower’s benefit, landline phone numbers and related accounts, cell phone numbers and related accounts, care coordinator phone numbers and related accounts, an @empowerhcs.com email domain, network, account and system, and provider databases housing credentialing applications and verification documents for Empower’s network of facilities, clinics, practice groups and each member of their medical staff (hereinafter referred to as “Empower’s Business Data and Systems”). *Id.*

In recognition of the fact that Beacon also operated a separate managed care health organization that included providers in Arkansas, the Services Agreement required that all intellectual property, records and data (including electronic data) related to Beacon’s work as a

contractor for Empower was to be maintained separately from other records belonging to Beacon. *Id.* at ¶ 26; Ex. C to Compl., Services Agmt., § 5.2. Beacon further promised in the Services Agreement that Empower would, at all times, have complete access to Empower's Business Data and Systems sufficient to fully disclose the nature of extent of Beacon's services to Empower in conformance with the applicable standards of care, licensing requirements and the provisions of the PASSE Contract. Compl., ¶ 27; Ex. C to Compl., Services Agmt., §§ 5.2, 5.3.

Empower secures traditional health services for its BH/IDD Members related to physical injuries, conditions and diseases, through a provider network of medical doctors, clinics and hospitals assembled by a company called Access Health. Empower's BH/IDD Members receive health care directly related to their behavioral health and intellectual and developmental disabilities ("IDD and Behavioral Health Services") from a network of providers with specialized education, training and experience in IDD and Behavioral Health Services ("Empower's BHS Provider Network"). Compl., ¶ 28. Empower's BHS Provider Network is comprised of hundreds of clinics, practice groups or facilities staffed by thousands of individual professionals. *Id.* Empower's BHS Provider Network is central to Empower's business operations and profitability given that the PASSE program focuses exclusively upon BH/IDD Members, all of which need IDD and Behavioral Health Services. *Id.*

As Empower's contractor, Beacon has been primarily responsible from 2017 until the present time for compliance matters and for the recruitment and contracting necessary to expand and maintain Empower's BHS Provider Network including the negotiation and execution of contracts, on Empower's behalf, and the collection, organization, verification and submission of credentialing data required by DHS for each individual professional included in the Empower's BHS Provider Network. *Id.* at ¶ 29.

B. Beacon Joins Team Anthem.

Anthem, through its subsidiaries, is a health benefits company servicing more than 40 Million medical members through its affiliated health plans. *Id.* at ¶ 30. Anthem is an independent licensee of the Blue Cross and Blue Shields Association. *Id.* It is one of the largest players in the health insurance market and has a well-earned reputation for anti-competitive conduct including violations of antitrust laws. *See, e.g.,* Susan Morse, *Anthem Is Paying \$594 Million to Settle Blues Antitrust Settlement,* HEALTHCARE FINANCE, Nov. 3, 2020, <https://www.healthcarefinancenews.com/news/anthem-paying-594-million-settle-blues-antitrust-settlement>; U.S. Dep’t of Justice, Justice News, *U.S. District Court Blocks Anthem’s Acquisition of Cigna,* Feb. 8, 2017, <https://www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna>. *Id.*

Anthem has been, and is, a direct competitor of Empower by virtue of its equity ownership in, and governance of, Summit, which, like Empower is a PASSE offering services to BH/IDD Members in Arkansas. *Id.* at ¶ 31. Summit and, therefore, Anthem will benefit directly from any service disruptions or operational failures that result in either a termination by DHS of Empower’s PASSE Contract or the reallocation by DHS of BH / IDD Members of Empower among the remaining two PASSEs, one of which is Summit. *Id.* Because there are only three PASSEs in Arkansas, harm to one would result in significant benefits to the other two PASSEs.

Through a merger agreement entered into on or about June 4, 2019 between Beacon, and its affiliated entities and a wholly-owned subsidiary of Anthem, Beacon agreed to merge its operations and assets with, and be acquired by, Anthem. *Id.* at ¶ 32. Empower learned of the merger agreement with Anthem when it was announced in the news on June 6, 2019 after it was fully negotiated by Beacon, its business partner. *Id.* at ¶ 33. Based upon Beacon’s representations, now known to be false, that Empower would continue to receive services in a similar manner despite

the proposed merger, Empower and its other members did not exercise their change of control rights against Beacon under the Operating Agreement. *Id.* at ¶ 34.

Empower later learned that most of the services Beacon was contractually obligated to provide under the Services Agreement (including, but not limited to, finance, personnel / human resources, risk management, legal, operations, fraud, waste and abuse, and the special investigation unit) would be provided by Anthem employees working in a “Shared Services Unit” rather than by the Beacon employees with whom Empower had worked closely in recent years. *Id.* at ¶ 35. The transfer and/or realignment of these services created a substantial, and unacceptable, risk of Empower’s proprietary information being inevitably disclosed to Anthem, its competitor. *Id.*

The Beacon-Anthem merger was consummated, and publicly announced, on or about March 4, 2020. *Id.* at ¶ 36. The press release announcing the Beacon-Anthem merger spotlighted Beacon’s provider relationships and expertise in IDD and Behavioral Health Services as the primary goal of the merger stating:

Beacon Health Options (Beacon) . . . [is] the largest independently held behavioral health organization in the country serving more than 36 million people across all 50 states. The acquisition offers Anthem the opportunity to combine its current behavioral health capabilities with Beacon’s successful model and support services in order to enhance whole person care.

Id. at ¶ 37; Beacon Health Options, *Anthem, Inc. Completes Acquisition of Beacon Health Options*, May 2, 2020, <https://www.beaconhealthoptions.com/anthem-inc-completes-acquisition-of-beacon-health-options/>.

C. The Failed “Restructuring.”

After learning of the Beacon-Anthem merger, Empower made numerous requests to restructure its relationships with Beacon given the potential conflicts of interests presented by Anthem’s ownership of Beacon. Compl., ¶ 38. Empower raised concerns about substandard

performance by Beacon and the Anthem “Shared Services Unit.” *Id.* Empower also continued to question the apparent lack of “firewalls” between Anthem and Beacon with respect to Empower’s Business Data and Systems over which Beacon had unrestricted access by virtue of its responsibilities under the Services Agreement. Empower also expressed grave concerns about a potential misappropriation or conversion of Empower’s BHS Provider Network upon discovering that the contractual relationships that Beacon had been establishing in recent years, while being paid by Empower, were actually established in Beacon’s name rather than with Empower. *Id.*

The restructuring conversations between Empower and Beacon quickly became acrimonious. *Id.* at ¶ 39. The parties eventually agreed to a restructuring plan which was detailed in the Restructuring Agreement. *Id.* at ¶ 40. In the Restructuring Agreement, Beacon agreed to:

- a. establish appropriate firewalls and measures;
- b. reconfigure the Empower BHS Provider Network to ensure direct contractual relationships with Empower;
- c. transition relationships with key subcontractors directly to Empower;
- d. bring certain key staff and functions under the direct control of Empower;
- e. provide ongoing annual accountings of all staff and costs attributable to Beacon’s services under the Services Agreement;
- f. not withhold any consent required of Beacon as a member of Empower for the company to modify or terminate the Services Agreement in the future if necessary; and
- g. obtain prior approval from Empower before terminating relationships with any subcontractors involved in Beacon’s work under the Services Agreement.

Id. at ¶ 40; Ex. A to Compl., Restructuring Agmt., Ex. A, Restructuring Terms. Beacon further promised to “work diligently, and in good faith, to conclude negotiations regarding additional details of the restructuring . . . [and] to enter into comprehensive amendments to the [Services

Agreement] and Operating Agreement, as necessary, to facilitate the restructuring” Compl., ¶ 40; Ex. A to Compl., Restructuring Agmt., § 2.

The Restructuring Agreement further provided that in the event that Beacon refused to agree to the Operating Agreement and Service Agreement modifications deemed necessary by Empower to adequately address the conflict of interest concerns, the parties would “work together in good faith to wind down and terminate their various relationships, including the [Services Agreement] and Beacon’s ownership in [Empower] no later than December 31, *such that [Empower] will remain, at its discretion, as a participant in the [Arkansas PASSE program].*” Compl., ¶ 41; Ex. A to Compl., Restructuring Agmt., § 3. (emphasis added).

Despite agreeing to the material terms necessary to restructure their relationships, Beacon steadfastly refused thereafter to perform the tasks necessary to implement the terms of the parties’ agreement. Compl., ¶ 42. Beacon refused to bring critical staff and functions under Empower’s direct control. Instead, Beacon continued to delegate critical service functions to *Anthem* employees within the “Shared Services Unit” who in turn provided incomplete, defective, and generic work-product that was not appropriately tailored to Empower’s business needs. *Id.* Beacon’s “interim CEO” refused to make decisions without first coordinating with *Anthem*’s Shared Services Unit. *Id.* Financial reports produced by this unit were inaccurate. *Id.* Data compilations prepared by this unit were incomplete. *Id.* And, Beacon failed to timely transfer key subcontractor relationships directly to Empower and reconfigure the provider network as required by the Restructuring Agreement. *Id.*

D. Beacon Sabotages Empower’s Attempts to Separate.

After months of stonewalling by Beacon, all members of Empower’s Board of Managers (except for the member designated by Beacon) voted unanimously to abandon attempts to restructure the parties’ relationships and to instead begin implementing an orderly unwinding of

the contractual and ownership relationships with Beacon. *Id.* at ¶ 43. The Board of Managers agreed to target December 31, 2021 as the completion date for the unwinding. *Id.* Beacon responded to the Board of Manager's vote by making unilateral demands for a more expedited conclusion to their relationships. *Id.* at ¶ 44.

On April 30, 2021, Empower received notice from Beacon purporting to terminate the Services Agreement effective as of August 31, 2021 and to withdraw as a member of Empower effective as of October 31, 2021. *Id.* Beacon subsequently altered the effective date of its purported termination of the Services Agreement to be October 31, 2021, but then tried to renege on that extension by informing DHS on June 30, 2021 that Beacon would cease providing administrative services to Empower on August 31, 2021. *Id.* The withdrawal and termination dates were later extended by the parties to December 31, 2021. *Id.*

Beacon's false claims about an August 31 termination of the Service Agreement alarmed DHS who had been previously told by Empower that it would not be ready to assume Beacon's administrative role for Empower's BHS Provider Network until December 31, 2021, the deadline included in the Restructuring Agreement. *Id.* at ¶ 45. Those concerns resulted in DHS threatening to begin immediately transitioning BH/IDD Members from Empower to other PASSEs. Empower eventually assuaged DHS's concerns and narrowly avoided a potentially disastrous interruption in its business due to Beacon's misrepresentations to the agency. *Id.* However, DHS informed Empower that its continued participation in the PASSE program would remain contingent upon demonstrating its "readiness" in a comprehensive review of its people, system, processes, internal controls and operating procedures to be conducted by DHS from October 1 to December 31, 2021 (the "DHS Readiness Review"). *Id.*

Beacon made false representations about Empower to DHS, which representations (if believed by DHS) could jeopardize Empower's future participation in the PASSE program. *Id.* at

¶ 46. As just one example, in an August 26, 2021 letter, Beacon asserted to DHS that Empower has no credentialing authority over the providers within its network and that Empower had adopted credentialing policies and procedures that are “inconsistent with regulatory requirements of the PASSE program.” *Id.*; Ex. D to Compl. Nowhere in this letter, does Beacon identify any actual regulatory requirement which is supposedly not satisfied by the credentialing policies submitted by Empower to DHS. Compl., ¶ 46; Ex. D to Compl. Nevertheless, Beacon asks DHS to “disregard the policies adopted and submitted by Empower.” Compl., ¶ 46; Ex. D to Compl. These misleading communications continue to occur in spite of the fact that Empower has formally notified Beacon on multiple occasions that its representatives are not to communicate with DHS regarding Empower matters without the participation of a duly authorized Empower representative. Compl., ¶ 46.

Upon information and belief, Beacon’s August 26, 2021 letter was prompted by its recognition that its prior regulatory submissions to DHS improperly conflated Beacon’s provider network with Empower’s BHS Provider Network and treated them as one in the same. *Id.* at ¶ 47. Upon information and belief, Beacon used the payments provided by Empower under the Services Agreement to expand its own provider network and now that the relationship between it and Empower is being unwound, Beacon wants to deprive its soon-to-be-former partner, and now-competitor, of those valuable relationships. *Id.* at ¶ 48. Beacon has asserted, and continues to assert, that the relationships it established with providers during, and as part of, its work for Empower under the Services Agreement belong to Beacon and not to Empower. *Id.* at ¶ 49. These assertions have created, and continue to create, substantial confusion with members of Empower’s BHS Provider Network. *Id.*

Beacon has made demands upon Evolent (a subcontractor to whom Beacon delegated a substantial portion of its duties to Empower under the Services Agreement) in furtherance of its

attempts to disrupt the business relationships between Empower and its BHS Network Providers. *Id.* at ¶ 50. For example, Beacon asserted to Evolent that after December 31, 2021 it could no longer utilize the provider information configured and loaded in Evolent’s own systems in performing claims management services for Empower. Beacon asserted that it “owned” the network and information. *Id.* In fact, the information over which Beacon was asserting exclusive rights was the provider’s information, not Beacon’s. The provider supplied it to Evolent for use in processing claims to be paid by Evolent on behalf of Empower. *Id.*

For several months immediately preceding the filing of the Verified Complaint, Empower attempted, both through business-to-business discussions and formal demand letters between legal counsel for the parties, to obtain unrestricted access to and a transfer of control over Empower’s Business Data and Systems. *Id.* at ¶ 51. Beacon has obstinately refused those efforts and instead engaged in a months-long game of obfuscation and stall tactics, some, but not all of which, are described hereinafter. *Id.* at ¶ 52. Empower has made multiple requests for copies of its own policies, templates, member handbooks and training materials and historical business records relating to operational and compliance areas such as quality assurance, utilization management, grievances, fraud, waste and abuse and care coordination (“Empower’s Records”). *Id.* at ¶ 53. With respect to Empower’s Records that exist in paper form, Beacon has argued that even though it was required to separately maintain records related to the services Beacon performed under the Services Agreement, that does not mean that all of the requested records must be made available to Empower for inspection and copying. *Id.* at ¶ 54.

Beacon’s position as to electronic copies of Empower’s Records is even more unreasonable. *Id.* at ¶ 55. After months of denials and feigned confusion as to what Empower was seeking, Beacon has recently taken the position that Empower must send a representative to “Beacon’s Little Rock Office” to access and download those records electronically. *Id.* This

response disregards the fact that Empower's representatives work in, and have since 2020 worked in, that very same office. *Id.* Had Beacon desired to turn over these electronic records in this manner it could have done so at any time in the past few months. *Id.* Instead, Beacon stalled and now wants to delay the process even further pending an unscheduled meeting between representatives who literally work in the very same physical office. *Id.*

With respect to the Empower website (<https://www.getempowerhealth.com>) constructed with Empower's money and under Empower's supervision that is visited and used daily by Empower's BH / IDD Members and the health care professionals within Empower's BHS Provider Network, Beacon initially asserted that the website belongs to it and not Empower. *Id.* at ¶ 56. It later abandoned that position and now asserts that it is simply not feasible for Beacon to grant administrator rights' access for the website to Empower until December 31, 2021. *Id.*

With respect the @empowerhcs.com email domain network, Beacon has consistently maintained that Empower must create its own separate email domain and network and develop an unnecessary plan to give new email address notices to thousands of people who previously communicated with Empower representatives using the current @empowerhcs.com email addresses. *Id.* at ¶ 57. Beacon takes a similarly disruptive stance with respect to employee and care coordinator phone numbers, accounts and history. *Id.* at ¶ 58. It outrageously claims that the phone numbers, accounts and history are part of a corporate account and cannot be transferred to Empower. *Id.* Instead, Beacon is attempting to force all individuals who will remain as Empower representatives after Beacon's December 31, 2021 withdrawal to obtain a new phone number and communicate their new contact information to approximately 19,000 people accustomed to contacting them on the current business phone numbers. *Id.*

Beacon's attempt to wedge Empower and its members into a new email domain and platform and new phone numbers and history, without the historical text communications and

voicemails, puts upwards of 19,000 Empower members at risk of having their care interrupted by having to hunt and peck for a new email address and telephone number, and for those who are fortunate enough to find the correct new address and number, to communicate with a care coordinator who has no written history of their care. *Id.* at ¶¶ 57-58. These care coordinators all have @empowerhcs.com email addresses and phone numbers and accounts that are used for all day-to-day correspondence with members, DHS, DCFS, and providers on a daily basis. *Id.* The majority of the care coordinators will transition to Empower beginning January 1, but under the Beacon plan, will lose all historical emails, correspondence, voice and text messages, and other important information regarding patient care and the continuation thereof. *Id.*

With respect to credentialing information, Beacon claims to have turned over its full database of provider information, but the transferred files do not include the individual provider credentialing that is required DHS contract and manual. *Id.* at ¶ 59.

Beacon's misconduct described herein is designed to impair Empower's transition schedule for the end of 2021. *Id.* at ¶ 60. Beacon's improper withholding of Empower's Records and Empower's Business Data and Systems is prejudicial to Empower's plan to emerge from this unwinding as a fully-ready and formidable competitor of Beacon and Anthem in the Arkansas market. *Id.* at ¶ 62. Beacon continues to wrongfully assert dominion and control over Empowers' BHS Provider Network thereby creating doubt and confusion among providers, vendors, and regulators as to Empowers' ability to continue to meet its obligations as a PASSE after December 31, 2021. *Id.* at ¶ 63. Beacon has not complied with Empower's repeated demands to relinquish Empower's Business Data and Systems which are essential to Empower's continued operations and its ability to prepare for the DHS Readiness Review. *Id.* at ¶ 64.

E. Empower files suit against Beacon to obtain control over Empower's Records and Empower's Business Data and Systems, and to require Beacon to honor its contractual obligations.

Empower has sued Beacon for the following causes of action:

- Count 1: Injunctive Relief;
- Count 2: Breach of Restructuring Agreement – Specific Performance; and
- Count 2: Breach of Restructuring Agreement – Damages.

Empower brings these claims to obtain specific performance of Beacon's obligations under the Restructuring Agreement; return, access, and control over Empower's Records and Empower's Business Data and Systems; excluding Beacon from continuing to assert dominion or control over the same; damages caused by Beacon's unlawful conduct; and costs and attorneys' fees.

LEGAL STANDARD

The familiar *Dataphase* factors govern requests for preliminary injunctive relief under Rule 56 in this Court:

Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc). The award of preliminary injunctive relief rests in the Court's discretion. *Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC*, 953 F.3d 1041, 1044 (8th Cir. 2020).

ARGUMENT

A. Empower has a strong likelihood of success on its breach of Restructuring Agreement claims against Beacon.

1. The standard for success on the merits—a “fair chance of prevailing.”

Success on the merits has been called the most important factor in granting preliminary injunctive relief. *Id.* But it does not require a finding that Empower “will ultimately win.” *Id.* (quoting *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007)). Empower need only show a “fair chance of prevailing,” not a 51+% chance of success. *Id.* at 1044–45 (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc)). Empower has more than a fair chance of prevailing on its claims.

2. Empower is likely to succeed on its breach of contract claim, because Empower and Beacon had a valid contract and Beacon is violating it.

Empower is likely to succeed on its claim against Beacon for breach of the Restructuring Agreement. To succeed, Empower must prove (1) the existence of an agreement, (2) breach of the agreement, and (3) resulting damages. *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 298, 948 S.W.2d 388, 395 (1997). There can be no serious dispute that the Restructuring Agreement here is valid and fully enforceable. The Restructuring Agreement is supported by consideration and executed by Empower and Beacon. Ex. A to Compl., Restructuring Agmt.

Moreover, Beacon is in breach of the Restructuring Agreement. The Restructuring Agreement required Beacon to work with Empower in good faith to terminate the parties’ relationships in the event that they could not agree upon additional details necessary to restructure their relationship in a manner acceptable to the “non-Beacon members” of Empower. Compl., ¶ 72. The “non-Beacon members” of Empower determined that Beacon’s conduct precludes a satisfactory restructuring of the parties’ relationships. *Id.* at ¶ 73. Beacon, however, has refused to cooperate in Empower’s attempts to plan and implement an orderly winding down of their

relationship. *Id.* at ¶ 74. Beacon continues to wrongfully assert control over Empower’s BHS Provider Network, Empower’s Records, and Empower’s Business Data and Systems, breaching its agreement to act in “good faith” in all matters related to unwinding the parties’ relationships and to act “such that ‘Empower will remain . . . as a participant in the [PASSE] Program.’” *Id.* at ¶ 75-76. *See also Cantrell-Waind & Assocs. v. Guillaume Motorsports*, 62 Ark. App. 66, 72, 968 S.W.2d 72, 75 (1998) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” (citing Restatement (Second) of Contracts § 205 (1981))). Thus, Beacon is in breach of the Restructuring Agreement.

This breach has caused damages and has the likelihood of causing damage in the future. Empower has retained and paid for services from third parties due to Beacon’s breaches of the Restructuring Agreement that would have been unnecessary had Beacon fulfilled its legal duties and honored its commitments. Compl., ¶ 85. Empower has been and will be required to recreate, at substantial cost, systems, data, policies, provider profiles, credentialing records, websites, intellectual property, and other work-product that Beacon was previously paid to develop but which Beacon refuses to turnover to Empower in violation of the Restructuring Agreement. *Id.* at ¶ 86. Beacon is seeking to cause further damage by attempting to sabotage Empower’s ability to compete against Beacon and Anthem in Arkansas. *Id.* at ¶ 77. Empower has, therefore, been damaged by Beacon’s breach of the Restructuring Agreement and the potential future damages are much more substantial.

B. Beacon’s actions threaten to irreparably harm Empower if it is not enjoined.

Empower will suffer irreparable harm in the absence of immediate injunctive relief. “Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.” *Gen. Motors Corp. v. Harry Brown’s, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). Beacon’s improper control over Empower’s Records and

Empower's Business Data and Systems in breach of the Restructuring Agreement is likely to cause irreparable harm to Empower's reputation and goodwill with members of Empower's BHS Provider Network. "Harm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars." *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003). As a result, the Eighth Circuit has established that "[l]oss of intangible assets such as reputation and goodwill can constitute irreparable injury." *Id.* (citing *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002)). Improper control over a company's website and email addresses has been shown to likely cause irreparable harm to a company's business reputation and goodwill. See *Galaxy Oil Co. v. Ameeti*, Case No. SACV21-00311, 2021 WL 4047405 (C.D. Cal. Mar. 9, 2021).

In *Galaxy Oil*, the court found that the plaintiff would likely face irreparable harm if injunctive relief was not granted, where the plaintiff demonstrated that the defendant, who was the plaintiff's former IT services provider, had control of the plaintiff's web page, confidential data, and network security systems. *Id.* at *4. The court noted that the plaintiff required that technology to operate and was likely to suffer irreparable harm to its business reputation and goodwill given that the defendant controlled essential features of the plaintiff's business. *Id.* Specifically, the plaintiff in *Galaxy Oil* did not have full access to its domain name and could not make any changes or updates to its website. *Id.* The defendant still retained access to the plaintiff's email accounts and underlying emails and, as a result, the plaintiff could not ensure the confidentiality of emails sent and received from its primary email addresses. *Id.* The court found that the plaintiff suffered irreparable harm to its reputation and goodwill because it had an insecure website and could not ensure the security of its confidential communications and data. *Id.*

Similarly, in *Nat. & Tasty, LLC v. Parnes*, No. 15-CV-4388, 2015 WL 4757181 (D.N.J. Aug. 10, 2015), the court held there was a risk of irreparable harm when the defendant employee seized

control over the plaintiff employer's website and retained control over several email addresses using the plaintiff's domain name when the defendant's employment ended. The plaintiff noted that its lack of control over the website and email domains was likely to cause consumer confusion and to harm the plaintiff's and its brand's reputations. *Id.* at *6. The court found that "[g]iven that [the p]laintiff's website is an important method of communicating to customers about its brand, the potential for harm to [the p]laintiff's reputation is likely if the website is left in the control of [the d]efendant." *Id.* Thus, the court held that the defendant's interference with the plaintiff's ability to represent its brand on the internet and contact customers caused a risk of irreparable harm. *Id.*

The same risk of irreparable harm exists in this case. Empower's website, which is visited and used daily by Empower's BH / IDD Members and the health care professionals within Empower's BHS Provider Network, remains under the exclusive control of Beacon, and Beacon has refused to relinquish control until December 31, 2021. Compl., ¶ 56. By waiting until December 31, 2021 to provide Empower with administrator rights' access to its website, Beacon is frustrating Empower's ability to transition the website to avoid any downtime or gaps in access and communication with Empower's BH / IDD Members and the health care professionals within Empower's BHS Provider Network.

Beacon also refuses to relinquish control over the @empowerhcs.com email domain network, which would force Empower create its own separate email domain and network. *Id.* at ¶ 57. Similarly, Beacon will not transfer control over the telephone numbers, accounts, and history for Empower's employees and care coordinators, forcing all individuals who will remain as Empower representatives after Beacon's December 31, 2021 withdrawal to obtain new phone numbers. *Id.* at ¶ 58. Beacon's control over Empower's email domain and network and telephone numbers will create a substantial hardship in requiring Empower to obtain new email addresses and telephone numbers and then communicate those changes in contact information to the

thousands of people accustomed to contacting Empower representatives through those contacts.

Id. at ¶¶ 57-58.

Beacon's retention of Empower's email domain and network and telephone numbers would include all historical emails, text communications, and voicemails. *Id.* Thus, even if Empower creates a new email domain and network and telephone numbers and provides that new contact information to its members and providers, its representatives will still not have access to historical information regarding patient care and the continuation thereof contained on the current email network and telephone system. *Id.* These innocent and vulnerable members suffering from significant mental illness and/or developmental disabilities should not be subjected to Beacon's attempt to harm Empower. *Id.* There is further a substantial risk that confidential information sent to and received by the current email addresses and telephone numbers will not be secure if they remain under the control of Beacon.

Moreover, Beacon has conflated its provider network with Empower's BHS Provider Network and treated them as one in the same, using payments provided by Empower under the Services Agreement to expand its own provider network. *Id.* at ¶¶ 47-48. Beacon claims the relationships it established with providers as part of its work for Empower under the Services Agreement belong to Beacon and not to Empower. *Id.* at ¶ 49. These wrongful claims from Beacon create substantial confusion with members of Empower's BHS Provider Network. *Id.* Empower's potential loss of reputation and goodwill among members of Empower's BHS Provider Network is likely to cause irreparable harm, as Beacon's improper exercise of control over Empower's BHS Provider Network threatens to frustrate Empower's relationship with those members.

Furthermore, a preliminary injunction is usually warranted when "absent preliminary relief [the party] would suffer a substantial loss of business and perhaps even bankruptcy." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). See also *Triosim Corp. v. A Dale Drake*, Case No. 4:20-

cv-00395-LPR, 2020 U.S. Dist. LEXIS 95631, at *39 (E.D. Ark. May 29, 2020) (finding irreparable harm where the plaintiff could go out of the business during the pendency of the trial or lose so much market share as to make the final outcome of the case all but irrelevant). Beacon refuses to relinquish Empower’s Records and Empower’s Business Data and Systems, which are essential to Empower’s continued operations and its ability to prepare for the DHS Readiness Review. *Id.* at ¶ 64. These actions prejudice Empower’s plan to emerge from this unwinding as a fully-ready and formidable competitor of Beacon and Anthem in the Arkansas market. *Id.* at ¶ 62. Beacon’s efforts seek to cause irreparable harm to Empower such that injunctive relief is warranted.

C. Enjoining Beacon would not create an inequitable balance of harms.

Empower is likely to suffer significant harm if the injunction is denied, but no undue harm would result to Beacon from granting the preliminary injunction. To determine the harms that must be weighed, courts in the Eighth Circuit look at the threat to each of the parties’ rights that would result from granting or denying the injunction. *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994). Enjoining Beacon will not impose undue or unbalanced harm on it. Empower should have access to and control over Empower’s Records and Empower’s Business Data and Systems pursuant to the Services Agreement and Restructuring Agreement. A preliminary injunction that requires Beacon to perform in accordance with those agreements, therefore, will not cause any undue harm to Beacon; it would only require Beacon to fulfill the obligations it previously promised to perform. Meanwhile, withholding injunctive relief will seriously and irreparably harm Empower.

D. Enjoining Beacon would not injure the public interest.

Enjoining Beacon would not harm the public interest. The PASSE Act was enacted to create a system that (1) improves the experience of health care, including without limitation quality of

care, access to care, and reliability of care, for enrollable Medicaid beneficiary populations; (2) enhances the performance of the broader healthcare system leading to improved overall population health; (3) slows or reverses spending growth for enrollable Medicaid beneficiary populations and for covered services while maintaining quality of care and access to care; (4) furthers the objectives of Arkansas payment reforms and the state's ongoing commitment to innovation; (5) discourages excessive use of services; (6) reduces waste, fraud, and abuse; (7) encourages the most efficient use of taxpayer funds; and (8) operates under federal guidelines for patient rights. Ark. Code Ann. § 20-77-2702(c). The public interest is, therefore, best served by maintaining participation of organizations under the PASSE Act.

Beacon seeks to sabotage Empower in an effort to thwart competition of organizations under the PASSE Act. "The public has an interest in restraining unfair competitive practices that is as strong as its interest in permitting freedom in fair competitive practices." *Olin Water Services v. Midland Research Laboratories, Inc.*, 596 F. Supp. 412, 415 (E.D. Ark. 1984). Here, Beacon is violating the Restructuring Agreement in an effort to harm Empower's abilities to compete with Beacon and Anthem in the Arkansas market. Beacon's unfair efforts to reduce competition are at odds with the public interest in fair competition, particularly competition that furthers the public interest of the PASSE Act.

Moreover, the public interest is promoted by the enforcement of contractual obligations. *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1145 (8th Cir. 2007) (holding that the district court did not abuse its discretion by concluding its grant of a preliminary injunction promoted the public interest by protecting freedom to contract through enforcement of contractual rights and obligations). See also *N.I.S. Corp. v. Swindle*, 724 F.2d 707, 710 (8th Cir. 1984) ("the public interest calls for the[] enforcement" of valid contracts). Empower is seeking to enforce Beacon's obligations under the Restructuring Agreement, which serves the public interest.

In sum, enjoining Beacon would not injure the public interest. To the contrary, an injunction would further the public interest in promoting competitive practices and enforcing valid contracts.

CONCLUSION

Consideration of all of the *Dataphase* factors supports a preliminary injunction. Beacon has breached the Restructuring Agreement in exercising control over Empower's Records and Empower's Business Data and Systems to the exclusion of Empower. Empower is, therefore, likely to succeed on the merits of its claims. Beacon's actions threaten irreparable harm to Empower's reputation and goodwill with Empower's BH / IDD Members and the health care professionals within Empower's BHS Provider Network. The potential harm to Empower is significant whereas the potential harm to Beacon is lacking. The public interest is best served in promoting competition and enforcing contracts. Thus, preliminary injunctive relief is warranted under the *Dataphase* factors.

Empower, therefore, specifically and respectfully asks that the Court:

1. Upon notice to Beacon, and after an expedited hearing, issue a preliminary injunction:
 - a. ordering Beacon to provide immediate access to and/or return Empower's Records and Empower's Business Data and Systems; and
 - b. enjoining, Beacon, its officers, employees, agents, servants, attorneys, instrumentalities, and/or those in privity or acting in concert or participation with Beacon from continuing to assert dominion or control over the assets and/or Empower's BHS Provider Network; and
2. Set a reasonable amount of security, not to exceed \$10,000, to support the preliminary injunction under Fed. R. Civ. P. 65.

Respectfully submitted,

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