18-0346-cv

United States Court of Appeals

for the

Second Circuit

JOHN DOE 1, On behalf of themselves and all others similarly situated, JOHN DOE 2, On behalf of themselves and all others similarly situated, BRIAN CORRIGAN, STAMFORD HEALTH, INC., BROTHERS TRADING CO., INC.,

Plaintiffs-Appellants,

KAREN BURNETT, individually and on behalf of all others similarly situated, BRENDAN FARRELL, individually and on behalf of all others similarly situated, ROBERT SHULLICH, individually and on behalf of all others similarly situated,

Consolidated Plaintiffs-Appellants,

– v. –

EXPRESS SCRIPTS, INC., ANTHEM, INC.,

Defendants-Appellees,

1-10 INCLUSIVE DOES,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE ANTHEM, INC.

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CORPORATE DISCLOSURE STATEMENT

Anthem, Inc. does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Plaintiffs complain that "Defendants" caused excessive pricing, but it is Express Scripts, Inc. ("ESI") that is determining the pricing. Indeed, Plaintiffs in this case are piggybacking on a related case filed by Anthem, Inc. ("Anthem") against ESI for, among other things, ESI's breach of its obligation under its pharmacy benefits management ("PBM") agreement with Anthem (the "PBM Agreement") to negotiate in good faith to ensure that Anthem is receiving competitive benchmark pricing (the "Anthem Lawsuit"). Anthem seeks damages based on ESI's inflated pricing under the PBM Agreement, and Plaintiffs here seek relief based on the alleged (but unexplained) impact of such inflation on the prices they paid for prescription medications. Rather than simply pursuing such claims against ESI (for the alleged impact of ESI's inflated pricing), Plaintiffs also sued Anthem (the party suing ESI for lower pricing), alleging breaches of fiduciary duty under the Employment Retirement Income Security Act of 1974 ("ERISA").

The reason for Plaintiffs' approach is that ESI alleged in the Anthem Lawsuit that, in 2009, Anthem could have obtained lower pricing under the PBM Agreement by sacrificing the interests of Anthem's stockholders and accepting a lower purchase price on a sale of its PBM subsidiaries, NextRx Services, Inc., NextRx, LLC, and NextRx, Inc. ("NextRx") to ESI. Five of the six ERISA Plaintiffs were not even Anthem pharmacy customers in 2009. Three of those

Plaintiffs contracted with Anthem *after* the spin-off on the terms offered to them, while two bought from ESI directly. And the pricing for the Plaintiff that was a customer in 2009 was actually *lowered* under the PBM Agreement. Thus, Plaintiffs do not allege that Anthem breached any term of any health plan. Instead, Plaintiffs' theory is that Anthem was required to accept a below market price for NextRx in order to better position itself to offer even lower pricing to customers, who could then either accept the offer or buy insurance from others in the marketplace. There is no law that even remotely supports Plaintiffs' theory.

The district court correctly dismissed all of Plaintiffs' claims against Anthem because Plaintiffs failed to allege any action by Anthem taken as an ERISA fiduciary, such as a claim denial or other discretionary function by Anthem in connection with management or administration of a plan. As a matter of settled law, Anthem did not owe ERISA fiduciary duties to Plaintiffs when taking corporate action to sell its subsidiaries or to establish contract terms with its PBM service provider for itself on a company-wide basis (including for Anthem's own purchases). Anthem likewise owed no fiduciary duties when determining the economic terms to offer to its health plan clients. Rather, Anthem stood at arms-length when it negotiated contracts with customers and members. As a matter of law, health insurers are free to determine the pricing terms to offer for their health plans, and customers are free to accept or refuse those terms.

The district court granted Plaintiffs leave to replead, but Plaintiffs instead brought this appeal. The district court's decision is correct under controlling and well-established law. And Plaintiffs have not cited a single case applying ERISA fiduciary duties to the types of corporate actions here at issue. Anthem respectfully asks this Court to affirm dismissal of Plaintiffs' Complaint as to Anthem.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court correctly followed long-established and uniform precedent that a health insurer does not owe fiduciary duties under ERISA when making core corporate decisions, such as selling subsidiaries or entering into a contract with a third party service provider?

2. Whether the district court correctly held that there is no co-fiduciary liability under ERISA (i) where the defendants are not fiduciaries with respect to the challenged conduct, (ii) where there was no adequate allegation that Anthem was aware that ESI was a supposed fiduciary, and (iii) where the Plaintiffs failed to allege a failure by Anthem to take reasonable efforts to remedy any breaches by ESI, but rather pled the exact opposite in alleging the extensive work of Anthem in

seeking to enforce ESI's pricing obligations to Anthem, culminating in a lawsuit against ESI?

3. Whether the district court correctly held that the Plaintiffs failed adequately to allege fraudulent concealment so as to toll the statute of limitations?

STATEMENT OF THE CASE

A. Defendants/Appellees

Anthem is one of the largest health benefits companies in the United States, serving more than 38 million members through affiliated health plans. (JA44, ¶ 10; JA73, ¶ 105) Defendant ESI provides PBM services related to prescription drug coverage for Anthem and other health insurers and sponsors of self-funded health plans, including private and public employers. (JA45, ¶ 11)

B. Plaintiffs/Appellants

The Plaintiffs are divided into two groups—the Subscriber Plaintiffs and the Plan Plaintiffs. The Subscriber Plaintiffs are four individuals (John Doe Two, Burnett, Farrell, and Shullich) who allegedly "are enrolled in health care plans insured or administered by Anthem" and whose co-insurance payments for prescription medications allegedly are "derived from the prices that [ESI] sets and/or charges Anthem for those prescription medications . . . ." (JA42-43, ¶¶ 3-4;

see also JA53, JA55-56, JA59-63, JA65-68, ¶¶ 35-36, 42-44, 52-55, 61-64, 70-73, 78-79) The Subscriber Plaintiffs seek to represent a class of:

> All persons who are participants in or beneficiaries of any health care plan from December 1, 2009 to the present in which Anthem provided prescription drug benefits through an agreement with [ESI] and who paid a percentage based co-insurance payment (in any percentage amount, including 100%) in the course of using that prescription drug benefit.

(JA133, ¶ 303)

The Plan Plaintiffs consist of two private employers, Stamford Health, Inc. and Brothers Trading Co., who brought this action in their capacities as ERISA fiduciaries with respect to the self-funded group health plans they sponsor and for which Anthem administers "certain healthcare benefits," including "prescription medication benefits . . . ." (JA44, ¶¶ 8-9) The Plan Plaintiffs seek to represent a class of:

> Fiduciaries of all self-funded employee welfare benefit plans administered by Anthem from December 1, 2009 to the present in which Anthem provided prescription drug benefits through an agreement with [ESI].

(JA133, ¶ 302)

C. Administrative Service Agreements

One of Anthem's lines of business is to provide "Administrative Services Only" ("ASO") plans to self-funded plans sponsored by employers, unions, or other entities pursuant to Administrative Service Agreements ("ASAs"). (SA2)

The services that Anthem agrees to perform expressly include both non-fiduciary and fiduciary functions. Each of the ASAs with Plaintiffs contains unambiguous, express language that identifies the limited activities where Anthem is acting in a fiduciary capacity and makes clear that Anthem otherwise is not acting as a fiduciary. (JA181-213)

D. The NextRx Agreement

On December 1, 2009, ESI purchased from Anthem's predecessor, Wellpoint, all of the stock of three operating PBM companies—(i) NextRx, LLC, (ii) NextRx, Inc., and (iii) NextRx Services, Inc. (collectively, "NextRx")—for $4.675 billion pursuant to a Stock and Interest Purchase Agreement by and between ESI and WellPoint, Inc., dated April 9, 2009 (the "NextRx Agreement"). (JA215)

E. Anthem's PBM Agreement With ESI

After selling NextRx to ESI, Anthem entered into the PBM Agreement with ESI, pursuant to which ESI agreed to serve as Anthem's exclusive provider of PBM services for a 10 year period (2009-2019), unless terminated earlier. (JA45-46, JA79, ¶¶ 12, 120) Pursuant to the PBM Agreement, Anthem and ESI agreed to Section 5.6, titled "Periodic Pricing Review," which requires ESI to negotiate pricing under the PBM Agreement in good faith every three years to ensure that

Anthem continues to receive competitive pricing through the life of the PBM Agreement":

> **5.6 Periodic Pricing Review**. [Anthem] or a third party consultant retained by [Anthem] will conduct a market analysis every three (3) years during the Term of this Agreement to ensure that [Anthem] is receiving competitive benchmark pricing. In the event [Anthem] or its third party consultant determines that such pricing terms are not competitive, [Anthem] shall have the ability to propose renegotiated pricing terms to PBM and [Anthem] and PBM agrees to negotiate in good faith over the proposed new pricing terms. Notwithstanding the foregoing, to be effective any new pricing terms must be agreed to by PBM in writing.

(JA83, ¶¶ 136-37) Plaintiffs complain about pricing, but do not allege that pricing increased, and it did not. To the contrary, ESI's pricing was lower than the pricing provided to customers by NextRx.

Plaintiffs also claim that the PBM Agreement allowed ESI to exercise discretion over drug pricing that was not tied to "industry-standard metrics for setting drug prices" (Pl. Brief at 9; *see also id*. at 48 (alleging PBM Agreement conferred "enormous discretion" on ESI), but that is likewise factually incorrect. As the district court correctly found, and which Plaintiffs themselves acknowledge, "the prescription drug pricing at issue here was not subject only to the requirements of Section 5.6, but was also constrained by the more specific requirements of Section 5.4 and Exhibit A ....," which does use the industry standard metrics. (SA28-33; Pl. Brief at 10 (noting that pricing terms are

"purportedly subject to certain caps or maximums based on discounts from a medications Average Wholesale Price ('AWP')")

F. ESI's Failure To Negotiate In Good Faith To Ensure That Anthem Receives Competitive Benchmark Pricing

In late-2014, in accordance with Section 5.6 of the PBM Agreement, Anthem engaged a top-tier, independent third-party expert consultant, Health Strategy, to determine whether ESI's pricing terms were competitive. The expert consultant determined that ESI's prices to Anthem were some $13 billion in excess of competitive pricing from December 1, 2015 through the remainder of the PBM Agreement term, plus approximately $1.8 billion in excess of market pricing through the post-termination period. In accordance with Section 5.6, Anthem made a proposal to ESI for competitive benchmark pricing. Throughout 2015, Anthem made multiple pricing proposals to ESI, but ESI refused to negotiate in good faith. To the contrary, ESI expressly and repeatedly repudiated its obligation to negotiate in good faith for competitive benchmark pricing. (JA46, ¶¶ 13-14; JA90-102, ¶¶ 164-98)

G. Anthem's Lawsuit Against ESI Over Breaches Of The PBM Agreement

Anthem commenced an action against ESI on March 21, 2016, for, among other things, ESI's breach of the PBM Agreement for failing to negotiate in good faith for competitive benchmark pricing effective as of December 1, 2015. (JA43-

44, ¶ 7; JA71, ¶ 98) Anthem seeks approximately $15 billion in damages and certain declaratory judgments related to Anthem's enforcement of the terms of the PBM Agreement. (JA46, ¶ 14; JA89 ¶ 159)

H. Plaintiffs' Lawsuit Against Both ESI And Anthem

Piggy-backing on to Anthem's suit against ESI, Plaintiffs commenced their action on or about May 6, 2016. (JA1) Plaintiffs allege that ESI's pricing injured Plaintiffs by increasing subscribers' co-insurance obligations for prescription medications and by causing plans to pay excessive and inflated prices for prescription medications. Plaintiffs allege that ESI, "through the exercise of its discretion to set pricing for prescription medications," charged the Plaintiffs "inflated prices for prescription medications during all or part of the Class Period." (JA49, ¶ 23)

Notwithstanding those allegations against ESI, Plaintiffs named Anthem as a defendant in this lawsuit (based on *ESI's* breach of the PBM Agreement). Plaintiffs' excuse for adding Anthem to this lawsuit is to repeat ESI's incorrect arguments in the Anthem Lawsuit that, in 2009, Anthem purportedly agreed to inflated pricing under the PBM Agreement in connection with ESI's $4.675 billion purchase of NextRx. Plaintiffs' Complaint includes six claims against Anthem. The third, fourth, sixth, seventh, and ninth claims allege breaches of fiduciary duty

under ERISA based on Anthem's sale of NextRx and its entry into the PBM Agreement with ESI. (JA141-JA144, JA146-149, JA151-52)

I. The District Court's Dismissal Of All Claims In Plaintiffs' Complaint

On April 24, 2017, Anthem and ESI separately moved to dismiss the Complaint. (JA11) On January 5, 2018, the district court issued an opinion and order dismissing all claims against both Anthem and ESI. (JA50) For the claims brought against Anthem (under ERISA Sections 404(a), 406(a)-(b) and 409), the district court held, *inter alia*, that:

> [I]t is well established that decisions about plan content, rather than plan administration, do not give rise to fiduciary duties. While an insurer "engages in a fiduciary act when making a discretionary determination about whether a claimant is entitled to benefits under the terms of plan documents," fiduciary duties are not triggered "when the decision is at core, a corporate business decision" . . . . Similarly, the decision to sell corporate assets or divisions is one made in an insurer's or employer's business capacity, not its fiduciary capacity, even if a plan is affected by the decision.
>
> Here, Anthem's decisions to sell its PBM business and to contract the provision of PBM services out to ESI did not trigger fiduciary duties. Plaintiffs have challenged Anthem's roles in setting prices they believe are unfair, not Anthem's "use of discretion in construing and applying the provisions of their group health plans and assessing a participant's entitlement to benefits." Plaintiffs do not argue that Anthem's actions misconstrued or interpreted their health plans in a way that benefitted Anthem to the detriment of Plaintiffs. Rather, Plaintiffs argue that they overpaid for prescription drugs, which they attribute, in essence, to the PBM Agreement itself, instead of Anthem's interpretation or application of their particular Anthem health plans. And while Plaintiffs point to Section 5.6 and its mention of "competitive benchmark" prices, Plaintiffs have no right under

> ERISA to receive "competitive benchmark pricing," or even average pricing, for prescription drugs. . . .
>
> This Court is persuaded by the Sixth Circuit's reasoning, as well as the reasoning of courts in this Circuit who have determined that a health benefits company setting prices in its role as health insurer is not acting as an ERISA fiduciary.

(SA 35-39 (internal citations and quotations omitted))

The district court also separately found that Plaintiffs' ERISA claims are time-barred to the extent they are based on conduct occurring before May 6, 2010, except that conduct pre-dating May 6, 2010 is timely solely with respect to Plaintiffs' duty to monitor claims against Anthem. (SA20-25)

Lastly, noting that "Plaintiffs have already had opportunities to amend the original complaint," the district court granted Plaintiffs leave to replead if "newly available information . . . enables them to raise colorable claims based on the [district court's guidance in this opinion.]" (SA50) Instead of repleading, Plaintiffs filed this appeal.

SUMMARY OF ARGUMENT

The district court correctly dismissed the Complaint against Anthem because Plaintiffs' claims are insufficiently pled and contrary to well-established law.

A. The District Court Correctly Held That Plaintiffs Failed To State A Claim For Breach Of Fiduciary Duty

The district court correctly held that Plaintiffs failed to state a breach of fiduciary duty claim under ERISA because, as a matter of law, Anthem did not

owe ERISA fiduciary duties to Plaintiffs when selling its PBM subsidiaries or negotiating the PBM Agreement with ESI. While a party "engages in a fiduciary act when making a discretionary determination about whether a claimant is entitled to benefits under the terms of plan documents," fiduciary duties under ERISA are not triggered "when the decision at issue is, at its core, a corporate business decision." *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 357 n.2 (2d Cir. 2016).

Plaintiffs do not allege any breach of their health plans, but rather argue that Anthem could have offered them lower pricing (by accepting a different pricing proposal on the sale of its PBM subsidiaries). That complaint is simply about the content of their plans. Health insurers have no fiduciary duty to offer any particular terms in their health plans. To the contrary, those are arms'-length transactions, and insurers are free to determine the terms of their offering, while customers are free to accept or reject terms after comparing to the offerings of others. Thus, "[d]ecisions about the *content* of a plan are not themselves fiduciary acts," but rather are business decisions, not subject to ERISA. *United States v. Pegram*, 530 U.S. 211, 226 (2000) (emphasis added).

Anthem's decision to sell NextRx—a textbook corporate business decision—also did not trigger any ERISA fiduciary duties. As the district court correctly held, "the decision to sell corporate assets or divisions is one made in an

insurer or employer's business capacity, not its fiduciary capacity, even if a plan is affected by the decision." (SA36) ERISA governs the administration of a plan, not corporate sales. *See infra at* pp. 15 - 44.

B. The District Court Properly Held That Plaintiffs Failed To State A Claim For Co-Fiduciary Liability

The district court correctly dismissed Plaintiffs' claim that Anthem is an ERISA co-fiduciary liable for ESI's alleged breaches of fiduciary duty because neither Anthem nor ESI were fiduciaries with respect to the challenged conduct. In addition, Plaintiffs failed to allege that Anthem breached any ERISA fiduciary duty or knew that ESI was an ERISA fiduciary. Plaintiffs also failed to allege that Anthem did not take "reasonable efforts" to remedy any breach by ESI. To the contrary, Plaintiffs allege that Anthem hired a market consultant to analyze ESI's pricing, then worked for one year to engage ESI in good faith negotiations to ensure competitive benchmark pricing, and then filed a lawsuit against ESI for some $15 billion in damages and declaratory judgments to address ESI's breaches. Anthem cannot control ESI, an unaffiliated public company, but certainly surpassed the "reasonable efforts" standard in trying to obtain performance by ESI. Plaintiffs do not, and cannot, identify anything further that Anthem could have done. *See infra at* pp. 44 -49.

C. The District Court Correctly Held That Plaintiffs Failed Adequately To Plead That The Statute Of Limitations Was Tolled Under The "Fraud Or Concealment" Exception

The district court also dismissed certain of Plaintiffs' claims based on conduct prior to May 6, 2010, under ERISA's six-year statute of limitations. (SA 24; 29 U.S.C. § 1113) The district court correctly held that Plaintiffs did not meet their burden of pleading an equitable toll under ERISA's "fraud or concealment" exception. *See infra at* pp. 49-56.

ARGUMENT

To survive a motion to dismiss under FRCP 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006) (internal quotation marks, citation, and alteration omitted). If a plaintiff fails to "provide the grounds upon which [its] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level,'" the court should dismiss the complaint. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Although a court "must generally accept as true all of the factual assertions in the complaint," that tenet

does not extend to "factual assertions [in the complaint] that are contradicted by the complaint itself, by documents upon which the pleadings rely, or by facts of which the court may take judicial notice." *Perry v. NYSARC, Inc.*, 424 F. App'x 23, 25 (2d Cir. 2011).

I. The District Court Correctly Held That Plaintiffs Failed To State A Claim For Breach Of ERISA Fiduciary Duties

Relying on well-established, uniform case law from the United States Supreme Court and this Circuit, as well case law from other Circuits, the district court correctly dismissed all of Plaintiffs' ERISA claims against Anthem. Specifically, the district court held that Anthem's business-wide, corporate decisions to sell its PBM subsidiaries and enter into the PBM Agreement with ESI did not trigger fiduciary duties. (SA34-39) Plaintiffs' efforts to re-characterize those core corporate decisions as somehow constituting discretionary decisions over the management and administration of an ERISA plan or control of ERISA plan assets are without merit. (Pls. Brief at 18-32)

A. The District Court Correctly Held That Anthem Was Not Performing A Fiduciary Function When It Sold NextRx Or Entered Into The PBM Agreement

As the district court noted, "[i]nsurers can, of course be fiduciaries with respect to ERISA health plans." (SA35) But plan fiduciaries do not act as fiduciaries for all their actions. Accordingly, as explained by the United States Supreme Court in the seminal case of *Pegram v. Herdrich*—a case Plaintiffs do not

even mention in their brief—the threshold issue in analyzing ERISA fiduciary liability is to determine whether the defendant was acting in a fiduciary capacity in connection with the challenged action. 530 U.S. 211, 226 (2000). In "every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was *acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint*." *Id.* at 226 (emphasis added).

That is because, under ERISA, a fiduciary "may have financial interests adverse to beneficiaries." *Id.* at 225 (an ERISA fiduciary "may wear different hats," qualifying as an ERISA fiduciary for certain acts that it takes, while other acts fall outside the scope of its ERISA fiduciary obligations). For instance, insurers act for their own interests, at arms'-length, in selling their products in the marketplace. *See Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 837 (9th Cir. 2018) ("[A] plan administrator is not an ERISA fiduciary when negotiating its compensation with a prospective customer" but rather "negotiat[ing] at arm's length" with customer); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) (holding that even though defendant was motivated by self-interest in amending ERISA plan, defendant was not acting in a fiduciary capacity, but rather making a "business decision"); *Navarre v. Luna (In re Luna)*, 406 F.3d

1192, 1207 (10th Cir. 2005) (noting that parties are "not acting in a fiduciary capacity" when making business decisions "motivated by self-interest").

To decide the threshold question that the United States Supreme Court identified in *Pegram*, courts look at the challenged action and ask: "was the defendant managing the plan, administering it or advising it?" *Larson v. United Healthcare Ins. Co.*, 2012 U.S. Dist. LEXIS 185564, at *12 (W.D. Wisc. Jan. 3, 2012), *aff'd*, 723 F.3d 905, 908 (7th Cir. 2013); *In re JPMorgan Chase & Co. ERISA Litig.*, 2016 U.S. Dist. LEXIS 2709, at *6 (S.D.N.Y. Jan. 8, 2016) ("In every case charging breach of ERISA fiduciary duty . . . the threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.") (internal quotation marks and citation omitted), *aff'd*, *Loeza v. Doe*, 659 Fed. App'x 44 (2d Cir. 2016).

Plaintiffs do not allege a breach of any term of their plans. Indeed, Plaintiffs expressly admit that they are not seeking benefits due under the terms of their contracts with Anthem. *See* Dist. Ct. Dkt.[1] 109 at 56 ("Plaintiffs do not allege the excessive coinsurance payments were impermissible by virtue of the 'terms of the plan[s]' in which Plaintiffs were participants."). Plaintiffs also do not challenge any act by Anthem in managing the plan, administrating or advising it. Instead,

[1] "Dist. Ct. Dkt. __ at __" refers to documents filed with the district court under index number 16-cv-3399.

Plaintiffs challenge two purely corporate business decisions that impacted Anthem's entire business. The district court properly held, as a matter of law, that those two corporate decisions—to sell subsidiaries and to enter into a company-wide contract with a third party service provider—were not taken as an ERISA fiduciary and were not subject to ERISA. (SA34-39)

1. Anthem Was Not Acting As An ERISA Fiduciary In Determining The Content Of Its Plan Offerings

Plaintiffs argue that the PBM Agreement allowed for excessive pricing. Insurers, however, are entitled to determine the terms of their offerings, including pricing, and customers are free to accept or reject those terms. *A. Ronald Sirna, Jr., P.C. Profit Sharing Plan v. Prudential Sec., Inc.*, 964 F. Supp. 147, 150 (S.D.N.Y. 1997) (dismissing fiduciary duty claims against the defendant: "At that point [when plan opened its account], the plan and PSI were strangers. PSI had no control over the plan or its assets. The plan trustee simply made his own decision to accept or reject PSI's offer. In those circumstances, PSI was not a fiduciary."). ERISA does not govern contract offerings, but rather the administration of the terms after acceptance.[2] *Musto v. Am. Gen. Corp.*, 861 F.2d 897, 911 (6th Cir.

[2] While "ERISA is designed to accomplish many worthwhile objectives . . . the regulation of purely corporate behavior is not one of them." *Peck v. Chopp*, Case No. 1:09-cv-621, 2010 U.S. Dist. LEXIS 58532, at *10 (W.D. Mich. June 14, 2010). Thus, courts "must examine the conduct at issue to determine whether it constitutes 'management' or 'administration' of *the plan* . . . or merely a business

1988) ("There is a world of difference between administering a . . . plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second.").

Thus, it is well-established that "[d]ecisions about the *content* of a plan are not themselves fiduciary acts," but rather are business decisions. *United States v. Pegram*, 530 U.S. 211, 226 (2000) (emphasis added); *Larson v. United Healthcare Ins. Co.*, 723 F.3d at 908 (affirming dismissal of ERISA fiduciary duty claims as "[s]etting policy terms, including copayment requirements, determines the *content* of the policy"); *Am. Psychiatric Ass'n*, 50 F. Supp. 3d at 170 (dismissing ERISA fiduciary duty claims where "[p]laintiffs ha[d] not challenged [d]efendants' use 'of discretion in construing and applying the provisions of [their] group health plan[s] and assessing a participant's entitlement to benefits' under the terms of such plans, but instead challenge[d] [d]efendants' setting of reimbursement rates and policies regarding the extent of coverage, which [were] business decisions"). This legal principle has been consistently and repeatedly applied by courts in the Second Circuit and other jurisdictions,[3] and Plaintiffs offer no contrary authority whatsoever.

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decision that has an effect on an ERISA plan not subject to fiduciary standards." *Id.*

[3] *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) ("[T]he composition or design of the plan itself . . . does not implicate . . . fiduciary duties"

Deluca v. Blue Cross Blue Shield of Mich., 628 F.3d 743, 747 (6th Cir. 2010) is instructive. There, the Sixth Circuit held that a health insurer was not acting as an ERISA fiduciary where negotiating rates because, even though the defendant made a decision that resulted in an increase in the PPO and traditional plan rates, such "business dealings were not directly associated with the benefits plan at issue . . . but were generally applicable to a broad range of health-care consumers." *Id.* Thus, the "conduct at issue" was a "business decision that has an effect on an ERISA plan not subject to fiduciary standards." *Id.* Here the spin-off

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under ERISA); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (noting that the functions of an ERISA fiduciary "do not include plan design" (*quoting Siskind v. Sperry Ret. Prog., Unisys,* 47 F.3d 498, 505 (1995)); *Belade v. ITT Corp.*, 909 F.2d 736, 738 (2d Cir. 1990) (affirming that "the defendant's decision to design a plan . . . did not give rise to any fiduciary duties under ERISA because [it] did not by virtue of the Program's formation exercise authority or control over the 'management' or 'administration' of either the . . . Plan or the Program."); *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1132 (7th Cir.1983) (finding that insurer "was not a fiduciary under ERISA with respect to the selection of a hospital service organization"); *In re Calpine Corp. ERISA Litig.*, 2005 U.S. Dist. LEXIS 9719, at *12-*13 (N.D. Cal. Mar. 31, 2005) (dismissing claim against defendants who "allegedly exercised authority to determine the structure of the Plan" as "plan design . . . does not give rise to fiduciary status under ERISA"); *Hartline v. Sheet Metal Worker's Nat'l Pension Fund*, 134 F. Supp. 2d 1, 16 (D.D.C. 2000) (dismissing claims as "setting the contribution rate was . . . not [a] fiduciary[ ] function because it was a matter of plan design"); *Am. Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc.*, 973 F. Supp. 60, 67-68 (D. Mass. 1997) (holding that "the organization and offering of restricted pharmacy networks" was part of the carrier's administration of its own business and not the administration of the ERISA plans (including self-insured plans) to whom it provided services, agreeing that "it is critical to distinguish between the carrier's administration of the ERISA plan and its own administration of its business.") (internal quotation marks and citation omitted).

and the PBM Agreements apply not merely to a broad range of healthcare consumers, but to all customers and to Anthem itself.

Similarly, in *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905 (7th Cir. 2013), the Seventh Circuit rejected an ERISA challenge to an overcharge of copayment rates because "it's clear that these allegations do not attack the discretionary aspects of claims administration as such; the plaintiffs are not challenging individual eligibility and benefits determinations. Instead, the complaint targets decisionmaking about policy terms" and "decisions about the content of a plan are not themselves fiduciary acts." *Id.* at 917.

Plaintiffs do not cite a single case where a health insurer's PBM contract or company-wide PBM pricing triggered fiduciary duties under ERISA. And Anthem's decision to enter into the PBM Agreement with ESI was not an individual eligibility or benefits determination under any ERISA plan, but a corporate action that determined the content of Anthem's insurance products offered to the market generally (and also governed Anthem's own purchases). Anthem did not owe Plaintiffs any fiduciary duty to offer an insurance product with any particular level of pricing, competitive or otherwise. Rather, like any business, Anthem was free to formulate the terms and economics of the products and services it wished to sell, and customers were free to accept such terms or reject them and purchase instead from another health insurer—though, ironically,

ESI's pricing was lower than NextRx's pricing. *See Am. Psychiatric Ass'n v. Anthem Health Plans*, 50 F. Supp. 3d 157, 169-170 (D. Conn. 2014) (dismissing ERISA fiduciary duty claim because challenged conduct that set "system wide" rates "regardless of the particulars of an individual [ERISA] plan" related to a corporate business decision); *Zang* v. *Paychex, Inc.*, 728 F. Supp. 2d 261, 272 (W.D.N.Y. 2010) (dismissing ERISA breach of fiduciary duty claim, noting that defendant was "free to design the various plan templates" in establishing an ERISA plan without giving rise to a fiduciary duty to plan beneficiaries).

As the district court correctly noted:

> Plaintiffs have challenged Anthem's role in setting prices they believe are unfair, *not Anthem's use of discretion in construing and applying the provisions of their group health plans and asserting a participant's entitlement to benefits.* Plaintiffs do not argue that Anthem's actions misconstrued or interpreted their health plans in a way that benefitted Anthem to the detriment of Plaintiffs. Rather, Plaintiffs argue that they overpaid for prescription drugs, which they attribute to the PBM Agreement itself, instead of Anthem's interpretation of application of their particular Anthem health plans.

(SA36) (emphasis added).

Plaintiffs argue that there is no "business exception" under ERISA and that "*every* service provider to ERISA plans operates as a 'business.'" (Pls. Brief 29) (emphasis original) The governing law is not that businesses are excepted from ERISA. Rather, the law is that decisions made for the business, rather than in administrating an ERISA plan, are not subject to ERISA fiduciary duties. *See*

supra at p. 15-18. The settled law limiting ERISA fiduciary duties to actions taken by fiduciaries on behalf of plans does not "swallow up ERISA's fiduciary obligations." Rather, extending ERISA fiduciary duties to core corporate activity would swallow up commercial law.

Plaintiffs rely on *Sixty-Five Security Plan v. Blue Cross & Blue Shield of Greater New York*, 583 F. Supp. 380 (S.D.N.Y. 1984), but that case concerned discretionary acts taken on behalf of an ERISA plan, not business-wide decisions setting the content of the plan offering. Specifically, the court found fiduciary status based on the defendant's "ability to determine which of the many claims submitted to it should be paid—especially where such a determination necessitated a decision on the appropriateness of hospital stays." *Id*. at 385. Unlike here, the defendant in *Sixty-Five Security* admittedly "exercised its discretion" as to individual claims in assessing the reasonableness of the length of any particular insured's hospital stay, which the court found to be "precisely what defines a fiduciary under ERISA." *Id*. at 386.

2. Anthem Was Not Acting As An ERISA Fiduciary In Selling Its PBM Subsidiaries

Anthem's decision to sell its PBM subsidiaries to ESI is a quintessential general corporate decision made for the benefit of its stockholders, not a transaction governed by ERISA. *See Flanigan*, 242 F.3d at 87-88 (dismissing complaint because decision to spin off a division of the company along with its

pension plan was a business decision that did not trigger ERISA fiduciary duties)[4]; *Peck v. Chopp*, No. 1:09-cv-621, 2010 U.S. Dist. LEXIS 58532, at *17 (W.D. Mich. June 14, 2010) (dismissing complaint because the decision to sell corporate assets was a business decision not regulated by ERISA fiduciary duties). Nothing in ERISA required Anthem to breach duties to stockholders by accepting less than fair value on the sale of NextRx—assets that do not belong to any ERISA plan and as to which no customer has any interest—to obtain lower pricing under the separate PBM Agreement (so that Anthem could potentially offer lower pricing to customers, which would then accept or reject the offer). ERISA simply does not address stock sales.

Plaintiffs do not cite to any authority to the contrary. Plaintiffs rely on *Donovan v. Bierworth*, 680 F.2d 263 (2d Cir. 1982) for the proposition that "*a plan-directed act* does not lose its fiduciary character simply because it is part of a larger business decision." (Pls. Brief at 31) (emphasis added) ERISA plans do not

[4] Plaintiffs asserts that *Flanigan* does not apply because Anthem was not "act[ing] in a settlor capacity" and Anthem's separate business did not amend the parties' ASAs (Pls. Brief at 32), but those matters have nothing to do with the holding in *Flanigan*. Rather, the question the Court considered there is whether the challenged activity is "at its core, a corporate business decision, and not one of a plan administrator," the same question followed by all the court's addressing legal issue. *Id*. at 88. And, as the district court correctly found here, Anthem's "decisions to sell its PBM business and to contract the provision of PBM services out to ESI" are core corporate business decisions, not plan administration decisions. (SA36)

decide corporate organization. Thus, the sale of NextRx was an act of Anthem's corporate board of directors, not a "plan-directed act." In *Donovan*, the trustees of a corporation's pension plan, who also served as officers of the corporation, attempted to defend against a hostile takeover attempt by purchasing shares of the corporation *with plan assets*. *Id.* at 264. Trustees plainly owe fiduciary duties when making investment decisions with plan assets, and no one in *Donovan* questioned the trustees' fiduciary status. The question in that case was simply whether the defendants had acted "imprudently with respect to their recent investment decisions." *Id.* at 265. Here, Anthem did not invest any plan assets. Rather, Anthem entered into a company-wide PBM Agreement, under which Anthem too makes its purchases.

3. Anthem Could Not Owe Fiduciary Duties To Mere Potential Customers

In addition to the fact that Anthem's decisions were core corporate matters unrelated to the administration of health plans, all but one of the Plaintiffs became insureds *after* the NextRx transaction and PBM Agreement were entered in 2009 and, therefore, are challenging pricing terms set before they had any relationship with Anthem. Anthem could not owe fiduciary duties to Plaintiffs who had no relationship with Anthem in 2009, when Anthem sold NextRx and entered into the PBM Agreement. ERISA Section 409(b) expressly provides that "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such

breach was committed *before* he became a fiduciary." ERISA § 409(b) (emphasis added); *see also Pegram*, 530 U.S. at 227 (holding that because a defendant's incorporation, which included certain challenged terms, preceded its contract with the plan, defendant could not have been acting as a fiduciary when it incorporated those terms).[5]

* * *

In sum, the district court correctly found that Plaintiffs do not, and cannot, allege that Anthem owed ERISA fiduciary duties with respect to the sale of NextRx or the PBM Agreement because they do not challenge any discretionary determinations by Anthem under an ERISA plan, such as a member's eligibility for particular benefits, "but rather dispute the substantive decisions that Defendants have made" in "rate setting on a 'system-wide' basis 'regardless of the particulars of the individual plan.'" *Am. Psychiatric Ass'n*, 50 F. Supp. 3d at 169. The plan terms were offered and accepted on an arms'-length basis.

B. Characterizing The Content Of The Plans As An Exercise Of Discretion Does Not Change The Law That Such Business Decisions Do Not Give Rise To ERISA Fiduciary Duties

Plaintiffs' argument that Anthem had "broad discretion . . . to determine [prescription drug] prices, including the discretion to negotiate a PBM contract that

[5] Plaintiffs Doe Two, Burnett, and Shullich were not members of any plan that Anthem administered for its customer employers in 2009, and Plaintiff Brothers Trading did not enter into an ASA with Anthem until 2012. (JA55, ¶ 42; JA59, ¶ 52; JA 65, ¶ 70, JA71, ¶ 95)

governs those prices" (Pls. Brief at 20-23, 28) is simply another way of saying that Anthem had the right to set the content of its policy offerings, which is not a fiduciary act under ERISA. *See Deluca*, 628 F.3d at 747 (finding defendant was not acting as a fiduciary in negotiating rates "because these business dealings were not directly associated with the benefit plans at issue—but were generally applicable to a broad range of health-care consumers" so the "conduct at issue" was a "business decision that has an effect on an ERISA plan not subject to fiduciary standards."); *Moeckel v. Caremark, Inc.*, 622 F. Supp. 663, 677 (M.D. Tenn. 2007) ("Caremark's contracting with retail pharmacies in its proprietary network—is separate and distinct from Caremark's contractual relationship with [plan sponsor] or any of its other customers. It is part of Caremark's *administration of its own business* as a PBM. As such, *it is not fiduciary in nature*.") (emphasis added); *In re Express Scripts, Inc., PBM Litig.*, No. 4:05-MD-01672 SNL, 2008 U.S. Dist. LEXIS 80769, at *36 (E.D. Mo. July 30, 2008) (finding defendant was not functioning as an ERISA fiduciary in "negotiating with pharmaceutical manufacturers for its entire book of business, without regard to any particular plan"). Anthem owed no fiduciary duty to potential customers in deciding the policy terms to offer, including as the pricing terms available under the PBM Agreement. "Succinctly put, contract negotiation is not discretionary

plan administration." *Marks v. Independence Blue Cross*, 71 F. Supp. 2d 432, 436 (E.D. Pa. 1999).

Additionally, Anthem did not exercise discretion in setting Plaintiffs' pricing. Anthem entered into the PBM Agreement—and all health insurers enter into PBM agreements—and ESI then established the pricing, subject to the ceilings established in the PBM Agreement. (SA28-31) Plaintiffs then purchased plans that allowed them to make purchases from ESI on such terms. Notably, Section 5.6 of the PBM Agreement requires ESI periodically to negotiate in good faith "to ensure that [Anthem] receives competitive benchmark pricing" at a business-wide level. (JA341)

None of the cases cited by Plaintiffs support their argument, but rather concern discretionary acts or control taken *on behalf of an ERISA plan or assets*, not business-wide decisions. *See F. H. Krear & Co. v. Nineteen Named Trs.*, 810 F.2d 1250, 1259 (2d Cir. 1987) (finding that plan trustees owed fiduciary duties when exercising discretion under the plan to determine their own compensation); *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 744 (6th Cir. 2014) (finding that an insurer acted as a fiduciary when determining, individually and selectively, whether to impose or waive a network access fee); *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 737-38 (7th Cir. 1986) (finding fiduciary status where a life insurer exercised a unilateral right under

retirement insurance policy after it was purchased to change return and premium rates which "does not appear to be qualitatively different from the ability to choose investments" on behalf of policy) [6]

C. Anthem Did Not Exercise Authority Or Control Over ERISA Plan Assets When It Sold NextRx Or Entered Into The PBM Agreement With ESI

Plaintiffs make two new arguments that Anthem should be treated as a fiduciary based on Anthem's purported "authority or control" over "management or disposition of [the Plans'] assets." *One*, Plaintiffs argue that Anthem exercises control over Plan assets because the self-insured Plans (not Anthem) ultimately pay the prescription medication claims. *Two*, Plaintiffs argue that the "contracts and other instruments" between Anthem and the Plans "are plan assets in and of themselves," and Anthem exercised control and "manipulated" such agreements when setting pricing terms. (Pls. Brief at 24-28) Plaintiffs' "plan asset control" claims were not pled below, are incorrect, and are not supported by any authority cited by Plaintiff or otherwise.

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[6] Plaintiffs also cite *Varity Corp. v. Howe*, 516 U.S. 489 (1996) for the general proposition that plan administration involves "powers as are necessary or appropriate for the carrying out of the purposes" of a plan (Pl. Brief at 22), but nothing in *Varity* is inconsistent with (much less overturns) the line of cases—including the United State Supreme Court's decision in *Pegram*—holding that determinations of plan content do not involve plan administration subject to fiduciary duties under ERISA. Indeed, the terms of the plan offering are not part of administering the plan. Administration of the plan occurs *after* there is an agreement on terms.

1. Plaintiffs' Arguments Were Not Pled Below, And Are Waived

The district court correctly found that "Plaintiffs do not allege that Anthem's fiduciary status arises from any purported control over any plan assets." (SA37) Plaintiffs' new argument that Anthem had authority or control over plan assets is not pled in the Complaint. (JA105, ¶ 207 (laying out the bases under which Anthem was allegedly a fiduciary to Plaintiffs))[7] Consequently, the argument is not properly raised on appeal. *Hallock v. Bonner*, 343 F. App'x 633, 635 (2d Cir. 2009) ("Plaintiffs never pled this new theory of liability and therefore have waived any claims relating to it"); *Kowal v. IBM (In re IBM Corporate Sec. Litig.)*, 163 F.3d 102, 110 (2d Cir. 1998) (same).

Plaintiffs also failed to raise these arguments with the district court and, therefore, have waived them for this reason as well. *Taylor v. Illinois*, 484 U.S. 400, 420 (1988) (finding an "issue, raised for the first time on appeal, to have been waived"); *N.Y. City Dist. Council of Carpenters v. Best Made Floors Inc.*, 706 F. App'x 31, 33 n.1 (2d Cir. 2017) ("Because [the party] raises this issue for the first time on appeal, we consider it waived.").

Plaintiffs also argue on appeal that Anthem had fiduciary duties because Anthem's ASA contacts purportedly are themselves plan assets (Pls. Brief at 26-

[7] Plaintiffs concede this failure, asking this Court to draw a "reasonable inference" that Plaintiffs had pled these control allegations, but they raised no allegation that would allow for such an inference.

27), but the argument that the ASA contracts are plan assets was not raised in the Complaint and first appeared in Plaintiffs' opposition to the motion to dismiss concerning a different claim against Anthem, so it too is untimely.[8] *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (rejecting claim raised for the first time in plaintiff's brief in opposition to the defendant's motion to dismiss).

In addition, the district court's order provided Plaintiffs with the opportunity to replead their claims (SA50), but Plaintiffs elected not to do so. Accordingly, dismissal of Plaintiffs' claims with prejudice is particularly appropriate. *Atlanta Shipping Corp. v. Chem. Bank*, 818 F.2d 240, 246 (2d Cir. 1987) ("When a complaint is dismissed with the right to replead, a plaintiff may decline to replead, accept an adverse judgment dismissing the action, and on appeal from the judgment secure review of the ruling requiring repleading. In doing so, the plaintiff takes a calculated risk. He stands or falls on the success of his challenge. If the order requiring repleading is upheld, the case is over.").

[8] Plaintiffs raised the argument as to a prohibited transaction claim. The district court dismissed the ERISA prohibited transaction claim because it found that Anthem was not acting as an ERISA fiduciary when taking the challenged conduct. (SA39) Plaintiffs do not challenge this dismissal on appeal and, therefore, have waived the issue. *See United States v. Quinones*, 551 F.3d 289, 311 (2d Cir. 2007) ("[B]ecause these issues are not pursued on appeal to this court, we deem them waived.").

2. Plaintiffs' Plan Asset Allegations Are Insufficient To Evade The Well-Established Law That Formulating Policy Content Does Not Trigger Fiduciary Duties

Plaintiffs argue that Anthem is a fiduciary with "'authority or control' over 'management or disposition of [the Plans'] assets" because (i) the self-insured Plans (not Anthem) ultimately pay the prescription plan claims,[9] and (ii) Anthem was permitted to negotiate the PBM Agreement that allowed ESI to set prices subject to price ceilings set forth in Schedule A. (Pl. Br. at 24-25) Plaintiffs' new argument is merely another way to state that Anthem had the ability to determine the content of the policies that it was free to offer, and that Plaintiffs were free to accept or reject. As addressed above, the courts are uniform in holding that a health benefits provider's determination of the content of its policy products are not governed by fiduciary duties under ERISA. *See supra* at pp. 19-23. Plaintiffs cannot evade the law by characterizing the business act of setting policy term offerings as managing plan assets. Plaintiffs cite no case allowing such a claim.

3. Plaintiffs' Plan Asset Allegations Are Irrelevant And Incorrect

Plaintiffs' arguments that Anthem had contractual authority to enter into the PBM Agreement and that prescription drug claims are paid by the self-insured

[9] Plaintiffs' argument that Anthem should be held to a fiduciary standard because the self-insured Plans pay for prescription drug claims with their own funds is incorrect, but also is made only on behalf of the two Plan Plaintiffs (Stamford Health, Inc. and Brothers Trading Co., Inc.). The argument has no relevance to the remaining Plaintiffs.

plans, not Anthem, are also irrelevant to the disputed claims on appeal. As the district court correctly recognized, the core issue is whether Anthem's decisions to sell its NextRx subsidiaries and to enter into the PBM Agreement that affected pricing terms on a business-wide basis (including for Anthem itself) triggered fiduciary duties. Whether any funds could be considered "plan assets" that would be used to pay claims under the terms of various policies is irrelevant to that determination. In addition, Plaintiffs' concession that Anthem complied with any Plan related agreement when entering into the PBM Agreement would only weigh against imposing a fiduciary duty here. *See, e.g.*, *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 737 (7th Cir. 1986) ("[n]o discretion is exercised when an insurer merely adheres to a specific contract term.") (cited at Pl. Br. p. 21).

Additionally, Anthem's negotiation of generally applicable pricing terms through the PBM Agreement is a distinct activity from the subsequent processing and payment of individual claims. Anthem negotiated the PBM Agreement for all of its customers, and for itself, as part of its corporate business activities. The PBM Agreement is strictly between Anthem and ESI. Anthem's future receipt or transfer of payments from a self-insured Plan—none of which are challenged—has no bearing on the fact that Anthem did not wear a fiduciary hat when negotiating the PBM Agreement and its related pricing terms.

Plaintiffs' new arguments are also incorrect. Anthem did not have any "discretion over the amount of Plan assets that went to prescription medication benefits, and to whom those assets would be paid." (Pl. Br. at 25 (citing to no supporting allegations in the Complaint)). Anthem did not control (i) whether any Plaintiffs agreed to an Anthem insurance product, (ii) whether and how many prescription claims would be filed, or (iii) what pharmacy providers were paid. ESI controlled pricing, subject to the PBM Agreement. Thus, Plaintiffs do not allege that Anthem had the power to control, direct or retain the payment of any plan assets, received any plan assets that should have been returned to Plaintiffs, or breached any governing plan documents.

In addition, Plaintiffs' threadbare, unexplained argument that the Plan's contracts (such as the ASAs) are themselves "plan assets," which Anthem somehow "exercised authority or control over" and "manipulated," makes no sense. (Pl. Br. at 26-27) Anthem does not "control" these bilateral contracts any more than the Plaintiffs do. Nor is there any allegation or explanation how Anthem allegedly "manipulated" any (unidentified) Plan associated contract. To the contrary, Plaintiffs have acknowledged that Anthem complied with relevant agreements. (Pl. Br. at 27-28)

4. None Of Plaintiffs' Cited Authority Supports Its New Argument That Anthem Controlled Plan Assets

Plaintiffs can cite no case where a health benefits provider assumed fiduciary duties in setting policy content by entering into a PBM Agreement or by receiving self-insured plan funds in the ordinary course of claims administration.[10]

[10] The cases Plaintiffs cite merely illustrate that fiduciary duties attach where a defendant exercises actual and direct control over a plan's funds or makes investments on behalf of a plan using plan assets. *IT Corp. v. Gen Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997) (addressing claims against a fiduciary who "controlled the money in the plan's bank account."); *United States v. Glick*, 142 F.3d 520 (2d Cir. 1998) (finding that agent who "deducted his commission directly from [plan] assets" had control over such assets); *Brook v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (finding fiduciary duty where union official directed plan assets to a corporation he owned); *Eversole v. Metro. Life Ins. Co.*, 500 F. Supp. 1162, 1165 (C.D. Cal. 1980) (holding that insurer was an ERISA fiduciary as to a claim for bad faith denial of medical benefits because the Summary Plan Description of plaintiff's benefit plan names the insurer as a fiduciary and provides that the insurer "has the authority to grant or deny claims"); *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (cited at Pl. Br. p. 27) (decision does not address control over plan assets or the definition of a plan asset; rather, U.S. Supreme Court held that extra-contractual damages was not a proper remedy under ERISA arising from a claim denial).

Other cases cited by Plaintiffs concern instances where defendants had actual possession or authority over plan assets and retained specific funds in violation of the parties' written agreements. *See, e.g., Negron v. Cigna Health & Life Ins.*, --- F. Supp. 3d ---, No. 3:16cv1702(WWE), 2018 U.S. Dist. 39820, at *7 (D. Conn. Mar. 12, 2018) (alleging that defendant insurers entered into a fraudulent scheme to retain the "claw-backs" of unnecessary copayments made by insureds and thereby breached the parties' agreement); *Everson v. Blue Cross & Blue Shield*, 898 F. Supp. 532, 538-39 (N.D. Ohio 1994) (finding a claim for breach of fiduciary duty was stated when the defendant-insurer did not share certain discounts received from health care providers and, thus, caused insureds to make co-payments in excess of that required by the insurance contract, noting that such result was particularly appropriate because the plan's only asset consisted of the

To the contrary, courts have uniformly rejected this argument. *See supra* at pp. 19-23.

Deluca is again instructive. There, the Sixth Circuit rejected an argument that the defendant "exercise[d[ ] any authority or control respecting management or disposition of [plan] assets" when negotiating rates, and recognized that "[e]ven if [defendant] did have authority or control respecting plan assets, this argument is refuted by *Pegram* . . . [which] holds that liability for a breach of fiduciary duty can occur only when a party "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." 628 F.3d at 747-48. The Sixth Circuit then noted that the "argument is not that the [defendant] unwisely invested, wrongly appropriated, or otherwise squandered plan assets under its authority and control. Instead, the action subject to the complaint is [defendant's] negotiation of rates. Regardless of whether [defendant] exercised discretionary authority or control over plan assets in some other contexts, the challenged rate negotiations were not an exercise of such authority or control." *Id.*; *see also Hannan v. Hartford Fin. Servs.*, 688 F. App'x 85, 89 (2d Cir. 2017) (finding that complaints about the defendant's "negotiation conduct . . . did not

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insurance policy and the insurer-defendant's misconduct reduced the actual benefits otherwise provided by the policy). Here, Plaintiffs allege that Anthem *complied* with all Plan agreements. (Pl. Br. at 24-28)

sufficiently allege that [it] had or exercised any discretionary authority over the Plan or its assets").

D. The *Amici Curiae* Brief Adds Nothing To The Arguments

The Brief of Amici Curiae of AARP and the National Employment Lawyers Association in Support of Appellants redundantly (and incorrectly) asserts that Anthem exercised discretion in managing ERISA plans or had authority and control over plan assets when Anthem made the business decisions to sell NextRx and enter into the PBM Agreement with ESI. (Amici Brief at 4) The AARP and the NELA largely rely on the same inapposite authorities cited by Plaintiffs and addressed above. (Amici at pp. 11-17) (citing *Varity*, *Negron*, *Everson*, and *Sixty-Five Sec. Plan*) Amici also cite *In re Express Scripts, Inc.*, No. 4:05-MD-01672 SNL, 2008 U.S. Dist. LEXIS 80769, at *36 (E.D. Mo. July 30, 2008), but that case only undermines the appeal because the court there found that the defendant was *not* functioning as an ERISA fiduciary in "negotiating with pharmaceutical manufacturers for its entire book of business, without regard to any particular plan."

Amici also assert incorrectly that a finding that Anthem was not an ERISA fiduciary with respect to the challenged conduct "would deprive plan sponsors of their ability to control costs." (Amici Brief at 5) To the contrary, sponsors have the ability to choose or reject the pricing terms offered to them in a highly

competitive market. Amici also ignores all the associated factors, such as fees, deductibles, co-pays, policy limits and benefit levels in other areas that are part of the bundle of contractual benefits that the plan sponsors *agreed to* in the Plans and that Anthem is indisputably providing. As the district court found, "Plaintiffs have challenged Anthem's role in setting prices they believe are unfair, not Anthem's 'use or discretion in construing and applying the provisions of their group health plans and assessing a participant's entitlement to benefits," and "while Plaintiffs point to Section 5.6 and its motion of 'competitive benchmark' prices, Plaintiffs have no right under ERISA to receive 'competitive benchmark pricing,' or even average pricing, for prescription drugs." (SA36) Additionally, it is ESI that is failing to provide competitive benchmark pricing, and Anthem is pursuing its rights in court.

Lastly, Amici cites general cases in which courts find that the determination of whether a person is a fiduciary "is a highly fact intensive inquiry and generally cannot be determined at the pleading stage" (Amici Brief at 11), but here the district court correctly dismissed the claims because Plaintiffs have failed to plead any facts showing that Anthem exercised any discretion or control over plan administration or plan assets when taking the challenged actions. ERISA claims are not immune from motions to dismiss. *See, e.g., Faber v. Metro. Life Ins. Co.,*

648 F.3d 98, 107 (2d Cir. 2011) (affirming dismissal of ERISA fiduciary breach claims); *Flanigan v. GE*, 242 F.3d 78, 87-88 (2d. Cir. 2001) (same).

E. Plaintiffs Also Failed To Allege That Anthem Breached Any Non-Existent Fiduciary Duties

In addition to the fact that the district court correctly held that Anthem did not owe fiduciary duties to Plaintiffs when it sold NextRx or entered into the PBM Agreement, Plaintiffs failed to allege facts that Anthem breached any alleged duties. Plaintiffs' unstated premise for their claims is that they are entitled to receive some unidentified pricing, but ERISA does not provide Plaintiffs a right to any specific level of pharmacy pricing, nor do Plaintiffs allege any related contractual right. To the contrary, insurers can, and do, determine their own pricing, which can be competitive or not competitive. Thus, as the district court correctly found:

> Plaintiffs do not allege that Anthem was required to provide them with certain pricing levels for prescription drugs and then violated those requirements. Nor do Plaintiffs allege that Anthem promised them "competitive benchmark pricing" and either failed to meet this requirement or failed to disclose that it could negotiate for, but could not guarantee, competitive benchmark pricing throughout the pendency of the PBM Agreement.

(SA38)

This fatal defect is evident throughout Plaintiffs' argument as Plaintiffs vaguely complain, for example, that Anthem "charge[d] higher prices" or Plaintiffs "would have to pay higher prices" (Pls. Br. at 1, 8), without explaining what they

were "higher" than. Plaintiffs do not, and cannot, argue that they were promised any pricing other than the pricing that they received. As the district court properly found, Plaintiffs cite to no legal or contractual authority that entitles Plaintiffs to any level of pharmacy pricing, including "competitive benchmark pricing." Plaintiffs simply seek to impose a fiduciary duty on Anthem when determining the content of its policy—an argument that has been uniformly rejected by the courts and others—in order to obtain specific pricing terms that neither ERISA nor the parties' written agreements require Anthem to provide.

Another example of Plaintiffs' deficiency is their one-sentence conclusory argument that Anthem's "process of negotiation" to sell NextRx "fell below the standard of care that a prudent entity in Anthem's shoes would have followed in similar circumstances. (Pls. Brief at 37) Plaintiffs make this argument without a single factual allegation concerning: (i) the actual 2009 NextRx negotiations, (ii) the value of NextRx, (iii) the actual PBM pricing (which was competitive), (iv) how Anthem's negotiating strategy was allegedly deficient, (v) what allegedly "prudent" negotiations would have entailed, (vi) what "similar circumstances" Plaintiffs are referring to, and (vii) why these Plaintiffs should have any right or interest in this 2009 transaction in conflict with Anthem's stockholders, to whom Anthem owed fiduciary duties when completing this corporate transaction.

None of the authorities cited by Plaintiffs remotely hold that insurers are subject to fiduciary duties when negotiating the sale of subsidiaries or a PBM agreement with a third party service provider for Anthem's pharmaceutical purchases as offered to customers and for Anthem's own account. *See Whitfield v. Cohen*, 682 F. Supp. 188 (S.D.N.Y. 1988) (named fiduciary breached fiduciary duties when he transferred funds of investment account to an unknown investment manager, with no knowledge of actual investments made, and without receiving monthly statements); *John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Grp., Inc. Profit Sharing Plan*, 26 F.3d 360 (2d Cir. 1994) (defendants breached fiduciary duties during the spinoff of a defined contribution plan when they failed to transfer investment gains made during the time period between the valuation date and the actual transfer); *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982) (directors and trustees of pension fund breached fiduciary duties by failing adequately to inform themselves and obtain appropriate legal advice while simultaneously opposing tender offer and managing pension fund's investment decisions).

F. The District Court Correctly Held That Plaintiffs Failed To Plead A Duty To Monitor Claim Against Anthem

The district court also correctly held that Plaintiffs failed to state a "duty to monitor" claim against Anthem. (SA35, n.43) To state a duty to monitor claim, Plaintiffs must allege not only the existence of a fiduciary duty relationship (which

Plaintiffs failed to do), but also the existence of specific factual circumstances and "red flags" that, if true, would reasonably have led Anthem to conclude that ESI was not performing its fiduciary duties—and the district court held that ESI also owed no fiduciary duties. *See, e.g., Pugh v. Tribune Co.*, 521 F.3d 686, 700 (7th Cir. 2008) ("ERISA imposes no duty on plan fiduciaries to continuously audit operational affairs. Rather, courts have held that a duty to investigate only arises when there is some reason to suspect that [the other fiduciary's act] may be imprudent—that is, there must be something akin to a 'red flag' of misconduct."); *Smith v. Williams*, 819 F. Supp. 2d 1264, 1282 (M.D. Fla. 2011) ("To show breach [of the duty to monitor] plaintiffs must allege that the [appointing fiduciaries] had 'notice of possible misadventure' by the [appointed fiduciaries] or knowledge of conduct that would warrant removal."); *In re ING Groep, N.V. ERISA Litig.*, 749 F. Supp. 2d 1338, 1350 (N.D. Ga. 2010) ("[T]o prove a breach of a duty to monitor, the monitoring party must have 'notice of possible misadventure' by the other fiduciaries.").

Plaintiffs do not allege any well-pled facts that Anthem failed to monitor ESI's performance. To the contrary, the NextRx transaction closed in 2009, so there was nothing to monitor thereafter. As to the PBM Agreement, Plaintiffs plead facts demonstrating that Anthem was doing far more than merely monitoring ESI. Rather, Anthem renegotiated lower pricing terms at the first opportunity,

when the original three-year period under the PBM agreement expired. (JA86, ¶ 144; JA88, ¶ 151) In late-2014 or early-2015, Anthem, engaged an independent third-party expert consultant to determine whether ESI's pricing terms were competitive. When Anthem determined that ESI's pricing exceeded competitive benchmark pricing, Anthem submitted numerous pricing proposals and attempted to engage ESI in good faith negotiations under Section 5.6 over a course of months. (JA83-102, ¶¶ 136-198) ESI failed to negotiate in good faith, and Anthem then sued ESI for breach of the PBM Agreement to obtain, among other things, damages for ESI's failure to provide competitive benchmark pricing. (JA89-90, ¶¶ 159, 161, 165)

Thus, far from alleging a failure to monitor claim, Plaintiffs themselves plead facts showing that Anthem not only monitored ESI's pricing, but also vigorously enforced its rights. ESI is an unaffiliated public company that is not subject to Anthem's control. Plaintiffs do not, and cannot, identify anything further that Anthem could have done to address ESI's pricing. Accordingly, the district court properly dismissed Plaintiffs' "duty to monitor" claim. *See In re Nokia ERISA Litig.*, 10 cv 03306, 2011 U.S. Dist. LEXIS 101265, at *22 (S.D.N.Y. Sept. 6, 2011) ("[T]he Complaint does not allege any specific factual basis to support Plaintiffs' conclusory allegation of a lack of legally sufficient monitoring by Defendants."); *In re Citigroup ERISA Litig.*, 07 Civ. 9790, 2009

U.S. Dist. LEXIS 78055, at *78-80 (S.D.N.Y. Aug. 31, 2009) (dismissing duty to monitor claim where plaintiffs "failed to cite any instance of misconduct that the Monitoring Defendants failed to detect"), *aff'd*, 662 F.3d 128 (2d Cir. 2011); *see also Pugh v. Tribune Co.*, 521 F.3d 686, 700 (7th Cir. 2008) (dismissing duty to monitor claim where allegations had "nothing but pure speculation to support them"); *In re Calpine Corp. ERISA Litig.*, Master File No. C-03-1685 SBA, 2005 U.S. Dist. LEXIS 9719, at *19-20 (N.D. Cal. Mar. 30, 2005) (granting dismissal where no factual allegations supported claim that defendants failed to review the performance of fiduciary appointees).

II. The District Court Correctly Held That Plaintiffs Failed To State A Claim For Co-Fiduciary Liability Under ERISA

Under Section 405 of ERISA, a "fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

> i. If he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> ii. if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> iii. if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach."

29 U.S.C. § 1105(a)(1)-(3).

A. The District Court Correctly Dismissed Plaintiffs' Section 405 Claims Because Anthem And ESI Are Not Fiduciaries Under ERISA

The district court correctly found that Anthem is not a fiduciary with respect to the conduct challenged in the Complaint, so there can be no Section 405 claim. (SA27-34) The district court also found that ESI was not a fiduciary, providing another ground for dismissal. *See In re Nokia ERISA Litig.*, 10 cv 03306, 2011 U.S. Dist. LEXIS 101265, at *23-24 (S.D.N.Y. Sept. 6, 2011) ("Having failed to plausibly allege a breach of fiduciary duty by any of the Plan Committee Defendants, Plaintiffs necessarily fail to state a claim for co-fiduciary liability."). [11]

B. Plaintiffs Also Failed To State A Claim That Anthem Enabled ESI's Alleged Breaches of Fiduciary Duty

In addition to the failure adequately to plead that Anthem and ESI were both fiduciaries with respect to the challenged conduct, Plaintiffs also failed to allege that Anthem is liable under Section 405(a)(2) for purportedly "enabling" ESI's alleged breaches. "[T]o pursue a claim for liability against one fiduciary based upon the breach by a second co-fiduciary under [ERISA Section 405(a)(2)], a plaintiff must aver sufficient factual matter to support a reasonable inference [] *that*

[11] In addition, Plaintiffs offer no argument concerning Section 405(a)(1) and, thus, have waived such claim. *See United States v. Quinones*, 511 F.3d 289, 311 (2d Cir. 2007) ("[B]ecause these issues are not pursued on appeal to this court, we deem them waived.").

the first fiduciary's breach caused his co-fiduciary to also commit a breach." *Askew v. R.L. Reppert, Inc.*, 902 F. Supp. 2d 676, 687 (E.D. Pa. 2012) (emphasis added); *Brandt v. Grounds*, 502 F. Supp. 598, 599 (N.D. Ill. 1980), *aff'd*, 687 F.2d 895 (7th Cir. 1982) (explaining that the language of ERISA Section 405(a)(2) "clearly contemplates a relationship between the fiduciary's failure to perform his specific duties and the resulting harm").

Thus, Plaintiffs must allege both (i) a breach by Anthem and (ii) that such breach caused or enabled a breach by ESI. Plaintiffs failed properly to allege either element. Instead, their own allegations make clear that Anthem did the opposite of enabling ESI's breaches by diligently pressing ESI to abide by the terms of the PBM Agreement, including commencing legal action against ESI based on such breach. (JA90 ¶¶ 161) Plaintiffs do not, and cannot, allege anything additional that Anthem could have done. Anthem's entry into the PBM Agreement with ESI also cannot support a claim for fiduciary liability because such decisions are not subject to ERISA. *See supra* at pp. 15-44; *see also Danza v. Fid. Mgmt. Trust Co.*, 533 F. App'x at 120, 125 (3d Cir. 2013) ("Because [defendant] cannot be held liable as a co-fiduciary, Plaintiff's Section 405(a) claims fail."); *Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011) (because trustee owed "no fiduciary duty with respect to the negotiation of its fee compensation by [the employer]," it could not be held liable as an ERISA co-fiduciary).

C. Plaintiffs Further Fail To State A Claim That Anthem Did Not Remedy Known Breaches Of Duty By ESI

Plaintiffs also allege that Anthem is subject to co-fiduciary liability under ERISA Section 405(a)(1) and (3) because Anthem: (1) "knowingly participated in [ESI's] breaches by allowing [ESI] to charge the Plans and the Subscriber ERISA Class members for prescription medication at inflated prices" or (2) "had knowledge of [ESI's] breaches . . . but failed to make reasonable efforts under the circumstances to remedy the breach." (SAC ¶ 360) Plaintiffs' allegations do not support a claim for two reasons.

One, to establish "knowledge" under these sections, "the fiduciary must know the other person is a fiduciary with respect to the plan, must know that he participated in the act that constituted a breach, and must know it was a breach." *Renfro,* 671 F.3d at 324. Here, Plaintiffs only (and inadequately) allege that Anthem knew that ESI is a counterparty to the PBM Agreement and that ESI is charging prices in excess of competitive benchmark pricing in breach of the PBM Agreement. (JA46, ¶ 14; JA90, ¶ 164) Plaintiffs do not allege that Anthem knew that ESI was anything more than its counterparty to the PBM Agreement, and vaguely argue (with no support) that ESI charged "pricing terms [that] were inconsistent with industry-standard metrics." (Pls. Brief at 49) Such bare-bones allegations are patently insufficient to state a claim for co-fiduciary liability. *See*

In re Nokia Erisa Litig., 10 cv 03306, 2011 U.S. Dist. LEXIS 101265, at *23 (S.D.N.Y. Sept. 6, 2011) (dismissing ERISA co-fiduciary claim where "[n]o specific factual allegations are made to support Plaintiffs' conclusory claim"); *see also Lee v. Burkhart*, 991 F.2d 1004, 1010-11 (2d Cir. 1993) (dismissing co-fiduciary duty claim under Section 405(a)(3) where plaintiffs failed to allege knowledge of co-fiduciary's breach by defendant); *Renfro*, 671 F.3d at 324-25 (dismissing co-fiduciary ERISA claims as plaintiffs failed to plead that the trustee knew the employer's investment decisions constituted a breach of fiduciary duty).

Two, Plaintiffs fail to allege any plausible facts showing that Anthem did not take "reasonable steps" to remedy ESI's non-existent breaches of ERISA fiduciary duties or breaches of the PBM Agreement. To the contrary, Plaintiffs' allegations are that Anthem attempted, for almost a year, to engage ESI in good faith negotiations for competitive benchmark pricing under Section 5.6 of the PBM Agreement, and then filed the Anthem Lawsuit seeking approximately $15 billion in damages and certain declaratory judgments to enforce the PBM Agreement. (JA90-JA102, ¶¶ 161-198) Plaintiffs assert that whether Anthem's multi-billion dollar lawsuit against ESI was a reasonable step to remedy ESI's breaches is a "question[ ] of fact" (Pls. Brief at 49), but they fail to identify any purported factual questions, much less any other steps Anthem should have taken, but did not take, to remedy's ESI's purported breaches. ESI is an unaffiliated public company

and Anthem has no ability to cause ESI to remedy its breaches. As Plaintiffs allege, however, Anthem hired an expert consultant, consistently tried to engage ESI in negotiations, and filed a lawsuit against ESI in federal court. (JA46-47, ¶¶ 144-147; JA47-48, ¶¶ 150-151; JA89-90, ¶ 159, 161; JA91-102, ¶¶ 165-98; JA156 ¶ 404). Plaintiffs cite no authority to support liability under Section 405(a)(3) based on the uncontested circumstances here. To the contrary, Plaintiffs cite only to a single case which specifically identified reasonable steps that could have been taken. *See Gordon v. Softech Int'l Inc.*, 726 F.3d 42 (2d Cir. 2013) (identifying steps defendant should have taken under Driver's Privacy Protection Act to verify information associated with credit card number before disclosing personal information).

III. The District Court Correctly Held That Claims Based On Conduct Before May 6, 2010 Are Time Barred And The Plaintiffs Cannot Equitably Toll The Statue Of Limitations

Plaintiffs challenge the district court's finding that claims related to the 2009 PBM Agreement were barred because they are not "entitled to equitable tolling under ERISA's 'fraud or concealment' exception."[12] (SA24; *see also* Plaintiffs

[12] In the decision on appeal, the district court found that "none of Plaintiffs' ERISA claims are time-barred to the extent they are based on conduct occurring after May 6, 2010." (SA22) The district court also found that "with respect to Plaintiffs' allegations against Anthem for breach of the duty to monitor . . . conduct pre-dating May 6, 2010 is timely." (SA25)

Brief at 53) As discussed below, Plaintiffs did not remotely meet their burden of establishing equitable tolling of the statute of limitations here.

Section 413 of ERISA provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after *the earlier of—*
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (emphasis added). Thus, an ERISA claim is untimely if it is not brought within three years of knowledge of the alleged breach or, at latest (where no knowledge exists), within six years of the conduct constituting the breach or violation. *Oechsner v. Connell Ltd. Partnership*, 283 F. Supp. 2d 926, 934 (S.D.N.Y. 2003) ("An ERISA claim will be untimely if it is not brought within the earlier of the two-prong limitations period.").

Here, there is no dispute that Plaintiffs' claims concerning Anthem's decision to select ESI as the PBM provider and enter into the PBM Agreement

arose in 2009. (JA142, ¶ 331 (alleging that "Anthem breached its fiduciary duty under ERISA [] by entering into the PBM Agreement with [ESI] that was not in the best interests of Subscriber ERISA Plaintiffs, the Subscriber ERISA Class, the Plan Plaintiffs and the Plan Class."); *see also* JA108, ¶ 217; JA143-144 ¶¶ 333, 338; JA146, ¶ 352; JA148, ¶ 360) Thus, Plaintiffs must rely on the "fraud or concealment" tolling exception to assert claims arising from Anthem's agreement to the terms in the PBM Agreement in 2009. (Pls. Brief at 53)

As this Court has explained, "to successfully plead this fraud or concealment exception," a complaint must allege that a fiduciary either "(1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment; or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 228 (2d. Cir. 2001) (internal quotation marks, citations, and alterations omitted) (emphasis added). In addition, these allegations must be stated "with particularity," under Rule 9(b) of the Federal Rules of Civil Procedures, requiring a plaintiff to "specify the time, place, speaker, and content of the alleged misrepresentations," as well as "how the misrepresentations were fraudulent" and "those events which give rise to a strong inference that the defendant had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth." *Id.* (*citing Janese v. Fay*, 692 F.3d 221, 227-28 (2d Cir. 2012)). Moreover, the fraud

"exception applies only to toll the running of the six-year period as to claims against *those defendants* alleged to have engaged in specific acts of fraud or concealment." *Janese v. Scrufari*, 09-CV-593-JTC, 2013 U.S. Dist. LEXIS 142888, at *5 (W.D.N.Y. Oct. 2, 2013) (emphasis added).

Plaintiffs do not allege that Anthem breached its duty by "making a knowing misrepresentation or omission of a material fact" or engaging in any other specific acts of fraud, much less plead such acts with the particularity required under Rule 9(b). Instead, Plaintiffs wrongly assert that the statute of limitations should be tolled based on Anthem's purported "concealment." Specifically, Plaintiffs assert that Anthem failed to provide them with information about "the details and nature of its negotiations regarding the PBM Agreement and the NextRx Agreement," "material terms of the PBM Agreement," and a market analysis of ESI's pricing. (Pls. Brief at 55-56) Plaintiffs further claim the alleged concealment of this information "is related to plan benefits" because they would show Plaintiffs "pay more than they should have paid for their prescription benefits." (Pls. Brief at 57)

As the district court correctly held, Anthem had no legal duty to disclose the information at issue to Plaintiffs or anyone else. In order to allege concealment, a "plaintiff must allege facts giving rise to a duty to disclose." *DePasquale v. DePasquale*, No. 12-CV-2564, 2013 U.S. Dist. LEXIS 30215, *36 (E.D.N.Y. March 1. 2013) (internal citation omitted). (refusing to apply the concealment

exception); *Murphy v. IBM*, 2012 U.S. Dist. LEXIS 21625, at *17 (S.D.N.Y. Feb. 21, 2012) ("Plaintiffs do not allege any facts suggesting that [the defendant] had a specific duty (under ERISA or otherwise) to provide a more detailed description than they did."); *Oechsner v. Connell Ltd. P'ship*, 283 F. Supp. 2d 926, 934 (S.D.N.Y. 2003) (no concealment where plaintiffs "essentially allege that defendants did not provide them with a side-by-side comparison of the two benefit plans").

Plaintiffs do not allege any "duty" that Anthem had to disclose negotiation history and communications, contracts, analysis, and other corporate documents to insureds and potential insureds (apparently in perpetuity). Moreover, Plaintiffs do not dispute customers were provided the terms of the plans and policies being offered to them, and Anthem's customers chose those plans and policies over other ones offered by others in the marketplace. And, as the district court properly held, "it is inappropriate to infer an unlimited disclosure obligation," (SA24 (*citing In re Bear Stearns Co., Inc. Sec., Derivative, and ERISA Litig.*, 763 F. Supp. 2d 423, 576-77 (S.D.N.Y. 2011)). Indeed, this Court has rejected breach of fiduciary duty claims seeking disclosure of valuation reports and financial information regarding plan investments. *See Gearren v. McGraw-Hill Companies, Inc.*, 660 F.3d 605, 610 (2d Cir. 2011) (rejecting ERISA breach of fiduciary duty claim based on failure to disclose financial information); *In re Citigroup ERISA Litig.*, 662 F.3d

128, 142--43 (2d Cir. 2011), *abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer,* 134 S. Ct. 2459 (2014) (rejecting ERISA breach of fiduciary duty claim based on failure to disclose expected financial performance of investment options); *Bd. of Trustees of the CWAIITU Negotiated Pension Plan v. Weinstein,* 107 F.3d 139, 146-47 (2d Cir. 1997) (finding that ERISA did not require disclosure of actuarial valuation reports).

The cases Plaintiffs cite concerning disclosure of plan benefits are not to the contrary. *See Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76 (2d Cir. 2001) (addressing descriptions of life insurance benefits); *Negron*, 2018 U.S. Dist. LEXIS 39820, at *7 (addressing disclosure of violations of plan terms). Plaintiffs have not alleged that Anthem concealed plan benefits or any other description of the plans at issue. And, as the district court correctly found, the information identified by Plaintiffs is "far from the type of disclosure typically required under ERISA: namely, "information about plan benefits. . . . Plaintiffs do not, for example, argue that they were unable to see their co-insurance rate and therefore could not have discerned the total prescription drug prices ESI was charging." (SA24)

Moreover, equitable tolling was not appropriate because Plaintiffs fail to allege any facts that give rise to an inference that Anthem had any intent to defraud, as required. *See Leber v. Citigroup 401k Plan Inv. Comm.*, 129 F. Supp.

3d 4, 20 (S.D.N.Y. 2015) ("Plaintiffs fail to plead that defendants intended to defraud or fraudulently concealed key documents earlier in this litigation; they merely disagree with defendants' discovery responses and objections.").[13]

Lastly, Plaintiffs assert that even if they do not satisfy the fraud exception, they still allege that Anthem engaged in acts to "hinder" discovery of any alleged breach. (Pls. Brief at 56) But Plaintiffs cannot avoid the law by renaming "fraudulent concealment" as "hindering discovery of an alleged breach." *Wasley Prods. v. Bulakites*, No. 3:03cv383 (MRK) (WIG) 2006 U.S. Dist. LEXIS 94632, at *16 (D. Conn. May 31, 2006) (equating "hindering" with fraudulent concealment); *See Losquadro v. FGH Realty Credit Corp.*, 959 F. Supp. 152, 157 (E.D.N.Y. 1997) ("[I]t is the plaintiffs' burden to plead with particularity under Fed. R. Civ. P. 9(b) the events giving rise to a claim of fraud or concealment."); *Janese v. Scrufari*, 09-CV-593-JTC, 2013 U.S. Dist. LEXIS 142888, at *18 (W.D.N.Y. Oct. 2, 2013) (dismissing claims where "the amended complaint is simply devoid of any allegations of fraud or fraudulent concealment on the part of the Trustee Defendants").

[13] In addition, Plaintiffs allegations that *ESI* engaged in acts of fraud cannot toll the statute of limitations for their claims against Anthem based on allegations about ESI's conduct. (JA118-119, ¶¶ 250-254) *See Griffin v. McNiff*, 744 F. Supp. 1237, 1256 n.20 (S.D.N.Y. 1990) ("[T]he doctrine of fraudulent concealment tolls the statute of limitations only as to those defendants who committed the concealment, and plaintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statute of limitations against other defendants."), *aff'd*, 996 F.2d 303 (2d Cir. 1993).

Although the district court did not agree, none of Plaintiffs' claims are timely.[14] (SA21-22) Plaintiffs' assertion that their ERISA claims are not based solely on the challenged 2009 transaction (which set ESI's initial pricing to Anthem) is absent from the Complaint. (SA21) Rather, Plaintiffs only challenge Anthem's entering into the PBM Agreement and the purchase price of the NextRx transaction—all conduct that occurred in 2009. (JA142, ¶ 331 ("Anthem breached its fiduciary duty under ERISA [] by entering into the PBM Agreement with [ESI] that was not in the best interests of Subscriber ERISA Plaintiffs, the Subscriber ERISA Class, the Plan Plaintiffs and the Plan Class."); JA142-43, ¶ 333 ("Anthem also breached its fiduciary duties under ERISA . . . by entering into the PBM Agreement and negotiating a $4.675 billion upfront payment from Express Scripts . . .")

CONCLUSION

For the foregoing reasons, Anthem respectfully asks that the Court affirm the district court's order of dismissal.

Dated: May 30, 2018

Respectfully submitted,

/s/ Glenn M. Kurtz
Glenn M. Kurtz

[14] This Court may affirm the order of dismissal on "any ground with support in the record." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 715 (2d Cir. 2001).

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