18-346

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., and 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., and ANTHEM, INC.,
Defendants-Appellees,
1–10 Inclusive DOES,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK – 1:16-CV-03399-ER

BRIEF OF *AMICI CURIAE* PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION, AMERICA'S HEALTH INSURANCE PLANS, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *amicus* entity—Pharmaceutical Care Management Association, America's Health Insurance Plans, and The Chamber of Commerce of the United States of America—certifies that it is not publicly traded, that it has no parent companies, and that no publicly held entity owns ten percent or more of it.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

INTERESTS OF *AMICI CURIAE*[1]

The Pharmaceutical Care Management Association ("PCMA") is the national trade association representing pharmacy benefit managers ("PBMs"). PCMA's PBM member companies, including Appellee Express Scripts, Inc. ("ESI"), administer prescription drug benefits for more than 230 million Americans covered by health benefit plans, many of which are governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C § 1001 *et seq*. The ERISA health benefit plans with which PCMA's members contract include insured and self-funded plans sponsored by employers and labor unions.

Health-insurance providers leverage the strengths of PBMs as they provide prescription drug benefits to their members. Among other things, health-insurance providers contract with PBMs to process and pay claims for prescriptions, to obtain access to pharmacy networks established by PBMs, and to take advantage of drug prices and discounts PBMs negotiate with pharmaceutical manufacturers and

[1] No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund the brief's preparation or submission. No person other than *amici* or their counsel contributed money intended to prepare or submit this brief. All parties have consented to this brief's filing.

retail pharmacies.

PBMs are able to leverage economies of scale that benefit health-insurance providers and their members, and their services allow health-insurance providers to provide pharmaceutical products in a streamlined way.

The pharmacies in a PBM's network fill prescriptions for health-plan members using prescription drugs that pharmacies have purchased on their own directly from wholesalers or manufacturers. When a plan member fills a prescription, the PBM provides the pharmacy his or her coverage and copayment information. After the prescription is filled, the PBM reimburses the pharmacy. The health-insurance provider then pays the PBM at a negotiated rate.

PCMA and its members have a strong interest in defending the settled principle that PBMs are not ERISA fiduciaries in forming and fulfilling contracts with health-insurance providers. Holding otherwise could subject PBMs to ERISA liability for virtually every health-plan contract they hold and result in federal courts supervising their day-to-day operations through ERISA litigation.

* * *

America's Health Insurance Plans ("AHIP") is the national trade association for health insurers. Its members, including Appellee Anthem, Inc. ("Anthem"), provide coverage for healthcare and healthcare-related services for millions of Americans, many of whom are participants in or beneficiaries of ERISA employee benefit plans. AHIP has over 50 years of experience in the industry and has a long history of advocating for public policies and legal positions that expand access to affordable healthcare coverage through a competitive marketplace that fosters choice, quality, and innovation. In addition to providing coverage through the individual market and public programs such as Medicare and Medicaid, AHIP's members also provide health and supplemental benefits through employer-sponsored ERISA coverage and have extensive experience contracting with PBMs to administer prescription drug plans.

As with PCMA, AHIP's members have an interest in ERISA fiduciary status. The positions Appellants have adopted throughout this litigation would work a sea change in ERISA liability, abolishing any limiting principle for insurers' liability in the ERISA context. Furthermore, AHIP's members have an interest in maintaining the

now-settled case law holding that negotiating, executing, and abiding by the terms of PBM agreements do not subject PBMs or insurers to ERISA fiduciary status. It is imperative to insurers that they have the ability to negotiate and contract for the provision of PBM services. Subjecting this already-highly regulated field to yet another layer of risk will only increase costs and slow progress for AHIP's members, harming them and, ultimately, healthcare consumers.

* * *

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community, including in cases involving ERISA.

In this case, Appellants seek to subject vast swaths of routine,

arm's-length business decisions to ERISA fiduciary liability. This is contrary to congressional intent and disregards decades of settled case law. Moreover, subjecting either Anthem or ESI to fiduciary liability for a series of routine business transactions could subject many of the Chamber's members to federal judicial oversight of many ordinary, daily decisions. The Chamber therefore has a particular interest in ensuring that ERISA fiduciary status is not expanded to include business decisions.

STATEMENT

A. ERISA Statutory Background

ERISA establishes standards governing employee benefit plans. *See* 29 U.S.C. § 1001(a) *et seq.* Among those standards are requirements that plan fiduciaries discharge their duties solely in the interest of plan participants. *See id.* § 1104(a)(1). A person is an ERISA fiduciary, "to the extent" she, *inter alia*, exercises "discretionary authority or discretionary control" over plan "management," *id.* § 1002(21)(A)(i), exercises "authority or control" over plan "assets," *id.*, or has "discretionary authority or discretionary responsibility" in the plan's "administration," *id.* § 1002(21)(A)(iii).

ERISA "does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only 'to the extent' that he acts in such a capacity in relation to a plan." *Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000) (quoting 29 U.S.C. § 1002(21)(A)). As a result, ERISA fiduciaries can have "two hats," and insofar as they perform non-fiduciary functions, they may wear the hat of a non-fiduciary and make decisions based on business analyses and decisions. *Id.* at 225. "ERISA does require, however, that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat making fiduciary decisions." *Id.* (citations omitted). Thus, where a breach of ERISA fiduciary duty is alleged, "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." *Id.* at 226.

B. Factual and Procedural Background

Anthem insures or provides administrative services for some ERISA and non-ERISA health plans. *See* JA42, ¶ 3. In 2009, Anthem sold to ESI its three in-house PBMs: NextRx Services, Inc., NextRx, LLC, and NextRx, Inc. (collectively, "NextRx"). JA215 *et seq*.

At the same time that ESI purchased NextRX, ESI contracted with Anthem to become Anthem's exclusive PBM until 2019. JA45 ¶ 12 & n.3; *see* JA354–689. ESI does not contract directly with the relevant ERISA plans; it contracts only with Anthem. *See* JA330, JA370. The contract for ESI's PBM services (the "Agreement") specifies the prices Anthem pays ESI for prescription medications. JA338, JA376. It does not specify prices any plan pays for prescription medications and establishes no legal relationship between ESI and any health plan or plan member. JA346, JA451. The contract also gives Anthem an opportunity, under certain circumstances, to compare ESI's pricing to "competitive benchmark pricing." JA83, ¶ 136. If Anthem determines that the pricing is not competitive, Anthem may "propose renegotiated pricing terms" to ESI. ESI must then "negotiate in good faith" over Anthem's proposed pricing terms. *Id.*

Appellants are private employer health-plan sponsors, JA44, ¶¶ 8–9, and individual health-plan members, JA 42–43, ¶¶ 3–4, whose health plans Anthem administers. In their second amended complaint (the "Complaint"), Appellants alleged that ESI's pricing increased subscribers' prescription-medication costs and that Anthem agreed to

the inflated pricing when it sold NextRx and entered into the Agreement. JA141–44, JA146–49, JA151–52.

The Complaint alleged that both Anthem and ESI were ERISA fiduciaries when they negotiated for and executed the Agreement. JA49, ¶ 22. The Complaint further alleged that the Agreement grants ESI sufficient discretion over prescription drug pricing to render ESI an ERISA fiduciary. JA49, ¶ 23.

The district court dismissed the Complaint without prejudice and with leave to amend, holding in relevant part that Appellants failed to allege plausibly that either ESI or Anthem was an ERISA fiduciary in entering into the Agreement, negotiating and setting drug pricing, or, in Anthem's case, setting drug prices in its role as a health insurer. *In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d 655, 690 (S.D.N.Y. 2018).

Appellants thereafter disclaimed any intent to replead and took this appeal.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's dismissal of Appellants' ERISA claims for two reasons.

First, neither ESI nor Anthem was an ERISA fiduciary for any relevant activity. Both entities' decisions to enter into the Agreement were business decisions outside either entity's fiduciary relationship with any ERISA plan. "[F]iduciary 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 (2d Cir. 2016) (internal quotation marks omitted) (second alteration in original) (quoting *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 88 (2d Cir. 2001)).

The business-decision rule prevents wasteful and unproductive burdens on health-insurance providers, which would lead to higher premiums as administrative costs increase. It further prevents publicly traded corporations from being subjected to dual, contrary fiduciary loyalties, one to their shareholders and the other to plan beneficiaries. Likewise, Anthem's sale of NextRx and ESI's control of pricing were business decisions outside ERISA's reach.

Furthermore, of the myriad courts to address the question whether a PBM acts as an ERISA fiduciary when forming and executing contracts with insurers or healthcare plans, all but one have

concluded that they do not. The single case holding otherwise misapplies case law and is inapposite to the present case. Therefore, ESI was not an ERISA fiduciary for any relevant activity.

Second, ESI cannot have engaged in a "prohibited transaction" under ERISA § 406 because none of the relevant transactions involved an ERISA fiduciary. *See DeLuca v. Blue Cross Blue Shield of Mich.*, 628 F.3d 743, 748 (6th Cir. 2010) ("Because BCBSM was not acting in a fiduciary capacity when it negotiated the rate changes at issue in this case, BCBSM did not violate [§ 406]."). In addition, ESI is an improper defendant under ERISA § 502(a)(3) because it has never received any plan assets; rather, only Anthem pays ESI for its services. *See Carlson v. Principal Fin. Grp.*, 320 F.3d 301, 308 (2d Cir. 2003) (non-fiduciary is a proper defendant under § 502(a)(3) only "if it would be a proper defendant under 'the common law of trusts,' for example, when it is 'a transferee of ill-gotten trust assets'" (quoting *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250–51 (2000))); *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 105 (2d Cir. 2011) (plan assets include only property "in which the plan has a beneficial ownership interest" (citation omitted)).

In summary, "[c]reation of ERISA fiduciary status . . . is not . . . to be undertaken lightly." *Bickley v. Caremark Rx, Inc.*, 361 F. Supp. 2d 1317, 1332–33 (N.D. Ala. 2004) (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004)), *aff'd,* 461 F.3d 1325 (11th Cir. 2006). There is no authority for extending ERISA fiduciary status to PBMs or to health insurers with regard to the business decisions at issue in this case, none of which involve discretionary authority over plan management or administration.

For these reasons, the district court's order should be affirmed.

ARGUMENT

I. The challenged activities of ESI and Anthem were non-fiduciary business decisions.

"[G]eneral fiduciary duties under ERISA [are] not triggered . . . when the decision at issue is, at its core, a corporate business decision, and not one of a plan administrator." *Am. Psychiatric Ass'n*, 821 F.3d at 357 n.2 (quoting *Flanigan*, 242 F.3d at 88) (internal quotation marks omitted) (first and second alterations in original). This decades-old principle finds support in Supreme Court case law and in the text of ERISA itself, which recognizes that a person is a fiduciary to a given plan only "'to the extent' that he or she 'exercises any discretionary

authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996) (quoting 29 U.S.C. § 1002(21)(A)).

Applied to PBMs, the business-decision rule encompasses the negotiation and execution of all PBM contracts, whether such contracts are with health plans, plan administrators such as Anthem, or pharmacies that join a PBM's network. Ordinarily, PBMs' performance under those contracts will be non-fiduciary functions as well.

Applied to insurers like Anthem, the rule allows insurers to conduct their business affairs—such as buying and selling subsidiary entities and entering into a PBM agreement—without becoming ERISA fiduciaries.

The business-decision rule also recognizes important policy considerations. It cabins ERISA liability to plan activity that is susceptible to self-dealing and manipulation and shields courts from the burden of supervising run-of-the-mill transactions. Second, the business-decision rule prevents publicly traded companies from being subjected to dueling fiduciary duties, one to shareholders and the other

to ERISA plan members.

A. The negotiation and execution of the Agreement were non-fiduciary business decisions of Anthem and ESI.

The activities surrounding the execution of the Agreement were ESI's and Anthem's corporate business decisions and did not render either an ERISA fiduciary. While it is true that "virtually every business decision . . . can have an adverse impact on an employee benefit plan," *In re Luna*, 406 F.3d 1192, 1207 (10th Cir. 2005) (citing *Howe*, 516 U.S. at 527 (Thomas, J., dissenting)), this Court has consistently held that "corporate business decision[s]" do not trigger ERISA fiduciary duties, *Am. Psychatric Ass'n*, 821 F.3d at 357 n.2; *see also, e.g.*, *Flanigan*, 242 F.3d at 88.

The district court properly "examine[d] the conduct at issue to determine" that entering into the Agreement was "merely a business decision." *Luna*, 406 F.3d at 1207. An ERISA service provider does not become a fiduciary "merely because it administers or exercises discretionary authority over its own . . . business." *Pegram*, 530 U.S. at 223.

Likewise, ESI's negotiations with Anthem did not render either a fiduciary, even when ESI was negotiating drug prices and its own

compensation. *See, e.g.*, *F.H. Krear & Co. v. Nineteen Named Trs.*, 810 F.2d 1250, 1259 (2d Cir. 1987) ("When a person who has no relationship to an ERISA plan is negotiating a contract with that plan, . . . [s]uch a person is not an ERISA fiduciary with respect to the terms of the agreement for his compensation." (citing *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1131–32 (7th Cir. 1983))); *Schulist*, 717 F.2d at 1131 (holding that an insurer was not a fiduciary with respect to plan negotiations and noting that during the relevant negotiations, the insurer "has no relationship to the [plan] at all"); *see also Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833, 837 (9th Cir. 2018) (collecting cases and holding that negotiations between plan and service provider did not subject provider to fiduciary duty).

To hold otherwise would be "absurd." *Santomenno*, 883 F.3d at 838. "If service providers were fiduciaries while negotiating fees, they would have to promise that its [sic] fees were no higher than those of any competitor, rather than negotiate at arm's length with an employer. And, an employer who knowingly agreed to a fee structure could nonetheless later sue to lower it, invoking the administrator's fiduciary obligation." *Id.*; *cf. DeLuca*, 628 F.3d at 747 ("[An insurer] was not

acting as a fiduciary when it negotiated the challenged rate changes, principally because those business dealings were not directly associated with the benefits plan at issue here but were generally applicable to a broad range of health-care consumers.").

B. Anthem's sale of NextRx was a non-fiduciary business decision.

The same principles apply squarely to Anthem's decision to sell NextRx to ESI. This decision, too, fits within the business-decision rule, as this Court has held that decisions to sell subsidiaries are business decisions. *Flanigan*, 242 F.3d at 88; *cf. Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 719 (6th Cir. 2000) (transferring assets from one ERISA plan to another was not a fiduciary activity); *Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1189 (3d Cir. 1993) (selling a division and transferring plan assets was not a fiduciary activity).

C. ESI's pricing practices were non-fiduciary business decisions.

In addition, ESI's drug pricing practices were routine to its business and fit squarely within the business-decision rule. *See, e.g.*, *In re Express Scripts, Inc., PBM Litigation*, No. 4:05-MD-01672 SNL, 2008 WL 2952787, at *9 (E.D. Mo. July 30, 2008) ("ESI's standard pricing

policy . . . is a business decision outside its relationships (fiduciary, or otherwise,) with ERISA plans." (citing *Pegram*, 530 U.S. at 226)). ESI's drug-pricing methods were not specific to its Anthem contract; rather, they ran "across its entire book of business." *Moeckel v. Caremark, Inc.*, 622 F. Supp. 2d 663, 682 (M.D. Tenn. 2007).

As in other contexts, Appellants' strategy thus far has been to ignore these authorities rather than to acknowledge them. And, as in other contexts, the only case Appellant relies on for the sweeping proposition that ERISA "contains no . . . 'business' exception" is readily distinguishable.[2] *See* Appellants' Br. at 30–31 (citing *Donovan v. Bierwirth*, 680 F.2d 263, 265 (2d Cir. 1982)). *Donovan* involved an attempt by the trustees of an ERISA plan to prevent a hostile takeover by using plan assets to purchase additional shares of the corporation the plan served. 680 F.2d at 264–65. No such allegations are made here.

[2] Referring to the business-decision rule as an "exception" to ERISA is a scarecrow. Nowhere do Appellees argue that ERISA contains an "exception" for business decisions. The business-decision rule merely acknowledges a truism inherent in ERISA: that entities do not become ERISA fiduciaries by engaging in run-of-the-mill business activities.

D. Most courts recognize that PBMs' core activities do not make them ERISA fiduciaries.

Of all the courts to address whether PBMs act as ERISA fiduciaries when entering into and performing agreements like the PBM Agreement, all but one have concluded that they do not. Throughout their briefing in this Court and the court below, Appellants have largely ignored these authorities.

In *Chicago District Council of Carpenters Welfare Fund v. Caremark, Inc.*, the Seventh Circuit held that a PBM was not an ERISA fiduciary while negotiating with a health plan. 474 F.3d 463, 477 (7th Cir. 2007). The agreement in *Chicago District* contained a provision similar to one at issue in this case. It provided that the PBM "will use its best commercially reasonable efforts to negotiate these rates with existing pharmacies in [the PBM's] network." *Id.* at 473. The court interpreted this provision to mean that the PBM

> was free to negotiate with retailers to pay less than the amount [the health plan] would later reimburse it, allowing [the PBM] to pocket the difference. This, of course, is the very conduct that [the plaintiff] alleges was a breach of fiduciary duty. Given that this scheme was the very deal for which [the health plan] bargained at arms' length, [the PBM] owed no fiduciary duty in this regard.

Id. at 473. Likewise, here, the Agreement gave Anthem the right to

compare ESI's pricing to "competitive benchmark pricing" and obliged Anthem and ESI to "negotiate" any new pricing terms "in good faith." *In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d at 664 (citing § 5.6 of the PBM Agreement). As in *Chicago District*, ESI "was not a fiduciary when it engaged in any of the relevant transactions." 474 F.3d at 472 n.4.

Similarly, the court in *In re UnitedHealth Grp. PBM Litigation* held that PBMs "did not act as fiduciaries because they did not exercise discretionary authority over the plan or its assets." No. 16-CV-3352, 2017 WL 6512222, at *9 (D. Minn. Dec. 19, 2017). Citing *Chicago District* among other cases, the court held that "negotiating prices with providers is also not a fiduciary function, but rather the administration of a network administrator's business." *UnitedHealth*, 2017 WL 6512222, at *10 (citing *DeLuca*, 628 F.3d at 747, *Chi. Dist.*, 474 F.3d at 475, *Moeckel*, 622 F. Supp. 2d at 677, and *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1003 (8th Cir. 2016)). The plaintiffs in *UnitedHealth* argued that the PBMs "acted as fiduciaries when they exercised discretion over the amounts they charged plan participants—which enabled Defendants to 'set' their own

compensation." *Id.* at *9. As the district court in this case did, *In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d at 679, the court concluded that it could not "reasonably infer that Defendants had discretion to require copayments or coinsurance outside of what was required by the plan documents." *UnitedHealth*, 2017 WL 6512222, at *9.

The plaintiff in *Moeckel v. Caremark, Inc.*, alleged that a PBM became a fiduciary by controlling drug prices by creating a "spread" between the prices the PBM paid pharmacies and the prices the plans reimbursed. 622 F. Supp. 2d at 667. The plaintiff also alleged that the PBM exercised discretion in pricing by determining which drugs would be included in its formularies. *Id.* at 667–68. The court held that the defendant-PBM was not a fiduciary for any of these purposes. *Id.* at 693 ("[The PBM] did not exercise discretionary authority or control over the management of the [plan]. . . . The activities relate to the basic administration of [the PBM's] own business, which is non-fiduciary in nature."); *id.* at 678 ("The arrangement challenged by the plaintiff is the product of the agreement into which [the employer] and [the PBM] entered voluntarily. No fiduciary duty is implicated.").

In *Mulder v. PCS Health Systems Inc.*, the plaintiff alleged that a PBM was a fiduciary when, among other things, it helped determine which drugs a plan would cover and negotiated contracts with drug manufacturers. 432 F. Supp. 2d 450, 455 (D.N.J. 2006). The court held that the PBM was not an ERISA fiduciary for any alleged activity, noting that "if a specific contractual term is bargained for at arm's length, adherence to that term, at a pre-determined price, is not a breach of fiduciary duty." *Id.* at 459 (quoting *Fechter v. Conn. Gen. Life Ins. Co.*, 800 F. Supp. 182, 199–200 (E.D. Pa. 1992)). As in this case, the PBM did not attain fiduciary status merely by contracting with drug manufacturers to provide products to a health-maintenance organization. *Id.* at 460; *see also id.* at 456 ("[A] plan supervisor holds no discretionary authority where its 'obligation [is] to follow the written plan instrument and follow the instructions of the plan administrator.'" (quoting *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 39 (3d Cir. 1991))).

Similarly, in *Bickley v. Caremark Rx, Inc.*, the plaintiffs alleged that a PBM collected a "spread" between the prices PBMs paid for prescription drugs and the prices it charged the ERISA plan. 361 F. Supp. 2d at 1321. The court rejected the same argument Appellants

advance in this case, holding instead that "[m]aking an advantageous contractual agreement with an ERISA plan does not make one an ERISA fiduciary." *Id.* at 1332 (citing *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 737 (7th Cir. 1986)).

Finally, the court in *In re Express Scripts, Inc., PBM Litigation* held that ESI was not a fiduciary in maintaining MAC lists, determining drug prices by selecting a pricing source, negotiating with drug manufacturers for rebates, and retaining interest on those rebates before passing the rebates along to the plans. 2008 WL 2952787, at *7–14. Perhaps most relevant to the present case, the court reasoned that "ESI's standard pricing policy . . . is a business decision outside its relationships (fiduciary, or otherwise,) with ERISA plans." *Id.* at *9 (citing *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). Similarly, "setting and/or adjusting" MAC lists, "while it would affect ESI's compensation, and ultimately plan assets[,] is not an exercise of discretion over plan management or plan assets." *Id.* Under one relevant PBM agreement, ESI "had discretion to select a pricing source" from a number of industry sources. *Id.* Finding this discretion "expressly authorized" by the parties' agreement, the court held that

this discretion did not render ESI a fiduciary. *Id.* Finally, the court held that "ESI is not a fiduciary for the purpose of negotiating rebates with pharmaceutical manufacturers." *Id.* at *11.

Appellants do not contest any of this. Indeed, they do not mention any of the above authorities in their opening brief. And the only attempts Appellants have ever made to distinguish any of these six cases are misguided. *See* Plaintiffs' Consolidated Opposition to Motions to Dismiss ("Opposition to MTD") at 26–28 & n.13.[3]

Appellants have distinguished *Carpenters Welfare Fund*, *Moeckel*, and *In re Express Scripts* as they apply to the "competitive benchmark pricing" provision on the ground that participants in the plans in those cases "had agreed to contractually pre-determined specific pricing or clear pricing formulas." *Id.* at 27. "Conversely," they claim, Anthem's contracts with health plans give Anthem "discretion" over drug pricing, which Anthem has "delegated . . . to ESI through the PBM Agreement." *Id.*

It is true that a contract that grants an entity "authority to later

[3] Even that brief failed to address *Bickley*, *Mulder*, and *UnitedHealth* (despite the fact that ESI had already cited *Bickley* and *Mulder*, *see* ESI Br. in Support of Motion to Dismiss at 19–20).

change [its] terms" may render the entity a fiduciary, "even though the contract is itself the product of an arm's length bargain." *Fechter*, 800 F. Supp. at 200. But the Agreement does not allow ESI unilaterally to alter its terms. *See In re Express Scripts/Anthem ERISA Litig.*, 285 F. Supp. 3d at 664–65.

For the Court's convenience, the following chart summarizes which authorities speak to which PBM activities:

PBM Activity	Cases Holding Activity Not Fiduciary
Negotiating the Agreement	- *Chi. Dist.*, 474 F.3d at 477 (PBM is not a fiduciary while negotiating with healthcare benefit provider).
Charging prices negotiated at arm's length	- *Chi. Dist.*, 474 F.3d at 474–75 ("[T]he contracts provided that [the employer] and [the PBM] would adjust the pricing between themselves, another arm's length transaction.").
Negotiating prices with Anthem under terms of the Agreement	- *Chi. Dist.*, 474 F.3d at 473 (agreement provided that the PBM "will use its best commercially reasonable efforts to negotiate these rates with existing pharmacies in [the PBM's] network").
Classifying drugs as "brand" or "generic"	- *Moeckel*, 622 F. Supp. 2d at 682 (PBM did not act as a fiduciary by "determining whether a drug is brand or generic"). - *Pegram*, 530 U.S. at 226–27 (formulary and drug-switching programs are not subject to fiduciary classifications).

PBM Activity	Cases Holding Activity Not Fiduciary
Determining which drugs to include on MAC list	- *Moeckel*, 622 F. Supp. 2d at 680, 682 (finding PBM did not act as a fiduciary by managing its own MAC list). - *Express Scripts*, 2008 WL 2952787, at *9("ESI's standard pricing policy, in retaining discretion over [MAC lists], is a business decision outside its relationships (fiduciary, or otherwise,) with ERISA plans.").
Determining whether to pass rebates onto plans	- *Chi. Dist.*, 474 F.3d at 475, 476 n. 6 (7th Cir. 2007) (PBM is not a fiduciary in paying rebates where plans are entitled to a fixed rebate amount). - *Express Scripts*, 2008 WL 2952787, at *11 (ESI is "not a fiduciary for the purpose of negotiating rebates"). - *Moeckel*, 622 F. Supp. 2d at 685 ("The court cannot see how 'credits' given or not given to [the employer] under [the employer's] contracts with [the PBM] relate to the exercise of discretion over the JM Plan or the Plan's assets.").

E. The only case to hold otherwise is poorly reasoned and distinguishable.

Appellants proffer only one case holding that a PBM could be an ERISA fiduciary in performing the activities alleged here. Appellants' Br. 44–45 (citing *Negron v. Cigna Health & Life Ins.*, No. 16CV1904

(WWE), 2018 WL 1258837 (D. Conn. Mar. 12, 2018)). This outlier case rests on flawed premises, and even if it were correct, it is distinguishable from the present case.

Of the authorities discussed above, the *Negron* court ignored all but two and cited *Chicago District* only in relation to a theory the plaintiffs "d[id] not assert." 2018 WL 1258837, at *8.[4] *Negron* also incorrectly suggested that a PBM agreement could itself constitute a "plan asset." *Id.* The only case the court cited in favor of this proposition held that *insurance policies* could be plan assets. *See Fechter*, 800 F. Supp. at 199–200; *see also Negron*, 2018 WL 1258837, at *8 (citing *Fechter*). This is a key distinction, given that ERISA provides that for limited purposes, insurance policies are plan assets. *See* 29 U.S.C. § 1101(b)(2)(B). ERISA contains no such provision for contracts with PBMs or other service providers. Furthermore, the plans at issue in this case do not contract directly with ESI.

[4] The *Negron* court ignored *Chicago District* in the portions of the opinion addressing discretion as to plan assets, *id.* at *7–8, setting cost-sharing payments, *id.* at *8, and collecting rebate "spreads," *id.* at *8–9. But *Chicago District* addressed all these issues. *See Chi. Dist.*, 474 F.3d at 472 (discretion as to plan assets and sharing costs); *id.* at 475–76 (addressing rebate collections).

Even if *Negron* were correct, it would be distinguishable from the present case in at least four key respects. First, the document at issue in *Negron* provided that "'[i]n no event will' a copayment or coinsurance amount paid by an insured exceed the amount paid by the plan to the pharmacy." 2018 WL 1258837, at *2. The Agreement contains no such provision. Second, the allegation in *Negron* was a violation of *ERISA plan terms*, not the terms of a third-party agreement. *Id.* at *8; *see also id.* at *7 (allegation that insurer conspired with PBM to defraud plan by retaining refunded copayments). There is no allegation in this case that either Anthem or ESI has violated any term of any ERISA plan. Third, to the extent *Negron* rests on the premise that an insurance policy is a plan asset, *see id.* at *8, ESI could not have exercised control over this asset, as it was not a party to any insurance policy and did not control any insurance policy's terms. Finally, *Negron* involved an allegation that the cost of the plaintiff's copayment exceeded the drug's total cost and that the PBM had "clawed back" the difference. *Id.* at *7. Appellants allege no such practice here.

Appellants cite two more cases for the proposition that "the contracts and other instruments that underpin the prescription drug

benefits at issue here, including Anthem's agreements with both self-insured and insured plans, are plan assets in and of themselves." Appellants' Br. at 26–27 (citations omitted). These cases are distinguishable on similar grounds. *See Everson v. Blue Cross & Blue Shield of Ohio*, 898 F. Supp. 532, 535 (N.D. Ohio 1994) (allegation that insurer retained copayment clawbacks and therefore that "participants [were] . . . obligated to make co-payments in excess of that stated in the *insurance contract*," not a third-party contract (emphasis added)); *Eversole v. Metro. Life Ins. Co.*, 500 F. Supp. 1162, 1165 (C.D. Cal. 1980) ("Alternatively, [the defendant-insurer] may also be a fiduciary by virtue of its management or control over the primary asset of this plan, the [insurance] policy itself." (citation omitted)).[5]

* * *

The business-decision rule also recognizes important policy considerations. First, it cabins ERISA liability to plan activity that is susceptible to self-dealing and manipulation, shielding courts from the burden of supervising run-of-the-mill transactions. Appellants would

[5] Additionally, the relevant language in *Eversole* was clearly an alternative holding, given that the benefit plan "name[d] [the insurer] as fiduciary of the plan." *Eversole*, 500 F. Supp. at 1165.

apparently do away with the business-decision principle as a whole, *see* Appellants' Br. at 29, leaving practically all business decisions made by any entity that deals with ERISA plans subject to potential ERISA liability.

Second, the business-decision rule prevents publicly traded plan administrators, insurers, and PBMs from being torn between two separate fiduciary duties in the same transaction. In a transaction like Anthem's spin-off of NextRx, Anthem's duty to its shareholders is to obtain the most favorable deal *for Anthem*. Its fiduciary duty to ERISA plans must apply only when it wears its discretion-wielding fiduciary "hat." Recognizing this, Congress designed ERISA to prevent this scenario from arising, insulating from liability "decisions about the content of a plan." *Pegram*, 530 U.S. at 226 (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)). Ultimately, "a contrary analysis . . . would be self-defeating." *DeLuca*, 628 F.3d at 747.

II. ESI is not liable for the transactions as a party in interest because it is an improper defendant under ERISA § 502(a)(3).

Appellants further argue that ESI is liable for a "prohibited transaction" regardless of its fiduciary status. *See* Appellants' Br. at 50–

52.

Section 406 of ERISA prohibits certain transactions between (a) a plan and a "party in interest," 29 U.S.C. § 1106(a), and (b) a plan and a fiduciary, *id.* § 1106(b). These provisions are not alternatives to general ERISA § 404 liability; rather, they merely "supplement[] the fiduciary's general duty of loyalty to the plan's beneficiaries . . . by categorically barring certain transactions." *Harris Tr.*, 530 U.S. at 241–42 (quoting *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993)). The Complaint alleges that ESI violated both provisions.

As to ERISA § 406(b), for the reasons discussed above, *see supra* Section I, ESI was not a fiduciary with regard to the relevant transactions. ESI is therefore not a proper defendant under § 406(b). *See DeLuca*, 628 F.3d at 748 ("Because BCBSM was not acting in a fiduciary capacity when it negotiated the rate changes at issue in this case, BCBSM did not violate [§ 406(b)]."); *Bickley*, 361 F. Supp. 2d at 1332 ("[T]his argument begs the question; if [the PBM] is not an ERISA fiduciary, its contractual arrangements with the Plan, even if disadvantageous to the Plan, do not convert [the PBM] into an ERISA fiduciary who has to give up its ill-gotten gains. Making an

advantageous contractual agreement with an ERISA plan does not make one an ERISA fiduciary . . . .” (citing *Ed Miniat*, 805 F.2d at 737)).

As to ERISA § 406(a), as Appellants admit, Appellants’ Br. at 51, this claim is valid only if Anthem was a fiduciary. *See* 29 U.S.C. § 1106(a)(1) (prohibiting “[a] fiduciary” from engaging in certain transactions). It was not. *See supra* Section I. There was therefore no transaction with any ERISA fiduciary, and therefore, no prohibited transaction took place.

Notwithstanding that, ESI is an improper defendant under ERISA § 502(a)(3), which authorizes civil actions under ERISA. *See* 29 U.S.C. § 1132(a)(3) (providing that “[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary”). While § 502(a)(3)’s text does not limit the class of defendants against which such an action may be brought, the Supreme Court has held that a non-fiduciary is a proper defendant under § 502(a)(3) only “if it would be a proper defendant under ‘the common law of trusts,’ for example, when it is ‘a transferee of ill-gotten trust assets . . . , and then only when the transferee . . . knew or should have known of the existence of the trust and the circumstances that rendered the transfer in breach of the trust.”

Carlson, 320 F.3d at 308 (quoting *Harris Tr.*, 530 U.S. at 250–51). Here, ESI received no plan assets, as it contracted only for *Anthem's* payments. *See Faber*, 648 F.3d at 105 ("[P]lan assets . . . 'include any property . . . in which the *plan* has a beneficial ownership interest' . . . ." (emphasis added)); *cf.* ESI Br. at 54–55 (arguing that the remedy Appellants seek is unavailable because the assets they seek to recover against—payments to ESI—are not "plan assets").

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of the ERISA claims against both ESI and Anthem.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Local Rule 29.1 because excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,073 words, as calculated by Microsoft Word.

This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirement of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in New Century Schoolbook LT Std font, 14-point type.

Dated: June 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system.

Dated: June 20, 2018

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