

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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

Plaintiffs,

v.

EXPRESS SCRIPTS, INC., and ANTHEM,  
INC.,

Defendants.

Case No.

**CLASS ACTION COMPLAINT**

**I. INTRODUCTION**

1. Plaintiffs, by and through the undersigned attorneys, bring this action on behalf of themselves and all others similarly situated (“Class members” or “Class”) against Defendant Express Scripts, Inc., a pharmacy benefit manager, including its operational divisions and subsidiaries (“Express Scripts” or “ESI”), and Defendant Anthem, Inc., a health benefit company, including its operational divisions and subsidiaries (“Anthem”).

2. Plaintiffs and the Class are participants in health care plans governed by ERISA for which Anthem provides health benefits. Anthem has contracted with Express Scripts to provide exclusive pharmacy benefits for the plans. Through this arrangement, Express Scripts sets the prices that the plans and their participants pay for prescription drugs. This action seeks to recover losses suffered by Plaintiffs and the Class, who overpaid and continue to overpay for the portions of the costs of prescription drugs they were and are responsible for paying as plan participants. Defendants—both fiduciaries under ERISA—have the duties to act prudently and in the best interests of these ERISA participants and to avoid transactions tainted by conflicts of interest. In violation of its fiduciary duties, Express Scripts exercised its discretion to charge the

plans, and therefore, Plaintiffs and the Class members for prescriptions at above competitive pricing levels during all or part of the Class Period, which is defined below. Furthermore, Anthem breached its fiduciary duties by entering into a contract with Express Scripts that allowed Express Scripts to overcharge for prescriptions, and by failing to adequately monitor Express Scripts' activities to the detriment of Plaintiffs and the Class.

3. As a result of Defendants' ERISA violations, Plaintiffs and the Class have suffered losses and/or Defendants have been unjustly enriched. As a result, appropriate equitable relief, including surcharge, is available to remedy Defendants' breaches of fiduciary duty. Plaintiffs bring this action under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), on behalf of all similarly situated participants in health care plans for which Anthem provides pharmacy benefits through an agreement with Express Scripts.

## II. PARTIES

### **Plaintiff Karen Burnett**

4. Plaintiff Karen Burnett is a resident of Shepherdsville, Kentucky. She is enrolled in the LG&E and KU Medical Dental and Vision Care Plan ("LG&E Plan"), an ERISA plan offered through her spouse's employer, LG&E and KU Energy LLC. Ms. Burnett has been a participant in the LG&E Plan for at least the last six years.

5. During the Class Period, the LG&E Plan had more than 3000 participants at any given time. At all relevant times, the LG&E Plan has provided benefit coverage, including prescription drug benefits, through Defendant Anthem under an Administrative Services Only ("ASO") agreement. ASO arrangements are commonly used by self-insured plans like the LG&E plan, where the charges for medical services (other than participants' shares of them) are paid by the employer, but an entity such as Anthem is retained to provide specific services, such as

access to a network of medical care providers and, in this case, as described below, provision of pharmacy benefit management.

6. At all relevant times, all participants in the LG&E Plan have received pharmacy benefits through Defendants Anthem and Express Scripts. As the LG&E Plan explained: “If you enroll in one of the Anthem medical options, you are automatically enrolled in prescription drug coverage administered by Express Scripts.” If a participant in the LG&E Plan has needed or needs certain specialty drugs, they have been and are required to obtain their prescriptions through Express Scripts’ dedicated specialty pharmacy, Accredo.

7. Under the LG&E Plan, at all relevant times, plan participants paid 100% of the price charged by Express Scripts for prescriptions that fell below established ceilings (referred to hereinafter as “percentage based copays”). In addition, if Ms. Burnett or her family or any other participant or beneficiary of the LG&E Plan has used and/or uses an “out of network provider” for pharmacy services they have been or would be responsible for 100% of the cost. In either case, Ms. Burnett, her family, and other participants and beneficiaries of the LG&E Plan have suffered and/or would suffer additional individual injury in fact to the extent Express Scripts charged more than competitive benchmark pricing for some or all of its prescription drugs. On information and belief, other plan participants have paid such excessive costs for out of network provider prescription charges. For the sake of simplicity, losses arising out of overcharges on drugs provided by out of network pharmacy providers are included within the definition of “percentage based copays,” in that the “copay” percentage is 100%.

8. Ms. Burnett has regularly used seven (7) different prescription drugs provided by Express Scripts during the Class Period. She estimates that she has paid approximately \$500 to \$700 per year in Express Scripts pharmacy copays.

9. As alleged herein, Express Scripts has charged more than competitive benchmark pricing for some or all of its prescription drugs, causing Ms. Burnett to suffer individual injury in fact for all percentage based copays. From May 2014 to present, Ms. Burnett has paid percentage based copays on at least 23 occasions.

**Plaintiff Brendan Farrell**

10. Plaintiff Brendan Farrell is a resident of Long Beach, New York. Mr. Farrell is a current participant in the Verizon Medical Expense Plan for New York and New England Associates (“Verizon Plan”), an ERISA plan offered through his employer, Verizon Communications Inc. Mr. Farrell has been a participant in the Verizon Plan (and its predecessors) since at least 1999.

11. During the Class Period, the Verizon Plan had more than 20,000 participants at any given time. At all relevant times, the Verizon Plan has provided benefit coverage, including prescription drug coverage, through Defendant Anthem under an ASO agreement.

12. At all relevant times, all participants in the Verizon Plan have received pharmacy benefits through Defendants Anthem and Express Scripts. If a participant in the Verizon Plan has need or needs certain specialty drugs, they have been and are required to obtain their prescriptions through Express Scripts’ dedicated specialty pharmacy, Accredo.

13. Under the Verizon Plan, plan participants have paid and/or are required to pay between 30% and 100% of the price charged by Express Scripts for prescriptions that fell and/or fall below established ceilings or a flat copay plus 100% of the cost difference between comparable brand-name and generic drugs (as set forth above, referred to as “percentage based copays”). If a plan participant used and/or uses a “non-participating pharmacy” for pharmacy services he or she has been and/or would be responsible for 30% to 40% of the discounted network price plus 100% of the cost difference between the discounted network price and retail

cost, in which case he or she has suffered and/or would suffer additional individual injury in fact to the extent Express Scripts charged more than competitive benchmark pricing for some or all of its prescription drugs. On information and belief, other plan participants have paid such excessive costs for out of network provider prescription charges. For the sake of simplicity, damages arising out of overcharges on drugs provided by non-participating pharmacies are included within the definition of “percentage based copays,” in that the “copay” percentage is 100% of the cost differential describe above.

14. Mr. Farrell has regularly used prescription drugs provided by Express Scripts during the Class Period. He estimates that he has paid hundreds of dollars per year in Express Scripts pharmacy copays.

15. As alleged herein, Express Scripts has charged more than competitive benchmark pricing for some or all of its prescription drugs, causing Mr. Farrell to suffer individual injury in fact for all percentage based copays. From June 2014 to present, Mr. Farrell has paid percentage based copays on at least 6 occasions.

**Plaintiff Robert Shullich**

16. Plaintiff Robert Shullich is a resident of Holmdel, New Jersey. He is a current participant in the AmTrust Health and Welfare Plan (“AmTrust Plan”), an ERISA plan offered through his employer, AmTrust Financial Services, Inc. Mr. Shullich has been a participant in the AmTrust Plan since at least September 2014.

17. During the Class Period, the AmTrust Plan had more than 3000 participants at any given time. The AmTrust Plan provides benefit coverage through Defendant Anthem d/b/a Community Insurance Company under an ASO agreement. AmTrust Plan participants are issued “Anthem Identification Cards.” The AmTrust Plan provides: “Reservation of Discretionary Authority. Anthem shall have all the powers necessary or appropriate to enable it to carry out its

duties in connection with the operation of the Plan and interpretation of the Benefit Booklet. This includes, without limitation, the power to construe the Administrative Services Agreement, to determine all questions arising under the Plan.”

18. At all relevant times, all participants in the AmTrust Plan have received pharmacy benefits through Defendants Anthem and Express Scripts. As the AmTrust Plan explains: “The pharmacy benefits available to you under the Plan are managed by the Administrator’s Pharmacy Benefits Manager (PBM). The PBM is a pharmacy benefits management company with which the Administrator [Anthem] contracts to manage your pharmacy benefits. The PBM has a nationwide network of retail pharmacies, a Mail Service pharmacy, a Specialty pharmacy, and provides clinical management services. The management and other services the PBM provides include, among others, making recommendations to, and updating, the covered Prescription Drug list (also known as a Formulary) and managing a network of retail pharmacies and, operating a Mail Service pharmacy, and a Specialty Drug Pharmacy Network.

19. Under the AmTrust Plan, the copay (sometimes referred to as co-insurance) paid by plan participants has been at all relevant times a percentage of the price charged by Express Scripts for non-generic prescriptions up to a maximum copay of \$250 per prescription (also referred to as “percentage based copays”). There is no percentage based copay for generic and certain “prevention” drugs, but the percentage based copay is 25% for preferred brand name drugs and 50% for non-preferred brand name drugs and specialty injectable drugs. At certain relevant times, plan participants also have paid “percentage based copays” to the extent they paid 100% of the price charged by Express Scripts for prescriptions that fell below established ceilings.

20. Mr. Shullich has regularly used several different prescription drugs provided by Express Scripts during the Class Period. He estimates that he has paid hundreds of dollars per year in Express Scripts pharmacy copays.

21. As alleged herein, Express Scripts has charged more than competitive benchmark pricing for some or all of its prescription drugs, causing Mr. Shullich to suffer individual injury in fact for all percentage based copays. From February 2015 to present, Mr. Shullich has paid percentage based copays on at least a dozen occasions.

**Defendant Express Scripts**

22. Defendant Express Scripts, Inc. (“ESI”) is a Delaware corporation with its principal place of business at One Express Way, St. Louis, Missouri 63121. Defendant ESI provides pharmacy benefit management (“PBM”) services, including network-pharmacy claims processing, mail order delivery pharmacy services, specialty pharmacy benefit management, benefit-design consultation, drug-utilization review, formulary management, and medical and drug data analysis services to manage prescription drug plans for a wide variety of health insurers, self-funded employers, the public sector, and government entity clients.

23. Since December 1, 2009, pursuant to a ten-year contract with Defendant Anthem (described below), ESI set the prices paid by ERISA-governed employee benefit plans and their participants, including Plaintiffs and the Class. ESI negotiates with drug companies for the price of prescription drugs that it manages and administers for participants in health care plans insured or administered by Anthem, including obtaining rebates and other discounts from the drug companies directly.

**Defendant Anthem**

24. Defendant Anthem is an Indiana corporation with its principal place of business at 120 Monument Circle, Indianapolis, Indiana 46204. Anthem is one of the nation’s leading health

benefits companies, with more than 38 million members enrolled in its family of health plans (“Anthem-administered plans”).

25. Anthem serves its members as the Blue Cross licensee for California and as the Blue Cross and Blue Shield, or BCBS, licensee for Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri (excluding 30 counties in the Kansas City area), Nevada, New Hampshire, New York (as BCBS in 10 New York City metropolitan and surrounding counties, and as Blue Cross or BCBS in selected upstate counties only), Ohio, Virginia (excluding the Northern Virginia suburbs of Washington, D.C.), and Wisconsin. In a majority of these service areas Anthem does business as Anthem Blue Cross, Anthem Blue Cross and Blue Shield, Blue Cross and Blue Shield of Georgia, and Empire Blue Cross Blue Shield, or Empire Blue Cross (in New York service areas). Anthem conducts business through an arrangement with another BCBS licensee in South Carolina. Anthem conducts business through its AMERIGROUP Corporation, or Amerigroup, subsidiary, in Florida, Georgia, Kansas, Louisiana, Maryland, Nevada, New Jersey, New Mexico, New York, Tennessee, Texas, Washington, and, effective January 1, 2016, Iowa. In addition, Anthem conducts business through its recently acquired Simply Healthcare Holdings, Inc., or Simply Healthcare, subsidiary in Florida. Anthem also serves customers throughout the country as HealthLink, UniCare (including a non-risk arrangement with Massachusetts), and in certain Arizona, California, Nevada, and Virginia markets through its CareMore Health Group, Inc., or CareMore, subsidiary.

26. As used herein, “Anthem” includes all of Anthem’s subsidiaries and “doing business as” (dba) monikers, including, but not necessarily limited to, all of those listed above. Anthem is licensed to conduct insurance operations in all 50 states through its subsidiaries.

27. Prior to December 23, 2014, Anthem's corporate name was WellPoint, Inc. ("WellPoint"). WellPoint was originally a party to the Agreement with Express Scripts. Anthem is the successor to WellPoint, and is the successor in interest to its rights and obligations under the Agreement.

### III. JURISDICTION AND VENUE

28. **Subject Matter Jurisdiction.** This action is brought by Plaintiffs pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), to remedy Defendants' violations of ERISA §§ 404(a), 406, and 405(a), 29 U.S.C. § 1104(a), § 1106, and § 1105(a). This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

29. **Personal Jurisdiction.** ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), provides for nationwide service of process. All Defendants are residents of the United States and subject to service in the United States, and this Court therefore has personal jurisdiction over them. This Court also has personal jurisdiction over them pursuant to Fed. R. Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general jurisdiction in New York. Each Defendant systematically and continuously conducts business in this State and otherwise has minimum contacts with this State sufficient to establish personal jurisdiction.

30. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391(b), because Defendants reside or may be found in this district. This district is also a convenient venue because two related cases have been filed in this district. *See Anthem v. Express Scripts, Inc.*, No. 1:16-cv-02048; *John Doe One and John Doe Two v. Express Scripts, Inc. et al.*, No. 1:16-cv-03399. In *Anthem v. Express Scripts*, the plaintiff asserts a breach of a contract claim with a specific choice-of-venue clause, requiring that it be adjudicated in this district.

#### IV. OPERATIVE FACTS

##### A. Plaintiffs Made Co-Payments Based in Whole or In Part on Drug Prices Set by Anthem and Express Scripts

31. Plaintiffs are participants in employee welfare benefit plans as that term is defined in 29 U.S.C. § 1002(1)(A) (referred to herein as “health care plans” or “plans”) insured or administered by Anthem to provide participants with medical care and prescription drugs.

32. Pursuant to an agreement between Anthem and ESI (“Agreement” or “PBM Agreement”),<sup>1</sup> ESI has served and serves as Anthem’s exclusive provider of PBM services for Anthem-administered plans for a ten year period from 2009 to 2019. Express Scripts paid Anthem approximately \$4.675 billion up front for the exclusive right to provide PBM services for Anthem.

33. PBMs are administrators of prescription drug programs for commercial health plans, self-insured employer plans, Medicare Part D plans, and various federal, state, and government employee plans. Generally, PBMs are primarily responsible for contracting with pharmacies, negotiating discounts and rebates with drug manufacturers, and processing and paying prescription drug claims.

34. ESI is the largest PBM organization in the United States, with revenues of approximately \$101.8 billion in 2015 alone.

35. As PBM for Anthem-administered health plans, ESI either (1) processes the claims of individuals who fill prescriptions for medications through retail pharmacies, or (2) as a mail-order provider of prescription medications, including specialty medications, processes

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<sup>1</sup> On information and belief, the Agreement is known as the Amended Restated Pharmacy Benefit Management Services Agreement, dated as of January 1, 2012, by and among Anthem (formerly known as WellPoint, Inc. as described above) on behalf of itself and its Designated Affiliates, and Express Scripts, on behalf of itself and its subsidiaries and Affiliates (including Accredo), as amended. A copy of the Agreement is on file with this Court in Anthem v. Express Scripts, Inc., No. 1:16-cv-0204 referenced herein, but is currently not a matter of public record.

individual claims either directly or through its subsidiaries such as the mail-order pharmacy Accredo. In the former situation, ESI controls what Anthem and retail pharmacies charge and collect as percentage based copays from Class members by exclusively setting the prices for such medications. In the latter situation, ESI controls what it bills Class members and collects for medications ESI mails directly to them.

36. Express Scripts handled more than 175 million claims for Anthem in 2015, including for approximately 130,000 fully-insured and administrative services only groups. Express Scripts supports Anthem's business in over 24 states and services more than 15 million members.

37. During negotiations for the right to be Anthem's exclusive PBM provider, ESI presented Anthem with a range of alternatives for structuring the transaction. At one end of the range, ESI offered to pay less money upfront to Anthem and offer lower pricing to plans and their participants for ESI's services over the 10-year life of the PBM Agreement. At the other end, ESI offered to pay significantly more upfront to Anthem, but would charge higher prices over the 10-year life of the Agreement to plans and their participants. The parties ultimately agreed on the latter option, as evidenced by the nearly \$5 billion payment made by ESI.

38. According to ESI, Anthem used this money to fund stock buybacks in 2009 and 2010 "during the low watermark" of Anthem's stock price, which ultimately enriched Anthem's stockholders and management. Anthem could have passed this money on to plan participants in the form of reduced drug pricing, but chose not to do so.

39. At all relevant times, Plaintiffs and the Class members' responsibility for the cost of certain prescription medications under their health care plans has been and is, in whole or in part, to pay percentage based copays, as defined above, which are percentages of the prices

Express Scripts has charged and charges for those medications. As a result of Defendants' wrongful conduct of charging prices above competitive pricing levels, explained in further detail below, Plaintiffs and Class members suffered economic harm.

**B. Express Scripts Overcharged Plaintiffs for Their Co-Pays**

40. ESI is obligated under the Agreement to ensure, among other things, competitive benchmark pricing.

41. With respect to the latter, § 5.6 of the PBM Agreement specifically provides that “[Anthem] or a third party consultant retained by [Anthem] will conduct a market analysis every [redacted<sup>2</sup>] during the Term of this Agreement to ensure that [Anthem] is receiving competitive benchmark pricing.” On information and belief, Express Scripts has repeatedly and over an extended period of time charged Plaintiffs and the Class in excess of competitive benchmark pricing and has concealed that material fact from Plaintiffs and the Class.

42. On information and belief, Anthem engaged Health Strategy, LLC (“Health Strategy”) in either late 2014 or early 2015—a highly experienced third-party consultant that regularly negotiates PBM contracts for the largest health plans and Fortune 100 companies in America—to conduct a market analysis in order to ensure that Express Script was providing competitive benchmark pricing under the PBM Agreement.

43. Plaintiffs are informed and believe that Health Strategy’s comprehensive market analysis, completed on or about February 2015, revealed that the prices ESI routinely charged were *higher* than competitive benchmark prices. Based on Health Strategy’s analysis, ESI’s pricing exceeded competitive benchmark pricing by more than \$3 billion annually, which projected forward indicated additional overcharges of approximately \$13 billion over the remaining term of

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<sup>2</sup> This information has been redacted by Anthem and ESI in publicly available documents.

the PBM Agreement. In addition, given the sheer volume of accounts administered by ESI, ESI is permitted to wind down accounts for Anthem under the PBM Agreement. Health Strategy determined that ESI's higher pricing would result in an additional \$1.8 billion in overpayments during this post-termination transition period, resulting in nearly \$15 billion in overcharges overall.

44. On information and belief, in the latter part of 2015, Health Strategy refreshed its analysis of market data and concluded that competitive benchmark pricing had decreased even further. Accordingly, the overpayments made by Plaintiffs and the Class have grown even larger.

45. On information and belief, ESI's pricing for medications has not improved since March 2015, despite notice of the improper overcharges.

46. As a result of ESI's use of supra-competitive prices, Plaintiffs and Class members made higher payments on their percentage based copays than Plaintiffs and Class members would have made had ESI fulfilled its fiduciary duties under ERISA.

47. Plaintiffs and Class members were harmed by ESI's actions, as they have been directly overcharged as a result of the inflated prices ESI has imposed for prescriptions.

48. At all relevant times, ESI knew that the prices for such prescription medications exceeded competitive benchmark pricing, but has charged and continues to charge Anthem and ultimately Plaintiffs and the Class prices well above these levels.

49. ESI has unlawfully retained the portion of the payments paid in excess above competitive benchmark pricing levels, resulting in a massive profit windfall for ESI.

50. Based on recently disclosed information, Anthem has been offered pricing in the marketplace that is approximately \$13 billion lower than ESI pricing over the remaining term of the Agreement, and approximately \$1.8 billion lower than ESI pricing that will be in effect after the termination of the Agreement. This recently disclosed information further demonstrates that

the pricing imposed on Class members for their pharmaceutical benefits exceeds competitive benchmark pricing as that term is used in the Agreement.

51. On information and belief, ESI offers lower pricing for pharmaceutical benefits to current and prospective customers other than those plans and their participants to which ESI provides benefits under the PBM agreement. These recent contract pricing and pricing proposals also demonstrate that its pricing to Anthem is well in excess of competitive benchmark pricing levels. Accordingly, the cost charged to Plaintiffs and Class members for prescription drug medications in terms of their percentage based copays is significantly higher than it should be.

52. In March 2016, Anthem initiated legal action against Express Scripts for breach of the PBM Agreement, including breach of ESI's obligation to provide Anthem competitive benchmark pricing. *Anthem, Inc. v. Express Scripts, Inc.*, Case No. 1:16-cv-02048-ER (S.D.N.Y. March 21, 2016). ESI filed an amended answer and brought counterclaims against Anthem on June 13, 2016. Although those parties have brought claims against one another for, among other things, breach of the PBM Agreement, neither party's claims seek recovery on behalf of Plaintiffs and the Class for the overpayments they have made for their pharmaceutical drug benefits.

**C. Defendants' Status as ERISA Fiduciaries**

53. ERISA fiduciaries include not only persons explicitly named as such in governing plan instruments, but also any other person who in fact performs fiduciary functions. Specifically, fiduciary status is a functional test under ERISA, and a person is a fiduciary "to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. . . ." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i), or "he has any

discretionary authority or discretionary responsibility in the administration of such plan,” ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii). Thus, an entity is an ERISA fiduciary if it exercises discretionary authority or control in managing or administering the plan, or, if it exercises any authority or control (discretionary or not) respecting management or disposition of plan assets. As a result, whether someone is a “named fiduciary” is irrelevant to the analysis of functional fiduciary status. Nor must there be a formal delegation of fiduciary responsibility for an individual to be found a fiduciary under the functional test.

54. At all relevant times, ESI has been a fiduciary of all of the plans for which it has provided pharmacy benefits under the PBM agreement by reason of one or more of the following: (1) it had the authority to determine the prices paid by those plans and their participants for prescription drugs, (2) it exercised discretionary authority and/or discretionary control with regard to those prices, (3) it had the authority to set its own margin/compensation for the sale of drugs to those plans and their participants, (4) it exercised discretionary authority and/or discretionary control to set its own margin/compensation for the sale of drugs to those plans and their participants, (5) it had discretionary responsibility over the management and administration of pharmacy benefits under those plans, (6) it exercised discretionary authority over the plans by choosing whether to fill a prescription from a participant, reject the prescription, or shift the participant to a different drug, and/or (7) it exercised discretion over the plans’ Formulary lists, and on information and belief, structured the lists in order to maximize its profits.

55. At all relevant times, Anthem has been a fiduciary of those plans by reason of one or more of the following: (1) it had the authority to negotiate on behalf of those plans the terms of the PBM agreement with ESI, at all (2) it exercised discretionary authority or discretionary

control with regard to the negotiation and terms of the PBM agreement, including but not limited to the setting of its own compensation under that agreement; (3) it had the authority to monitor ESI's performance and to take appropriate action to protect plan participants from Express Scripts' overcharges; and/or (4) it had discretionary responsibility over the management and administration of pharmacy benefits under those plans.

56. In addition, both ESI and Anthem exercised discretionary authority or discretionary responsibility over the Plan by agreeing to a ten-year PBM Agreement wherein ESI provided Anthem with a substantial upfront payment in the amount of \$4.675 billion. Both ESI and Anthem had knowledge, unbeknownst to Plaintiffs and the Class at the time, that this payment would result in *higher* pricing for participants in Anthem plans. Furthermore, on information and belief, Anthem used the upfront payment to repurchase its stock and enriched its own shareholders and management rather than passing this money through to Plaintiffs and the Class.

#### **D. Fiduciary Duties Under ERISA**

57. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B), provide, in pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

58. These fiduciary duties under ERISA §§ 404(a)(1), 404(a)(1)(A), and (B) are referred to as the duties of loyalty and prudence and are the "highest known to the law."

*Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

59. In negotiating and entering into a contract on behalf of an ERISA plan, a fiduciary must act prudently and negotiate terms that are reasonable and in the best interests of plan participants. In these negotiations and in the contract that is ultimately agreed upon, a fiduciary cannot place its interests over the interests of the plan participants and beneficiaries. In negotiating the PBM agreement, Anthem breached these duties.

60. In addition, a fiduciary that appoints another person to fulfill all or part of its duties, by formal or informal hiring, subcontracting, or delegation, assumes the duty to monitor that appointee to protect the interests of the ERISA Plans and their participants. Here, Anthem retained ESI to provide PBM and direct mail-order pharmacy services on behalf of Plaintiffs and their Plans. In doing so, Anthem authorized ESI to exclusively set the prices for such medications and thereby to control what Anthem and retail pharmacies charge and collect as percentage based copays from Class members. For mail-order pharmacy services, Anthem authorized ESI to control the prices paid by Class members under the terms of their Anthem health plans for medications ESI sends to them directly by authorizing ESI to set the prices for such medications.

61. An appointing fiduciary must take prudent and reasonable action to determine whether the appointees are fulfilling their fiduciary obligations.

62. When Anthem endowed ESI with authority and discretion to control drug pricing for Plaintiffs and Class members, and thereby the amount of percentage based copays Plaintiffs and the Class members would be required to pay, Anthem assumed the duty to monitor ESI's exercise of that discretionary authority. Anthem owed and owes Plaintiffs and the Class the duty to establish policies and procedures to monitor ESI's performance of its duties, to monitor ESI's drug pricing, to monitor the effect of ESI's drug pricing on percentage based copays paid by

Plaintiffs and the Class, to negotiate promptly and aggressively to protect the interests of Plaintiffs and the Class, to promptly and aggressively initiate litigation to protect the interests of Plaintiffs and the Class, and to provide complete and accurate information to Plaintiffs and the Class concerning violations of their ERISA rights.

63. In allowing ESI to violate ERISA and in failing to correct such breaches of duty, Anthem breached its duty to monitor as described above, which breaches are actionable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

64. ERISA also holds fiduciaries liable for the misconduct of co-fiduciaries. ERISA § 405(a), 29 U.S.C. § 1105(a). Co-fiduciary liability is an important part of ERISA's regulation of fiduciary responsibility. Because ERISA permits the fractionalization of the fiduciary duty, there may be, as in this case, more than one ERISA fiduciary involved in a given issue.

65. In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The result would be a setting in which a major fiduciary breach could occur, but the responsible party could not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary merely knows of a breach with which it had no connection, it must take steps to remedy that breach. *See* 1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 5080 (“[I]f a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. . . . [T]he most appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor. The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to

the plan and to the co- fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.”). Anthem and Express Scripts are liable for each-others’ misconduct as co-fiduciaries.

66. In addition, ERISA § 406, 29 U.S.C. § 1106 prohibits certain types of transactions. The Supreme Court has noted that in enacting ERISA § 406, “Congress’ goal was to bar categorically a transaction which was likely to injure the pension plan.” *Comm’r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993); *see also Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 439 (6th Cir. 2002) (“Congress was concerned in ERISA § 406 to prevent transactions which offered a high potential for loss of plan assets or for insider abuse . . . .”) (citations omitted). The provisions of ERISA § 406, 29 U.S.C. § 1106 are designed to supplement the general fiduciary duty provisions of ERISA. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-42 (2000).

67. Pursuant to ERISA § 406(b), “[a] fiduciary with respect to a plan shall not (1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.” ERISA § 406(b), 29 U.S.C. § 1106(b).

68. Pursuant to ERISA § 406(a), fiduciaries are prohibited from causing a Plan to engage in a transaction, “if the fiduciary knows or should know that such transaction constitutes a direct or indirect (A) sale or exchange, or leasing, of any property between the plan and a party in interest; (B) lending of money or other extension of credit between the plan and a party in

interest; (C) furnishing of goods, services, or facilities between the plan and a party in interest; [or] (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; . . . .” ERISA § 406(a), 29 U.S.C. § 1106(a).

69. Parties-in-interest can also be held liable for violations of ERISA § 406, 29 U.S.C. § 1106. As defined in ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(a), a party in interest includes “any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan,” or “a person providing services to such plan.”

70. At all relevant times, Anthem and ESI have been parties-in-interest to the Plans because each was a fiduciary of the Plans and/or was “a person providing services to” the Plans. As parties in interest, Anthem and ESI are each liable for prohibited transactions to which they were parties.

71. Neither fiduciary nor party-in-interest status is required for liability under ERISA where non-fiduciaries participate in and/or profit from a fiduciary’s breach of duty or a prohibited transaction. Accordingly, Plaintiffs may make claims against entities that, even if not found to have fiduciary or party-in-interest status themselves, nevertheless must restore unjust profits or fees and are subject to other appropriate equitable relief, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and pursuant to the Supreme Court’s decision in *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000). To the extent that either Anthem or Express Scripts is not deemed to be a fiduciary or a party-in-interest with regard to any transaction at issue in this action, they are nevertheless subject to equitable relief under ERISA.

72. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes individual participants and fiduciaries to bring suit “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” The remedies set forth in § 502(a)(3) include remedies for breaches of the fiduciary duties set forth in ERISA § 404, 29 U.S.C. § 1104, and for violation of the prohibited transaction rules set forth in ERISA § 406, 29 U.S.C. § 1106. Plaintiffs therefore bring this action under the authority of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for appropriate equitable relief from Defendants as fiduciaries (and, in the alternative, from Defendants as parties in interest to prohibited transactions and/or knowing participants in breaches of any of ERISA’s fiduciary responsibility provisions), including without limitation, injunctive relief and, as available under applicable law, imposition of a constructive trust, equitable surcharge, and restitution.

## **V. CLASS ALLEGATIONS**

73. Plaintiffs bring this action on behalf of themselves and all other similarly situated persons pursuant to Federal Rule of Civil Procedure Rule 23. Plaintiffs seek to represent the following class (the “Class”):

All persons who are participants in or beneficiaries of any ERISA-governed employee welfare benefit plan from December 1, 2009 to the present for which Anthem provided prescription drug benefits through an agreement with Express Scripts and who paid a percentage based copay (in any percentage amount, including 100%) in the course of using that prescription drug benefit.

74. The members of the Class are so numerous that joinder of all members is impracticable. More than 38 million members are enrolled in Anthem health care plans, and ESI states it provides services to over 15 million Anthem enrollees and subscribers. Although information is not publicly available at the present time as to how many of those health care plans include percentage based copays for certain medications, Plaintiffs are participants in such

Plans and allege on information and belief that discovery will show that that the putative class includes at least thousands of ERISA plan participants. Defendants maintain records showing the identities of Class members who paid copays based in whole or in part on a percentage of the price of the drug, the amounts of those copays, and the drugs for which the copays were made. Therefore, the numerosity requirement of Rule 23 is easily satisfied.

75. There are common questions of law and fact within the meaning of Federal Rule of Civil Procedure 23(a)(2). The legal and factual questions common to the Class include, but are not necessarily limited to, the following:

- A. Whether Express Scripts owed ERISA fiduciary duties to Plaintiffs and the Class.
- B. Whether Express Scripts breached ERISA fiduciary duties that it owed to Plaintiffs and the Class under ERISA § 404(a);
- C. Whether Express Scripts committed a prohibited transaction in violation of ERISA § 406(b);
- D. Whether Express Scripts was a party in interest within the meaning of ERISA § 3(14);
- E. Whether Express Scripts was party to any transactions prohibited by ERISA § 406(a);
- F. Whether a fiduciary caused the Plans to enter into ERISA § 406(a) prohibited transactions with Express Scripts, a party-in-interest;
- G. Whether Anthem owed ERISA fiduciary duties to Plaintiffs and the Class;
- H. Whether Anthem breached any ERISA fiduciary duties that it owed to Plaintiffs and the Class;

I. Whether Anthem committed a prohibited transaction in violation of ERISA § 406(b);

J. Whether Anthem caused the Plans to enter into any transactions prohibited by ERISA § 406(a);

K. Whether Express Scripts or Anthem is liable as a co-fiduciary under ERISA § 405;

L. Whether Plaintiffs and Class members were injured as a result of Defendants' violations of ERISA;

M. Whether Express Scripts was unjustly enriched as a result of Defendants' violations of ERISA;

N. Whether Anthem was unjustly enriched as a result of Defendants' violations of ERISA;

O. Whether Plaintiffs and Class members are entitled to equitable relief, including but not limited to surcharge, disgorgement of profits, and/or restitution;

P. Whether Plaintiffs and Class members are entitled to a declaration regarding their rights under ERISA; and

Q. Whether Plaintiffs and Class members are entitled to an Order enjoining Defendants from engaging in the conduct at issue here.

76. Plaintiffs' claims are typical of the claims of Class members within the meaning of Federal Rule of Civil Procedure 23(a)(3), because Defendants have breached their obligations to Plaintiffs and the Class in a uniform manner. Express Scripts has overcharged Plaintiffs and the entire Class for percentage based copays based on prescription drug charges that are higher than competitive benchmark prices. Anthem breached its obligations to the Plaintiffs and the

entire Class by (1) entering into an agreement with Express Scripts that was imprudent and not in the best interests of the members of the Class but enriched Anthem, and granted to Express Scripts excessive discretion to set prescription drug prices, and (2) by failing to properly monitor and prevent Express Scripts from overcharging Plaintiffs and the entire Class for copays.

Anthem and Express Scripts both engaged in prohibited transactions or allowed such transactions to occur, causing losses to Plaintiffs and the entire Class and allowing Anthem and Express Scripts to unjustly enrich themselves to the detriment of Plaintiffs and the entire Class over the course of the Class Period.

77. Plaintiffs are adequate class representatives within the meaning of Federal Rule of Civil Procedure 23(a)(4) because they will fairly and adequately protect the interests of the members of the Class, are committed to the vigorous prosecution of this action, have retained counsel competent and experienced in class action litigation and in the prosecution of ERISA and other health care-related claims, and have no interests antagonistic to or materially in conflict with those of the Class.

78. A class should also be certified pursuant to Fed. R. Civ. P. 23(b)(1)(A), because the prosecution of separate actions by individual members of the Class would also create a risk of inconsistent or varying adjudications that could establish incompatible standards of conduct for Defendants.

79. A class should also be certified pursuant to Fed. R. Civ. P. 23(b)(2) because Defendants have acted or refused to act on grounds that apply generally to Plaintiffs and the Class, such that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as whole.

80. Alternatively, a class should be certified pursuant to Fed. R. Civ. P. 23(b)(3) because the common questions of law and fact set forth above predominate over individual questions, if any, and a class action is superior to other available methods for the fair and efficient group-wide adjudication of this controversy. Because the injuries suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for the Class members individually to redress the harm done to them. Given the uniform nature of ESI and Anthem's conduct with regard to Class members, any difficulty in the management of this litigation as a class action are outweighed by the lack of any feasible alternatives for the group-wide adjudication of this controversy.

## **VI. CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF**

#### **Equitable Relief Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) For Breach of Fiduciary Duties Under ERISA § 404(a), 29 U.S.C. § 1104(a) Against Defendant Express Scripts**

81. Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

82. This claim is brought against Defendant Express Scripts.

83. ESI is a fiduciary of each of the ERISA-governed health care plans in which Plaintiffs and the Class members are participants.

84. ESI breached its fiduciary duty of prudence under ERISA § 404(a)(1)(B) by setting the costs of prescription drugs at unreasonable and excessive rates, thereby causing Plaintiffs and Class members to pay increased amounts each time Plaintiffs and Class Members paid for a prescription based on (a) a percentage of the price of the prescription and/or (b) 100% of the cost of the prescription. As discussed above, these types of payments are referred to as "percentage based copays".

85. ESI also breached its duty of loyalty under ERISA § 404(a)(1)(A) by extracting higher payments from participants and beneficiaries than it should have charged consistent with its duties to the Class in order to maximize its profits. Furthermore, ESI effectively fixed its own compensation as a result of inducing overpayments made by Plaintiffs and the Class when it set the prices of drugs artificially high—*i.e.*, increasing the drug’s cost in turn increased payments made by Plaintiffs and the Class. In so doing, ESI did not act solely in the interest of participants in and beneficiaries of the Plans, but instead put its own interests before theirs.

86. ESI’s breaches of fiduciary duty caused direct injury and losses to Plaintiffs and each member of the Class.

87. Plaintiffs and the Class seek appropriate equitable relief along with such other and additional relief enumerated in the Prayer and/or as may be otherwise available.

## **SECOND CLAIM FOR RELIEF**

### **Equitable Relief Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) For Prohibited Transactions Under ERISA § 406(b), 29 U.S.C. § 1106(b) Against Defendant Express Scripts**

88. Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

89. This claim is brought against Defendant Express Scripts.

90. ESI engaged in prohibited transactions as a fiduciary. It violated ERISA §406(b) by dealing with the assets of the Plans in its own interest or for its own account and/or by receiving consideration for its own personal account from any party dealing with a Plan in connection with a transaction involving the assets of that Plan.

91. Specifically, ESI effectively fixed its own compensation as a result of inducing overpayments made by Plaintiffs and the Class when it set the prices of drugs artificially high—

*i.e.*, increasing the drug's cost in turn increased payments made by Plaintiffs and the Class to ESI. In so doing, ESI did not act solely in the interest of subscribers and beneficiaries of the Plans, but instead put its own interests before theirs. This is not only a breach of ERISA's duty of loyalty, as alleged above, but also a self-dealing prohibited transaction under ERISA § 406(b)(1). Further, ESI violated ERISA § 406(b)(2) by acting in its own or Anthem's interest (*i.e.*, in the interest of one whose interests are adverse to the participants, instead of in the interests of the participants) by overcharging for prescriptions to recoup the nearly \$5 billion it fronted to Anthem to get the exclusive right to provide prescription drug benefits to the Class.

92. ESI's violations of ERISA §406(b) caused direct injury and losses to Plaintiffs and each member of the Class.

93. Plaintiffs and the Classes seek appropriate equitable relief along with such other and additional relief enumerated in the Prayer and/or as may be otherwise available.

### **THIRD CLAIM FOR RELIEF**

#### **Equitable Relief Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) For Breach of Fiduciary Duties Under ERISA § 404(a), 29 U.S.C. § 1104(a) Against Defendant Anthem**

94. Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

95. This claim is brought against Defendant Anthem.

96. Anthem is a fiduciary of all of the ERISA-governed health care plans in which Plaintiffs and the Class members are participants.

97. Anthem breached its fiduciary duty under ERISA § 404(a)(1)(B) by failing to negotiate and enter into a contract with ESI that was reasonable in nature and in the best interests of Plaintiffs and the Class. This breach included, but was not limited to, entering into the PBM

Agreement, which gave to ESI virtually unfettered discretion to set the prices of prescription drugs provided to Plaintiffs and the Class.

98. Anthem further breached its fiduciary duty under ERISA § 404(a)(1)(B) by failing to adequately monitor in a timely fashion the activities of ESI, including but not limited to failing to monitor the prices charged by ESI for prescription drugs provided to Plaintiffs and the Class.

99. Anthem also breached its fiduciary duty under ERISA § 404(a)(1)(A) by entering into the PBM Agreement and accepting \$4.675 billion upfront from ESI, rather than accepting available contract terms that were more favorable to Plaintiffs and the Class members, but provided a lesser payment to itself.

100. Anthem's breaches of fiduciary duty caused direct injury and losses to Plaintiffs and the Class.

101. Plaintiffs and the Class seek to recover all losses suffered by the Class along with such other and additional relief enumerated in the Prayer and/or as may be otherwise available.

#### **FOURTH CLAIM FOR RELIEF**

**Equitable Relief Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)  
For Prohibited Transactions Under ERISA § 406(a) & (b), 29 U.S.C. § 1106 (a) & (b)  
Against Defendant Anthem**

102. Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

103. This claim is brought against Defendant Anthem.

104. By entering into the PBM Agreement and receiving nearly \$5 billion from ESI—rather than entering into other available alternative that would have paid it less than \$5 billion but provided better benefits to Plaintiffs and the Class—Anthem violated ERISA § 406(b)(1)

because it received consideration for its own personal account from ESI in connection with transactions involving the assets of the plans in which Plaintiffs and the Class were participants.

105. Further, by these same actions, Anthem violated ERISA § 406(b)(2) by acting in the transaction with ESI—whose interests were adverse to the participants—on behalf of ESI instead of on behalf of the participants.

106. In addition, Anthem violated ERISA § 406(a) because it caused the Plans to engage in one or more transactions with ESI that Anthem knew or should have known constituted direct or indirect (1) sales or exchanges of property between the Plans and ESI, as a party in interest under ERISA § 406(a)(1)(A), (2) furnishings of goods, services, or facilities to the Plans by ESI, a party in interest under ERISA § 406(a)(1)(B), and/or (3) transfers to, or use by or for the benefit of ESI, a party in interest, of assets of the Plans under ERISA § 406(a)(1)(C).

107. Anthem's breaches of ERISA's prohibited transaction provisions caused direct injury and losses to Plaintiffs and the Class.

108. Plaintiffs and the Class seek appropriate equitable relief along with such other and additional relief enumerated in the Prayer and/or as may be otherwise available.

#### **FIFTH CLAIM FOR RELIEF**

#### **Equitable Relief Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) For Liability as a Non-Fiduciary Party to § 406 Prohibited Transactions Against Defendant ESI**

109. Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

110. This claim is brought against Defendant ESI.

111. To the extent that it was not a fiduciary with regard to any of the prohibited transactions under ERISA § 406 alleged above, ESI is liable to disgorge ill-gotten gains and/or provide other equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), because it was a party in interest with regard to each such transaction.

112. To the extent that it was not a fiduciary or a party in interest with regard to any of the breaches of ERISA set forth above, ESI is liable to disgorge ill-gotten gains and/or provide other appropriate equitable relief, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and *Harris Trust*, because it had actual or constructive knowledge of and participated in Anthem's violations of ERISA.

113. As a direct and proximate result of the prohibited transactions and/or other breaches of ERISA alleged above, Plaintiffs and the Class lost and ESI and/or Anthem gained the value of inflated copays that Plaintiffs and the Class were forced to pay for their prescription drugs.

#### **SIXTH CLAIM FOR RELIEF**

##### **Equitable Relief Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) For Liability as a Non-Fiduciary Party to § 406 Prohibited Transactions Against Defendant Anthem**

114. Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

115. This claim is brought against Defendant Anthem.

116. To the extent that it was not a fiduciary with regard to any of the prohibited transactions under ERISA § 406 alleged above, Anthem is liable to disgorge ill-gotten gains and/or provide other equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), because it was a party in interest with regard to each such transaction.

117. To the extent that it was not a fiduciary or a party in interest with regard to any of the breaches of ERISA set forth above, Anthem is liable to disgorge ill-gotten gains and/or provide other appropriate equitable relief, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and *Harris Trust*, because it had actual or constructive knowledge of and participated in ESI's violations of ERISA.

118. As a direct and proximate result of the prohibited transactions and/or other breaches of ERISA alleged above, Plaintiffs and the Class lost and Anthem and/or ESI gained the value of inflated copays that Plaintiffs and the Class were forced to pay for their prescription drugs.

#### **SEVENTH CLAIM FOR RELIEF**

##### **Equitable Relief Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) For Co-Fiduciary Liability Under ERISA § 405(a), 29 U.S.C. § 1105(a) Against Defendants Express Scripts and Anthem**

119. Plaintiffs incorporate by reference each of the preceding paragraphs as though fully set forth herein.

120. This claim is brought against Defendants ESI and Anthem.

121. As Express Scripts and Anthem are both fiduciaries under ERISA, they are liable under ERISA § 405(a) for each others' violations of ERISA.

122. Under ERISA § 405(a), 29 U.S.C. § 1105(a), 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:

(1) 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;

(2) if, by his failure to comply with [ERISA § 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

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

ERISA §§ 405(a)(1)-(3), 29 U.S.C. §§ 1105(a)(1)-(3).

123. Anthem knowingly participated in ESI's breaches by allowing ESI to charge the Plans and the Class members for prescription drugs at rates in excess of market rates. Anthem also enabled ESI's fiduciary breaches pursuant to ERISA § 405(a)(2) by, *inter alia*, failing to negotiate and enter into an agreement with ESI that was not in the best interests of Plaintiffs and the Class, and by failing to adequately monitor ESI's conduct during the term of the PBM Agreement. Anthem also had knowledge of ESI's breaches but failed to make reasonable efforts under the circumstances to remedy the breach pursuant to ERISA § 405(a)(3).

124. ESI knowingly participated in Anthem's breaches pursuant to ERISA § 405(a)(1) by overcharging Plaintiffs and the Class for their drug benefits which resulted in higher payments by Plaintiffs and the Class for their drug benefits, which Anthem allowed. ESI also enabled Anthem's fiduciary breaches pursuant to ERISA § 405(a)(2) by, *inter alia*, (1) causing Plaintiffs and the Class members to pay increased amounts for percentage-based co-pays each time Plaintiffs and the Class paid for pharmaceutical drug benefits, which Anthem allowed on an ongoing basis, (2) failing to negotiate or renegotiate lower prices for its services with Anthem pursuant to the PBM Agreement despite being aware that Plaintiffs and the Class were overpaying for their benefits, which Anthem failed to monitor, and/or (3) failing to fulfill its ongoing and continuing duty to determine whether the current PBM Agreement with Anthem was and is in the best interests of Plaintiffs and the Class. ESI also had knowledge of Anthem's breaches but failed to make reasonable efforts under the circumstances to remedy the breach pursuant to ERISA §405(a)(3).

125. Co-fiduciary liability is joint and several under ERISA, and thus, Express Scripts and Anthem are jointly and severally liable to Plaintiffs and the Class for each of the other's breaches of ERISA's fiduciary responsibility provisions.

## **VII. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of the Class, pray for relief as follows as applicable for the particular cause of action:

- (a) An Order certifying this action to proceed on behalf of the Class, and appointing Plaintiffs and the counsel listed below to represent the Class;
- (b) An Order finding that Defendants violated their fiduciary duties to Class Members and awarding Class members such relief as the Court deems proper;
- (c) An Order finding that Defendants engaged in prohibited transactions and awarding Plaintiffs and the Class such relief as the Court deems proper;
- (d) An Order awarding Plaintiffs and the Class recovery in the form of equitable surcharge to the extent permitted by the above claims;
- (e) An Order finding that Defendants are jointly and severally liable as co-fiduciaries and/or as fiduciary and party in interest and/or as a fiduciary and a non-fiduciary participant in violations of ERISA;
- (f) An Order awarding Plaintiffs and the Class other appropriate equitable and injunctive relief to the extent permitted by the above claims;
- (g) An Order awarding Plaintiffs' counsel attorneys' fees, litigation expenses, expert witness fees and other costs pursuant to ERISA § 502(g)(1), 29 U.S.C. 1132(g)(1), and/or the common fund doctrine; and
- (h) An Order awarding such other and further relief as may be just and proper, including pre-judgment and post-judgment interest on the above amounts.

DATED: June 24, 2016

KELLER ROHRBACK L.L.P.

By /s/ T. David Copley

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**Attorneys for Plaintiffs and the Class**

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

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

DEFENDANTS  
EXPRESS SCRIPTS, INC., and ANTHEM, INC.,

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) ATTORNEYS (IF KNOWN)  
T. David Copley, Lynn Lincoln Sarko, Derek W. Loeser, Gretchen S. Obrist,  
David J. Ko, David S. Preminger, and Jeffrey Lewis  
Keller Rohrback, L.L.P., 1201 3rd Ave, Ste 3200, Seattle, WA 98101  
(206) 623-1900

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)  
(DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Breach of fiduciary duties under ERISA, 29 U.S.C. § 1001, et seq.

Has this action, case, or proceeding, or one essentially the same been previously filed in SDNY at any time? No  Yes  Judge Previously Assigned

If yes, was this case Vol.  Invol.  Dismissed. No  Yes  If yes, give date \_\_\_\_\_ & Case No. \_\_\_\_\_

IS THIS AN INTERNATIONAL ARBITRATION CASE? No  Yes

(PLACE AN [x] IN ONE BOX ONLY)

NATURE OF SUIT

TORTS		ACTIONS UNDER STATUTES			
<b>CONTRACT</b>	<b>PERSONAL INJURY</b>	<b>PERSONAL INJURY</b>	<b>FORFEITURE/PENALTY</b>	<b>BANKRUPTCY</b>	<b>OTHER STATUTES</b>
[ ] 110 INSURANCE	[ ] 310 AIRPLANE	[ ] 367 HEALTHCARE/ PHARMACEUTICAL PERSONAL	[ ] 625 DRUG RELATED	[ ] 422 APPEAL	[ ] 375 FALSE CLAIMS
[ ] 120 MARINE	[ ] 315 AIRPLANE PRODUCT LIABILITY	[ ] INJURY/PRODUCT LIABILITY	[ ] SEIZURE OF PROPERTY	28 USC 158	[ ] 376 QUI TAM
[ ] 130 MILLER ACT	[ ] 320 ASSAULT, LIBEL & SLANDER	[ ] 365 PERSONAL INJURY PRODUCT LIABILITY	21 USC 881	[ ] 423 WITHDRAWAL	[ ] 400 STATE REAPPORTIONMENT
[ ] 140 NEGOTIABLE INSTRUMENT	[ ] 330 FEDERAL EMPLOYERS' LIABILITY	[ ] 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY	[ ] 690 OTHER	28 USC 157	[ ] 410 ANITRUST
[ ] 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT	[ ] 340 MARINE	<b>PERSONAL PROPERTY</b>		<b>PROPERTY RIGHTS</b>	[ ] 430 BANKS & BANKING
[ ] 151 MEDICARE ACT	[ ] 345 MARINE PRODUCT LIABILITY	[ ] 370 OTHER FRAUD		[ ] 820 COPYRIGHTS	[ ] 450 COMMERCE
[ ] 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL VETERANS)	[ ] 350 MOTOR VEHICLE	[ ] 371 TRUTH IN LENDING		[ ] 830 PATENT	[ ] 460 DEPORTATION
[ ] 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS	[ ] 355 MOTOR VEHICLE PRODUCT LIABILITY	[ ] 380 OTHER PERSONAL PROPERTY DAMAGE	<b>LABOR</b>	[ ] 840 TRADEMARK	[ ] 470 RACKETEER INFLU- ENCED & CORRUPT ORGANIZATION ACT (RICO)
[ ] 160 STOCKHOLDERS SUITS	[ ] 360 OTHER PERSONAL INJURY	[ ] 385 PROPERTY DAMAGE PRODUCT LIABILITY	[ ] 710 FAIR LABOR STANDARDS ACT	<b>SOCIAL SECURITY</b>	[ ] 480 CONSUMER CREDIT
[ ] 190 OTHER CONTRACT	[ ] 362 PERSONAL INJURY - MED MALPRACTICE	<b>PRISONER PETITIONS</b>	[ ] 720 LABOR/MGMT RELATIONS	[ ] 861 HIA (1395ff)	[ ] 490 CABLE/SATELLITE TV
[ ] 195 CONTRACT PRODUCT LIABILITY	<b>ACTIONS UNDER STATUTES</b>	[ ] 463 ALIEN DETAINEE	[ ] 740 RAILWAY LABOR ACT	[ ] 862 BLACK LUNG (923)	[ ] 850 SECURITIES/ COMMODITIES/ EXCHANGE
[ ] 196 FRANCHISE	<b>CIVIL RIGHTS</b>	[ ] 510 MOTIONS TO VACATE SENTENCE	[ ] 751 FAMILY MEDICAL LEAVE ACT (FMLA)	[ ] 863 DIWC/DIWW (405(g))	[ ] 890 OTHER STATUTORY ACTIONS
	[ ] 440 OTHER CIVIL RIGHTS (Non-Prisoner)	[ ] 530 HABEAS CORPUS	[ ] 790 OTHER LABOR LITIGATION	[ ] 864 SSID TITLE XVI	[ ] 891 AGRICULTURAL ACTS
	[ ] 441 VOTING	[ ] 535 DEATH PENALTY	[ ] 791 OTHER LABOR SECURITY ACT (ERISA)	[ ] 865 RSI (405(g))	[ ] 893 ENVIRONMENTAL MATTERS
<b>REAL PROPERTY</b>	[ ] 442 EMPLOYMENT	[ ] 540 MANDAMUS & OTHER	<b>IMMIGRATION</b>	<b>FEDERAL TAX SUITS</b>	[ ] 895 FREEDOM OF INFORMATION ACT
[ ] 210 LAND CONDEMNATION	[ ] 443 HOUSING/ ACCOMMODATIONS	<b>PRISONER CIVIL RIGHTS</b>	[ ] 462 NATURALIZATION APPLICATION	[ ] 870 TAXES (U.S. Plaintiff or Defendant)	[ ] 896 ARBITRATION
[ ] 220 FORECLOSURE	[ ] 444 AMERICANS WITH DISABILITIES - EMPLOYMENT	[ ] 550 CIVIL RIGHTS	[ ] 465 OTHER IMMIGRATION ACTIONS	[ ] 871 IRS-THIRD PARTY	[ ] 899 ADMINISTRATIVE PROCEDURE ACT/REVIEW OR APPEAL OF AGENCY DECISION
[ ] 230 RENT LEASE & EJECTMENT	[ ] 446 AMERICANS WITH DISABILITIES -OTHER	[ ] 555 PRISON CONDITION		26 USC 7609	[ ] 950 CONSTITUTIONALITY OF STATE STATUTES
[ ] 240 TORTS TO LAND	[ ] 448 EDUCATION	[ ] 560 CIVIL DETAINEE CONDITIONS OF CONFINEMENT			
[ ] 245 TORT PRODUCT LIABILITY					
[ ] 290 ALL OTHER REAL PROPERTY					

Check if demanded in complaint:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y. AS DEFINED BY LOCAL RULE FOR DIVISION OF BUSINESS 13? IF SO, STATE:

DEMAND \$ \_\_\_\_\_ OTHER \_\_\_\_\_ JUDGE See attachment. DOCKET NUMBER \_\_\_\_\_

Check YES only if demanded in complaint  
JURY DEMAND:  YES  NO

NOTE: You must also submit at the time of filing the Statement of Relatedness form (Form IH-32).

(PLACE AN X IN ONE BOX ONLY)

ORIGIN

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from (Specify District), 6 Multidistrict Litigation, 7 Appeal to District Judge from Magistrate Judge Judgment

(PLACE AN X IN ONE BOX ONLY)

BASIS OF JURISDICTION

IF DIVERSITY, INDICATE CITIZENSHIP BELOW.

- 1 U.S. PLAINTIFF, 2 U.S. DEFENDANT, 3 FEDERAL QUESTION, 4 DIVERSITY (U.S. NOT A PARTY)

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship status: CITIZEN OF THIS STATE, CITIZEN OF ANOTHER STATE, CITIZEN OR SUBJECT OF A FOREIGN COUNTRY, INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE, FOREIGN NATION.

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES)

Karen Burnett, Shepherdsville, Bullitt County, Kentucky

Brendan Farrell, Nassau County, Long Beach, New York

Robert Shullich, Holmdel, Monmouth County, New Jersey

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES)

Express Scripts, Inc. One Express Way, St. Louis, St. Louis County, Missouri 63121

Anthem, Inc.

120 Monument Circle, Indianapolis, Marion County, Indiana 46204

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

COURTHOUSE ASSIGNMENT

I hereby certify that this case should be assigned to the courthouse indicated below pursuant to Local Rule for Division of Business 18, 20 or 21. DO NOT check either box if this is a PRISONER PETITION/PRISONER CIVIL RIGHTS COMPLAINT.

Check one: THIS ACTION SHOULD BE ASSIGNED TO: [ ] WHITE PLAINS [x] MANHATTAN

DATE, SIGNATURE OF ATTORNEY OF RECORD, ADMITTED TO PRACTICE IN THIS DISTRICT [ ] NO [ ] YES (DATE ADMITTED Mo. Yr. Attorney Bar Code #)

Magistrate Judge is to be designated by the Clerk of the Court.

Magistrate Judge \_\_\_\_\_ is so Designated.

Ruby J. Krajick, Clerk of Court by \_\_\_\_\_ Deputy Clerk, DATED \_\_\_\_\_.

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)

**Civil Case Cover Sheet Attachment**

**Related Cases**

*Anthem v. Express Scripts, Inc.*

Judge: Hon. Edgardo Ramos

No. 1:16-cv-02048

*John Doe One and John Doe Two v. Express Scripts, Inc. et al.*

Judge: Hon. Edgardo Ramos

No. 1:16-cv-03399